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# **URGENT NOTE ON INTERNATIONAL STANDARDS AND COMPARATIVE PRACTICES REGARDING THE CONTINUATION OF OMBUDSPERSONS' TERMS OF OFFICE UNTIL THE APPOINTMENT OF A NEW OFFICE- HOLDER**

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## **POLAND**

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## EXECUTIVE SUMMARY

International recommendations and good practices suggest that transition modalities whereby an incumbent Ombudsperson remains in office after the end of her/his term of office until a successor is appointed, is a recommended solution in order to ensure the stability of the NHRI mandate and operations, the continuity and effective functioning of the institution and the proper transfer of duties between the old and new office-holder. Such arrangements should be in place to ensure that the position of head of an NHRI does not stay vacant for a long time, which beyond potentially having an actual or perceived impact on the permanency and independence of the institution, may restrict the ability of the NHRI to effectively carry out the full extent of its mandate. A prolonged vacuum in the effective functioning of the NHRI services, especially when the NHRI also acts as a National Preventive Mechanism (NPM) under the *Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) and Equality Body, may negatively impact the access of potential victims to appropriate administrative procedures for the protection of human rights and the enforcement of the principle of equal treatment.

Many legislators across the OSCE region have actually chosen to regulate in primary legislation aspects pertaining to the continuation of ombudspersons' mandate in the transition period following the end of their term of office until a new-office holder is appointed, even if the maximum duration of the NHRI mandate is stated in the Constitution.

It is of great importance that legislation establishes procedures to ensure NHRIs' continuous functioning without interruption, either through provisions allowing ombudspersons to continue their mandate until their successor is appointed or through the introduction of clearly defined rules, which would allow NHRIs to continue effectively performing their functions. Decisions undermining the independence and effectiveness of an NHRI, or resulting in the paralysis of this institution, would not only go against the Paris Principles but also the international obligations of a state, including the OPCAT when the NHRI serves as an NPM.

The provisions of the Constitution of Poland establishing the term of office of the Commissioner for Human Rights in combination with Article 3 par 6 of the Act on the Commissioner for Human Rights of Poland, which provides that the Commissioner will remain in office until the new office-holder is appointed, are valid and effective mechanisms which can help protect the independence, efficiency, stability and continuity of the office. The choice the legislator expressed in Article 3 par 6 of the Act is in line with the above described principles and further enhances the guarantees established by the Constitution of Poland.

Without prejudice to the decisions of the Constitutional Tribunal, ODIHR considers that the transitional solution provided in Article 3 par 6 of the Act is in line with international standards on the independence and effectiveness of the institution and the general principles of rule of law. It is welcome that these principles are recognized and guaranteed by the Constitution of Poland and by the Act on the Commissioner for Human Rights, which provides a solid foundation for the independence and effective functioning of the NHRI in Poland.

***As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

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## I. INTRODUCTION

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1. On 1 October 2020, the Deputy Commissioner for Human Rights of Poland sent to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) an urgent request for a legal analysis on international standards and comparative practices regarding the continuation of ombudspersons in the transition period following the end of their term of office until the appointment of a new office-holder. This request was initiated following a motion for abstract constitutional control concerning the constitutionality of Article 3 par 6 of the Act on the Commissioner for Human Rights of Poland (hereinafter “the Act”),<sup>1</sup> lodged by a group of Members of Parliament with the Polish Constitutional Court on 17 September 2020.
2. The respective provision of the Act provides that a serving Commissioner for Human Rights (hereinafter “Human Rights Commissioner” or “Commissioner”) remains in office until his/her successor has taken up the position. Given that the term of the previous Commissioner expired on 9 September 2020, the incumbent currently continues to run the Office of the Commissioner until a new office-holder is appointed by the *Sejm* (lower house of parliament), with the consent of the Senate (upper house of parliament). The motion of 17 September 2020 argues that Article 3 par 6 of the Act is not in line with Article 2 of the Constitution (principle of a democratic state ruled by the law and principle of the protection of legitimate expectations) and Article 209.1 of the Constitution, which only specifies the Commissioner’s 5-year term of office.
3. On 2 October 2020, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal analysis on international standards, OSCE human dimension commitments and comparative practices relevant to the issue. Given the short timeline to prepare this legal analysis, as the hearing before the Constitutional Tribunal to review the above-mentioned motion will take place on 20 October 2020 (No. of the case K 20/20), ODIHR decided to prepare an Urgent Note.
4. This Urgent Note was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist OSCE participating States in the implementation of key OSCE commitments in the human dimension.

## II. SCOPE OF THE NOTE

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5. The scope of this Urgent Note focuses on the issue of the continuation of ombudspersons in the transition period following the end of their terms of office until the appointment of a new office-holder and has been prepared in the context of the above-mentioned proceedings on the issue of the constitutionality of Article 3 par 6 of the Act on the Commissioner for Human Rights of Poland, without prejudice to the final outcome of the case. Thus limited, this urgent legal review does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the Commissioner and his/her Office in Poland.
6. The aim of this Urgent Note is to inform and contribute to the legal debate on the issue by providing an overview of international and regional standards, norms and

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<sup>1</sup> Article 3 par 6 of the Act on the Commissioner for Human Rights of Poland (hereinafter “the Act”) states: “*The previous Commissioner fulfils their obligations until taking up the position by the new Commissioner*”.

recommendations, as well as relevant OSCE human dimension commitments. The Note also lays down comparative practices from other OSCE participating States on this issue.

7. This Urgent Note is based on unofficial English translations of relevant legislation from OSCE participating States. Errors from translation may result. The Note is also available in Polish. The English version shall prevail.
8. In view of the above, ODIHR would like to stress that this legal analysis does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating the Commissioner and his/her Office in Poland in the future.

### III. LEGAL ANALYSIS

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#### 1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. National Human Rights Institutions (NHRIs) such as the Polish Human Rights Commissioner are independent domestic bodies with a constitutional and/or legislative mandate to protect and promote human rights. NHRIs hold a crucial position among the range of institutions that form the infrastructure of a democratic system based on the rule of law and human rights.<sup>2</sup> They are “*a key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level*”.<sup>3</sup> Thus, NHRIs link the responsibilities of the State stemming from international human rights obligations to the rights of individuals in the country. Although part of the state apparatus, the independence of NHRIs from the executive, legislative and judicial branches ensures that they are able to fulfil their mandate to protect individuals from human rights violations, particularly when such violations are committed by public authorities or bodies.<sup>4</sup>
10. There are many different types of NHRIs, with various structures, sizes, mandates and competencies. Internationally recognized rules on the mandates and competencies of NHRIs can first and foremost be found in the *United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights*, the so-called “Paris Principles”.<sup>5</sup> Adopted by the UN General Assembly, these principles set out minimum standards on the establishment and functioning of NHRIs, in terms of pluralism, transparency, guarantees of functional and institutional independence and effectiveness.
11. The implementation of the Paris Principles and evaluation of NHRIs against these principles is undertaken by the Global Alliance of National Human Rights Institution’s (hereinafter “GANHRI”) Sub-Committee on Accreditation (hereinafter “SCA”).<sup>6</sup> The

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<sup>2</sup> See ODIHR, [Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland](#) (31 October 2017), par13.

<sup>3</sup> See UN High Commissioner for Human Rights, [Report to the UN General Assembly \(2007\), A/62/36](#), par 15.

<sup>4</sup> See ODIHR, [Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland](#) (16 February 2016), available in [English](#) and in [Polish](#), par 11.

<sup>5</sup> The [UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights](#) (hereinafter “the Paris Principles”) were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

<sup>6</sup> The Global Alliance of National Human Rights Institutions (GANHRI), formerly known as the International Coordinating Committee for National Human Rights Institutions (hereinafter “ICC”), was established in 1993 and is the international association of national human rights institutions (NHRIs) from all parts of the globe. The GANHRI promotes and strengthens NHRIs in accordance with the Paris Principles, and provides leadership in the promotion and protection of human rights. See <https://ganhri.org/>.

SCA publishes reports on the accreditation of NHRIs, reviews their status and provides them with status accreditation every five years.<sup>7</sup>

12. The importance that the United Nations ascribes to NHRIs in the promotion and protection of human rights is documented by various resolutions of the UN General Assembly and the UN Human Rights Council.<sup>8</sup>
13. In addition, pursuant to Article 1 par 4 of the Act on the Commissioner for Human Rights of Poland as amended in 2007, the Commissioner performs the function of a National Preventive Mechanism (hereinafter “NPM”) under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the OPCAT”).<sup>9</sup> As such, the legislation pertaining to the Commissioner shall comply with the relevant provisions of the OPCAT, particularly its Article 18, which states that State Parties “*shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel*” and “*shall give due consideration to the [Paris] Principles*” when establishing national preventive mechanisms. The Commissioner also serves as the independent monitoring mechanism pursuant to Article 33 of the *UN Convention on the Rights of Persons with Disabilities* (CRPD),<sup>10</sup> though the Committee on the Rights of Persons with Disabilities has raised some concerns regarding the lack of clear legal basis concerning such a mandate.<sup>11</sup>
14. It is also worth mentioning the [Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments](#) (2012),<sup>12</sup> which the UN Office of the High Commissioner for Human Rights (OHCHR) recommends to use as guidelines to strengthen co-operation between NHRIs and parliaments for the promotion and protection of human rights at the national level. Principle 13 of the *Belgrade Principles* specifically emphasizes that vacancy in the composition of the membership of a NHRI “*must be filled within a reasonable time*” and that “[a]fter expiration of the tenure of office of a member of a NHRI, such member should continue in office until the successor takes office”.

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<sup>7</sup> See GANHRI, [Statute of GANHRI](#) (version adopted on 5 March 2019), Article 15. Accreditation is the official recognition that an NHRI meets the requirements of or continues to comply with the Paris Principles. The SCA awards A, B or C Status. Status A means that an NHRI is fully in compliance with the Paris Principles and a voting member in the work and meetings on NHRIs internationally; Status B means that the NHRI does not yet fully comply with the Paris Principles or has not yet submitted sufficient documentation in this respect. Status B NHRIs have observer status in the work and meetings of NHRIs; Status C Institutions do not comply with the Paris Principles. The Polish Commissioner for Human Rights currently has Status A; see Global Alliance of National Human Rights Institutions, [Chart of the Status of National Institutions Accredited](#) - Accreditation Status as of 27 November 2019.

<sup>8</sup> See e.g., UN General Assembly, [Resolution no. 74/156 on National Human Rights Institutions](#), [A/RES/74/156](#), adopted on 18 December 2019; [Resolution no. 72/186 on the Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights](#), [A/RES/72/186](#), adopted on 19 December 2017; [Resolution no. 70/163 on National Institutions for the Promotion and Protection of Human Rights](#), [A/RES/70/163](#), adopted on 17 December 2015; [Resolutions nos. 63/169 and 65/207 on the Role of the Ombudsman, Mediator and Other National Human Rights Institutions in the Promotion and Protection of Human Rights](#), [A/RES/63/169](#) and [A/RES/65/207](#), adopted on 18 December 2008 and on 21 December 2010 respectively; [Resolutions nos. 63/172 and 64/161 on National Institutions for the Promotion and Protection of Human Rights](#), [A/RES/63/172](#) and [A/RES/64/161](#), adopted on 18 December 2008 and 18 December 2009 respectively; and [Resolution no. 48/134 on National Institutions for the Promotion and Protection of Human Rights](#), [A/RES/48/134](#), adopted on 4 March 1994. See also UN Human Rights Council, [Resolution no. 39/17 on National Human Rights Institutions](#), [A/HRC/RES/39/17](#), adopted on 28 September 2018; [Resolution no. 34/17 on Regional Arrangements for the Promotion and Protection of Human Rights](#), [A/HRC/RES/34/17](#), adopted on 11 April 2017; and [Resolution no. 27/18 on National Institutions for the Promotion and Protection of Human Rights of the UN Human Rights Council](#), [A/HRC/RES/27/18](#), adopted on 7 October 2014.

<sup>9</sup> *UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), adopted by UN General Assembly resolution A/RES/57/199 of 18 December 2002. The Republic of Poland ratified the OPCAT on 14 September 2005.

<sup>10</sup> *UN Convention on the Rights of Persons with Disabilities* (CRPD), adopted by UN General Assembly resolution A/RES/61/106 of 13 December 2006 and which entered into force on 3 May 2008. Poland ratified the CRPD on 6 September 2012. See the [Report of Poland to the Committee on the Rights of Persons with Disabilities](#), 3 November 2015, par 571.

<sup>11</sup> See Committee on the Rights of Persons with Disabilities, [Concluding observations on the initial report of Poland](#), 29 October 2018, CRPD/C/POL/CO/1, pars 55-56.

<sup>12</sup> See UN Secretary General, [Report to the UN Human Rights Council on National Institutions for the Promotion and Protection of Human Rights](#), 1 May 2012, A/HRC/20/9, Annex - Belgrade principles on the relationship between national human rights institutions and parliaments.

15. At the Council of Europe level, *Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution*,<sup>13</sup> several Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe,<sup>14</sup> and the European Commission against Racism and Intolerance's (ECRI) *General Policy Recommendation No. 2 on Equality bodies to combat racism and intolerance at national level* (2017),<sup>15</sup> among others, set out the characteristics which are essential for NHRIs, more specifically for any ombuds institution, to operate effectively while guaranteeing their independence. Especially, Principle 3 of *Recommendation (2019)6* explicitly 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 European Commission for Democracy through Law (hereinafter “Venice Commission”) also published the *Principles on the Protection and Promotion of the Ombudsman Institution* (The Venice Principles).<sup>16</sup> They clearly state that “States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats”. The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe on 2 May 2019, by the Parliamentary Assembly of the Council of Europe on 2 October 2019 and by the Congress of Local and Regional Authorities on 30 October 2019.
16. Within the European Union (hereinafter “EU”), the European directives on equal treatment require Member States to designate a body for the promotion, monitoring and support of equal treatment of all persons, which competences shall also include the independent assistance to victims of discrimination.<sup>17</sup> The European Commission's *Recommendation on Standards for Equality Bodies* (2018)<sup>18</sup> emphasizes the importance of guaranteeing the independence of equality bodies. The Commissioner serves as the “Equality Body” under these Directives, as per the Act of 3 December 2010, which amended the Act.<sup>19</sup> Moreover, the EU Agency for Fundamental Rights also published several reports relating to national human rights institutions, which can serve as useful reference documents.<sup>20</sup>
17. OSCE participating States have committed to facilitating “the establishment and strengthening of independent national institutions in the area of human rights and the rule of law” in the Copenhagen Document of 1990.<sup>21</sup> ODIHR has been specifically tasked to “continue and increase efforts to promote and assist in building democratic institutions

<sup>13</sup> Council of Europe, [Recommendation CM/Rec\(2019\)6 of the Committee of Ministers to member States on the development of the Ombudsman institution](#), adopted on 16 October 2019.

<sup>14</sup> See e.g., Parliamentary Assembly of the Council of Europe, [Recommendations 757 \(1975\)](#) (29 January 1975) and [1615 \(2003\) on the Institution of Ombudsman](#) (8 September 2003); and [Resolutions 1959 \(2013\) on the Strengthening the Institution of Ombudsman in Europe](#), 4 October 2013; and [2301 \(2019\) on Ombudsman Institutions in Europe – The need for a set of common standards](#), adopted on 2 October 2019.

<sup>15</sup> European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 2 on Equality bodies to combat racism and intolerance at national level*, adopted on 13 June 1997 and revised on 7 December 2017.

<sup>16</sup> European Commission for Democracy through Law (Venice Commission), [Principles on the Protection and Promotion of The Ombudsman Institution](#) (The Venice Principles), CDL-AD(2019)005 .

<sup>17</sup> See [Council directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin](#), Article 13.1; [Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services](#), Article 12; [Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation](#) (recast), Article 20.

<sup>18</sup> European Commission, [Recommendation of 22 June 2018 on Standards for Equality Bodies](#), C(2018) 3850 final, par 1.2.1 (1).

<sup>19</sup> See especially Articles 18, 19 and 26 of the [Act of 3 December 2010 on the implementation of some regulations of European Union regarding equal treatment](#).

<sup>20</sup> See e.g., European Union Agency for Fundamental Rights (EU FRA), [Strong and effective national human rights institutions – challenges, promising practices and opportunities](#), 3 September 2020; [National Human Rights Institutions in the EU Member States \(Strengthening the fundamental rights architecture in the EU I\)](#), 10 August 2012; and [Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union](#) (2012).

<sup>21</sup> See OSCE Copenhagen Document (1990), par 27, available at <<http://www.osce.org/odihr/elections/14304?download=true>>.

at the request of States, inter alia by helping to strengthen [...] Ombud[s] institutions”,<sup>22</sup> which should be impartial and independent.<sup>23</sup>

## 2. LEGAL BACKGROUND

18. The institution of the Human Rights Commissioner in Poland was first established on 1 January 1988, pursuant to the *Act of 15 July 1987 on the Commissioner for Human Rights*, and is now regulated by Article 208 of the Constitution of Poland, which states that this body shall “safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts”.
19. According to Article 209 of the Constitution, the Human Rights Commissioner is appointed by the *Sejm*, with the consent of the *Senate*, for a period of five years. Article 210 stresses that the Human Rights Commissioner shall be independent in his/her activities, “independent of other State organs and [...] accountable only to the *Sejm* in accordance with principles specified by statute”. Other provisions in the Constitution concern incompatibilities with the Human Rights Commissioner’s position, his/her immunity and reporting obligations. Based on Article 208 par 2 of the Constitution, a statute shall specify the Human Rights Commissioner’s scope and mode of work.
20. The Act on the Commissioner for Human Rights was passed in 1987 and established the Commissioner to safeguard the liberties and human and citizen’s rights as set forth in the Constitution and other normative acts (Article 1 of the Act).
21. The procedure for nominating and appointing the Commissioner is set out in Article 3 of the Act. Based on paragraph 1 of this provision, the Human Rights Commissioner is appointed by the *Sejm* with the consent of the Senate based on a proposal of the Speaker of the *Sejm*, or of a group of 35 Members of Parliament. A resolution of the *Sejm* shall specify the procedure for nominating candidates (par 2). Once the *Sejm* has passed a resolution on appointing the Human Rights Commissioner, the Speaker of the *Sejm* shall send this resolution immediately to the Speaker of the Senate (par 3).
22. Based on Article 3 par 4 of the Act, the Senate then has one month to adopt a resolution on expressing consent to the appointment of the Human Rights Commissioner. If the Senate fails to adopt a resolution within this time, then the Senate is considered to have consented to the appointment.
23. If, however, the Senate refuses to consent to the appointment of the Human Rights Commissioner, then Article 3 par 5 obliges the *Sejm* to appoint another person, following the procedures set out in pars 1-4 of the provision.
24. Article 3 par 6 of the Act stipulates that the existing Human Rights Commissioner shall perform his/her duties until a new Commissioner has taken up his/her post. As with similar provisions in other OSCE participating States (see Sub-Section 3.3 below), the purpose of Article 3 par 6 is presumably to ensure the continuity of the Human Rights Commissioner’s work, so that the Office of the Commissioner (and consequently of NPM, CRPD independent monitoring and equality body under the EU Anti-Discrimination Directives) continues to implement its constitutional functions and international treaties’ obligations if the *Sejm* and Senate fail to agree on a candidate for Human Rights Commissioner, especially if the appointment process is prolonged.

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<sup>22</sup> See OSCE, *Bucharest Plan of Action for Combating Terrorism* (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, par 10.

<sup>23</sup> See e.g., *OSCE Action Plan for the Promotion of Gender Equality* (2004), Annex to OSCE Ministerial Council Decision No. 14/04, MC.DEC/14/04, 7 December 2004, par 42 (second indent).

25. Article 20 pars 3 and 4 of the Act provides that the Commissioner “*may appoint up to three Commissioner’s deputies*” and “*shall determine the scope of [deputies’] responsibilities*”. Accordingly, the role and powers of Deputy may vary depending on the Commissioner’s decision. Thus, it seems to fall under the prerogative of the Commissioner to delegate authority to her/his Deputy to temporarily perform the functions of the Commissioner. In the absence of such decision, which may happen due to objective reasons (for instance, such as the incapacity of an incumbent Commissioner), the Office of the Commissioner may be left without an acting head. Furthermore, the Act is silent as to the immunities and privileges of Deputy Commissioner(s) and therefore fails to grant the same protection as the one granted to the Commissioner to protect his/her independence in the exercise of core functions. To address such deficiency, as shown in par 43 *infra*, the legislation of some countries mandates Deputy ombudspersons to assume the functions of the head of office during the interim, while ensuring that they enjoy similar privileges and immunities as the ombudsperson.

### 3. COMPLIANCE WITH RELEVANT INTERNATIONAL PRINCIPLES

#### 3.1. *Independence, Stability and Continuity of the NHRI*

26. The Paris Principles focus, among others, on general questions of independence and functionality of NHRIs. They *inter alia* stress (although in the context of infrastructure and funding) the need for sufficient prerequisites to ensure the smooth conduct of NHRI activities.<sup>24</sup>
27. In terms of mandates for members of NHRIs, Principle B.3 on the “*Composition and guarantees of independence and pluralism*” emphasizes the importance of stable mandates, noting that without such stability, there can be no real independence.<sup>25</sup> In its General Observations, the SCA also emphasizes the importance of “*ensur[ing] the continuity of [the NHRI’s] programs and services*”.<sup>26</sup> Principle B.3 further states that members of NHRIs shall be appointed via a special act that shall establish the specific duration of their mandate.
28. Thus, while the Paris Principles do not specifically call on states to introduce transitional provisions that would allow heads of ombuds institutions or of other NHRIs to stay in office until their successor takes up his/her work, they do stress the need for the smooth conduct of NHRI activities, and to ensure stability and continuity of NHRI mandates and operations. Thus, states are obliged to ensure the effective functioning and stability of the NHRI, including continuity of its programmes and services. At the same time, it is left to the states to determine how to best achieve this.

#### 3.2. *Security of Tenure as a Guarantee of Independence*

29. Whether an NHRI can play its role within the state to the full extent depends on various factors, including political and legal guarantees of independence. One such guarantee is the irremovability and security of tenure of NHRI members or of the Ombudsperson.<sup>27</sup> Establishment of term limits serves multiple purposes. It allows ombudspersons to act without any interference from the executive or the legislative branches during their terms

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<sup>24</sup> See *op. cit.* footnote 5, Principle B.2 (Paris Principles).

<sup>25</sup> See *ibid.* Principle B.3 (Paris Principles).

<sup>26</sup> See SCA, [General Observations](#) (adopted on 21 February 2018), especially General Observation 2.2.

<sup>27</sup> See SCA, [General Observations](#) (adopted on 21 February 2018), especially General Observation 2.1. on “Guarantee of tenure for members of the NHRI decision-making body”, which states that “*ensuring the security of tenure of NHRI members is consistent with the Paris Principles requirements regarding the composition of the NHRI and its guarantees of independence and pluralism*”.

of office, and in accordance with the mandate defined by a constitution or a statute. It also offers security of tenure and the ability to act without fear of dismissal for making decisions being unpopular or contrary to the will of an executive or prevailing political powers.

30. The security of tenure of an Ombudsperson also ensures stability of the office, reduces the risk of political influence, extending powers, privileges and immunities for the period defined by law. This not only protects the office-holder but allows the NHRI to carry out its functions for the benefit of individuals and society as a whole.
31. It is therefore important that the mandate and the term of office of the Commissioner for Human Rights are provided in the Polish Constitution. Furthermore, it is highly welcome that the Act further introduces mechanisms, which address the risk of a failure on behalf of the legislator to elect a new head of the NHRI – the Human Rights Commissioner, thus avoiding a gap between the mandates and minimizing the negative impact this may have on the work of the office.

### ***3.3. Legal Basis for Guaranteeing the Independence of the NHRI***

32. The Paris Principles state that guarantees for independence, mandate and competence of the NHRI should be set forth in a constitutional or legislative text, as should its independence from government.<sup>28</sup> Similarly, Council of Europe’s *Recommendation (2019)6*, which in an Annex contains “*Principles for the development of the Ombudsman institution*”, notes the importance of a firm legal basis for ombuds institutions, defining such institutions’ main tasks, guaranteeing their independence, and providing them with the means necessary to accomplish their functions (Principle 2).
33. According to ECRI General Policy Recommendation No. 2, “*the mandate, institutional architecture, functions, competences and powers, appointment and dismissal procedures, safeguards and terms of office for the leadership positions and the arrangements for the funding and accountability of equality bodies should be set out in the law in a manner that ensures both their independence and effectiveness*”.<sup>29</sup> The Venice Principles also recommend that an ombuds institution, including its mandate, should be based on a firm legal foundation, preferably at the constitutional level, while its characteristics and functions may be further elaborated at the statutory level.<sup>30</sup>
34. It is important to note in this respect that the Constitution of Poland, like many other constitutions of OSCE participating States, recognises the competence of the NHRI (Article 208), guarantees its independence from other State organs (Article 210), provides certain procedural safeguards (obtaining the consent of the Sejm) in the context of criminal proceedings and certain special rules regarding the Commissioner’s arrest or detention (Article 211) and defines the term of office (Article 209). In addition to the above constitutional provisions, the Act on the Commissioner for Human Rights (the Act) establishes the procedure for election of the Commissioner, elaborates on security of tenure, and defines exhaustive grounds for the termination of office.
35. At the same time, the length and level of details of constitutional texts across the OSCE varies greatly.<sup>31</sup> As shown in par 43 *infra*, most legislators have chosen to regulate aspects pertaining to the continuation of the mandate of the incumbent ombudsperson until a

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<sup>28</sup> See *op. cit.* footnote 5, Principle A.2 (Paris Principles).

<sup>29</sup> See *op. cit.* footnote 15, par 3 (ECRI General Policy Recommendation No. 2).

<sup>30</sup> See *op. cit.* footnote 16, par 2 (Venice Principles).

<sup>31</sup> See e.g., Venice Commission, [Final Draft Report on Constitutional Amendment Procedures](#), 4 December 2009, CDL(2009)168, pars 128 and 138.

new-office holder is appointed in primary legislation, even if the maximum duration of the NHRI mandate is stated in the Constitution.

### **3.4. Vacancy of Office and Transition Period to Ensure Stability and Continuity of the NHRI**

36. Principle 3 of Council of Europe’s Committee of Ministers *Recommendation (2019)6* stipulates that the process of the selection and appointment of the head of an ombuds institution should promote its independence. In this context, Principle 3 explicitly 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*”. In this, *Recommendation (2019)6* and its annexed principles go even further than the Paris Principles, by not only noting the importance of ensuring the smooth conduct of NHRI activities, but also stressing the need to avoid vacancies in the institution’s leadership for a lengthy amount of time. Moreover, as expressly recommended in Principle 13 of the [Belgrade Principles](#), vacancy in the composition of the membership of a NHRI “*must be filled within a reasonable time*” and “[a]fter expiration of the tenure of office of a member of a NHRI, such member should continue in office until the successor takes office”.
37. The GANHRI Sub-Committee on Accreditation (SCA) has in the past noted with great concern that the continued failure to appoint a head of an NHRI had an actual or perceived impact on its permanency and institutional independence, and restricted the ability of this institution to effectively carry out the full extent of its mandate.<sup>32</sup>
38. Indeed, it is precisely for this reason that ODIHR has repeatedly urged OSCE participating states to include transitional provisions in their NHRI legislation, that will allow the parting head of the institution to remain in office until his/her successor takes up office.<sup>33</sup> ODIHR has specifically recommended, as a matter of good practice, to ensure that the current Ombudsperson should remain in office after the end of their terms until a successor is appointed, in order to ensure the continuity of the institution and ensure proper transfer of duties between the old and new office-holder.
39. The Venice Commission has made similar recommendations in its opinions on NHRI legislation.<sup>34</sup> In particular, it has recommended that after the expiration of the term of an Ombudsperson (Protector), and prior to the selection of a new one, the current office holder should continue in office until the successor takes office. The Venice Commission emphasized that “[t]his would help to avoid a situation where no Protector holds an office - as happens sometimes for up to several months - with only a deputy as an acting ombudsman filling in temporarily”, noting “the need for the proper transfer of Protector’s duties between the old and the new office holder”.<sup>35</sup> Moreover, the Venice Principles clearly state that “States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats”. Failing to ensure continuity of leadership would clearly represent a significant hurdle to the effective functioning of the Office of the Commissioner for Human Rights.

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<sup>32</sup> See e.g., SCA, [Report and Recommendations of the Session](#), held on 15-19 October 2018 in Geneva, Decision 3.1 on the *Defensor del Pueblo de la Nación Argentina*.

<sup>33</sup> See, e.g. ODIHR, [Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland](#), 6 February 2017, par 53; and ODIHR and Venice Commission, [Joint Opinion on the Law No. 2008-37 of 16 June 2008 Relating to the Higher Committee for Human Rights and Fundamental Freedoms of Tunisia](#), 17 June 2013, par 43. See also ODIHR, [Opinion on the on the Law of the Republic of Lithuania on the Seimas Ombudsmen](#), 21 September 2011, par 44, where such a transitional provision was considered reasonable in cases where an Ombudsperson’s mandate expires.

<sup>34</sup> See e.g., Venice Commission, [Opinion on the Draft Amendments to the Law on the Protector of Human Rights and Freedoms of Montenegro](#), 13 October 2009, par 16.

<sup>35</sup> *ibid.* par 16.

40. If the position of head of institutions such as the Office of the Human Rights Commissioner is left vacant for a long period, this creates repercussions that go far beyond the functionality and smooth conduct of activities. Rather, if there are no domestic provisions in place that ensure continuous leadership of such institutions, MPs or governments (depending on who is responsible for the appointment of such leadership) could easily cripple such bodies and cause long-lasting damage to their work and their reputation by simply failing, or refusing to appoint a successor. As stated in a recent EU publication on NHRIs, processes involving parliaments can result in stalemates for NHRIs – political divisions may prevent decision-making or political parties may seek to have their own political nominees appointed.<sup>36</sup> This type of dependency on the legislature or executive does not sit well with the necessary independence of NHRIs from the executive and legislative branches, as required by the Paris Principles.<sup>37</sup> For this very reason, Article 3 par 6 of the Act, in fact, provides an important safeguard to avoid such a situation where the NHRI remains without a head for a long period of time. Moreover, a prolonged vacuum in the effective functioning of the services of the Commissioner for human rights, who also acts as NPM and Equality Body may negatively impact the access of potential victims to appropriate administrative procedures for the protection of human rights and the enforcement of the principle of equal treatment.
41. Therefore, it is of great importance that legislation establishes procedures to ensure NHRIs' continuous functioning without interruption, either through provisions allowing ombudspersons to continue their mandate until their successor is appointed or through the introduction of clearly defined rules, which would allow NHRIs to effectively perform their functions. Decisions undermining the independence and effectiveness of an NHRI, or resulting in the paralysis of this institution, which also serves as an NPM and Equality Body, would be inconsistent not only with the Paris Principles but also with the international obligations of a state, including the OPCAT. Constitutional provisions establishing the term of office of the Commissioner in combination with the provisions of the Act allowing the Commissioner to remain in office until a new office-holder is appointed, are valid and effective mechanisms which can help protect the independence, efficiency, stability and continuity of the office. The choice that the legislator expressed in Article 3 par 6 of the Act is in line with the above described principles and further enhances the guarantees established by the Constitution of Poland.
42. Bearing in mind the need to ensure the continuous functioning and independence of their NHRIs, and to ensure smooth transitions of leadership, numerous OSCE participating States have included transitional provisions in their NHRI legislation that resemble Article 3 par 6 of the Act, thus allowing an office-holder to remain in office until a successor is appointed. By definition, provisions such as these do not unduly extend the leader's term of office as they are transitional or temporary in nature. The NHRIs in the majority of countries with similar transitional modalities (including Poland) have received "A-status" accreditation.<sup>38</sup>

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<sup>36</sup> EU FRA, *Strong and Effective National Human Rights Institutions – Challenges, Promising Practices and Opportunities*, 3 September 2020, page 47.

<sup>37</sup> See *op. cit.* footnote 5, Principles B.2 and B.3 (Paris Principles).

<sup>38</sup> Notably, Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Finland, Georgia, Latvia, Lithuania, Moldova, Portugal, Serbia and Spain.

43. For example, a number of states, e.g. Albania,<sup>39</sup> Belgium,<sup>40</sup> Bosnia and Hercegovina,<sup>41</sup> Bulgaria,<sup>42</sup> Czech Republic,<sup>43</sup> Denmark,<sup>44</sup> Lithuania,<sup>45</sup> Moldova,<sup>46</sup> Portugal<sup>47</sup> and Romania,<sup>48</sup> have stipulated that the heads of their NHRIs shall remain in office until their successor has been elected or appointed, or has taken the oath of office. Such provisions are included in primary legislation even if the respective maximum length of the mandate is mentioned in the Constitution. Such a transitional modality is also provided in the case of the EU Ombudsman.<sup>49</sup> Other countries, notably Croatia,<sup>50</sup> Finland,<sup>51</sup> Georgia,<sup>52</sup> Latvia,<sup>53</sup> Montenegro,<sup>54</sup> Serbia,<sup>55</sup> and Spain,<sup>56</sup> have stated that until a new head of the institution has taken office, one or more deputy heads shall act as the head of the NHRI. In these countries, generally the deputy heads either enjoy the same privileges and immunities as the head of the NHRI, or the legislation specifies that when performing the duties of the head during the transition period until appointment of the new office-holder, the deputy head shall enjoy the rights, legal guarantees and immunity granted to the head of the NHRI.<sup>57</sup> This latter option of having a Deputy acts as the head during the transition period until appointment of a new office-holder is not the one chosen by the Polish legislator, which preferred the first approach. In France, the legislation provides that the replacement of NHRI collegium members should be decided at least eight days before the end of their term of office and if successors are not appointed by that time, the collegium of the NHRI should propose a candidate to the appointing authority.<sup>58</sup> Such provisions stress the importance of the principle of continuity of the operations of the NHRI for the sake of victims of human rights violations and the need to avoid any vacuum in that regard.

<sup>39</sup> See Article 9 of the *Law on the People's Advocate of Albania*, passed on 4 February 1999, last amended in 2014.

<sup>40</sup> Regarding the Federal Ombudsman, see Article 3, par 1, last sentence of the *Federal Ombudsmen Act* (1995, as amended).

<sup>41</sup> See Article 12 of the *Law on the Human Rights Ombudsman of Bosnia and Hercegovina* of 12 December 2000, last amended in 2006.

<sup>42</sup> See Article 13 of the *Ombudsman Act of Bulgaria*, in force since 1 January 2004, last amended in 2013.

<sup>43</sup> See Section 4, par 1 of the [Act on the Public Defender of Rights of the Czech Republic](#) (8 December 1999, last amended in 2017).

<sup>44</sup> See Section 1 (3) of the *Ombudsman Act of Denmark* (1996, as amended).

<sup>45</sup> See Article 9 par 4 of the *Law of the Seimas Ombudsmen of Lithuania* of 3 December 1998, last amended in 2017.

<sup>46</sup> See Article 5 of the *Law on the People's Advocate* of 9 May 2014 of Moldova, last amended in 2019.

<sup>47</sup> See Article 6 of the *Statute of the Ombudsman of Portugal* of 9 April 1991, last amended in 2013.

<sup>48</sup> See Article 8 of the *Law on the Organization and Functioning of the Ombudsman of Romania* of 13 March 1997, last amended in 2018

<sup>49</sup> See Article 7(2) of the [Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties](#) (94/262/ECSC, EC, Euratom); and Rule 231 of Title X of the [European Parliament Rules of Procedure](#).

<sup>50</sup> See Articles 12 and 14 of the *Ombudsman Act of Croatia* of 29 June 2012.

<sup>51</sup> See Section 16 of the *Parliamentary Ombudsman Act of Finland* of 1 April 2002, last amended in 2015.

<sup>52</sup> See Article 9 of the *Organic Law on the Public Defender of Georgia* of 23 June 1999, last amended in 2014.

<sup>53</sup> See Section 16 of the *Ombudsman Law of Latvia* of 5 April 2006, last amended in 2011.

<sup>54</sup> See Article 14 of the *Law on the Protector of Human Rights and Freedoms of Montenegro* of 10 July 2003, last amended in 2014.

<sup>55</sup> See Article 16 of the *Law on the Protector of Citizens of Serbia* of 2005, last amended in 2007.

<sup>56</sup> See Article 5 of the *Organic Law on the Public Defender of Spain* of 7 May 1981, last amended in 2009.

<sup>57</sup> See e.g., Article 8 of the *Ombudsman Act of Croatia* of 29 June 2012, which states that “[t]he Ombudsman and his/her deputies shall enjoy immunity as do members of the Croatian Parliament”; Article 9 of the *Organic Law on the Public Defender of Georgia* of 23 June 1999, last amended in 2014, which states that when performing the duties of the current Public Defender of Georgia until a new Public Defender is elected, the Deputy Public Defender “shall enjoy the rights, legal guarantees and immunity granted to the Public Defender of Georgia”; Section 16 of the *Ombudsman Law of Latvia* of 5 April 2006, last amended in 2011, provides that “[d]uring the absence of the Ombudsman his or her functions and tasks shall be performed by the Deputy Ombudsman, who during this period of time shall have the same powers as the Ombudsman has”; Articles 9-12 of the *Law on the Protector of Human Rights and Freedoms of Montenegro*, which grants the same privileges and immunities to the Deputy Protector; Article 10 of the *Law on the Protector of Citizens of Serbia* of 2005, last amended in 2007, providing for the same immunity as the Protector of Citizens; Article 6 par 4 of the *Organic Law on the Public Defender of Spain* of 7 May 1981, last amended in 2009, which provides that the rules on immunities, prerogatives and incompatibilities “shall be applicable to the Deputy Ombudsmen in the performance of their duties”.

<sup>58</sup> See the *French Law n°2017-55 of 20 January 2017* on the general statute of independent administrative authorities, which includes the *Commission Nationale Consultative des Droits de l'Homme* (French NHRI).

#### 4. CONCLUSION

44. As stated in the Paris Principles, it is essential that NHRIs are independent from other state bodies and remain functional throughout, so that the human rights protection that they provide to individuals, but also overall, may continue in a seamless manner. The independence of such institutions has many facets. In the case of ombuds institutions, the Office of the Human Rights Commissioner in Poland is led by the Commissioner whose mandate is defined by the Constitution and the Act; if this person is no longer able to exercise this mandate, be it due to the expiration of his/her mandate or for other reasons, then this may have serious repercussions for the work of the entire institution.
45. For this reason, many states have introduced provisions that allow for the extension of the mandate of such heads of institutions in cases where parliaments or other state organs responsible for appointing or electing such leadership fail to or refuse to do so within the statutory time limits. These types of provisions aim to resolve a problem that is transitional in nature, and in no way seek to unduly extend the mandate of an ombudsperson or, in the case of Poland, of the Human Rights Commissioner. Rather, they seek to create continuity in the field of human rights protection and promotion, and to shield national human rights institutions from consequences of political stalemates that are not of their making. After all, if the relevant appointment organs initiate the process of appointing or electing a new head of an NHRI early on, then this particular situation can easily be avoided.
46. Therefore, to conclude, Article 3 par 6 of the Act is in line with the Paris Principles and other relevant international recommendations pertaining to NHRIs, as this provision helps protect the very independence, stability, functionality and smooth conduct of activities that these documents seek to maintain. Without prejudice to the decisions of the Constitutional Tribunal, ODIHR considers that the transitional solution provided in Article 3 par 6 of the Act is in line with relevant international standards and recommendations on the independence and effectiveness of NHRIs and ombuds institutions and the general principles of rule of law. It is welcome that these principles are recognized and guaranteed by the Constitution of Poland and by the Act on the Commissioner for Human Rights, which provides a solid foundation for the independence and effective functioning of the NHRI in Poland.

*[END OF TEXT]*