



RZECZNIK PRAW OBYWATELSKICH

# **SUMMARY**

**of the Report on the Activity  
of the Commissioner for Human Rights in 2016  
with Comments on the Observance of Human  
and Civil Rights and Freedoms**

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**Summary of the Report on the Activity  
of the Commissioner for Human Rights in 2016  
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# Introduction

According to Article 80 of the Constitution of the Republic of Poland, everyone has the right to apply to the Commissioner for Human Rights, under the rules set out in the relevant Act of Parliament, for assistance in protecting their freedoms or rights violated by public authorities. Applications filed with the Commissioner are free of charge and no particular form is required to submit them. The broad basis for action, as well as the absence of formal requirements and fees result in a large number of applications submitted to the Commissioner for Human Rights. In 2016, a total of 52,551 applications were filed, of which 24,360 were applications in new cases. Employees of the Office of the Commissioner for Human Rights spoke to 5,195 citizens who visited the Office, and answered 38,074 telephone calls to its free-of-charge helpline, providing relevant advice and explanations.

The Commissioner for Human Rights may initiate proceedings on his/her own initiative, e.g. upon analysis of information published by the media. Such *ex officio* proceedings may also be initiated based on information received by the Commissioner (inter alia from prisons, pre-trial detention facilities and the police) with regard to so-called extraordinary incidents with the participation of law enforcement officers. In 2016, the Commissioner initiated 837 *ex officio* proceedings (including 231 in the form of a general intervention).

In 2016, complaints submitted to the Commissioner for Human Rights related primarily to issues in the fields of: criminal law (22.3% of the cases), law on enforcement of criminal sanctions (20.9%), civil law (18.7%), administrative and commercial law (14.5%) and labour law and social security (12.4%).

The Commissioner for Human Rights carries out his/her tasks with the support of the Commissioner's Office. In 2016, the Commissioner's tasks were carried out by the Warsaw-based Headquarters Office and by the Commissioner's Representative Offices in Wrocław, Gdańsk and Katowice. Moreover, employees of the Commissioner's Office received citizens' applications at application reception points in Bydgoszcz, Słupsk, Częstochowa, Kielce, Lublin and Szczecin.

The number of persons to whom, upon consideration of their complaints, explanations and information were provided with regard to generally available measures the complainants might use remained high. This confirmed not only the insufficient level of people's legal knowledge, but also the systemic lack of citizens' access to legal aid and education.

In the reporting period, the Commissioner for Human Rights submitted 441 problem interventions. The procedure was used by the Commissioner when

analysis of individual cases revealed a common practice of applying the law in a manner which violated freedoms or rights of individuals. Problem interventions were also undertaken when complaints received by the Commissioner referred to violation of people's freedoms or rights due to the content of legal regulations. In 2016, the Commissioner submitted 196 problem interventions regarding the necessity to take legislative action in order to eliminate such violations.

For many years, the Commissioner for Human Rights has actively participated in proceedings before the Constitutional Tribunal. The Commissioner's participation in such proceedings increased after the entry into force of the Act on the Constitutional Tribunal<sup>1</sup>, which allows the Commissioner to join all types of proceedings before it (and not, as formerly, only proceedings instituted pursuant to constitutional appeals); with the exception of proceedings instituted as part of preventive supervision over the legality of Acts of Parliament. In 2016, using his capacity to independently bring an action before the Tribunal, the Commissioner filed 24 applications with the Constitutional Tribunal. He also joined 12 proceedings instituted pursuant to constitutional appeals, 13 proceedings instituted pursuant to questions of law submitted by courts and 6 proceedings instituted pursuant to claims filed by other entities. Unfortunately, due to the subsequent amendments to the Acts of Parliament which govern proceedings before the Constitutional Tribunal its work was gradually paralyzed. As a result, most of the Commissioner's applications, as well as cases joined by him, still remain unresolved. In the light of judgements issued by the Constitutional Tribunal, there are also serious doubts as to its current composition.

As regards the Commissioner's relations with the judiciary, of particular importance are questions of law which the Commissioner submits to the Supreme Court and the Supreme Administrative Court, to be adjudicated upon by the Courts' panels in extended composition. The questions seek to unify adjudication standards and, consequently, serve the aim of protecting the principle of people's equality before the law, as, in practical terms, inconsistent interpretation of the law by courts constitutes a violation of this principle.

In view of the revealed inconsistency in jurisprudence of common courts, in 2016 the Commissioner for Human Rights submitted 1 question of law to the Supreme Court and 3 questions of law to the Supreme Administrative Court. As regards individual cases adjudicated upon by common courts, the Commissioner filed 72 cassation appeals against the courts' final verdicts. In administrative cases, the Commissioner filed 12 complaints to voivodeship (i.e. regional) administrative courts and 6 cassation appeals to the Supreme Administrative Court.

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<sup>1</sup> The Act of 25 June 2015 (Journal of Laws [Dz. U.] item 1064).



As part of fulfilling its mandate of the National Preventive Mechanism, in 2016 the Commissioner's Office carried out 85 preventive visits in penitentiary institutions (e.g. prisons, pre-trial detention facilities, police detention facilities and youth correctional facilities).

The Commissioner also performs tasks relating to the implementation of the principle of equal treatment. The tasks were entrusted to the Commissioner for Human Rights under the provisions of the Act of 3 December 2010 implementing certain European Union regulations in the field of equal treatment (Journal of Laws No. 254, item 1700). The tasks include: consideration of complaints regarding violation of the principle of equal treatment; analyses, monitoring and support in the field of equal treatment of all persons; conducting independent research on discrimination; developing and publishing independent reports and recommendations on issues relating to discrimination. In 2016, within the series of publications entitled *Equal treatment principle: law and practice*, the Commissioner published two reports *Availability of community support for the elderly from the point of view of representatives of municipalities of the Dolnośląskie province* and *Access of persons with disabilities to judicial institutions*.

Furthermore, the Commissioner for Human Rights is Poland's independent entity for supporting, protecting and monitoring the implementation of the Convention on the Rights of Persons with Disabilities. A summary of the Commissioner's activities in this area and in the field of implementation of the equal treatment principle is contained in the *Report on the Activity of the Commissioner for Human Rights in the Area of Equal Treatment*.

In the implementation of the aforementioned tasks, the Commissioner cooperates with six expert committees: Expert Committee on Senior Persons, Expert Committee on Persons with Disabilities, Expert Committee on Migrants, Expert Committee for the Prevention of Homelessness, Expert Committee of the National Preventive Mechanism and Expert Committee for Health. The expert committees support the Commissioner in monitoring the compliance with the principle of equal treatment and the Convention on the Rights of Persons with Disabilities.

In the framework of the Commissioner's cooperation with civil society organizations for the protection of human rights and freedoms, numerous meetings, seminars and conferences were organized by the Commissioner's Office. They related, inter alia, to the protection of the rights of homeless persons, persons with disabilities and migrants. After taking the Commissioner's office, Adam Bodnar established an organizational unit named the Social Projects Centre which, within the Office of the Commissioner for Human Rights, is responsible for the cooperation with civil society organizations. The cooperation consists in conducting regional consultations in individual voivodeships (i.e. regions) where the Commissioner or his Office employees meet with civil society organizations and leaders.



In 2016, within the programme of the regional consultations the Commissioner visited 49 towns and cities. In 38 of them he met with representatives of social organizations, and in 7 of them debates were held on those articles of the Constitution which focus on civil rights and freedoms. As part of the regional visits, 7 meetings with students and scientific communities were also held. The Commissioner visited 29 social organizations which presented their activities in support of persons at risk of social and occupational exclusion.

An important activity of the CHR Office in 2016 was the dissemination of information about citizens' rights and about the Commissioner's actions. Over 850 replies were given to information requests and inquiries from the media, and over 100 releases were sent with information about the CHR's key activities. Newspapers, radio, television and the internet published 23,552 information items relating to matters covered by the Commissioner's activities.

In 2016, the CHR Office continued its cooperation with newspapers and television and radio stations, and established contacts with numerous new web services. The Commissioner and the CHR Office representatives frequently presented information about their activities on the media, and explained the complexities of the legal system. In connection with the holding of regional meetings with citizens, the CHR Office established cooperation with representatives of local media across Poland. The Commissioner's posts were also placed in social media.

2016 was a very important year in terms of protecting and strengthening the Commissioner's political position, both nationally and internationally. Representatives of numerous international bodies visited Poland, also in order to monitor the effectiveness of work of the CHR Office. The Venetian Commission visited the Office twice, each time to verify whether the Commissioner can independently carry out his mandate and duties, taking into account the crisis of the Constitutional Tribunal. Support for the Commissioner's activities was expressed by many international institutions, including the Office for Democratic Institutions and Human Rights (ODIHR)<sup>2</sup>, the European Network of National Human Rights Institutions (ENNHRI)<sup>3</sup>, the EQUINET Network of Equality Bodies<sup>4</sup>, the Council of Europe<sup>5</sup>, the United Nations High Commissioner for Human Rights (OHCHR)<sup>6</sup> and the United Nations Special Rapporteur on the Situation of Human Rights Defenders.

One of the key issues discussed internationally by the Commissioner in 2016 was migration and its impact on the respect for human rights and dignity. In January 2016, the Commissioner met with members of the European Economic

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<sup>2</sup> Office for Democratic Institutions and Human Rights – <http://www.osce.org/odihr>

<sup>3</sup> European Network of National Human Rights Institutions – <http://ennhri.all2all.org/>

<sup>4</sup> Equinet European Network of Equality Bodies – <http://www.equineteurope.org/>

<sup>5</sup> Council of Europe – <http://www.coe.int/en/>

<sup>6</sup> United Nations Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Pages/Home.aspx>





and Social Committee who arrived to Poland with a mission on migration issues. In March, the CHR Office organized the *Third Ombudsmen Summit Eastern Partnership, Balkans and the Visegrad Group (V4)* in the European Parliament in Brussels. The objective of the meeting was to exchange experience and good practices between the Ombudsmen to increase the human rights standards in the context of the migration crisis. The meeting was also attended by Ms. Emily O'Reilly, the European Ombudsman.

There were numerous study visits to the CHR Office with the aim to exchange experience in the fields of protection of human rights, support to civil society and compliance with the rule of law. Among the visiting delegations were representatives of: courts and prosecutors' offices from EU member states, non-governmental organisations from Ukraine, administrative court judges from the Kingdom of Thailand, the Supreme Council of the Judiciary of Portugal, as well as lawyers and human rights defenders from Belarus and Kyrgyzstan.

In 2016, the Commissioner made several international visits in order to attend inter alia: the seminar *EU Fundamental Values, Immigration and Integration: A Shared Responsibility* in Strasburg, the international conference on the right of defence in criminal proceedings in Budapest, and the international workshops for European Ombudsmen in Oxford and Barcelona. The meetings focused on the issues relating to migrants and refugees, but also on the threats to the independence of the Ombudsman institutions as well as the challenges facing national human rights institutions in the 21<sup>st</sup> century.

The Commissioner's new responsibilities taken over in recent years (such as the mandate of the National Preventive Mechanism, the principle of equal treatment, the monitoring of the implementation of the Convention on the Rights of Persons with Disabilities, the monitoring of improper activities of the police and other services) were underfinanced, as the Commissioner had already indicated in his previous annual reports. In 2016, the situation further worsened as a result of a significant reduction of the Commissioner's budget. For this reason, the number of visits within the framework of the National Preventive Mechanism had to be decreased (from 121 in 2015 to 85 in 2016).

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## Main issues in the field of constitutional and international law



## A. Right to good legislation

In 2016, the Commissioner focused on amendments to the Acts of Parliament which govern the operation of the Constitutional Tribunal. The Commissioner filed an application with the Constitutional Court for declaring the Act of 22 December 2015 amending the Act on the Constitutional Tribunal non-compliant with the Constitution. In the Commissioner's opinion, there existed numerous objections to the procedure of passing the act, as well as to the procedures provided for therein with regard to: declaring the expiry of a mandate of the Constitutional Tribunal's judge; conducting disciplinary proceedings against the Tribunal's judges; taking decisions, as a principle, by the Tribunal sitting in full bench; hearing the cases in the order in which they are lodged. On 9 March 2016 the Constitutional Tribunal examined the Commissioner's application and declared the act non-compliant with the Constitution.

On 22 July 2016, a new Act on the Constitutional Tribunal was passed, and also in that case the Commissioner filed an application to the Tribunal for declaring the act non-compliant with the Constitution. According to the Commissioner, the act reintroduced solutions infringing, to an unacceptable extent, the independence of the Tribunal and the impartiality of its judges. On 11 August 2016, the Constitutional Tribunal examined the Commissioner's application and declared most of the challenged provisions of the Act non-compliant with the Constitution.

The Commissioner also applied to the Constitutional Tribunal for declaring non-compliance with the Constitution of the amended provisions of the Act on the Promotion of Employment and Labour Market Institutions. In the opinion of the Commissioner, the act, in the part regulating the procedure of so-called profiling of unemployed persons, failed to introduce an adequate remedy against the determined profile of assistance to an unemployed person, as well as moved certain matters which should have been regulated in the act to the level of executive acts. The case is pending consideration by the Tribunal.

As a continuation of work on the issue of child benefits for parents of still-born children whose sex cannot be determined, the Commissioner submitted a request to the Chairperson of the Polish Senate Committee on Human Rights, Rule of Law and Petitions to take relevant action in this area. The senators supported the Commissioner's proposal and commenced work to draft an amendment to the Act on Retirement Pensions and Other Pensions.

The Commissioner also submitted to the Prime Minister a proposal to introduce new legislative solutions permitting the use of electronic signatures under citizens' legislative initiatives. In reply, the Minister of Digitization informed of the possibility to introduce such solutions and supported the idea, pointing out, at the same time, that its fulfilment requires further analyses.

The Commissioner also submitted an intervention to the Minister of Development with regard to the draft amendment to the Petitions Act, according to which a petition filed in an electronic form should bear a qualified electronic signature or an electronic signature validated in the *ePUAP* trusted profile system. In response, the Minister informed that the Commissioner's suggestion was taken into account and provided for in the draft amendment.

## B. Right to judicial protection of citizens' rights and freedoms

The Commissioner applied to the Constitutional Tribunal for declaring the Act on the System of Common Courts non-compliant with the Constitution, in the part in which it fails to provide for a system of court review of the Minister of Justice's decisions refusing to take into account judges' applications regarding their secondment to other positions. The case is pending consideration by the Tribunal.

In his intervention to the Minister of Justice, the Commissioner pointed out that the regulations governing the system of recalling a judge from his/her secondment should be amended as soon as possible. Decisions to recall judges from their secondment were left to the discretion of the Minister and, in addition, may not be challenged in court. In reply, the Minister informed that the issue would be considered within the framework of the envisaged large-scale reform of the system of courts.

The Commissioner also joined the proceeding before the Constitutional Tribunal with regard to the claim of the National Council of the Judiciary concerning the external administrative supervision of the Minister of Justice over Polish courts. Justifying his position the Commissioner pointed out that the Minister of Justice, who at the same time holds the office of Public Prosecutor General, should not have powers that undermine impartiality of judges and independence of courts. The case is pending consideration by the Tribunal.

In his intervention to the Minister of Justice the Commissioner pointed out that there existed no separate procedure regarding disciplinary liability of assistant judges. At the same time, however, an assistant judge's promotion to the position of a senior assistant judge may only take place if the judge had not been punished for any disciplinary offence. This violates the principle of citizens' trust to the state and the law. In reply, the Minister explained that the issue would be regulated in the amendment to the Act on the System of Common Courts.

The Commissioner forwarded to the President of Poland an intervention regarding the President's refusal to appoint a judge to the post of a higher-instances court judge, without indicating the reasons for the refusal. According to



the standards of democratic rule of law, interested candidates to judicial positions, who seek nomination to the position of a judge should have access to the information about the reasons justifying the refusal of the nomination by the President of Poland. In reply, the President informed that according to the Constitution, the power to accept or reject a candidature is a prerogative of the President and therefore does not require justification. The Commissioner did not share the position of the President and joined an administrative court proceeding initiated by the judges' complaint. After the dismissal of the complaint by the Voivodeship Administrative Court, the Commissioner filed a cassation appeal to the Supreme Administrative Court. At present, the case is pending consideration by the Supreme Administrative Court.

The Commissioner also intervened before the Minister of Justice again with regard to the urgent need for a comprehensive Act of Parliament to regulate the work of court experts. He also pointed out the need for the act to appropriately regulate court expert fees, in order to ensure access to highly qualified experts. In reply, the Minister informed that the draft text of the Act, after its completion, would be forwarded to the Commissioner for expressing his opinion.

Due to numerous doubts regarding non-compliance with the Constitution of certain provisions of the new Act on Public Prosecutors, the Commissioner applied to the Constitutional Tribunal for resolving the issue. The new Act changed the system of organisation of prosecutors' offices. As a result, prosecutors who worked in organizational units that were closed down were transferred either to new units or to lower-level units. The Commissioner pointed out that the decision to transfer a prosecutor to a lower-level or even the lowest-level position disregards his/her professional achievements and shows that his/her professional accomplishments are assessed negatively. The legislator has not provided for any procedural safeguards to the transferred prosecutors. The application is pending consideration by the Tribunal.

In another application to the Constitutional Tribunal, regarding disciplinary proceedings against prosecutors, the Commissioner pointed out that the legislator should not accept solutions which allow public service employees to violate human rights by excluding the employees' disciplinary liability if they claim to act in a vaguely understood public interest. The application is also awaiting consideration by the Tribunal.

The Commissioner, in his intervention to the Minister of Justice, indicated that the court competent to examine an appeal lodged by a bailiff was a competent district court. Administrative supervision over such court was exercised by its president who, at the same time, was one of the applicants in the proceeding. This might lead to the violation of the bailiff's right to an impartial and fair appeal proceeding. In reply, the Minister stated he did not share the Commissioner's opinion and that in his view, the current procedural regulations sufficiently protected bailiffs' right to impartial and independent court.

## C. Freedom of speech and right to information

The Commissioner challenged the Act amending the Broadcasting Act before the Constitutional Tribunal. According to the Commissioner, the act violates the constitutional guarantees of freedom of speech and freedom of the media, by making the public radio and television supervised directly by the government while ignoring the role of the National Broadcasting Council, which is provided for in the Constitution. On 13 December 2016, the Tribunal issued a judgment on the case, which in part shared the Commissioner's objections.

In his intervention to the Minister of the Interior and Administration, the Commissioner pointed out that the issuing of press publications by local governments poses a threat e.g. to the freedom of expression, the observance of the principle of fair competition, and the citizens' right of access to public information. In the Commissioner's opinion, local government entities should only be allowed to publish newsletters containing objective information that is useful for the local community. In reply, the Minister informed that in view of the complexity of the issue raised by the Commissioner, a larger group of entities should be engaged in the discussion.

In connection with the debate regarding decriminalization of defamation, the Commissioner applied to the Minister of Justice for considering the possibility of introducing such legislative changes that would lead to the simplification of the relevant civil-law redress procedure while leaving the possibility of applying criminal sanctions in cases in which civil-law sanctions may be insufficient. In reply, the Minister disagreed with the Commissioner's suggestion and pointed out that current provisions on defamation ensured a balance between the protection of the freedom of speech and the protection of human dignity.

The Commissioner is also monitoring the case filed by Polish Radio journalists who had been transferred to other positions or dismissed. The Commissioner contacted the President of the Polish Radio about the issue, pointing to the constitutional standards of freedom of speech. In response, the Commissioner was informed that all decisions were taken because of the employer's needs and were compliant with the Labour Code.

In connection with the *Information on changes in the organization of work of the media in the Parliament*, the Commissioner filed an intervention with the Speaker of the Sejm, reminding him of the standards arising from the citizens' constitutional right to information on actions taken by public authorities. He also emphasized that it is not acceptable for journalists' access to information and the procedure of information provision to be regulated by way of regulation of the Speaker of the Sejm.



## D. Right to privacy and protection of personal data

In 2016, the Commissioner focused again on the issue of regulations on video surveillance. The Commissioner requested the Minister of the Interior and Administration for information on the planned activities and schedule of work in this area. The problem of video surveillance relates to the fundamental rights of all citizens and therefore there is a need for an Act of Parliament to regulate the issue in a comprehensive manner. The Minister informed that draft assumptions for an Act of Parliament on video surveillance, developed in the past years, were deleted from the agenda of the Government Work Programming Team, due to the necessity to further analyse the subject and plan the works, which, as he assured, was done in the Ministry.

The Commissioner submitted to the Minister of Family, Labour and Social Policy his comments on the protection of the right to privacy and the right to personal data protection in connection with the entry into force of the Act on State Support in Raising Children, which introduced the Family 500 Plus programme. The Commissioner raised doubts with regard to the development of a central database for the needs of the programme, access to data contained therein, and key principles of data collection (adequacy, transparency and accuracy). In reply, the Minister informed that in his opinion the data collection process was correct and compliant with the law. In addition, he assured that within 12 months, a comprehensive review and evaluation of the programme would be carried out, including consultations with the Inspector General for Personal Data Protection.

The issue of personal data protection was also raised in the Commissioner's intervention to the Minister of Development and Finance, which concerned the provisions of the Act on Capital Market Supervision. The Commissioner expressed doubts with regard to the powers of the Chairperson of the Polish Financial Supervision Authority, in particular the power to request a telecommunication service provider to provide access to information constituting telecommunications secret or to other information related to telecommunications connections or data transfer. The doubts related, primarily, to the lack of independent control by the state authorities over the data collection process. In response, the Minister informed the Commissioner of the reasons for which the regulations were introduced. He also shared the doubts regarding the lack of an external control mechanism and explained that measures will be taken at the inter-ministerial level to coordinate the works remaining within the responsibilities of many state authorities.

In 2016, the Commissioner received a number of citizens' complaints caused by the entry into force of the Act on the Implementation of the Agreement between the Government of the Republic of Poland and the Government of

the United States of America to Improve International Tax Compliance and to Implement FATCA, which imposed on Polish citizens the obligation to submit statements concerning US tax residence, and provided for the transfer of citizens' data to the US. The Commissioner shared the complainants' objections and informed the Minister of Finance that the act failed to define the key terms including, in particular, the term *US tax resident*, but at the same time provided for criminal liability for submitting a false statement. In reply, the Minister informed that the act would be adequately amended.

Having received the information on data leakage from the PESEL database in connection with bailiffs' activities, the Commissioner requested the Minister of Digitization, the Minister of the Interior and Administration and the Inspector General for Personal Data Protection to present their opinions on the issue. In reply, the Minister of the Interior and Administration forwarded to the Commissioner information on the security of IT systems used by the Ministry and entities supervised by it. He also presented the system of telecommunications systems' protection and pointed out that all units subordinate to him introduced security measures to improve information security. The Minister of Digitization also informed of measures taken by his Ministry in this area. On the Ministry's website information for citizens was published on the operation of the PESEL database and related personal data protection. The aim of the publication was to reassure the citizens that no unauthorized access to sensitive data had ever taken place. The Inspector General for Personal Data Protection informed the Commissioner that in connection with the situation, an inspection of bailiffs' offices was planned in order to verify their compliance with relevant regulations on personal data protection.

The Commissioner also analysed the provisions of the draft act on combating sexual crime, which was considered by the Parliament in 2016. The Commissioner's main objections related to the fact that the draft act was not justified in terms of the effectiveness of the proposed solutions, as well as to specific aspects relating to the protection of the right to privacy of the perpetrators, but primarily of the victims. The Commissioner expressed his concerns in the form of a legal opinion. The adopted Act took into account some of the Commissioner's points.

## E. Freedom of assembly

The Commissioner also expressed his position on the draft amendment to the Public Assemblies Act. The draft provided for priority treatment of assemblies organized by public authorities, churches and religious associations, and for an institution of "regular assemblies". The finally adopted version of the act took into account some of the Commissioner's comments. However, the provi-





sions which give priority to regular assemblies still violate the freedom of assembly. Prior to signing the Act, the President applied to the Constitutional Tribunal for examining those provisions' compliance with the Constitution.

In his correspondence to the Mayor of the City of Kraków, the Commissioner pointed out that it is unacceptable to restrict the constitutional freedom of assembly by way of referring to road traffic regulations. The City Council of Kraków several times refused to accept a notification of an assembly planned in the form of a cycling event called "Masa Krytyczna". In reply, the Mayor of Kraków assured the Commissioner that the practice would be changed.

## F. Right to vote and right to stand for election

The Commissioner applied to the Government Plenipotentiary for Civil Society and Equal Treatment for taking effective measures to ensure the protection of the rights of voters with disabilities, as certain polling stations were not adjusted to their needs. In response, the Plenipotentiary assured the Commissioner of his support for the rights of disabled voters and expressed his readiness to cooperate in this area.

The Commissioner also applied to the President of Poland to consider initiating legislative changes in the area of voting rights of legally incapacitated persons in Poland. The Commissioner is expecting relevant legislative action thanks to which incapacitated persons would no longer be automatically deprived of their electoral rights.

In his intervention to the President of the State Electoral Commission, the Commissioner emphasized that the Polish electoral law does not provide for so-called "national election observers", which had been underlined already some time before in the OSCE reports. The President of the National Electoral Commission confirmed the law needs to be amended. Thus, the Commissioner applied to the relevant Parliamentary Subcommittee to initiate legislative works in this area.

The Commissioner also applied to the Chairman of the Polish Sejm's Standing Subcommittee on Amendments to the Electoral Code and the Code of Administrative Procedure to address the problem of the lack of regulations on the so-called pre-election campaigns. The problem negatively impacts the principle of equal chances of candidates and election committees, and the financial transparency of election campaigns. In response, the Chairman of the Subcommittee informed that the Commissioner's suggestions would be taken into account in due course, i.e. in case draft amendments to the Electoral Code are considered by the Subcommittee.

The Commissioner also requested the Government Plenipotentiary for Civil Society and Equal Treatment to provide information on planned measures to increase the participation of women in public life, including the number

of women standing for elections. He emphasized the lack of educational and promotional activities addressed to potential female candidates and the lack of in-depth analyses of obstacles which women face in standing for elections. In response, the Plenipotentiary ensured that the topic would be included among the priorities of the new edition of the National Action Plan for Equal Treatment as well as the priorities of the Plenipotentiary.

## G. Freedom of association

In his intervention to the Minister of Health, the Commissioner raised the issue of organisational structure of the professional association of physicians and dental practitioners. He emphasized, *inter alia*, the problem of unclear rules governing the election of delegates – dental practitioners to the National Assembly of Physicians and Dental Practitioners, and the lack of regulations ensuring an appropriate mechanism of candidates' election to the association. The Minister did not, however, share the Commissioner's objections and replied that the current system was appropriate.

In connection with the TVP television channel's programme presenting activities of several renowned non-governmental organizations in a negative light, without stating specific allegations, the Commissioner appealed to the Chairman of the National Broadcasting Council to appropriately react to the situation. In reply, the Chairman informed that he wrote a letter to the President of the Board of Telewizja Polska SA (the Polish Television), reminding him, *e.g.*, of the principles to be followed by the public broadcaster pursuant to the Broadcasting Act, including in particular: impartiality, reliability, pluralism, objectivity, balanced approach and viewers' freedom to develop their own opinions.

The Commissioner also submitted an intervention to the President of the Polish Association of Allotment Garden Holders requesting its position on the provisions of the association's statutes, which, according to unsatisfied garden holders, limited their freedom of association. The President of the association replied that the objections to the statutes were unjustified. He emphasized that the statutes of the Polish Association of Allotment Garden Holders had been considered compliant with the law by the competent registry court.

## H. Right to healthcare

The Commissioner submitted an intervention to the Minister of Health with regard to the discontinuation of funding for the *in vitro* fertilization procedure and related government programmes. The Minister stated that the discontinu-



ation of the procedure's funding from the state budget did not result in ineffectiveness of the Infertility Treatment Act, and pointed out that work is on-going to improve the protection of procreative health. He emphasized e.g. the significance of the new National Health Programme 2016-2020 in this area.

The Constitutional Tribunal's ruling on the issue of the use of the conscience clause by physicians has not yet been followed by adequate legislative action. There are no effective mechanisms to provide patients with information about healthcare facilities providing procedures whose performance has been refused by doctors on the basis of the conscience clause. Therefore, the Commissioner is expecting relevant legislative work in this field, as he stated in his intervention to the Minister of Health.

The Commissioner also requested the Minister of Health and the Minister of Digitization to provide information on steps taken to bring the Polish legislation in line with the provisions of the Regulation of the European Parliament and of the Council on clinical trials on medicinal products for human use. Until now, the ministers have not responded to the request.

The Commissioner informed the Minister of Health about the need to regulate the issue of genetic testing and biobanking. In reply, the Minister shared the Commissioner's opinion that works in this area should be commenced as soon as possible, and informed of the establishment of a team to work on a relevant bill.

The Commissioner submitted an intervention to the Patient Ombudsman to ensure the possibility to exercise the right to abortion in the cases referred to in the Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy. In reply, the Patient Ombudsman informed that he was conducting a proceeding in order to verify media information regarding the availability of legal abortion.

## I. Right to education

In the course of work on the education system reform, doubts had arisen as to whether the reintroduction of the eight-year primary education system should also apply to primary music schools. The Commissioner submitted an intervention regarding the matter to the Minister of National Education. In reply, the Minister informed that, following consultations with the Minister of Culture and National Heritage, a decision was taken to make combined general-and-music primary schools operate in the eight-year system, with the six-year primary music course being taught over several stages.

The Act amending the Act on the System of Education reintroduced the system in which compulsory schooling for children starts at the age of seven. The change caused the Commissioner's doubts regarding the right of children aged

3, 4 and 5 to preschool education. The Commissioner submitted an intervention to the Minister of National Education with regard to the matter. In reply, the Minister informed that the change meets the expectations of parents as they were against the lower school starting age.

Another intervention of the Commissioner, submitted to the Minister of National Education, related to the transferring of some six-year-old children from kindergartens to zero-grade classes in primary schools. In response, the Minister pointed out that every six-year-old child should have a place ensured in a zero-grade class in the kindergarten which he/she has attended so far. The refusal to provide continued education in the kindergarten attended by the child before is a violation of educational law.

As regards matriculation examinations, the Commissioner requested the Minister of National Education to consider: the possibility of requesting verification of oral examination results and written examination results; a change of the Polish language oral examination rules; and the classification of the ordinary-level foreign language examination an optional examination rather than a compulsory one. In response, the Minister informed that work was carried out on an amendment to the Act on the System of Education, to allow secondary school students to request verification of results of written matriculation examinations, to be carried out by the Arbitration Board for Examination Results.

In another intervention to the Minister of National Education, the Commissioner raised the issue of difficult financial situation of youth correctional facilities. The situation was caused by the fact that the size of such facility's subsidy depended on the number of persons entered in the register of residents of a given facility and staying there as of 30 September. In reply, the Minister confirmed that the regulations in force indeed caused significant problems with the facilities' funding. Therefore, in the amended Act on the System of Education, a new definition of resident of a youth correctional facility was included.

In another intervention to the Minister of National Education, the Commissioner raised the need to introduce regulations on video surveillance in schools and other educational facilities. In reply, the Minister shared the Commissioner's concerns and informed that further action in this area would depend on the results of the Supreme Audit Office's audit regarding the actual impact of video surveillance on the improvement of the safety levels in schools.

In his intervention to the Minister for Science and Higher Education, the Commissioner expressed his doubts as to the compliance with the principle of equality of the age limit for candidates for members of the Central Committee for Academic Degrees and Titles, the Central Council for Science and Higher Education and the Polish Accreditation Committee. The Minister did not share the Commissioner's position. According to the Ministry, the rules in force do not discriminate scientific and academic staff members on the grounds of age.



The Commissioner submitted an intervention to the Minister of Science and Higher Education with regard to too high recruitment fees charged by universities, which was against the provisions of the Act on Higher Education. In response, the Minister pointed out that, in his opinion, the situation concerned not the law itself, but the method of its application and therefore did not require changes in the legislation.

The Commissioner also continued to contact the Ministry on the issue of equal access to higher education by persons who passed the so-called “old-type matriculation examination”. In reply, the Minister announced that efforts were taken to standardize the relevant university recruitment procedures.

## J. Citizens safety. Powers of the police and other uniformed services

The Commissioner considered that the state’s obligation to ensure safety to citizens may not involve disproportionate and excessive interference in their rights. Therefore, he submitted an application to the Constitutional Tribunal with regard to the Anti-Terrorism Act. According to the Commissioner, numerous provisions of the Act, including the one defining terrorist activity, were unclear and imprecise which may cause inconsistency in their application by the responsible authorities. Moreover, the provisions failed to establish the required procedural guarantees, including of court proceeding to be taken in a situation a person’s right or freedom has been violated. The provisions also differentiated between Polish citizens and foreign citizens (including of EU member states) in a way which finds no justification in the provisions of the Constitution, the European Convention on Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the EU. The case is pending consideration by the Tribunal.

In his intervention to the Minister of the Interior and Administration, the Commissioner requested the presentation of the Ministry’s position on the provisions of the Act on the Government Protection Bureau, according to which the Bureau may, in implementing its tasks, collect and process information including personal data. The legislator has not provided for any control mechanism over the processing of such information. In reply, the Minister did not agree with the Commissioner’s opinion. The matter will still be monitored by the Commissioner.

In reaction to complaints by citizens who were refused entry to a sporting event (a match) because of their place of residence, the Commissioner submitted an intervention to the Minister of the Interior and Administration, requesting an explanation. In reply, the Minister confirmed that the practice of certain local government authorities may indeed have features of illegal discrimination.

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## Main issues in the field of criminal law



## A. Right to good legislation

The Commissioner, in an intervention to the Minister of Justice, pointed out the need to amend the substantive law's defective provision relating to the possibility to hold criminally liable an authorized person who has forwarded a computer system password to another person. The provision failed to specify that the person committing the offence described therein, consisting in developing, receiving, disposing of or providing access to a computer password, access code or other data that enables access to information stored in a computer system or data transmission network may only be a person who was not authorized to do so.

The Commissioner also forwarded to the Minister of Justice a critical opinion on the new provisions of the Code of Criminal Procedure. It related, in particular, to: the permissibility of pre-trial detention on the sole grounds of severity of sanctions for the committed act; the possibility of taking and using evidence in criminal proceedings in a way which is prohibited by the law; limiting the right to public defender; and limiting the State Treasury's liability for errors of the system of administration of justice by shortening, to one year, the limitation period of claims relating to wrongful conviction, temporary detention and arrest.

In his intervention to the Minister of Finance, the Commissioner noted that the regulations on manipulation in financial instruments were imprecise, violated the principle of sound legislation and might consequently cause difficulties in determining which market activities were allowed and which were prohibited, thus violating the principle that criminal liability may be enforced only if the perpetrator has committed an act prohibited by the law. In reply, the Minister informed that legislative work was carried out on the implementation of the provisions of the Directive of the European Parliament and of the Council on criminal sanctions for market abuse, and enabling application of the Regulation of the European Parliament and of the Council on market abuse.

The Commissioner, in his application to the Constitutional Tribunal, expressed the view that intertemporal provisions on cumulative sanctions should strictly respect the constitutional principle of equality before the law. The Commissioner announced that he joined the proceeding before the Constitutional Tribunal regarding the question of law asked by a court in order to clarify the differences in the right to adjudicate a cumulative sentence, depending on the dates on which the individual sentences became binding and the date on which the cumulative sentence became binding.

The Commissioner also expressed his objections to situations in which employers failed to fulfil their obligation to obtain statements of their employees' clean criminal records, and shifted this obligation and related costs to the em-

ployees. This might violate the privacy of employees or persons seeking employment and, at the same time, limit their rights and freedoms. The Minister of Family, Labour and Social Policy shared this view, admitting at the same time that employer's requirement for an employee to certify circumstances not relating to his/her professional work or position might be considered an unjustified infringement of the employee's rights.

The Commissioner, in his interventions to the Minister of Justice and to the Chairman of the Legislative Committee of the Sejm, pointed out the threats posed by the proposed amendments to the criminal law system, including the "extended-scope" confiscation covering a whole enterprise as an organized entity. The proposed solutions violate the principle of proportionality of criminal sanctions, the ownership and inheritance rights, the principle of the presumption of innocence, the fact that criminal law is not retroactive, the right to privacy and family life and the right of defence, which principles and rights are set out in the Constitution.

## **B. Right to court protection of individuals' rights and freedoms**

In his intervention to the Minister of Justice, the Commissioner raised the need to introduce legal solutions that would take into account the situation of persons with disabilities, persons who are bed-ridden or who for other reasons are unable to personally receive court letters relating to criminal proceedings.

The outdated system of delivery of court correspondence in Poland results in the fact that in criminal proceedings, it is practically impossible to deliver letters by fax or e-mail, which violates the rights of parties to the proceedings. In his application to the Minister of Justice, the Commissioner negatively assessed the lack of the possibility to receive court correspondence regarding criminal proceedings through a proxy.

The Commissioner also submitted to the Constitutional Tribunal an intervention questioning the solutions provided for in the Act on Public Prosecutors, relating e.g. to the Minister of Justice's powers to change or revoke decisions of subordinate prosecutors, to take over proceedings conducted by such prosecutors and to impose on them the obligation to comply with the Minister's instructions. According to the Commissioner, the Constitution does not allow the Minister of Justice who at the same time holds the office of Prosecutor General to interfere with prosecutors' decisions regarding personal freedoms, the right to privacy and inviolability of the home.

Consequently, the Commissioner joined a proceeding before the Constitutional Tribunal relating to the motion of the National Council of the Judiciary





to declare the provisions of the new Act on Public Prosecutors non-compliant with the Constitution. Granting the Prosecutor General the right to disclose information gathered in the course of preparatory proceeding, also without the consent of the prosecutor conducting the proceeding, is inconsistent with the principle of democratic rule of law, with the right to protection of private life and family life, the principles of proportionality, independence of courts and impartiality of judges, the prohibition for judges to be members of political parties or trade unions, and with the constitutional principle of tripartite division of power.

In connection with complaints lodged by families of victims of the Smolensk plane crash, who disagreed with the prosecutor's decision to exhume the bodies of all the victims of the crash that took place on 10 April 2010, the Commissioner intervened with regard to the issue before Deputy Prosecutor General. The Commissioner argued that the decision on the exhumations undermined the rights of the victims' living family members and should therefore have been subject to court review. Therefore, it was necessary to seek such interpretation of the provisions of the Code of Criminal Procedure, so as to ensure the protection of the Constitution, including the right to court, at the level of application of the law. The Commissioner did not share the Prosecutor General's opinion contained in his reply and stating that the prosecutor's decision on the exhumations was not subject to challenge in court.

The Commissioner joined a proceeding before the Constitutional Tribunal concerning the constitutional appeal regarding the impossibility for the aggrieved party to attend a court session held for the purpose of issuing a pre-trial judgment. The provisions of the Code of Criminal Procedure should enable the aggrieved party to effectively exercise its rights through active participation in the court proceedings as an auxiliary prosecutor. However, the Constitutional Tribunal discontinued the proceeding on the matter.

In his intervention to the Minister of Justice, the Commissioner argued that the right of defence, guaranteed by the Constitution, was undermined by limiting the value of refundable defence costs in proceedings relating to offences prosecuted by public indictment, in particular in complex and long-term proceedings in which defence costs often exceed six times the minimum rate. In such proceedings, in the case of acquittal of the defendant or discontinuation of the proceeding under public indictment, most of the defence costs were covered by the citizen rather than the losing party i.e. the State Treasury. The Minister considered that the adopted solutions left the judgment on each case to the judge and therefore there was no need to introduce any changes.

The Commissioner also informed the Minister of Justice of the need to introduce the principle of non-regression of the defendant's legal situation in the event of lodging an appeal against a summary judgment issued in a criminal

proceeding, in order to avoid a situation in which the second sanction is more severe than that the one imposed in the summary judgment.

Another issue presented to the Minister of Justice was the lack, in the provisions of the Code of Criminal Procedure, of a precise definition of “suspected person” and of a catalogue of such person’s rights and obligations in criminal proceedings. This might raise concern that judicial authorities could treat a witness as a member of a whole group of suspected persons, and conduct, in relation to him/her, such activities which would be difficult if the person had the status of a suspect. This raised doubts regarding the system’s compliance with the constitutional right of defence, and entailed the need to strengthen the status of a suspect. In reply, the Minister announced an amendment planned to be introduced as part of the implementation of the Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

The Commissioner drew the Minister of Justice’s attention to the standard according to which a detainee, at his/her request, should be immediately provided with the possibility to contact a solicitor (legal counsel) and to speak to him/her directly. The introduction of the standard required urgent implementation of the Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. The Minister replied that the issues were regulated properly. The Commissioner also requested the Police Commander-in-Chief’s Plenipotentiary for the Protection of Human Rights to take steps e.g. with the aim to organize police officers’ training on the rights of detained persons.

In an application to the Constitutional Tribunal, the Commissioner challenged the provision of the Code of Criminal Procedure, according to which an evidence may not be considered inadmissible solely on the grounds of the fact that it has been obtained in a way involving violation of provisions governing the procedure, or as a result of a prohibited act. According to the Commissioner, the provision is inconsistent with the constitutional rights to: defence, court, privacy and the protection of secrecy of communications, as well as with the prohibition of torture and the principle of citizens’ trust to the state and its laws.

The Commissioner also joined the proceeding relating to the constitutional appeal concerning the participation of a detainee, accused of an offence, in a court session considering the complaint against the detention order. In the Commissioner’s opinion, the provisions governing offence-related proceedings – insofar as they do not guarantee detainee’s right to attend the court session considering a complaint against the detention order – are incompatible with



the constitutional right to court and the right to a fair hearing. The Commissioner also submitted this opinion to the Minister of Justice who shared it and informed that the Commissioner's position would be taken into account in the forthcoming amendments of regulations on the offence-related procedure.

In his intervention to the Chair of the Petitions Committee of the Sejm, the Commissioner expressed his hope for an amendment to the provision under which it was not possible to refuse to provide answers in the case the witness or his/her relative might be held liable for a fiscal offence or offences. Such legislation was in conflict with the individuals' constitutional right of defence in criminal proceedings.

The Commissioner submitted to the Speaker of the Sejm an opinion on the amendments to the Code of Criminal Procedure, pointing out the need to observe the principles of equality of the parties to criminal proceedings, and of the court's superior position as the ruling body after an indictment. A prosecutor's motion for him/her to take over the case in order to supplement the preparatory proceeding should be optional and subject to court review. At the stage of the Senate's works, that opinion was shared. The provision which made it possible to transfer the case, at the stage of the appeal proceeding, back to the prosecutor for him/her to remove the deficiencies in the preparatory proceeding, was deleted. Under the amended provisions, however, the first instance court will still be required to transfer the case back to the prosecutor for supplementing the preparatory proceeding.

In an intervention to the Minister of Justice, the Commissioner argued that the extension of powers of appellate courts by the power to transfer a case file back to the first-instance court for supplementing the rationale for the judgement violated the right to a fair trial as there was no possibility to appeal again against the judgement whose rationale has been supplemented, and no possibility to supplement the appeal lodged prior to the rationale's supplementation.

The Commissioner also pointed out to the Minister of Justice the need to undertake legislative works to provide to parties to criminal proceedings, by way of clear instructions, access to the information required to freely and consciously determine their positions in the proceedings. The instructions should meet the minimum standards set forth in the Directive of the European Parliament and of the Council on the right to information in criminal proceedings.

The Commissioner, in a proceeding joined by him and initiated based on a constitutional appeal, expressed the opinion that it was unacceptable to cancel a person's status as an auxiliary prosecutor in a criminal proceeding without relevant-instance court's review. The aggrieved party's right to act as an auxiliary prosecutor, which has its source in the constitutional right to court, may not be a theoretical right and should be subject to actual protection in the course of relevant proceedings.



The Minister of Justice also submitted an intervention regarding the need to introduce court review of decisions of non-prosecuting entities conducting preparatory proceedings, which decisions refuse access to case files, as well as court review of prosecutor's arbitrary decisions refusing, to the suspect and his/her defender, access to evidence based on witness testimony, in the case of rightly suspected risk to the life, health or freedom of the witness or persons close to him/her.

With regard to historical cases, the Commissioner, in his intervention to the Minister of Justice, pointed out that the assumption regarding domicile of Polish nationals fighting for the independence of the country, who, in connection with the change of the country's borders, continued their fight and died outside the territory of Poland, did not meet the constitutional standards arising from the principle of individuals' equality before the law. The solution made it impossible for persons close to the deceased freedom fighters to claim damages. In his intervention to the Speaker of the Senate, the Commissioner stated that the legislator should provide for the possibility to seek compensation by persons who suffered repressions under the martial law and in relation to whom internment orders were issued, but who were not actually interned by the authorities of the People's Republic of Poland e.g. because they remained in hiding. Most of the Commissioner's postulates were taken into account. The proposed solutions were included in a draft law drawn up by the Senate Committee on Human Rights, Rule of Law and Petitions.

Also with regard to historical cases, the Commissioner submitted an application to the Constitutional Tribunal concerning the limitation of communist regime crimes. According to the Commissioner, the limitation of intentional offences against people's life, health, liberty or against the system of justice, committed by law enforcement officers between 1 January 1944 and 31 December 1989, violates the victims' right to court as laid down in the Constitution and international legislative acts, and makes it impossible for victims to pursue claims regarding their infringed rights which could not be protected initially due to political reasons, and then due to the legislator's decision to limit the punishability of such acts.

## C. Personal liberty

The Commissioner, taking into account the constitutional right to court and the case law of the European Court of Human Rights, filed an application to the Constitutional Tribunal, in which he challenged the possibility of using pre-trial detention on the sole grounds of severity of sanctions for the act committed by the suspect, in a situation when there is no risk that he/she will hinder the pro-



ceedings. An optimum solution would be to determine a time limit for pre-trial detention and to specify reasons for which it may be extended.

The Commissioner, in another proceeding joined by him and initiated based on a constitutional appeal, expressed the view that the principle of democratic rule of law, laid down in the Constitution, is violated by the system of safeguards which requires the court to indicate so-called potential future criminals. Such indication is done by determining the degree of harm to the society which may be caused by a prohibited act the perpetrator may commit in the future, and the probability of its commitment by him/her.

The Commissioner, in an application to the Constitutional Tribunal, challenged the provisions of those Acts of Parliament which failed to provide for the possibility of claiming damages for the use, by law enforcement officers, of direct coercion or firearms, as their use seriously interferes with citizens' rights and freedoms and may take the form of prohibited inhuman or degrading treatment. The use of such measures requires a simultaneous system of effective supervision, for which the law does not provide.

In his interventions to the Minister of Justice and the Commander-in-Chief of the Police, the Commissioner appealed for securing computer equipment in criminal proceedings in a way causing the least possible disturbance, especially to persons who do not have the status of a suspect. In reply, the National Public Prosecutor's Office assured that such activities were properly supervised by prosecutors' offices which, however, would pay increased attention to the issue. The Commander-in-Chief of the Police also assured that the police would aim to reduce the disturbance caused by securing digital evidence.

## D. Citizens safety. Powers of the police and other uniformed services

In his application to the Constitutional Tribunal, the Commissioner expressed the view that the amended provisions of the Act on the Police and of certain other acts relating to operational control, eavesdropping and collection of telecommunications, postal and Internet data raised serious reservations in the light of the standards set out in relevant case law of the Constitutional Tribunal, the European Court of Human Rights and the Court of Justice of the European Union with regard to impartial supervision, as well as the right to privacy and autonomy of information. The Commissioner also pointed out that the requirement for the state to respect the rights to privacy, freedom, protection of communications secrecy and inviolability of the home, the prohibition to seek and collect such information on citizens which is not necessary for a democratic state of law, should lead to derogation of provisions on court's consent to the use in criminal proceedings

of material obtained as a result of operational control (eavesdropping) relating to another offence or another person than the offence/person indicated in the court's order to carry out the operational control.

## E. Protection of the family rights

In his intervention to the Minister of Justice, the Commissioner expressed the view that it was essential to monitor the problem of parental child abductions and to consider amendment of related legislation. The Minister, in his reply, raised the need to award enhanced powers to the police to be able to effectively enforce court judgements to take children away from parents when so required by family guardians.

Another problem raised in an intervention to the Minister of Justice was the drafting of specific provisions on the crime of illegal adoption, because certain actions which violated children's rights were not subject to criminal liability.

The Commissioner also requested the Minister for Justice and the Director of the National Institute of Justice to present their positions on postulates of the association named "*Dla naszych dzieci*" [For our children], and to provide data on investigation and prosecution of the offence of non-payment of child maintenance and on analyses of the effectiveness of related investigations and court judgements' enforcement. The Minister admitted the problems with enforcing child maintenance payments and announced measures to improve the situation. The Director of the Institute declared that relevant research would be carried out on the subject.

The Commissioner also requested the Minister of Justice and the Chairperson of the National Council of the Judiciary to take measures to improve the efficiency of court proceedings against child maintenance debtors. The Minister informed of the planned amendment of the provisions on the offence of non-payment of child maintenance. The Chairperson of the National Council of the Judiciary informed that the Commissioner's request would be forwarded to the Head of the National School of the Judiciary and Prosecution Service with the aim to consider the possibility of conducting training on the problem of non-payment of child maintenance.

## F. Road traffic

The Commissioner, in his intervention to the Commander-in-Chief of the Police, pointed out the need to provide the police with equipment for detecting psychoactive substances other than alcohol in drivers. The Commander con-



firmed that the number of drug tests was not sufficient. The Commissioner then requested the Minister of the Interior and Administration to allocate funds required to purchase a sufficient number of drug tests. The Minister informed that relevant activities were taken.

The Constitutional Tribunal considered the Commissioner's application regarding regulations on driving license suspension and concluded that the challenged provision was compliant with the Constitution in the part providing for the application, with regard to the same person and for the same offence, of an administrative sanction, i.e. driving license suspension, in addition to a criminal sanction, but was not compliant with the Constitution in failing to provide for emergency situations for which appropriate appeal procedures should have been introduced by the legislator. The Commissioner, taking into account the Tribunal's recommendations, requested the Chairperson of the Legislative Committee of the Polish Senate to consider the possibility of initiating appropriate legislative action.

## G. Protection of rights of persons deprived of liberty

The Commissioner appealed to the Minister of Justice to include, in the Penal Code, a comprehensive definition of torture and to set out sanctions for it. According to the Commissioner, this would not only serve the practical purpose of enabling the prosecution of torture, but also have a symbolic significance. The Minister did not agree with the Commissioner's opinion and replied that the existing criminal law provisions on torture were sufficient and made it possible for Poland to fulfil its international obligations in that area. The Commissioner, therefore, requested the Chairperson of the Senate Committee on Human Rights, Rule of Law and Petitions to take relevant legislative action in the Senate.

In his intervention to the Minister of Justice, the Commissioner appealed for the inclusion of the institution of mediation in the regulations on enforcement proceedings. The only solution relating to mediation, contained in the Penal Enforcement Code so far, was the obligation of penitentiary courts, when considering applications for parole, to take into account agreements reached between parties to relevant proceedings. Unfortunately, the courts did not forward such cases to institutions or persons competent to conduct mediation proceedings, and, consequently, the recommendation contained in the provision was not fulfilled. The Minister refused to take legislative action in that area. The Commissioner, therefore, submitted an intervention to the Chairperson of the Senate Committee on Human Rights, Rule of Law and Petitions.

The Commissioner requested the Minister of Justice to provide information on measures taken to improve the effectiveness of the system of social reintegration of convicted persons. The conclusions of a report drawn up by the Supreme Audit Office indicated that the system required a change. The basic reason was the lack of a comprehensive and coordinated system supporting social reintegration of convicted persons. In reply, the Minister emphasized that the implementation of tasks in the field of social reintegration was a responsibility of executive bodies.

In the Commissioner's opinion, the practice of placing prisoners in conditions in which there is 3m<sup>2</sup> of living space per person, or even less, should be regarded as inhuman and degrading treatment and punishment. In his intervention to the Minister of Justice, the Commissioner called for taking legislative action to increase the prison cell living space limit to 4m<sup>2</sup> per person. The Minister replied that there were no sufficiently justified grounds for introducing the limit of 4 m<sup>2</sup> living space per prisoner. However, in the opinion of the Ministry, it is desirable to take steps aimed at gradual reduction of the number of prisoners in penitentiary facilities, which should be done through education, elimination of social exclusion and professional activation among the society. The actual reduction in the number of persons deprived of liberty, living in penitentiary facilities will result in an increase in the living space per prisoner.

In another intervention to the Minister of Justice, the Commissioner emphasized that prisoners most affected by the low living-space limit are persons with non-psychotic mental disorders and mental retardation, who live in special care units of prisons. Such persons' long-term stay in small multi-person cells increases problems relating to their detention. In reply, the Minister informed the Commissioner that the ministry was taking efforts to comply with the recommendations of the National Preventive Mechanism to ensure respect for the rights and dignity of persons in penitentiary facilities.

The Commissioner submitted an intervention to the Constitutional Tribunal to declare the provisions of the Penal Enforcement Code non-compliant with the Constitution insofar as they fail to introduce the requirement to issue a formal decision to carry out a body search of a prisoner. A decision to carry out a body search of a prisoner is taken by a prison officer and the prisoner may not challenge the decision before a penitentiary court. In the Commissioner's view, the obligation for a prisoner to undergo a body search, and the impossibility for a court to verify whether or not there are reasons for it, violates, in particular, the constitutional right to a fair and open examination of the case, without undue delay, by a competent, independent and impartial court, and violates the prohibition for an Act of Parliament to block the possibility to seek confirmation, by a court, of infringement of person's rights.

In the Commissioner's opinion, prisoners' right of access to Public Information Bulletins (PIBs) should be clearly stated in the provisions of the Penal





Enforcement Code. In practice, penitentiary facilities provide access to selected BIP sites, e.g. of the Prison Service, the Minister of Justice and the Commissioner for Human Rights. The Commissioner requested the Minister of Justice to take appropriate legislative action. In reply, the Minister indicated that the list of available BIP sites cannot cover all the sites due to technical reasons. He agreed with the postulate that legislative changes are need with regard to prisoners' access to information published in PIBs as there is no justification for restricting their rights of access to public information. The changes need, however, to be preceded by an analysis of the technical possibilities.

The Commissioner looked into the issue of direct coercion used in penitentiary facilities on the basis of the Act on Mental Health. Conclusions from the analysis were presented in an intervention to the Head of the Prison Service. The Commissioner also appealed to the National Patient Ombudsman to take steps to ensure that patients ombudsmen from psychiatric hospitals located in areas where penitentiary facilities with psychiatric wards are located take responsibility also for patients of those wards. The National Patients Ombudsman informed that it is unjustified to expect the extension of responsibilities of patients ombudsmen from psychiatric hospitals to cover patients from psychiatric wards/units of pre-trial detention centres and prisons, as those ombudsmen work only for specific healthcare institutions in particular voivodeships. Having analysed the materials submitted by the CHR, the National Patients Ombudsman planned to carry out, in 2017, on-site inspections verifying the observance of patients' rights in prison-based hospital units, in particular with regard to the use of direct coercion in patients with mental disorders.

The Commissioner requested the Head of the Prison Service to express his position on the lack of a system of acknowledging the receipt of correspondence (motions, complaints or requests) addressed by prisoners to directors of penitentiary facilities. The Prison Service does not keep registers of internal correspondence and does not issue related acknowledgements of receipt, so there exists no evidence of such correspondence, except of statements of the parties. The Head of the Prison Service replied that no changes were required, and that the applicable legislation provided for optimal solutions to meet the needs and to guarantee that penalties of imprisonment are executed in compliance with the law.

In another intervention to the Head of the Prison Service, the Commissioner referred to the issue of legal grounds for the Prison Service to conduct sobriety tests in persons intending to visit prisoners. According to the Commissioner, there is a need to introduce appropriate regulations on sobriety tests in persons who intend to visit a prisoner in a penitentiary facility, so as to ensure the observance of the tested person's rights and the order and safety in the facility. The Head of the Prison Service expressed the opinion that the existing regulations met those needs of the Prison Service.

On several occasions, the Commissioner contacted the Head of the Prison Service with regard to a guarantee of proper fulfilment of prisoners' right to use payphones, as numerous complaints in this area were received by the CHR Office. The Head informed that the Prison Service Board took measures to establish a uniform system of payphones across all penitentiary facilities, to meet the needs of prisoners. Due to the complexity and specific nature of the task, the system is planned to be launched in 2017.

The practice of not allowing persons held in provisional detention to use telephones to contact their lawyers was mentioned in the Commissioner's intervention to the Minister of Justice. Lawyers and legal advisors perform professions trusted by the society. A person's defender is required to comply with the principles of professional ethics and, most importantly, with the law. If there are grounds to believe that a defender uses telephone conversation with a detained person in order to bypass the law, it is reasonable to disagree to telephone contacts with the detainee. However, in such a case additional action should be taken, for instance the case should be reported to the regional Bar Association or regional Association of Legal Advisors. Otherwise, the impossibility for a detainee to use a telephone eliminates parties' equal opportunities to prepare for the proceedings.

The Commissioner contacted the Head of the Prison Service about irregularities in the implementation of the right of persons deprived of liberty to receive parcels. In reply, the Head of the Service informed that prisoners had no problems with receiving parcels and with ordering different ranges of products, including fruits and vegetables. The obligation for a prisoner to consent to the replacement of a product with another one was also cancelled.

The Commissioner also joined the proceeding with regard to the constitutional appeal concerning the right of persons deprived of liberty to receive food parcels. He expressed an opinion that the provisions of the Penal Enforcement Code which have been in effect since 1 July 2015 are non-compliant with the Constitution in the part in which they stipulate that a food parcel for a prisoner (if not ordered by him/her) may be ordered only by a person close to the prisoner; this is non-compliant with the constitutional principles of equality, humanitarian treatment and people's trust to the state and its laws.

The Commissioner carried out an analysis of dozens of internal regulations of penitentiary facilities of different types. As a result, he submitted an appeal to the Head of the Prison Service to ensure appropriate clothing, for the different seasons of the year, for persons held in penitentiary facilities and pre-trial detention facilities. The Head of the Service emphasized that persons responsible for drawing up internal regulations for the facilities were the directors thereof. He also disagreed with the Commissioner's



opinion that the rules on clothing, to be observed during meetings with correction officers, psychologists and non-sporting activities held outside the prisoner's cell, were too strict.

The Commissioner requested the Head of the Prison Service to take steps to eliminate, from the facilities' internal regulations, the provisions which do not guarantee the implementation of prisoners' rights in full and which are non-compatible with binding legal regulations. He also proposed to consider the publication of internal regulations of penitentiary facilities, adopted by directors thereof, on the Prison Service website. The reply to the Commissioner's postulates was positive.

In another intervention to the Head of the Prison Service the Commissioner appealed for taking action to ensure to prisoners actual access to public information. The Commissioner emphasized that an application for access to public information does not require any specific form. It should only contain the applicant data for responding to the application in the manner and form indicated therein. The applicant is not required, either, to indicate the legal basis for the provision of information, or the reason for submitting the application. If the requested information does not require any processing, the applicant is not required to indicate his/her beneficial and legal interest. This means that the content of the justification for the application should not affect the manner of its consideration. In reply, the Head of the Prison Service informed that he would send a letter to the Prison Service organizational units ordering them to carefully examine applications for access to public information. Additional training in this area would also be held. He also positively assessed the Commissioner's postulate to provide to persons deprived of liberty access to the websites: [www.echr.coe.int](http://www.echr.coe.int) and [www.ms.gov.pl](http://www.ms.gov.pl) which contain judgements, decisions, resolutions and reports of the ECHR.

The Commissioner informed the Minister of the Interior and Administration again of the problem of lack of legal grounds for carrying out detained persons' body search within the Border Guard premises. Detailed body search by Border Guard officers may not be performed pursuant to the instruction attached to the regulation of the Ministry of the Interior and Administration. It is a procedure which interferes with the right to privacy, and, as such, may only be provided for in an Act of Parliament as a method to be used only in specific situations. The Commissioner appealed for taking relevant legislative action. The Minister shared the Commissioner's opinion and informed that within the legislative works, the provisions of the Act on Foreigners and the Act on the Border Guard would be amended to the necessary extent.

Representatives of the National Preventive Mechanism who carried out preventive visits concluded that a common practice in such entities was to carry out strip search of detained persons. The procedure might also include body cavity search performed under the provisions of the relevant regulation of the

Ministry of the Interior and Administration. In view of the previous interventions regarding the issue, the Commissioner was assured of on-going works aimed at regulating the procedure in the Act on the Police. However, the legislative process was not yet completed. The Commissioner once again requested the Minister of the Interior and Administration to indicate the date when relevant provisions would enter into force. The Minister replied that the formula of works on the amendment to the Act had been changed and the planned changes would be introduced successively, taking into account the legislative priorities of the Ministry.

The Ministry of the Interior and Administration drew up a document entitled *Strategy against human rights violations by police officers*. It provides for work in 10 thematic areas, including: complaints regarding police actions; education activities; research on aggression of police officers; and support to victims. In an intervention to the Minister the Interior and Administration, the Commissioner described the case of suspected use of torture, at a city police station, with regard to a man detained on suspicion of drug possession. Visits at police stations, carried out in the last years by representatives of the National Preventive Mechanism, detected some cases of improper treatment of detained persons by police officers (detainees got pushed, pulled by the ear or slammed on the face). The Commissioner requested the Minister to provide information on actions taken within all the thematic areas of the *Strategy* document. In reply, the Minister pointed out that within those actions, a research project on aggression of police officers was carried out with the aim to counteract their potential violent behaviours; organisational strengthening of police plenipotentiaries for human rights protection was considered; and training manuals for the police, containing international standards of human rights protection, were translated into Polish.

In the Commissioner's opinion, there was no legal regulation on the use of direct coercion in residential care homes run as sole-trader companies. According to the provisions in force, direct coercion may be used by authorised persons in psychiatric hospitals, social welfare institutions, social welfare homes and other places. The Commissioner was of the opinion that the use of direct coercion in residential care homes was illegal and could be considered an offence. The Commissioner requested the Minister of Family, Labour and Social Policy to regulate the use of direct coercion in residential care homes. The Minister agreed with the Commissioner's arguments and assured that the Ministry was working on the possibility to employ, in residential care homes, under the provisions of the Act on Social Welfare, medical staff authorised to use coercive measures.

The Constitutional Tribunal considered the Commissioner's application regarding verification of compliance, with the Constitution and international treaties, of the Act on procedures for dealing with persons with mental disorders,



who pose a threat to the lives, health or sexual freedom of other individuals. According to the Act, a person who has served a sentence of imprisonment in full and who has been considered to be posing a threat to other people, may be placed in the National Centre for the Prevention of Dissocial Behaviours, or his/her liberty may be restricted by way of preventive supervision. The Constitutional Tribunal ruled that only one of the challenged provisions of the Act, governing the extension of stay in the said Centre, was non-compliant with the Constitution as it made it possible for a court to consider further stay in the Centre necessary/unnecessary based on an opinion of only one psychiatrist and on the effects of the treatment.

In an intervention to the Minister of Health, the Commissioner pointed to the need to regulate, by way of Act of Parliament, the restrictions on the rights and obligations of patients staying at the National Centre for the Prevention of Dissocial Behaviours. The Minister stated that the provision of healthcare to the Centre's residents should be governed by the regulations on healthcare provision to other patients, unless their application has been excluded or unless other specific regulations exist. Pursuant to the Act on Medical Practice, the manner and conditions of healthcare provision by a given healthcare facility, including the procedures of service provision, are defined in the facility's internal regulations adopted by its manager. The Minister assured that he monitored the Centre's activity on regular basis and was considering possible changes aimed at proper implementation of its tasks. The Commissioner submitted an intervention with regard to the matter to the Minister of Justice, but did not receive a reply.

The Commissioner drew attention to the lack of legal provisions on ensuring food and drink to persons detained by the police, during procedural actions. He submitted relevant interventions to the Minister of the Interior and Administration and to the Minister of Justice. The first of the Ministers informed that police detention units had limited infrastructure, compared to pre-trial detention facilities and prisons. The units had no cooking equipment and thus no possibility to prepare meals for persons required to take part in procedural activities. The Minister of Justice did not express any position on the issue.

## H. Medical care for persons deprived of liberty

The Commissioner expressed the opinion that it was necessary to increase the availability of psychological support for persons deprived of liberty and, at the same time, to ensure adequate standards of work of the psychologists. One penitentiary psychologist is required to work with 200 prisoners, which is a large number, making it impossible to fulfil all the required tasks. A full-time

penitentiary psychologist can, in theory, spend 48 minutes per month working directly with each prisoner in his/her group. The problem of access to psychologists gets more severe in situations of their long-term absence from work, e.g. due to sick leave, participation in training or further development of professional qualifications. Therefore, the Commissioner appealed to the Head of the Prison Service to set out a new standard of work for penitentiary psychologists. In reply, the Head of the Service shared the Commissioner's opinion but at the same time stated that without creating new jobs in the penitentiary sector, psychological care would be able to evolve only gradually, depending on the funds available to the Prison Service.

Existing legislation does not give paramedics the same powers as the ones enjoyed by physicians and feldshers. According to the law, only a physician or a feldsher may take a decision on admitting a person to a sobering-up station or another similar facility. As training of feldshers in the country has been discontinued, most sobering-up stations employ physicians. Visits carried out within the National Preventive Mechanism identified cases in which sobering-up stations were temporarily closed down due to lack of physicians. According to the Commissioner, paramedics who are qualified in life-saving procedures could provide care to persons held in sobering-up stations. The solution would significantly contribute to improved operation of the stations and would guarantee the continuity of their work. The Commissioner appealed to the Minister of Health to take legislative action in this area. In reply, the Minister explained that the paramedics training curriculum did not cover assessment of health condition of patients prior to admittance to a sobering-up station. Such assessment entails a high risk of error, and paramedics are not sufficiently qualified to carry it out and take decisions on further treatment.

The Commissioner informed the Ministers of Justice several times of the problem of the lack of a register of "non-penitentiary" healthcare facilities to provide healthcare services to persons in pre-trial detention. It is therefore feared that in the event no penitentiary healthcare facility is able to provide adequate medical care to such detainee, and there is no possibility to use non-custodial supervision measures, the detainee will not receive adequate medical care. Thus, the Commissioner requested the Prime Minister to take steps with regard to the issue.

In 2016, the Commissioner looked into the issue of medical care for persons held in penitentiary institutions. In his intervention to the Head of the Prison Service, he emphasized the insufficient number of specialist doctors and other healthcare personnel. This increases the waiting time for medical services and affects their quality. It would also be advisable to carry out regular training for healthcare personnel on how to build good relationships with the patients. The Commissioner also requested the Minister of Justice and the Minister of Health to establish an inter-ministerial team to evaluate the system of medical care in



prisons. The Minister of Health positively assessed the idea, but the Minister of Justice stated there was no need for it.

Medical treatment of persons deprived of liberty and suffering of hepatitis C was the subject of the Commissioner's intervention to the Head of the Prison Service. Prisoners are a high risk group as regards hepatitis C. Unfortunately, they have no access to information leaflets with basic information on preventing the disease. The only healthcare facility in Poland providing treatment to prisoners with hepatitis C has no free beds. Consideration should also be given to a comprehensive project in the field of psychosocial support to the sick prisoners, and information on medical care available after leaving prison. In reply, the Commissioner was informed that in 2017 the Prison Service Board, following the Commissioner's suggestions, would carry out health education programmes on blood-transmitted diseases, in particular hepatitis C; the programmes will be carried out by Chief Physicians of Regional Inspectorates of the Prison Service.

The Commissioner requested the Head of the Prison Service to take relevant action to ensure that diagnostic procedures in penitentiary facilities do not violate the patients' rights. In the Commissioner's opinion, the requirement to file a medical examination request with the facility's director violates prisoner's right to privacy and patient's right to confidentiality of his/her health condition, as defined by the Act on Patient Ombudsman. The Head of the Prison Service agreed with the Commissioner's position and admitted that such cases were unacceptable. A letter was sent to Heads of the Prison Service Regional Inspectorates reminding them of the applicable procedures.

## I. Protection of the rights of minors

Visits to juvenile detention centres, juvenile shelters and youth correctional centres, carried out under the National Preventive Mechanism, revealed varied practices regarding correspondence of the facilities' residents. In some of the facilities, outgoing and incoming correspondence is controlled by the correctional officer, but the juvenile delinquent does not participate in the procedure. In other facilities, the delinquent's presence during correspondence control is obligatory. The Commissioner noted that the differences in the procedures used by administrators of juvenile correctional facilities are caused by the lack of regulations on juvenile delinquents' correspondence control. The Commissioner called for removing the gap in the legislation during the works on the amendment to the Act on Juvenile Delinquency. In reply, the Minister assured that the issue of correspondence control would be analysed and taken into account in the course of the legislative works on the amendment to the Act.

For several years, the Commissioner had been appealing for amending the Act on Juvenile Delinquency so as to make it possible for minor mothers to actually take care of their children in juvenile correctional facilities. In the opinion of the Commissioner, the provisions of the relevant Regulation of the Minister of National Education should allow minor mothers to stay in such facilities together with their children. The Commissioner requested the Minister of National Education to express his position on the issue. In reply, the Minister informed that all possible steps would be taken to ensure an optimal process of social reintegration of minor mothers and minor pregnant women in juvenile correctional facilities, and to create conditions enabling their participation in the childcare process.

The visits carried out by representatives of the National Preventive Mechanism in juvenile correctional facilities, and the consequent analysis of existing regulations revealed there exists no catalogue of extraordinary events i.e. difficult and undesirable situations that are subject to registration in such facilities. The lack of such a catalogue was pointed out by the Commissioner already in his previous interventions. As there is no such catalogue, in many cases information about such extraordinary events does not reach the supervision authorities. The Commissioner therefore requested that appropriate legislative action be taken. The Minister replied that a working group was established in order to develop a uniform catalogue of extraordinary events. The team included representatives of the National Preventive Mechanism.

The Constitutional Tribunal discontinued the proceeding with regard to the possibility to place minors in a separate room or temporary-stay room in order to ensure safety and order in a juvenile detention centre or a juvenile shelter. The provisions of the existing regulation, which were challenged by the Commissioner, were repealed by the Regulation of the Minister of Justice of 6 July 2016 amending the Regulation on juvenile detention centres and juvenile shelters.

## J. Prisoners with intellectual disability

In 2016, the Commissioner examined over 120 cases of persons with mental or intellectual disabilities who were held in penitentiary facilities. The analysis carried out by the CHR Office revealed that there existed no proper regulations on the placement, in properly secured psychiatric institutions, of persons who committed a prohibited act while being sane according to expert opinions, and in relation to whom no special supervision measures were adjudicated, but who then developed a mental illness posing a direct threat to the ill person's life and health. The Commissioner requested the Minister of Health to initiate





relevant legislative action and develop a legal basis for the placement, in psychiatric hospitals with an appropriate security level (basic, increased or maximum, as applied in the case of special supervision measures) of persons in relation to whom a court adjudicated a temporary suspension of penalty in connection with their mental illness posing a direct threat to the lives and health of the ill person and other persons. The Commissioner also presented to the Minister of Justice the problem of not adjudicating temporary suspension of penalty in situations when reasons for it exist. Presenting specific individual cases, the Commissioner also highlighted the problem of mentally ill persons held in penitentiary institutions, and the lack of adequate reaction on the side of penitentiary facilities' administrations, to the Head of the Prison Service.

In the Commissioner's opinion, it is necessary to develop systemic solutions for proceeding in cases of doubts as to intellectual or mental disability of a detained person placed in a pre-trial detention centre or penitentiary institution. There is a need for a coherent and comprehensive system of support provision to such persons starting from the time of their detention by the police. Police officers are the first persons to have contact with such detainees. Thus, the Commissioner forwarded to the Commander-in-Chief of the Police a postulate to develop guidelines on documenting and forwarding information and conclusions regarding mental or intellectual condition of persons detained by the police. The Commander-in-Chief expressed his intention to cooperate in this area.

According to the Commissioner, the catalogue of police officer's tasks carried out in connection with bringing a detained person to a police station should include the obligation to indicate whether the detainee is a person who requires special treatment and if so, for what reasons. This should be indicated in the apprehension report. The Commissioner requested the Prime Minister to consider relevant legislative action. In reply, the Minister of the Interior and Administration explained that apprehension report is a document regarding the detention procedure as such, and thus its contents should not contain police officer's "personal" observations concerning physical or mental health of the detainee.

In the context of intellectually and mentally disabled persons, the Commissioner also wrote to the President of the National Association of Probation Officers emphasizing the need to extend the scope of the officer's training to include issues relating to persons with intellectual and mental disabilities. Of particular importance seemed behavioural history inquiries, conducted by probation officers during preparatory, court and enforcement proceedings. Properly conducted inquiries constitute an invaluable source of information on the person concerned.

The Commissioner drew attention to the binding regulation according to which every provisionally detained person and every convicted person, even facing an immediate risk to his/her life, has to be placed in a penitentiary facil-

ity and only later may receive appropriate medical treatment. This applies also to persons with acute psychosis and with serious somatic diseases. In view of this, the Commissioner requested the Minister of Justice to present the reasons behind the regulation which was included in the Regulation of the Minister of Justice on administrative activities taken during pre-trial detention, enforcement of adjudicated penalty and coercive measures, and on related documentation. In reply, it was indicated that the Ministry of Justice was ready to carry out analytical and conceptual works leading to the amendment of relevant Acts of Parliament or implementing regulations, if such amendments are suggested by the Commissioner.

The Commissioner also submitted to the Head of the Prison Service a postulate concerning a change in the procedure of holding first meetings with persons brought to penitentiary facilities. A properly conducted first meeting makes it possible to determine whether a given person should be held in a penitentiary facility at all. In each case, appropriate information should be forwarded to a penitentiary court judge. The Commissioner also postulated to develop and implement a special offer of social rehabilitation for persons deprived of liberty who are intellectually or mentally disabled. In reply, the Head of the Prison Service explained that prison service officers were informed many times of the necessity to notify a penitentiary court judge of any cases of doubt as to whether a given person should be held in penitentiary isolation. This is and will continue to be reminded. Prison service officers also take part in various training courses regarding methods of proceeding with persons with intellectual and mental disabilities.

During visits to police units for detained persons, also persons detained for the purpose of sobering up, representatives of the National Preventive Mechanism identified the malpractice of examining detainees with psychiatric disorders (e.g. after suicide attempts) by physicians who were not specialists in psychiatry. The purpose of such medical examinations is to determine whether a given detainee may be held within the police units for detainees. In the event of an incorrect diagnosis, there may be a risk to the health or even life of the detainee. The Commissioner appealed to the Commander-in-Chief of the Police to take appropriate action to eliminate the said malpractice. In reply, the Commander-in-Chief assured that the existing regulations were sufficient. The applied solution seems to be optimal as general practitioners have extensive medical knowledge based on which additional specialist medical consultations, e.g. psychiatric consultations, may be ordered.

For several years, the Commissioner has called for regulating the procedure of escorting patients from psychiatric hospitals and wards to places outside those facilities, for the purpose of conducting medical consultations, examinations or treatment. The escort provision was the responsibility of psychiatric hospitals' administrations. The Commissioner noted that one of the permitted



solutions was to transport an escorted psychiatric patient by means of public transport, which raised justified concerns regarding the safety of other passengers. In the opinion of the Ministry of Health, it was justified to include, in the Penal Enforcement Code, provisions governing the procedures of escorting persons in relation to whom special supervision solutions were applied. Thus, the Commissioner requested the Minister of Justice to initiate legislative action in this area.

Due to the fact that there exists no Act of Parliament permitting the use of monitoring in psychiatric hospitals, the Commissioner appealed to the Minister of Health for initiating relevant legislative works. The Minister shared the Commissioner's view. The Ministry of Health is working on an amendment to the Act on Mental Health in order to regulate the key issues related to monitoring of rooms used for applying coercive measures in the form of isolation.

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Main issues in the field of labour  
law, social security and uniformed  
services



## A. Issues in the field of labour law

The Commissioner for Human Rights requested the Minister of Family, Labour and Social Policy to present the Minister's position on the principles of establishing the guaranteed minimum pay. The existing regulation results in disadvantageous treatment of least paid people with work experience of more than 5 years as compared to people with shorter work experience. Despite having longer work experience, a person whose remuneration was established as a minimum pay may receive the same pay as a person who begins work or has shorter work experience. This results in the infringement of the principle of equal treatment and non-discrimination with regard to employees with more than 5 years of work experience vis-à-vis new employees. Such practices take place both in the private and public sector. In response to the inquiry, the Commissioner was informed that the Ministry was aware of the need to modify the existing regulations concerning minimum pay in order to ensure that regulations governing it are more fair and transparent. Changes consisting in gradual exclusion of various remuneration components from the definition of minimum pay are being considered. From 1 January 2017, extra pay for night work is no longer considered a component of minimum pay. The Commissioner will monitor further legislative changes in this field.

The issue of proper regulation of the principles of reducing the remuneration of the head of local government by the municipality/town/city council during the term of office, in compliance with labour law standards, was the subject of an intervention of the Commissioner to the Minister of Family, Labour and Social Policy. Rulings of the Supreme Court on this issue are consistent as concerns the key point, i.e. that a mayor's remuneration is subject to change and may also be reduced. These rulings present an unanimous view that regulations concerning termination of contract of employment with the aim of changing contractual terms cannot be applied to contracts of employment based on election results. This does not, however, mean that other provisions of the labour law, including regulations stemming from the Act on local government employees and the Act on local government, are not applicable to contracts of employment based on election results. According to the Commissioner, a contract of employment based on election result is a specific construct; however, it should not result in depriving this group of employees of protection provided by the labour law. Therefore, it should be deemed desirable that employment conditions be set for the entire term at the time the contract of employment is signed, and that any change of those conditions to the employee's disadvantage without his/her consent should take place only in extreme situations and be based on the explicit statutory provisions. In response, the Minister admitted that the above-mentioned regulations do not contain provisions concerning change/reduction

of remuneration of those employed based on election results. At the same time, the Minister stated that the issue of any supplements to the regulation concerning the establishment of the remuneration of a mayor, included in the Act on local government employees and the Act on local government, is not within the jurisdiction of the Minister of Family, Labour and Social Policy, but within the jurisdiction of the Minister of the Interior and Administration.

The Commissioner submitted an application to the Constitutional Tribunal, in which he questioned the compliance of some provisions of the Act of 30 December 2015 amending the Act on civil service and certain other acts. According to the Commissioner, the amendments violate constitutional standards concerning access to civil service jobs and the functioning of the civil service. The reservations mainly concern the change in the procedure for filling senior civil service positions. Open and competitive recruitment was replaced with appointments. The amending act also reduced the qualification requirements for those appointed to senior civil service positions. Stability of employment in civil service is of crucial importance to impartial and neutral performance of the state's tasks, whereas a contract of employment based on appointment is connected with the lowest degree protection of the employee in case of termination. Furthermore the legislator decided to phase out contracts of employment with employees holding senior civil servants positions who were chosen in open and competitive recruitment procedures, after 30 days from the date of entrance into force of the amending act, if no new employment or remuneration conditions are offered to them or if they reject the new employment or remuneration conditions. The decision concerning the phasing out of those contracts of employment is left to the absolute discretion of heads of individual offices. This regulation is non-compliant with the principle of citizens' trust in the state and the law because it compromises the legal safety of people hitherto holding senior civil service positions, on no constitutionally justified grounds. The application is yet to be considered by the Constitutional Tribunal.

The seven-day deadline for appeal by the employee, counted from the date of delivery of a notice of termination of the contract of employment, infringes the constitutional right to fair and open consideration of the case without unjustified delay by a competent, independent, impartial and independent court. Such a short deadline for lodging an appeal against a notice of termination of the contract of employment does not give the employee real right to access to courts because it does not ensure the necessary time to lodge an appeal and adversely impacts the ability to claim damages inherent in the contract of employment. The excessive limitation (to seven days) of the time for appeal may in practice lead to the employee's relinquishment of the right to this remedy even when the employer's decision concerning the termination of the contract of employment clearly violates the existing law. The excessive rigorism of this regulation is not mitigated by the possibility of reinstatement of the deadline if the employee's



failure to meet the original deadline was not his/her fault, and therefore it does not apply to each case of definitive loss of the possibility to claim damages in court. The issue of compliance of this regulation with the Constitution is the subject of proceedings before the Constitutional Tribunal, in which the Commissioner declared his participation.

The Commissioner submitted an intervention to the Minister of Family, Labour and Social Policy, requesting that the ban on working on public holidays in shops/retail outlets cover not only employees but also other people performing paid work under civil law agreements or as self-employed persons under conditions similar to employment. The regulation included in the Labour Code is not fully compliant with the constitutional standards. The right to public holidays, stemming from the Constitution, applies not only to employees as defined by the Labour Code, but also to other people performing paid work. This broader definition of an employee was confirmed in the ruling of the Constitutional Tribunal of 2 June 2015 on the freedom of association. In addition to the above, according to the judicature of the Court of Justice of the European Union, the criteria defining an employee include in particular performing work for another person, performing work under the direction of the employer and payment for work. The type of work relationship binding the employee and the employer is not decisive in this case. In response, the Minister explained that the ban on work in shops/retail outlets during public holidays, governed by the Labour Code, covers only employees, i.e. those working under contracts of employment. Hence the ban does not apply to owners of shops/retail outlets or other people performing work under civil law agreements (e.g. commission contracts). According to the Minister, the proposal to cover business owners who perform work themselves with the ban on work on public holidays would violate the principle of freedom of economic activity, guaranteed by the Constitution. The Commissioner remains interested in the issue.

In his intervention to the Minister of Health, the Commissioner raised the question of excessive duration of procedures of diagnosing work related illnesses. The Commissioner called for modification of the existing legislation so as to ensure the control of common courts over the decisions of health inspection bodies and to create mechanisms of supervision over the bodies which diagnose and certify work related illnesses, similarly as in case of supervision of the Social Security Administration over the certification of incapacity of work. According to the Minister, a modification of the principles of control over decisions of health inspection bodies concerning work related illnesses, suggested by the Commissioner and involving control by courts, is not justified. Existing regulations allow rulings on a person's health and on conditions of work, taking into account work records and occupational risks. In addition, the Minister disagreed with the view that the broadening of the jurisdiction of common courts to include the considered cases would contribute to solving the problem

of excessive duration of proceedings concerning diagnosing and certification of work related illness. The Commissioner remains interested in the issue.

The Commissioner submitted an intervention to the Minister of Family, Labour and Social Policy with regard to the implementation of the judgement of the Constitutional Tribunal of 2 June 2015 concerning association in trade unions. He also asked when a new bill would be presented to the Sejm. The Constitutional Tribunal recognized that the subjective scope of statutory guarantees to associate in trade unions is too narrow in the light of constitutional provisions and regulations stemming from international agreements signed by Poland. According to the Commissioner, those who work under civil law agreements and who are self-employed, who are defined by the Constitution as employees, should have the right to associate in trade unions. According to the constitution, an employee is any person who performs paid work, remains in a legal relationship with the entity for which he/she performs the work and has occupational interests connected with performing work that may be subject to group protection. In response to the inquiry, the Minister stated that a bill amending the Act on trade unions and other acts was included in the list of legislative and policy tasks of the Council of Ministers. In essence, the new regulations will broaden the right to associate in trade unions to cover those who perform paid work, who fit the constitutional definition of employees and who are employed on grounds other than those provided for by the Labour Code.

## B. Right to social security

The modification of the rules for calculating pensions received by people who were born after 31 December 1948 and took early pension violates the Constitutional principle of equal right to social security. This refers in particular to women born in 1953, who were the last group entitled to early retirement. With regard to this group of pensioners, regulations that preclude the deduction from subsequent payments of sums previously received as retirement pension as a result of early retirement should be kept in place. People who submitted complaints to the Commissioner pointed out that they had no way of knowing that their decision to retire early would adversely impact the value of the retirement pension they would receive in the future. The Commissioner called without success for appropriate statutory changes and supported petitions in this matter, submitted to the Sejm and Senate. It is possible that the issue will be resolved in proceedings before the Constitutional Tribunal that have been initiated by a legal question. The Commissioner declared his participation in the proceedings and presented the view that the questioned regulation of the Act on Social Security Fund pensions violates the constitutional principle of equal





right to social security with regard to women born in 1953 who were entitled to so-called early retirement.

The principle of equal treatment as concerns the right to social security entails the obligation of equal treatment of unpaid parental leaves, unpaid leaves and non-working periods related to the upbringing of children for the purposes of establishing the basis for calculating pension benefits both under the old retirement system, as well as for calculating the initial capital under the new retirement system. However, an amendment to the Retirement Act, which entered into force on 1 May 2015, changed the method of calculating the initial capital, which determines the value of the pension amount. When calculating the initial capital, contributory and non-contributory periods are taken into account. Periods of child upbringing were previously calculated as any other non-contributory period (0.7 per cent of the base of the initial capital). At present, they are calculated similarly as contributory periods (1.3 per cent of the base of the initial capital). However, the initial capital is only calculated for people born after 31 December 1948. Therefore, people whose pension was calculated according to the “old” principles cannot benefit from the more advantageous calculation of periods during which they did not work but were bringing up their children. The Commissioner called without success for legislative work designed to provide equal “valuation” of periods of bringing up children for the purposes of calculating pension amounts in old and new retirement systems. The considered constitutional problem was raised in a legal question to the Constitutional Tribunal and the Commissioner declared his participation in the proceedings.

The Commissioner submitted an intervention to the Minister of Justice concerning differences in the treatment of two groups of prosecutors and judges with regard to early retirement. This problem had been raised by the Chief Council of the Trade Union of Prosecutors and Employees of Prosecutor’s Offices of the Republic of Poland, which requested the Commissioner to question the compliance with the Constitution of the provisions of the Act amending the Act on Social Security Fund pensions and certain other acts, increasing the retirement age of men and women to 67 years. According to the Chief Council of the Union, these regulations violate the constitutional principle of democratic rule of law and the constitutional principle of equality because they arbitrarily differentiate between the rights of two groups of prosecutors and judges to retire early, by introducing a time boundary i.e. 31 December 2017. Female judges or prosecutors may retire upon request if they are 55 and have worked as judge or prosecutor for at least 25 years, and male judges or prosecutors may retire upon request if they are 60 and have worked as judge or prosecutor for at least 30 years. After 1 January 2018, all prosecutors and judges will be able to retire after reaching the age of 67. This means that a difference of only one day in the date of birth may extend the service of judges and prosecutors by as many as 12

and 7 years for women and men, respectively. The Commissioner is analysing the legitimacy of the complaints in the context of submitting an application to the Constitutional Tribunal. The Commissioner is waiting for the opinion of the Minister of Justice concerning the issue.

The Commissioner submitted an intervention to the Minister of Family, Labour and Social Policy concerning medical rehabilitation. According to the Act on social security system, the scope of activities of the Social Security Administration includes, among others, disability prevention comprising, *inter alia*, medical rehabilitation of insured people at risk of total or partial incapacity to work, people entitled to sickness benefits or rehabilitation benefits after the expiry of their sickness or work accident insurance entitlement, as well as people receiving temporary disability benefits due to incapacity to work. The provisions of the Act do not regulate any procedural issues associated with referring insured people or disability pensioners to medical rehabilitation. If the Social Insurance Administration refuses such referral, the insured and disability pensioners have no way to claim their rights under the existing regulations. This raises doubts concerning their compliance with the Constitution, as referral to medical rehabilitation as part of disability prevention is in fact an aspect of exercising the right to social security. The Minister of Family, Labour and Social Policy shared the Commissioner's doubts and promised to undertake appropriate legislative steps. The Commissioner will monitor the legislative process.

It is necessary to begin work on the development of a social insurance system that meets the expectations of authors and artists, taking into account the specific nature of their activities. At present, the same social insurance premium regulations apply to authors and artists as are applied to self-employed people and freelancers. However, the vast majority of authors and artists have irregular incomes which do not allow them to regularly pay social insurance. The system existing at present, and in particular the amounts payable and the frequency of payment of social insurance contributions may result in the exclusion of authors and artists from access to social insurance benefits. In many European Union countries, there are separate systems of funding the costs of insurance of artists, supported by the state and by entrepreneurs who make use of the artists' and authors' works. The Commissioner is waiting for the opinion of the Minister of Culture and National Heritage as concerns the undertaking and implementation of this task in close consultation with representatives of authors and artists.


The Commissioner declared participation in the proceedings before the Constitutional Tribunal concerning a legal question from a court aimed at clarifying whether or not the provision of the Act on social insurance system, construed in such a way that the employer is the payer of contributions for a person performing work under a commission contract concluded with a third person, if under this contract this person performs work for the employer who at the



same time employs this person under a contract of employment, is compliant with the principle of the democratic rule of law and with the principle of protection of property rights which may be limited only through an act, and with the principle of equal and universal taxation. The Commissioner presented his view that the provisions of the Act on social insurance system, according to which the employer is a contribution payer for an employee performing work under a commission contract concluded with a third person, if under this contract the same person performs work for the employer, is non-compliant with the constitutional norms cited above. Therefore, the Commissioner declared his participation in the proceedings before the Constitutional Tribunal to be held upon Lewiatan Confederation's request concerning the determination of the social contribution payer in the case of commission contracts. The case is waiting for consideration by the Constitutional Tribunal.

### C. Social care

The Commissioner submitted an intervention to the Prime Minister and to the Minister of Family, Labour and Social Policy with regard to the increase in the number of cases of inhuman treatment of residents of commercial institutions providing care to the elderly, the disabled and the chronically ill, and requested that actions be taken to improve the level and effectiveness of protection of people staying in private nursing homes. According to the Commissioner, the most important thing is to ensure that this type of economic activity is not performed without the required permits. However, irregularities also occur in nursing homes which have been granted such permits. The Commissioner's reservations concern, in particular, the low standard of services, lack of requirements concerning the qualifications of private nursing home employees, and restrictions of the rights of the residents of such homes. According to the Commissioner, the regulations included in the Act on social care do not provide the heads of voivodeship administrations with sufficient instruments for taking effective actions, while the existing system of fines does not work. The Commissioner also raised the issue of the lack of an efficient system of delegating care over dependent persons between hospitals and social care institutions. This is evidenced by the lack of institutional solutions that would fill the gap between the health care system and social care system. The Ministry of Family, Labour and Social Policy is working on the identification of the most frequent irregularities in services provided by 24-hour care facilities as well as the needs to change or clarify the existing regulations.

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Main issues concerning  
the protection of the rights  
of soldiers and public service  
officers



The Commissioner submitted an intervention to the Minister of the Interior and Administration concerning commercial security services. The Commissioner had concerns about the procedure employed by the licensing body in controlling commercial security services. According to new regulations, the procedure would not require the licensing body to notify the entrepreneur of an on-site inspection. Moreover, the licensing body would be able to carry out an on-site inspection simultaneously with inspection activities performed by other bodies. In consequence, the entrepreneur would be deprived of the right to protest against the undertaking of inspection activities. However, an analysis of the Act on economic freedom and of the legislative procedure preceding the enactment of the so-called Deregulation Act has shown that the legislative body's plans were not implemented. The Minister informed the Commissioner that measures aimed at changing regulations that allow for unannounced inspections will be taken, with regard to specialized, armed security units.

The Commissioner requested the Minister of the Interior and Administration to look into the issue of obligatory disbarring from the list of qualified security workers in cases when a worker has been convicted in a final ruling for an intentional crime or criminal proceedings have been instituted against him/her for such a crime. The debarring, or stripping of qualifications required for the job, may result in discharge. Unfortunately, even if the criminal proceedings are discontinued or the person in question is found not guilty, his/her qualifications are not automatically reinstated. Moreover, it is not possible for him/her to claim lost income. What is particularly concerning is the regulation according to which a security worker is debarred if he/she fails to notify the competent Voivodeship Police Chief of any modifications of the data contained in the list of qualified security workers within 14 days of such modifications. The Minister of the Interior and Administration replied that a qualified security worker is debarred when a criminal investigation is launched against him in connection with an intentional crime or if he/she is sentenced for such a crime. The administrative decision to debar such a person does not prejudice the person's guilt or his/her conduct, but simply guarantees that security services are performed in line with existing regulations and in the public interest. In the Minister's opinion, a security worker should be stripped of his/her statutory authorizations, especially those allowing security workers to use physical coercion and firearms.

In his intervention to the Minister of National Defence, the Commissioner raised the question of inadequate protection of pregnant women against discharge from professional military service and requested the Minister to undertake a legislative initiative in order to eliminate the problem. Regulations on professional military service provide for protection against discharge dur-

ing maternal leave, paternal leave and parental leave. However, they do not protect pregnant servicewomen even though regulations concerning other uniformed services do contain such provisions. The Constitution of the Republic of Poland calls for special support of maternity on the part of public authorities. EU regulations also guarantee a certain degree of protection of pregnant women. It seems therefore that Polish regulations still fall short of these standards. In contrast, the judicature of the European Court of Justice clearly states that unfavourable treatment of women in connection with pregnancy or maternity amounts to direct sex discrimination. The Minister of National Defence agreed with the position of the Commissioner and confirmed that additional measures that will guarantee adequate protection of pregnant servicewomen are needed. Such changes will be proposed as part of the nearest revision of the Military Service Act.

The Commissioner inquired the Minister of National Defence about the disclosure of health information concerning a contract soldier who had been diagnosed with bipolar disorder and hospitalized. The basis for the disclosure was a document issued by the Staff Department of the MND, instructing military unit commanders to specify the name of entities, such as psychiatric hospitals, issuing sick leave statements. According to the Commissioner, public disclosure of medical statements is problematic in the light of the Act on personal data protection, particularly in the context of the statutory conditions for processing sensitive data, such as data concerning health. Public disclosure of the identity of the hospital in which a soldier is being treated allows the identification of the type of disease in question. The disclosure of such information may expose the soldier and his/her relatives to unpredictable problems. It also creates opportunities for abuse and discrimination. The confidentiality of such data is inherent in the protection of private life and internal regulations must contain guarantees preventing the disclosure of health information on individuals. In the Commissioner's opinion, the disclosure of the content of a medical statement violates the ban on processing of soldiers' health information, provided for by the Act on personal data protection. The Minister agreed with the views expressed in the Commissioner's intervention and appealed to the military units referred to in the Commissioner's letter to limit health information on soldiers and armed forces employees contained in daily orders.

The Commissioner submitted an intervention to the Minister of National Defence concerning compensation for the loss of earnings by persons on commission contracts, called in for military exercises and requested a change of the Act on general defence duty in this respect. The Commissioner stressed that the constitutional general duty to defend the country is not dependent on the form of employment. The duty concerns both persons employed



under contracts of employment and those working on the basis of commission contracts. According to the Act on general defence duty, compulsory military service includes military exercises. This leads to the conclusion that persons on commission contracts are also entitled to compensation for the loss of earnings for the time spent on military exercises. The Minister replied that in the opinion of the Ministry, existing regulations concerning financial compensation for reserve soldiers for participating in military exercises are adequate. An extension of the category of people entitled for compensation to include people on commission contracts could make compensation calculations much more difficult.

In his intervention to the Minister of the Interior and Administration, the Commissioner raised the issue of age limits for the officers of the Government Protection Bureau and requested a change of the regulations. The provisions of the Act on the Government Protection Bureau may lead to discrimination against GPB officers on grounds of age, as age in itself is sufficient reason for obligatory termination of a service contract with an officer. In the Commissioner's opinion, an officer's fitness for duty should not be assessed basing solely on age. In the light of the tasks of the Government Protection Bureau, such assessment should also take account of other factors, such as health, physical and mental fitness and the possibility to use an officer's experience in training. In the Commissioner's view, regulations concerning officers are differentiated, with the age limit set at 55, 58 and 60 years for some officers and with no age limit for others. The regulation does not cover privates but differentiates between members of the officers corps. In reply, the Minister assured the Commissioner that the proposed legislative changes would be taken into account as part of the nearest revision of the Act on the Government Protection Bureau covering the problem area.

A case concerning parental leave benefit received by a male officer was raised by the Commissioner in his intervention to the Chief of the Customs Service. A mother expressed her wish to go on parental leave immediately following her maternity leave and during parental leave she received 80% of her remuneration. Next, she interrupted her leave and returned to work. The father of the child, a customs officer, wanted to go on paternal leave in her place. However, it turned out that he was only entitled to 60% of his remuneration. In the opinion of the Commissioner, the mother's declaration is binding also in the case of the male officer. The Chief of the Customs Service agreed with the Commissioner that the male officer is entitled to 80% of his remuneration if the mother had expressed her will to go on parental leave immediately following maternity leave and then returned to work. The Chief of the Customs Service pointed out that the wording of the Act on the Customs Service is ambiguous in this regard.

The Commissioner submitted an intervention to the Minister of Finance concerning the implementation of the ruling of the Constitutional Tribunal on the pensions of Customs Service officers and requested information on the way the ruling is being implemented and, in particular, on whether the new regulation is intended to cover only officers involved in the identification, detection, prevention and fighting of criminal acts and offences, or all officers of the Service, as is the case in other uniformed services. Having found the legislative omission, the Constitutional Tribunal obliged the legislature to take legislative measures aimed at the implementation of the principle of equality with regard to the right of Customs Service and Police officers to social security. The Minister replied that a citizens' bill was submitted to the Sejm, outlining a way to include Customs Service officers in the pension scheme that covers Police officers. In its statement concerning the bill, the Council of Ministers supported efforts to develop legislative solutions aimed at including Customs Service officers in the pensions system covering uniformed services.

The Commissioner declared his participation in constitutional appeal proceedings concerning the Penitentiary Service and in his statement presented the position that the Act on the Penitentiary Service is unconstitutional insofar as it allows a director of a penal institution to be dismissed at any time by the General Director of the Penitentiary Service and preclude any appeal against such dismissal or the filing of a complaint to the administrative court. The case is pending consideration by the Constitutional Tribunal.

The Commissioner requested the General Director of the Penitentiary Service to look into the problem of inadequate legal protection of officers against whom lawsuits have been filed by inmates. Their procedural position is weaker than that of the inmates who are entitled to a public defender. Officers should be represented by professional lawyers paid by the units in which the officers serve, insofar as they are sued against or obliged to testify in cases immediately related to their service. Another question is that of overtime and the increase of the number of overtime hours as a result of recalculation of service time three years back. The General Director of the Penitentiary Service disagreed with these statements and pointed out that legal protection of officers who have been sued by inmates is the same as the legal protection of officers of other uniformed services. With regard to the cause of the increase of overtime hours, he stated that measures have been taken to developing proper overtime calculation procedures and to eliminate cases whereby the number of calculated overtime hours is reduced as a result of misinterpretation of regulations governing the Penitentiary Service.

The Commissioner analysed pension regulations concerning soldiers who began serving after 31 December 2012 and assessed that they contain dis-





crepancies resulting from differences in terminology between service regulations applicable to soldiers and to other uniformed officers. Consequently, he requested the Minister of National Defence to consider a legislative initiative aimed at eliminating these problems. According to the Commissioner, they may in the future lead to an unjustified differentiation with regard to pension entitlements between people who have served in services that are essentially similar. The intention of the legislature was to ensure that the new pension system is obligatory only with regard to soldiers enrolled and other uniformed officers admitted to service for the first time after 31 December 2012. However, according to the Act on military personnel pensions, the new pension system does not cover those soldiers who were enrolled to professional service after 31 December 2012 if they had served in the Police prior to that date, having been admitted to the Police before 31 January 2013. The fact that the word “enrol” is used in the regulation allows it to be construed so that it applies only to those who have been “enrolled”. The Minister recognized the concerns of the Commissioner and undertook to amend the pension act.

The Commissioner submitted an intervention to the Chairperson of the Senate Committee on Human Rights, Rule of Law and Petitions concerning damages for conscripts forced to work on railroads in the 1950’s, requesting an inquiry into the matter. He also requested that measures be taken to extend the benefits awarded to so-called “soldier miners” to include soldiers who worked on railroads. In the Commissioner’s opinion, the legislature, by omitting this group of soldiers and not providing appropriate regulations, has given rise to concerns about equal treatment. The legislature, in recognition of the fact that forced labour of soldiers in mines was a specific form of political repression, has established rules for compensating this group of soldiers. However, railroad soldiers have not been included among those eligible for financial benefits, damages and other social entitlements. Thus, they have been deprived to compensation for the repressions endured and for forced labour during military service. In response, the Public Communications Director, on behalf of the Chairperson of the Senate Committee on Human Rights, Rule of Law and Petitions, stated that the best way to approach the problem raised by the Commissioner is to submit a petition to the Senate. Consequently, the Petitions and Correspondence Department informed the National Association of Former Railroad Soldiers about this possibility.

The Commissioner turned to the Prime Minister concerning inadequate protection of whistle-blowers among soldiers and other uniformed service personnel. The Ministry of Justice is considering a legislative initiative aimed at strengthening the position of whistle-blowers in the Polish legal system, but this initiative concerns only civilian employees. Tasks performed by soldiers and other uniformed officers have a direct impact on national security



and public order. In view of the specific nature of uniformed services and of the fact that they are hierarchical and hermetic institutions with strong top-down structures, it seems particularly important to ensure that whistle-blowers are protected. Moreover, the need to ensure effective protection of soldiers who inform about irregularities stems from the constitutional obligation to ensure civilian and democratic control over the Armed Forces. The Commissioner is awaiting a statement from the Minister of National Defence.

Main issues in the field of civil law



## A. Right to good legislation

In 2016, the Commissioner continued to monitor legislative proceedings in matters brought to the attention of the relevant state bodies in previous years and concerning, among others, changes in the system of care for incapacitated persons (including those partially incapacitated), rules governing genetic code tests, including tests for the purposes of civil law proceedings, changes in administrative enforcement proceedings, cooperative law, including in particular regulations on housing cooperatives and on the protection of tenants. The Commissioner pointed to the urgent need for new regulations that would implement the rulings of the Constitutional Tribunal. To date, the recommendations of the ruling in case P 46/13 have not been implemented and the deadline has not been set after which it would be impossible to rule null and void an administrative decision on the basis of which a party has acquired a right or a conditional right. In response to the Commissioner's intervention, the Minister of the Interior and Administration stated that a team of experts appointed by the Chair of the Supreme Administrative Court has developed proposals for changes in administrative procedures. A solution has been proposed whereby it would be impossible to rule null and void a decision 10 years or more after it was delivered or announced.

The Commissioner also pointed to the need to adapt to the existing requirements concerning the sources of law the Instruction of the Minister of Health and Social Care concerning permissible concentrations and intensities of factors hazardous to health, emitted by construction materials, equipment and fittings in rooms intended for humans, and to extend the list of factors hazardous to human health to include chemical substances which have been identified as harmful in the past 20 years. The Minister of Health informed the Commissioner that the Town Planning and Construction Code is under preparation. The Chief Sanitary Inspector requested the Minister of Infrastructure and Construction Industry to consider the need to include the subject matter raised by the Commissioner in the above-mentioned draft.

The Commissioner has fundamental concerns with regard to the compliance of some of the provisions of the Act on the agricultural system as introduced by the Act on the withholding of the sale of property from the State Treasury's Agricultural Property Resource and on the amendment of certain acts. The Commissioner filed an application to the Constitutional Tribunal, pointing to fundamental lack of clarity of provisions pertaining to citizens' constitutional rights and freedoms. The case is pending consideration by the Constitutional Tribunal.

The Commissioner also voiced his concerns with regard to whether public administration bodies and investors are implementing EU standards concern-



ing public consultations related to the planning and implementation of power grid projects. However, the Government's plenipotentiary for strategic energy infrastructure development assured the Commissioner that existing regulations guarantee the public the right to active participation in the development of documents pertaining to the planning and implementation of grid projects.

## B. Right to a court in civil proceedings

Various problems with the costs of court proceedings continued to be on the agenda of the Commissioner in 2016. The Commissioner declared his participation in the Constitutional Tribunal proceedings in the case concerning the impossibility of full recovery of legal expenses by a party acting on its own, i.e. without a professional plenipotentiary and in the case concerning the impossibility of exemption of a party from proceedings costs in electronic writ of payment proceedings. The Commissioner is waiting for the Constitutional Tribunal to set a date for the hearing.

The Commissioner continued to work on the issue whether existing civil proceedings regulations concerning exemption from legal expenses and appointment of a public lawyer safeguard the privacy of persons seeking such forms of assistance. The Commissioner also expressed his reservations concerning the practical functioning of the new practice according to which justifications of verdicts in civil courts are given orally, with a transcript instead of a written justification. In the Commissioner's assessment, experience gathered to date gives rise to concerns that extensive use of this practice may lead to limiting the constitutional right to sound proceedings and the right to appeal, since in many cases the practice makes it difficult to identify the motives behind the verdict. In response to the Commissioner's intervention, the Ministry of Justice expressed the view that the practice of oral justification, being a novelty in civil proceedings, should be the subject of an in-depth analysis, particularly with regard to its practicalities, including the manner in which transcripts are prepared.

The Commissioner continued to work on last year's intervention concerning the right of a court enforcement officer to subpoena the debtor to appear in person in the officer's office in order to provide explanations and the officer's right to impose fines for non-compliance with the subpoena. In the opinion of the Commissioner, such practice amounts to an irregularity, as it is not based on existing regulations. The Commissioner did not receive any reply from the Minister of Justice in this matter.

The Commissioner also submitted interventions concerning excessive duration of expulsion proceedings against domestic violence perpetrators, con-

ducted at the request of victims of domestic violence, as well as concerning the implementation of the judgement of the European Court of Human Rights of 16 June 2015 in the case of *Rutkowski and others against Poland*. The Commissioner pointed out that in the light of the recommendations of the Strasbourg Court there is a need to take legislative measures in order to ensure more effective means of protection against excessive duration of court proceedings. The Minister of Justice disagreed with the Commissioner and stated that with regard to the duration of proceedings and the courts' failure to meet the one month deadline for the first hearing the Act on counteracting domestic violence is sufficient and answers the need to ensure swift proceedings.

The Commissioner also noted that new, more effective legal measures are needed in the fight against so-called hate speech in the internet. According to existing regulations, a complaint concerning protection of personal rights violated in the internet must specify the parties (name and address). If this is not the case, the missing information must be added or else the complaint is returned to the plaintiff. Alternatively, one may defend one's rights in a procedure described in the Act on personal data protection, but the procedure is often very lengthy. This is why many people opt for penal proceedings in order to obtain the personal data of the perpetrator. Having obtained the necessary personal details, the victims often lose interest in the penal proceedings and use the data in a civil lawsuit concerning violation of personal rights. In the opinion of the Commissioner, this practice is not commendable. Penal law institutions should not be treated as an instrument for obtaining personal details. The Commissioner noted that the American legal system has long known the concept of the so-called John Doe lawsuit. The introduction of a similar instrument in Poland, with due regard for the character of Polish civil proceedings, could constitute an element of a systemic approach to fighting hate speech. The Minister of Justice disagreed with this opinion. He noted that the John Doe lawsuit would be a serious departure from the general principle of civil law proceedings, according to which a complaint must be filed against a specific person named by the plaintiff.

## C. Right to use cultural achievements

In 2015, the Constitutional Tribunal, in line with the position of the Commissioner, ruled that the regulations of the Copyright Law imposing high damages for intentional unlawful use of unowned work are unconstitutional. The elimination of the unconstitutional regulation has resulted in a situation whereby those who infringe copyrights are obliged to pay double the fee for legal use of the work, regardless of whether the infringement was intentional or not. This situation is particularly injurious to those who have acted in good will and have



infringed copyrights without any fault on their part. Therefore, it is necessary to begin work on legislation that will regulate damages for the copyright infringement in a way that allows copyright owners to receive fair compensation for copyright infringement without interfering excessively in the property freedom of the infringers. The Commissioner submitted an intervention in this regard to the Minister of Culture and National Heritage but has not received a reply.

## D. Protection of family rights

Throughout 2016, the Commissioner monitored issues related to court-regulated contacts with children. In the opinion of the Commissioner, the regulations introduced a few years ago, according to which persons who refuse court-regulated contacts with children may be fined as a result of a two-stage procedure initiated by the affected person, need to be thoroughly analysed, because complaints filed to the Commissioner demonstrate that these regulations are not effective. Family judges also express doubts as to the functioning of the new regulations. However, in response to the Commissioner's intervention, the Minister of Justice stated that an analysis of the issue by the Institute of Justice has shown that the use of fines is rare and that claims that the fining mechanism is being abused are unfounded and therefore measures aimed at changing existing regulations would be premature.

The Commissioner also brought up the issue of court rulings in cases concerning the release, on the basis of the Hague Convention, of children abducted abroad, and monitored the progress of legislative work that the Ministry of Justice promised to undertake in this regard.

Together with the Children's Rights Commissioner, the Commissioner pointed to the need to change regulations on child representation and to consider the establishment of child curators to represent children in curatorship cases (parental authority, contacts, child's place of residence), at least in those cases in which the child's parents are in serious conflict that hampers any agreement to the benefit of the child. Both Commissioners stressed the need to ensure an adequate level of qualifications of "collision curators", in line with the recommendation of the Constitutional Tribunal in case S 2/14, and to ensure that children in curatorship cases receive assistance of professional lawyers who will act according to their suggestions and will, as well as according to the Recommendations of the Committee of Ministers of the Council of Europe. In response to the appeal of the two Commissioners, the Minister of Justice confirmed there was a need to regulate more precisely the issue of collision curator qualifications. The Ministry is working to determine the scope of the proposed changes.

The Commissioner also took a number of measures to improve the effectiveness of execution of court orders concerning maintenance, among others requesting the Ministry of Justice to consider the use by courts of so-called alimony tables that would facilitate the determination of maintenance amounts, or the establishment of a central register of maintenance non-payers. The matter continues to be within the Commissioner's area of interest as the Ministry did not reply.

## E. Rights of persons with disabilities

In many cases, the Commissioner pointed to the need to adjust the outdated regulations to current international standards in the field of protection of the rights of persons with disabilities, and in particular to the Convention on the Rights of Persons with Disabilities, ratified by Poland. In this field, it is necessary to amend the provisions of the Civil Code and to change the outdated concept of full and partial incapacitation, as well as to redress the issue of legal representation of the rights of such persons (among others in proceedings before state bodies), which is of key importance for their functioning in the society. The Commissioner is monitoring the progress of legislative work in this field.

According to the Commissioner, it is also necessary to consider the broadening of the regulation allowing the court to rule on contacts with adults under care, and in particular with legally incapacitated persons. The Commissioner has been receiving complaints from family and friends of such persons to the effect that the actual guardian prevented them from contacting his/her adult ward. The Commissioner will continue to monitor the issue.

## F. Protection of housing rights

With regard to housing rights, the Commissioner's activities were focused on issues related to evictions and protection against homelessness. The Commissioner drew attention to the lack of precise regulations on evictions to municipal homes, including the lack of clear rules according to which the debtor could verify the standard and condition of the municipal home assigned to him/her. The Commissioner had many reservations concerning so-called temporary shelters, regarding both their definition and the rules of eviction to such shelters. He also expressed criticism to the proposed amendment of the Act on tenant rights protection, aimed at relieving courts from including in their eviction rulings clauses about the evicted person's right to a municipal home. However,





the Minister of Infrastructure and Construction Industry stressed that persons who have lost rights to a social home or a temporary shelter, as well as persons who have no such rights, are entitled to guaranteed state assistance.

The Commissioner noted that the provisions of the Act on counteracting domestic violence, according to which the state is obliged to provide housing assistance to victims of domestic violence, are not being implemented. The Commissioner also submitted a comprehensive intervention to the Prime Minister, concerning state policy and, in particular, state support for social housing for the most underprivileged. In response to the issues raised by the Commissioner, the Minister of Infrastructure and Construction Industry stated that the government's new housing programme should result in about 30 thousand new flats for rent over a period of 10 years, as well as in the strengthening of the role of social housing associations in the development of institutionalized housing rental.

The Commissioner continued activities related to the lack of adequate protection of housing cooperative members against liability for debts incurred by cooperatives. Among others, it is legal for creditors to draw on the monthly rental payments made by cooperative members to recover debts from housing cooperatives. In addition, there are discrepancies between bankruptcy regulations and the Act on the land and mortgage register, leaving people who have cooperative titles to flats in a very difficult situation when their cooperative goes bankrupt. The Commissioner was informed that the Ministry of Infrastructure and Construction Industry is cooperating with the Ministry of Justice on the development of regulations that would protect housing cooperative members from liability for the debts of their cooperatives.

The Commissioner also highlighted problems faced by persons who use electric energy for room and water heating as they have no central room heating installations. Such persons have problems with obtaining electric energy benefits. The Minister of Energy indicated that in its so-called winter package, scheduled for the end of 2016, the European Commission was to define energy poverty and to oblige Member States to implement national measures to counteract energy poverty.

## G. Protection of property rights and real estate management

The activity of the Commissioner focused on issues of protection of the rights of real estate owners facing various limitations due to implementation of public projects by the state authorities. The Commissioner took various actions concerning cases where, in his view, there was a lack of balance between the protection of the owners' rights and the need to protect public interests.

He drew attention to the fact that it is necessary to enforce two rulings of the Constitutional Tribunal: the ruling in case K 50/13 concerning properties appropriated for public projects in land use plans enacted before 1995 and the recommendation in case S 1/15 concerning the need to eliminate loopholes in regulations concerning compensations for limitations in exercising ownership rights to premises appropriated for public projects. The Minister of Infrastructure and Construction Industry explained that the ministry is working on a comprehensive reform of spatial planning.

The Commissioner continued follow up on the issue, raised a few years ago, of excessive limitations of the rights of real estate owners in cases when regulations require that a land use plan for a particular area be enacted and the municipality has not enacted such a plan. In such cases, a land development decision cannot be issued and hence the owner cannot begin construction works that require such a decision. Unfortunately, the Commissioner has not received any response from the Ministry of Infrastructure and Construction Industry.

The Commissioner also drew attention to doubts concerning compliance with the Constitution of regulations governing the rules of compensation for damages resulting from nuclear power plant siting decisions. Another intervention submitted by the Commissioner concerned the transparency of procedures preceding power grid development projects of strategic importance for the state and protection of the right of local communities to active participation in the consultation processes. The Minister of Energy assured the Commissioner that the issues raised will be subject of thorough analysis by the ministry and decisions concerning legislative steps, if any, will be made accordingly.

The Commissioner submitted applications to the Constitutional Tribunal regarding the non-compliance of some provisions of the Act on the agricultural system as introduced by the Act on the withholding of the sale of property from the State Treasury's Agricultural Property Resource and on the amendment of certain acts, with the constitutional principles of proper legislation, property freedom and economic freedom. In the first application, the Commissioner focused mainly on the violation by the legislature of the principle of proper legislation as evidenced by the fundamental lack of clarity of provisions pertaining to citizens' constitutional rights and freedoms, and on the violation of the principles of the legal certainty and of the loyalty of the state to its citizens. In the second application, the Commissioner requested that the questioned provisions be examined for their compliance with constitutional guarantees of property protection and inheritance rights as well as with the freedom to choose the place of residence.

Moreover, the Commissioner submitted to the Constitutional Tribunal an exhaustive document presenting his position concerning issues covered by applications submitted by two groups of Members of the Sejm and a group of Senators, for joint consideration with the application submitted earlier by the



Commissioner. Due to the extensiveness of the case material submitted before, the Commissioner only supplemented the argumentation for non-compliance by such issues as the 5 year suspension by Agricultural Property Agency of the sale of the State Treasury's agricultural property, limitations in acquiring of ownership of agricultural properties by prescription and excessive arduousness of obligations imposed on the owners of agricultural property purchased from the Agricultural Property Agency. The Commissioner is waiting for a date of the hearing before the Tribunal to be fixed.

Once again, actions were taken with regard to the siting of called wind farms in the neighbourhood of residential buildings. In his interventions submitted to several ministries, the Commissioner emphasized how important it is to ensure more precise regulations in this field, as at present there are no legal instruments allowing the examination of the impact of wind farms on the environment, neither in project preparation phase nor when the wind farms are in operation. The law does not protect human health effectively. In 2016, the rules for the siting of wind farms, including their location in respect to residential areas, were stipulated in the Act on wind farm development. In the response to the Commissioner's appeal, the Minister of Health informed that a Sejm Members' Bill on wind farm development had been submitted to the Sejm of the Republic of Poland. This bill determines, among others, the conditions for siting residential buildings in the neighbourhood of wind power plants. It also obliges the investor to obtain a usage permit and a permit to operate the plant and place it under technical supervision.

Another issue that required significant activity on the part the Commissioner was that of so-called reprivatisation, a problem yet unresolved by public authorities. Yet another comprehensive intervention concerning the matter was submitted to the Prime Minister. The intervention summarized actions taken hitherto by the Commissioner and cited recommendations for and obligations of the legislature, stemming from the current rulings of the European Court of Human Rights, the Constitutional Tribunal and Polish courts. It also included seven specific arguments concerning issues that require intervention on the part of the legislature. Unfortunately none of the ministries took a position on the Commissioner's proposals.

The Commissioner's intervention submitted to the Speaker of the Senate of the Republic of Poland concerned an amendment of Article 156 of the Code of Administrative Procedure. This article allows to rule administrative decisions null and void if they were issued with gross violation of the law, regardless of the date of issue. In practice, this regulation has become the key tool in reprivatisation. Under this article, proceedings are under way aiming at recovering or regulating the legal status of properties taken from private owners with gross violation of the law. A comprehensive solution to the problem of reprivatisation would allow to avoid the current problems with

the acceptability of revision of decisions decades after their issue. The present situation is partly non-compliant with the Constitution, as confirmed by a ruling of the Constitutional Tribunal. Since the Senate undertook the legislative initiative to enforce the ruling mentioned above, the Commissioner submitted to the Senate his comments in this regard. The Commissioner did not receive any reply, but the Senate bill was withdrawn. In this situation, with regard to the necessary amendment of Article 156 of the Code of Administrative Procedure, the Commissioner is exchanging letters with the Minister of the Interior and Administration.

The Commissioner is still dealing with the issue of the need for statutory regulation of the procedure for court control of decisions concerning the return to churches and religious communities of property seized by the authorities of the Polish People's Republic as part of post-war expropriations and nationalization processes. The Commissioner's reservations concern some aspects of the so-called regulating procedure, described in the acts governing relationships between the State and individual churches and religious communities, and in particular the fact that it is impossible to appeal to courts against decisions issued by so-called regulating commissions. The Commissioner submitted yet another intervention concerning this issue to the Minister of the Interior and Administration. However, the Minister responded that he does not have any influence on decisions taken by the regulating commissions.

The Commissioner presented his reservations and doubts concerning the draft Act on the transformation of shared perpetual usufruct of residential real estate into shared freehold real estate ownership. In his intervention submitted to the Minister of Infrastructure and Construction Industry, some problems stemming from the existing regulations were outlined, including the following: when the annual fee for perpetual usufruct is changed, the change can only be appealed against separately by individual users, and rulings in such cases are binding only with regard to the claimant, which in practice means that in one property, shared by various entities, annual fees vary even though the annual fee is established on the basis of the value of the considered property. The bill does not eliminate this problem. On the contrary, it aggravates it by introducing the provision that the annual fee valid as of 31 December 2016 shall become the "annual transformation fee". The Commissioner did not receive any response to this intervention.

The Commissioner declared his participation in the proceedings before the Supreme Court aimed at resolving the following legal problem: "Does an owner-like possessor have passive locus standi in a case concerning payment of remuneration for non-contractual use of property handed over to a dependent possessor?" and he was in favour of referring such claims to the owner-like possessor. The Commissioner also noted that a different inter-



pretation of the regulations may result in passing the burden of liability for illegal nationalization onto individuals (lessees, tenants, allotment holders) who are often in difficult circumstances, and who use the property under valid lease agreements, paying rent, rather than onto the “expropriators”. The case is pending consideration.

The Commissioner submitted an application to the Supreme Administrative Court to decide whether a notice about a permit to implement a road project on a property, delivered to the owner or user of the property to the address indicated in the land register, is for information purposes only or does it have legal consequences in the sense that the date of the delivery begins the period for appeal against the permit. Considering the need to ensure effective protection of property rights, the Commissioner was in favour of the interpretation according to which a notification delivered to the owner or perpetual user to the address indicated in the land register does have legal consequences. The case is pending consideration.

The Commissioner declared his participation in the proceedings before the Supreme Administrative Court aimed at determining whether a proportional court fee should be charged for a complaint against an expropriation damages decision. The Commissioner presented the view that a fixed court fee should be charged for such a complaint. In his opinion, this interpretation is justified by the need to ensure constitutional standards of protection of the expropriated and equal treatment of the expropriated in terms of the right to complain to court against an expropriation damages decision. The SAC did not agree with this view and passed a resolution stating that a proportional court fee should be charged for a complaint against an expropriation damages decision.

In 2016, the Supreme Administrative Court ruled, in line with the position of the Commissioner, that construction supervision authorities have the right to examine the legality of all construction projects and works, regardless of whether they are conducted on the basis of a construction permit or a notification. In another development, the Supreme Court passed a resolution, in line with the opinion of the Commissioner, that a land register court may refuse to make an entry in the land register if the court is aware of circumstances which are not mentioned in the application, but due to which the considered entry in the land register would lead to violation of the law.

## H. Situation of homeless persons

The Commissioner has taken numerous actions concerning the situation of homeless persons. Among others, he drew attention to the situation of people staying in family allotment gardens. As the activities of the Polish Association of Allotment Garden Holders to eradicate illegal residents from gardens intensify, there is a risk that a large number of people will begin to sleep rough. At the same time, there are no reliable figures concerning the number of such people, no ministry monitors on an on-going basis their situation, and municipalities do not have solutions in place to provide housing assistance to people evicted from allotment gardens. The Minister of Infrastructure and Construction Industry did not share the concerns of the Commissioner and assured that at present, people evicted from allotment gardens can count on local authorities offering temporary shelters. If, however, such shelters are not offered to them, such people will be evicted to night shelters or similar places.

The Commissioner submitted an intervention to the Minister of Family, Labour and Social Policy concerning the census of the homeless conducted every two years by the Ministry. The Commissioner pointed to discrepancies between the results of the survey of the number of the homeless conducted by the Central Statistical Office using the census methodology under the National Census and the results of the all-Poland survey conducted by the Ministry of Family, Labour and Social Policy. Concrete and practical comments concerning this issue were developed by the Commission of Experts for Counteracting Homelessness attached to the Commissioner for Human Rights. The Minister of Family, Labour and Social Policy assured the Commissioner that every person in a crisis situation, such as the loss of shelter, would receive necessary assistance from the competent social care organizational units.

Main issues in the field  
of administrative and commercial  
law and in other fields of law

## A. Right to good legislation

In the interventions submitted to the Minister of the Interior and Administration, the Commissioner raised the issue of enforcement of the Constitutional Tribunal's indicative judgement regarding the legal form of the Council of Ministers' decisions concerning, inter alia, change of boundaries of municipalities. The existing regulation excludes the possibility of judicial review of the Council of Ministers' decisions in this matter. The Minister expressed his readiness to actively participate in the Parliament's legislative works on the issue, but did not see the need for taking legislative action on his own initiative. The Commissioner will continue the works on the issue.

The Commissioner joined the proceeding before the Constitutional Tribunal, concerning the constitutionality of the Council of Minister's regulation changing the boundaries of the city of Opole and the neighbouring municipalities; the complaint in this matter was filed jointly by the municipal councils and the powiat [county] council concerned. In an opinion submitted to the Tribunal, the Commissioner expressed the view that the regulation was issued in breach of the existing procedure, without meeting one of the statutory requirements. The proceeding was, however, discontinued by the Constitutional Tribunal.

## B. Right to judicial protection of citizens' rights and freedoms

In an intervention to the Minister of Justice, the Commissioner raised the problem of lack of legal regulations on insurance of court-appointed family guardians. In reply, the Minister of Justice ensured that the necessary measures were taken to ensure sufficient funds for 2017 and to introduce a system of such insurance. The Commissioner is awaiting the fulfilment of the Minister's declaration.

The Commissioner submitted an intervention to the Minister of Justice with regard to the change of the form of notice about a court letter to be collected by the addressee from the post office, by including the sender's data on the notice. This would make it possible for a person who did not collect the letter from the post office to find it later in the sending court. In reply, the Ministry stated that there existed no reasons for the proposed changes.

In an application to the Vice-President of the Supreme Administrative Court, the Commissioner raised the issue of notifications sent by administrative courts about the possibility of cancellation of unpaid court fees for drawing up and posting of court judgment reasonings. In reply, the Commissioner was informed that there were no grounds for changing the existing practice of





forwarding such information to parties to court proceedings, and that the issue was monitored. The Commissioner discontinued the works on the matter due to the fact that all the measures were exhausted.

The Commissioner submitted an intervention to the Minister of Development and Finance regarding judicial review of decisions of the Polish Financial Supervision Authority to appoint members of insurance company management boards. In the Commissioner's opinion, a system of review by common courts would ensure better exercise of the right to court than the present system of review by administrative courts. In reply, the Minister of Development and Finance stated that the issue of proper exercise of the right to court in the area in question was outside his responsibility. The issue will be monitored by the Commissioner.

In an intervention to the Chairman of the Senate Committee on Human Rights, Rule of Law and Petitions, the Commissioner raised the impossibility to file a complaint with an administrative court with regard to court idleness in cases of complaints and motions filed under the Code of Administrative Procedure. The Commissioner requested the Committee to consider legislative action to make it possible for complainants to effectively exercise their constitutional rights.

## C. Protection of consumer rights

The Commissioner submitted an intervention to the Chairman of the Polish Financial Supervision Authority and the President of the Association of Polish Banks regarding the problem of bank account seizure enforced in relation to persons who are not debtors but whose personal data are identical or similar to those of debtors. An analysis carried out by the Polish Financial Supervision Authority identified problems in the area of satisfying financial claims by way of bank account seizure. According to the President of the Association, the entity liable for damage caused by debtor's incorrect data included in the bank account seizure order should be the entity that issued the order.

The Constitutional Tribunal, having considered joint cases under an application of the Commissioner for Human Rights and a constitutional appeal, ruled that the failure to determine a maximum fee for seizure of cash receivables or property rights other than social security benefits and salary, and failure to determine a maximum handling fee for debt enforcement in administrative proceedings, as well as the impossibility to have the fees reduced in the case the debtors, on their own initiative, pay the amounts subject to recovery, violate the constitutional prohibition of excessive legislative intervention. In the Tribunal's view, the existing system of determining the size of seizure-related fees, includ-

ing handling fees, makes the fees a source of revenue whose size is not justified by the extent, duration or complexity of work of the enforcement body. The Tribunal ruled that an appropriate enforcement system requires the legislator's intervention.

## D. Government levies

The Commissioner submitted to the Constitutional Tribunal an application in which he questioned the constitutionality of the Tax Code provision according to which tax liabilities secured by a mortgage or tax lien are not subject to limitation, but after the lapse of the limitation period the liabilities may be enforced only against the assets covered by the mortgage or tax lien. According to the Commissioner, the regulation undermines the meaning and purpose of the institution of limitation of tax liabilities with regard to taxpayers whose receivables have been secured by a mortgage or tax lien, either before or after determining the value of the liabilities. The case is pending consideration by the Constitutional Tribunal.

The Commissioner joined the proceeding before the Constitutional Tribunal, initiated by a question of law from a court which had doubts as to the compliance with the Constitution of the General Tax Law provision on non-limitation of tax liabilities secured by a mortgage and the possibility to enforce the liabilities only against the assets covered by the mortgage. The Commissioner expressed an opinion identical to the one presented in the case of the formerly mentioned abstract application, and emphasized that a citizen may not be a lifetime debtor of the state because of the fact that he/she owns certain assets which may be subject to a mortgage.

The Commissioner forwarded to the Minister of Finance a postulate regarding the inclusion, in the General Tax Law, of non-prescriptive forms of influence of tax authorities (including, in particular, mediation). In reply, he was informed that the *Assumptions of the New General Tax Law* included a suggestion to introduce mediation to proceedings conducted by tax authorities. The works on drafting a relevant bill and implementing regulations should end by 13 October 2017.

The Commissioner informed the Minister of Finance that tax authorities' approach is disadvantageous for taxpayers when it comes to joint tax liability for tax on agricultural land and for property tax, in cases when one of the co-owners is exempt from the tax or is not subject to the tax. The Minister revised his opinion and assured the Commissioner that in such cases, the tax on the whole property would be reduced by the amount equivalent to the property's part exempt from the tax or not subject to the tax, calculated proportionally.



Although the Minister did not see the need for legislative changes, the Sejm's Committee on Petitions proposed an amendment to the relevant Act of Parliament. The Commissioner is monitoring the legislative works.

The Commissioner submitted an intervention to the Minister of Finance with regard to doubts as to the expiry of individual interpretations that were inconsistent with general interpretations issued under the same regulations. The Commissioner pointed out that the existing provisions failed to regulate the situation of taxpayers whose individual interpretations expired but whose audits ended before the general interpretation was issued. The Commissioner also noted that the general interpretations did not take into account administrative courts' judgements, which resulted in varying interpretations of the existing tax regulations. The Commissioner is awaiting a reply of the Minister of Development and Finance.

The Commissioner informed the Speaker of the Senate and the Minister of Development and Finance of the consequences of non-enforcement of Constitutional Tribunal's judgment regarding the income tax threshold. In particular, he highlighted the fact that the newly adopted Act of Parliament extended the validity period of the existing provisions on income tax threshold by one year. The Sejm's eventual adoption of the amendment causing the Commissioner's doubts did not end the parliamentary works. The Senate proposed further amendments regarding the income tax threshold and the rules of its calculation. In reply to the Commissioner's request, the Minister of Development and Finance presented the final version of the provisions on income tax threshold and the principles of its application. The new regulations entered into force on 1 January 2017 and will apply to income received starting from that date.

In connection with the change of individual interpretations of regulations on the tax on employer-paid accommodation costs of the construction industry employees temporarily delegated to another location, which change was disadvantageous for those employees, the Commissioner requested the Minister of Finance to provide explanations on the issue. In reply, the Minister maintained his position, stating that the provision by the employer of free-of-charge accommodation to non-mobile workers generates revenue for the employees. Only in the case of mobile workers, accommodation provision by the employer is neutral from the point of view of tax. The Commissioner is monitoring administrative courts' decisions in this field.

The Commissioner joined a proceeding initiated by a constitutional appeal, and expressed the view that differences in parents' right to medical rehabilitation allowance, depending on whether their children receive child maintenance, is inconsistent with the obligation to protect families in difficult financial and social situation, with the principle of equality and with the principle of social justice. The current legislation provides that taxpayers whose children receive maintenance in the amount adjudicated by the court and exceeding the thresh-

old set by the legislator are not entitled to medical rehabilitation allowance. However, the size of child maintenance (paid in cash or in kind) does not affect the right to medical rehabilitation allowance for parents who pay maintenance themselves. The case is pending consideration by the Constitutional Tribunal.

The Commissioner applied to the Minister of Development and Finance to consider extending the family members' exemption from inheritance tax to cover foster children. The Commissioner emphasized that the role of foster families is not limited to the provision of temporary care to children, but also helps them to become self-reliant. The Minister did not share the Commissioner's position and stated that in the case of foster families, the system of individually awarded tax exemptions is more appropriate.

The Commissioner submitted an intervention to the Minister of Infrastructure and Construction and to the Minister of Culture and National Heritage concerning the lack of legal basis for inspecting TV subscribers' apartments by employees of Poczta Polska SA [the Polish Post]. The ministers confirmed the Commissioner's view that under the law, the inspected citizens are not required to allow Poczta Polska SA employees to enter their apartments, but may do so depending on their will. The Ministry of Culture informed that at the moment, no works were carried out on amending the regulations on inspecting TV sets registration. It emphasized, however, the need for a comprehensive change of the existing legislation to increase funding for the public service media.

The lack, in tax regulations, of legal basis for public debt recovery by the State Treasury through *actio Pauliana* was the subject of the Commissioner's intervention to the Minister of Finance. In reply, the Minister informed that he did not see the need for amending relevant regulations. In view of the Ministry's position, the Commissioner filed an application with the Constitutional Tribunal, whereby he questioned the compatibility – with the principle of a democratic state of law and with the principle of universal applicability of public charges – of the Civil Code provision which applies, by way of analogy from statutes, to public debt recovery by civil courts, in the form of *actio Pauliana*. The case is pending consideration by the Constitutional Tribunal.

The Commissioner forwarded to the Minister of Finance the postulate to take legislative action to draw up a precise definition of "construction structure" for tax purposes. The uncertainty as to whether a specific object is subject to taxation poses a risk to the rights of taxpayers. It also significantly impedes the work of tax authorities which may face the risk of having to return tax paid, together with interest. According to the ministry, the problem raised by the Commissioner is extremely complex and requires in-depth and time consuming analysis.



## E. Business activity

The Commissioner continued his efforts to protect victims of unauthorized registration of business activity, in connection with which he expressed his doubts regarding the amendment of the Act on Freedom of Business Activity. Following the Commissioner's intervention, the Minister of Development and Finance informed of further legislative changes which additionally strengthened the protection of persons at whose address someone else's business activity has been registered.

The Commissioner several times informed the Minister of Finance of the need to develop regulations on the so-called online currency exchanges. According to the collected information, work is carried out to include, on the list of legislative works of the Council of Ministers, a bill in which the Ministry of Finance will propose specific solutions regulating the operation of online currency exchanges.

The Commissioner again drew the attention of the Minister of Finance to the problems of entrepreneurs who offer payment services. The problems relate to covering the costs of supervision exercised by the Financial Supervision Authority. The ministry recognizes the need to simplify and adjust the rules of supervision over such entrepreneurs to the scale of their operations, as well as the need to reduce the supervision fees. The Commissioner is monitoring the legislative works in this area.

The Commissioner notified the Minister of Development of the problems concerning the system of exchange of information on payments. The Minister shared the Commissioner's position that the current system requires extensive modifications. Currently, solutions are being developed for a comprehensive reform of the regulations on the exchange of business information. The Commissioner is monitoring the legislative works in this area.

The Commissioner joined the proceeding initiated by a constitutional appeal and questioning the constitutionality of those provisions of the Bankruptcy and Reorganization Law which require insolvency administrator to deposit, in an interest-bearing bank account or a deposit account of the Minister of Finance, money which is not subject to immediate payment and which constitutes a part of bankruptcy estate, and money coming from the sale of encumbered objects and rights. According to the Commissioner, the regulations limit the freedom of business activity and infringe the constitutionally guaranteed rights to property, as they deprive insolvent entrepreneurs of the possibility to increase their capital to be used to satisfy creditors' claims. The case is pending consideration by the Constitutional Tribunal.

The Commissioner joined the proceeding initiated by a constitutional appeal with regard to the Industrial Property Law's provision which is non-compliant

with the constitutional freedom of business activity insofar as it disproportionately interferes with such freedom by limiting the scope of such activity of a business entity and by violating its business secrets, which is against the principles of fair legislation, legal certainty and proportionality. The case is pending consideration by the Constitutional Tribunal.

## F. Healthcare system

In his intervention to the Minister of Health, the Commissioner once again raised the problem of the inconsistency of regulations on the rights of transplant donors, which inconsistency hinders the possibility to exercise their right to healthcare services without waiting under waiting lists. The Minister of Health agreed with the Commissioner's assessment of the situation and stated that the regulations would be amended. The Commissioner is awaiting the fulfilment of the Minister's declaration.

The Commissioner intervened before the Minister of Health with regard to the lack of implementing regulations for the Act on Emergency Medical Services, regulating, inter alia, the performance of emergency procedures. In reply, the Minister of Health described the advancement of work on individual implementing regulations of which some had already been drafted, and some were at the consultation stage. After receiving the explanations, the Commissioner closed the case.

In a letter to the President of the Polish Chamber of Physicians and Dentists, the Commissioner inquired how the doctor should proceed when he or she receives information that persons who are not his/her patients may potentially be infected with HIV. The purpose of the correspondence was to determine the existing practice in such cases and the possible need for legislative changes. The matter is still pending; the President of the Polish Chamber of Physicians and Dentists is expected to provide detailed information.

The Commissioner wrote to the Minister of Health with regard to the legal basis for the work of the Coordination Team on Ultra-Rare Diseases. The team, in practice, decides about patients' eligibility for treatment programmes. Unregulated legal status of the team precludes the possibility to appeal against decisions on non-eligibility for treatment programmes, and thus to get effective treatment by patients with ultra-rare diseases. Despite several reminders, the Minister has not yet presented his position on the issue. Awaiting the Minister's reply, the Commissioner is analysing other options of work on the issue.

The Commissioner, in the continuation of his efforts to improve the situation of patients suffering from rare diseases, requested the Minister of Health to provide information on activities taken with regard to this group of patients,



and the planned date of entry into force of the National Plan on Rare Diseases. In reply, the Minister of Health informed that the draft plan, drawn up at the end of 2016, was awaiting the approval by the Ministry of Health, following which it will be proceeded further. The issue remains in the Commissioner's area of interest.

The Commissioner also examined the issue of access to gynaecologists and urologists by minor persons over 15 years of age. Based on the information provided by the Children's Ombudsman, the Patient Ombudsman and the National Consultant in gynaecology and obstetrics, the Commissioner forwarded to the Minister of Health and the Patient Ombudsman a postulate to permit patients over 15 access to use the services of the said specialists without the consent of a parent/legal guardian. The Commissioner was informed that the Minister of Health was analysing the possibility. The Minister's final position on the issue is expected.

The Commissioner raised the issue of legal obstacles to the issuance of individual consents for the refund of medicines imported to Poland under the system of the so-called direct import. The existing obstacles in some cases deprive patients of access to treatment due to the high cost of medicines. In reply, the Minister of Health presented a schedule of works on a bill amending the Act on Publicly-Funded Healthcare Services and Certain Other Acts, and of works on related implementing regulations. The Commissioner is awaiting the works announced by the Minister of Health.

In another intervention to the Minister of Health, the Commissioner raised the issue of the shortage of nurses. He emphasized that a minimum necessary number of decently-paid nurses and midwives, employed by every healthcare entity is, from patients' point of view, a formal guarantee of compliance with the nursing care standards. The Minister of Health presented measures taken to solve the existing problems. The works include analysis of entities' compliance with the regulation on determining minimum numbers of nurses and midwives by healthcare providers other than single-person companies, and drafting of regulations on minimum salaries in the healthcare sector. The minister stated that all those activities should contribute to solving the existing problems.

In an intervention to the Minister of Health and the acting President of the National Health Fund, the Commissioner raised the issue of the healthcare system's inability to provide care to the increasing number of patients with the so-called morbid obesity. There were doubts regarding the scope of available bariatric procedures, the waiting time for them, and their pricing. In reply, the Minister of Health informed that work was initiated to classify dedicated surgery procedures as refundable and guaranteed procedures for obesity treatment. The acting President of the National Health Fund explained amendments to the Fund's internal regulations on payment for medical services, including

the introduction of a separate category “Surgical treatment of obesity”. The issue remains in the Commissioner’s area of interest.

In another intervention to the Minister of Health, the Commissioner pointed out that the previously reported and still unresolved problem of the National Health Fund regional offices’ practice consisting in the use of waiting lists for individually prescribed medical devices. The Commissioner emphasized that the Fund’s practice limits access to guaranteed medical services and is not based on any Parliamentary Act provisions. The Minister of Health informed the Commissioner that a specification of cases in which the use of waiting lists is permitted will be drawn up during the planned healthcare system reform. According to the information provided by the Minister, the Fund’s regional offices discontinued to use waiting lists.

The Commissioner informed the Minister of Health of doubts as to the quality and efficacy of pain management and treatment procedures used in the Polish healthcare system. He referred, in particular, to data collected by the Healthcare System Quality Monitoring Centre, according to which one in six hospitals has no pain monitoring procedures and keeps no documentation in this area. In reply, the Minister of Health submitted information on the regulations which require hospitals to implement pain treatment procedures and their efficacy assessment systems, and regulations on medical personnel education in the area of pain treatment. The Commissioner will monitor the issue.

In an intervention to the Minister of Health, the Commissioner recalled the problem of quality of food in hospitals. The Commissioner underlined the importance of regulating the issue by referring to patient’s right to food adequate for his/her health condition, as well as related obligations of healthcare facilities and a supervision system. The Minister of Health explained that the existing regulations did not leave the determination of food standards to healthcare facility managers, and ensured that education in the area of proper nutrition of hospitalized patients is carried out.

The Commissioner applied to the Minister of Health for amending regulations on physicians’ working time. He pointed out that the regulations allow doctors to work even for several consecutive days and nights, which entails risk related to their tiredness level, both to themselves and to patients. The Minister of Health presented an assessment of the situation, stating that the main reason is the shortage of medical personnel. He assured that analytical works were conducted on regulations to determine medical practitioners’ minimum rest breaks at work. The issue remains in the Commissioner’s area of interest.

The Commissioner submitted an intervention to the Minister of Health with regard to the availability of epidural anaesthesia during childbirth. Statistical data received by the Commissioner indicate that there are considerable differences in the access to the procedure between individual voivodeships. In his reply, the Minister of Health informed that the procedure’s price had been





increased by the National Health Fund. He also suggested that the problem may also be caused by the shortage of anaesthesiologists, on which problem the Minister was working. The issue remains in the Commissioner's area of interest.

In his intervention to the Minister of Health and the President of the Supreme Medical Council, the Commissioner referred to cases in which women in childbirth, that is in circumstances that hinder conscious decision-making, were asked to consent to medical procedures. The Minister of Health stated that there was a need for increased awareness, among patients and medical personnel, of the rights of patients. The President of the Supreme Medical Council assured that the professional association of physicians would react to specific reported irregularities, and would include the issue in doctors' training.

In his intervention to the Minister of Health, the Commissioner inquired about the assessment of work of the so-called oncology package. According to the information received by the Commissioner, the implementation of the package did not shorten the waiting time for treatment. In his reply, the Minister of Health expressed doubts as to whether studies on the effectiveness of solutions provided for in the package reflect the realities, as they relate only to a small sample of patients. He also presented information on the Ministry of Health's activities aimed at reducing bureaucracy related to the oncology package. The issue will continue to be monitored.

Having received no replies to his earlier interventions, the Commissioner again raised the issue of the implementation of the Constitutional Tribunal's indicative judgement on the need to consider the availability of medical marijuana for Polish patients. The Minister of Health did not forward any position on the issue to the Commissioner. In view of the on-going parliamentary work on a bill permitting the use of marijuana for therapeutic purposes, the Commissioner informed the chairman of the relevant Parliamentary Subcommittee of his doubts regarding some of the proposed solutions.

As a continuation of his earlier interventions, the Commissioner informed the Minister of Health of the still unresolved problems regarding healthcare services for the elderly. The Polish systems of healthcare and social care for the elderly are inefficient and not prepared for the rapid demographic changes which bring about a sudden growth in the elderly population. In reply, the Minister of Health informed the Commissioner of the healthcare system's adjustments to the demographic changes. In particular, he emphasized the programme of free-of-charge medicines for senior persons, and the developed map of healthcare needs taking into account the need for geriatric care.

The Commissioner submitted another intervention to the Minister of Health with regard to the still unresolved problem of the lack of requirement to appoint professional proxies of persons who are parties to proceedings concerning their placement in a psychiatric hospital without consent. The minister informed that legislative work was on-going. It will be monitored by the Commissioner.

The Commissioner drew the Minister of Health's attention to the need to ensure real healthcare for homeless persons and other persons without income. In the Commissioner's opinion, the existing mechanisms under which those groups of people are covered by health insurance do not guarantee their actual access to healthcare. The Minister of Health shared the Commissioner's opinion and informed of the on-going works on the draft amendment to the Healthcare Act, which will guarantee free-of-charge primary healthcare to persons whose eligibility for such care is difficult to confirm.

## G. Protection of rights of persons with disabilities

The Constitutional Tribunal, in its judgement, took into account the Commissioner's intervention regarding the requirement for disabled persons to provide an appropriate car for their practical driving test, and concluded that public authorities should provide effective support to disabled persons who take driving license tests. Therefore, the Commissioner requested the Minister of Infrastructure and Construction to take legislative action to enforce the Tribunal's judgment. However, the Minister considered that the existing regulations issued by his Ministry made it possible to provide support to disabled persons taking driving license tests. The issue remains in the Commissioner's area of interest.

In an intervention to the Minister of the Environment, the Commissioner focused on the issue of disabled persons' right to drive in forest areas. The regulations in force were inconsistent and could be interpreted differently by forest rangers some of whom imposed fines on disabled persons. In reply, the Minister of the Environment assured that he would introduce clear regulations on disabled persons' right to drive across forest areas.


## H. Road traffic

The Commissioner submitted an application to the Speaker of the Polish Senate to consider legislative action to introduce a system of illness compensations for persons who suffered as a result of road accidents in the 1990s but, because of the fact the guaranteed amount has been exceeded, lost their rights to the compensations which are necessary for their further treatment and living. The Senate drew up a bill amending the existing regulations by imposing on the Insurance Guarantee Fund the obligation to satisfy the claims even in the case the sum guaranteed under the insurance contract has been exceeded. The Commissioner is monitoring legislative works in this area.



In an intervention submitted to the Financial Ombudsman, the Commissioner raised the issue of civil liability for road traffic accidents caused by driving course trainees. The Financial Ombudsman expressed the opinion that damages caused by a trainee during a driving lesson, in the case the law's requirements in relation to the vehicle have not been met, are exempt from recourse claims. The potential possibility of filing a lawsuit by a particular legal entity is not equivalent to the objective possibility to effectively prove the plaintiff's legitimate interest during a court proceeding.

The Commissioner joined a proceeding before the Constitutional Tribunal with regard to professional liability of vehicle technical condition inspectors. In the Commissioner's opinion, the applicable regulations which provide for the same disciplinary penalty for every error, without taking into account its circumstances, is non-compliant with the Constitution. The case is pending consideration by the Constitutional Tribunal.

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## Main issues in the field of equal treatment and non-discrimination



The Commissioner submitted to the Constitutional Tribunal a motion challenging the provisions of the Act implementing certain European Union regulations on equal treatment, insofar as those provisions limit the scope of the Act by setting out a closed catalogue of discriminatory criteria. The Act fails to cover certain social groups which experience discrimination in numerous areas of their lives. Their omission in the legislation results in the fact that in court proceedings, different persons discriminated against find themselves in different situations versus the law. The challenged provisions of the Act are, in the Commissioner's opinion, non-compliant with the constitutional principle of equality and the right to court, and with the provisions of the Convention on the Rights of Persons with Disabilities.

## A. Combating discrimination on the grounds of race, ethnic origin, nationality, religion or belief

The Commissioner received information about a group of several hundred foreigners who, for some time, had been unsuccessfully attempting to enter the territory of Poland in order to apply for international protection. According to the regulations in force, a foreigner's declaration of intention to apply for such protection should result in permitting him/her to enter Poland and in the acceptance, by the Border Guard, of his/her application for international protection. However, those persons were refused entry to Poland. The Commissioner requested the Chief Commander of the Border Guard to take action to eliminate irregularities in the work of the Border Guard officers. The situation on the eastern border was also assessed by representatives of the CHR Office during unannounced inspections at the border crossings in Terespol and Medyka. Both inspections revealed that neither the existing regulations on border checks, nor the procedures of accepting applications for international protection on border crossings, sufficiently safeguarded the rights of foreigners seeking such protection. The conclusions from the inspections were presented by the Commissioner to representatives of the Border Guard, the Ministry of the Interior and the Office for Foreigners during a seminar entitled *Refugees on the border*.

In connection with the Commissioner's examination of cases relating to the legalization of foreigners' stay in Poland and their recognition as Polish citizens, another problem was identified, which consists in the refusal, to parties to such proceedings, of access to documents classified as "secret" or "top secret" and included in relevant case files. Entities which issue administrative decisions on such cases fail to draw up justifications of their decisions, which significantly limits foreign citizens' right to an effective appeal procedure. The Commission-

er notified the Minister of the Interior and Administration that under the law as it currently stands, foreigners have no access to effective legal remedies and appeal procedures, as required under the guarantees provided for the Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the EU. The Minister agreed with the Commissioner that the issue raised in his intervention should be comprehensively analysed.

The Commissioner was concerned with increasingly frequent information on incidents of violence against foreigners who live in Poland, in particular persons from Middle East or Africa and persons of Muslim faith. Such incidents are publicly discussed on internet forums, and in some cases such hateful behaviours are accepted or even supported by internet users. The police statistics also indicate that in Poland there is a risk of offences motivated by national, ethnic, racial or religious hatred. The number of such offences against persons of Muslim faith and of Arab origin is increasing. The Commissioner appealed to Commander-in-Chief of the Police and to the Board of the Association of Rectors of Polish Universities, which is strongly against all forms of xenophobia and racism expressed in relation to foreign students in Poland, to adequately react to such situations.

The Commissioner also continued his activities in support of a group of Roma people who arrived from Romania, now live among others in Wrocław, Poznań and Gdańsk, and for various reasons are unable to regulate their stay in Poland. During a seminar held at the CHR Office and devoted to the situation of Roma immigrants in Poland, the Commissioner met with a group of Roma people living on camps in Wrocław and Poznań. One of the main topics discussed in the meeting was the registration of Roma persons as foreigners – citizens of the European Union who stay in the territory of Poland. The Commissioner also indicated to the Minister of the Interior and Administration the need to amend legislation so as to make it easier for EU citizens to register their residence in Poland.

The Commissioner received a complaint regarding a project implemented by municipal authorities of the town of Limanowa. The aim of the project was to improve the living conditions of several Roma families. The municipality of Limanowa bought new houses, located in two other municipalities: Czchów and Marcinkowice, for the Roma people. However, some of them refused to leave their camps and move to Czchów. The reason was the approach of Czchów municipal authorities. The mayor of Czchów, having learned about the plans to relocate the Roma families from Limanowa to their municipality, issued a prohibition to use the building for residential purposes. However, prior to this, all project beneficiaries signed notarized declarations that they would leave their camp and move to the new building. Despite the on-going mediation process, the Limanowa authorities attempted to claim compensations from the Roma

families, based on the signed notarized declarations. Given the risk of debt enforcement procedure against them, the Commissioner filed, with the district court in Limanowa, a lawsuit against the Limanowa municipality, demanding annulment of the instruments permitting enforcement. The Commissioner also intervened in connection with the regulation issued by the mayor of Czychów and prohibiting the use of the building, purchased by the Limanowa municipality, for residential purposes. In relation to this, he joined a proceeding before the Voivodeship Administrative Court in Kraków, initiated by the governor of the Małopolskie voivodeship.

The Commissioner submitted an intervention to the Minister of National Education, pointing out the problem with the availability of religion lessons for religious minorities as well as ethics lessons within the general education system. Also, according to the Commissioner, the requirement to submit a statement refusing participation in religion lessons or ethics lessons, or to declare, in the presence of other parents or pupils, the intention to participate in such lessons violates the freedom of conscience, the freedom of religion and the right not to publicly disclose one's religion or belief. It is also required that the initiative to organize religion lessons and ethics lessons is taken more strongly by schools themselves, rather than to be left to parents or students concerned.

## B. Combating discrimination on the grounds of gender

The Commissioner continued to work towards increased protection of victims of domestic violence. The Polish legislation on the separation of perpetrators from their victims needs to be adjusted to the Council of Europe Convention on preventing and combating violence against women and domestic violence. The existing legislation already provides for a number of measures aimed at separating domestic violence perpetrators from the victims. However, the Commissioner sees the need to adopt a measure which can be applied immediately, in case of immediate danger, irrespective of any pending criminal proceedings. The Commissioner also stressed the need to increase the protection of victims of domestic violence, e.g. by launching a nationally available 24/7 free-of-charge helpline for women – victims of gender-based violence and victims of domestic violence. In reply to the Commissioner's intervention, the Minister of Family, Labour and Social Policy informed that the establishment of the helpline was included in the National Programme Against Domestic Violence for 2014-2020, and that it would be launched in 2017.

The Commissioner also intervened with regard to the lack of funding allocated within the Fund for Assistance to Victims and Post-penitentiary Assistance to support organizations which help women – victims of violence. An

important role in the provision of professional specialist support to victims of violence, in particular to older women and women with disabilities, is played by non-governmental organisations. The statement of reasons for refusing targeted grants to the Centre for Women's Rights and to the BABA Lubin Centre for Women's Rights indicated that the two organizations did not receive the grants because they supported solely women who were victims of crimes. According to the police and court statistics, however, women are also victims of frequent gender-based violence. The Commissioner wrote to the Minister of Justice stating that the competition for the funds was related e.g. to the European Parliament resolution on the elimination of violence against women, and the resolution on priorities and outline of a new EU policy framework to fight violence against women. Both resolutions call on the Member States to improve their national laws and policies to combat all forms of violence against women.

The Commissioner was concerned about the media information about work carried out by several ministries with the aim to denounce the Council of Europe Convention on Preventing and Combating of Violence Against Women and Domestic Violence. In the Commissioner's view, the entry into force of the Convention was a milestone in ensuring the protection of the fundamental rights and freedoms of women experiencing gender-based violence. In reply to the Commissioner's inquiry, the Government Plenipotentiary for Equal Treatment informed that he had received a draft document regarding denunciation of the Convention, together with a statement of reasons, developed by the Ministry of Justice and sent to the ministries for consultations. However, in a later letter the Plenipotentiary assured the Commissioner that the Government did not undertake the works on denouncing the Convention, and had no intention to do so.

The Commissioner's area of interest included protection of the family, motherhood and parenthood, as well as equal rights of men and women to family and professional lives. In his intervention to the Minister of Family, Labour and Social Policy, the Commissioner noted that it was essential to ensure equal access to solutions which make it possible to reconcile family and professional roles, irrespective of gender. According to the Commissioner, parental leave should be constructed in such a way as to divide it between both parents, without the possibility of avoiding it, except when one of the parents has been prohibited to take care of the child. In addition, employers should be legally required to inform parents of their parental rights. The Commissioner also noted that given the limited availability of childcare facilities for children below 3 years of age, flexible forms of employment were a solution enabling the reconciliation of childcare with professional work. Employers should be required to take into account employees' applications for flexible working time unless it is technically impossible because of the organisation system or nature of work. Employers should also be supported in the operation of nurseries and childcare clubs.



## C. Combating discrimination on the grounds of sexual orientation and gender identity

The Commissioner received complaints regarding unequal treatment of children in connection with their birth status or the legal status of their parents, and regarding violation of children's rights by refusal to transcribe their foreign birth certificates or to issue decisions confirming their Polish citizenship. The law on civil-status records requires transcription of a foreign civil-status record e.g. when a person applies for a passport, ID card or PESEL number. When birth certificates indicated two women as parents, public administration authorities and administrative courts did not question the child's Polish citizenship but, pursuant to the public order clause and the Family and Guardianship Code, refused transcription of birth certificates which made it impossible for the child to get a Polish ID document. In the Commissioner's opinion, the interpretation of existing legislation should give priority to the good of the child. According to the Commissioner, the easiest solution to issue an identity document confirming the citizenship of a child with same-sex parents is to give up the compulsory system of birth certificate transcription and to issue identity documents based on foreign birth certificates indicating one parent as a Polish citizen. The Commissioner requested the Minister of the Interior and Administration to analyse a legal basis on which children born abroad, having same-sex parents and having Polish citizenship by law, may apply for Polish identity documents.

The Commissioner was informed of a large scale of prejudice-based violence. The Commissioner therefore called for increased legal protection of groups of people at particular risk of discrimination. Hate-motivated crimes provided for in the Penal Code currently include offences on the grounds of nationality, race, ethnic origin, religion or lack of religious belief. The Commissioner postulated to amend the existing regulations by extending the category of hate-motivated crimes and to introduce more severe penalties also for offences committed on the grounds of disability, age, sexual orientation and gender identity. Violence against persons with disabilities, the elderly, non-heterosexual and transgender persons is of specific nature. It is motivated by the perpetrators' prejudice. Thus, increased efforts are required to investigate, prosecute and punish such offences. The Commissioner requested the Minister of Justice to provide information on activities taken by the Ministry to strengthen the protection, under the penal law, of victims of offences related to discrimination.

## D. Combating discrimination on the grounds of age

In his intervention to the Minister of Family, Labour and Social Policy, the Commissioner highlighted the particular issues of respecting the rights of the elderly and the observance of the principle of equal treatment regardless of age. He emphasized the need to change the approach to the rights of the elderly and to shift emphasis from their social rights to the need to develop the state's comprehensive strategy and policy for the elderly, involving all institutions at the central and local levels. The Commissioner also inquired about the advancement of implementation of Poland's Long-Term Senior Policy for 2014-2020. As regards international activities, the Commissioner expressed his support for the proposed UN Convention on the Rights of Older Persons, and requested the minister to present the Polish Government's position on it. According to the ministry, the drafting and adoption of the UN convention is not essential because the existing international laws ensure comprehensive protection of people's fundamental rights, and age as such should not be considered a reason for extraordinary protection.

## E. Combating discrimination on the grounds of disability, and implementation of the Convention on the Rights of Persons with Disabilities

The Constitutional Tribunal considered the Commissioner's application regarding the issue of incapacitated persons' placement in residential care homes. The Tribunal ruled that the existing provisions, insofar as they fail to make it possible for an incapacitated person to verify the grounds on which he/she has been placed in a residential care home, are non-compliant with the Constitution. The possibility for a court to permit a legal guardian to place a fully incapacitated person in a residential care home, without taking his/her will into account, constitutes an example of the law's disregard for people and a violation of human dignity.

The Commissioner issued a report entitled *Access of persons with disabilities to judicial institutions*. The conclusions of the study show that accessibility, understood as the adjustment of infrastructure of courts and prosecutors' offices to the needs persons with various disabilities significantly impacts the exercise of the right to court by those persons. Another important element which limits disabled persons' access to the justice system is the regulations on their procedural capacity. Furthermore, in reality, persons with disabilities have no possibility to exercise key functions in the justice system i.e. to perform the profession of a judge, a prosecutor, a juror or a professional attorney.



In his intervention to the Government Plenipotentiary for Persons with Disabilities the Commissioner addressed the issue of the requirement for doctors to indicate patient's specific disability code and doctor's specialization code in medical certificates of disability. The regulation constitutes an excessive and unjustified interference with disabled persons' right to privacy. According to the Commissioner, the compulsory disclosure to the employer of information on the employee's specific illness may raise concern about the constitutional rights to privacy, personal data protection and patient data confidentiality, and, consequently, cause disabled persons' discrimination on the labour market.

The Commissioner continued his efforts towards disabled persons' increased access to university education. Students with disabilities encounter not only architectural and transport barriers, but also obstacles which relate to people's mentality. The main problem is disabled persons' exclusion as potential students of certain universities. It is most often seen in universities or university departments with specific specialisations such as arts, medicine, military or maritime subjects. The Commissioner, therefore, submitted an intervention to the ministers responsible for university-level education in those specialist areas, emphasizing that any possible restrictions in access to university education should be based on objective and rational criteria whose fulfilment should be assessed on individual basis rather than jointly for the whole group of persons with disabilities.

The examination of complaints submitted to the CHR Office further identified the problem of possible discrimination of persons with severe intellectual disability with regard to access to education. Firstly, there is no requirement to develop a core curriculum or teaching framework for the subsequent years of education of children and youth with severe intellectual disabilities. Secondly, no requirements are specified with regard to evaluation and promotion of pupils. It should also be emphasized that the process of education is not divided into separate stages. Furthermore, under the existing regulations a class of pupils may be composed of persons of very different age (from 3 to 25). The Commissioner presented the problem in a motion to the Minister of National Education.

The Commissioner also appealed to the Prime Minister for ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The Commissioner emphasized the lack of effective protection mechanisms making it possible to enforce the rights conferred by the Convention. The Commissioner's appeal was supported by 170 non-governmental organizations working in the field of protection of the rights of persons with disabilities, protection of human rights and the principle of equal treatment. In view of a negative approach of the government the Commissioner, in cooperation with the committee, organized an expert seminar on the sub-



ject, in which the opportunities and threats relating to the ratification of the Protocol were analysed. According to the latest position of the government, the ratification of the Protocol will be reconsidered after the examination by the Committee on the Rights of Persons with Disabilities of Poland's report on the implementation of the Convention.

Statistical information and data



# Annex no 1

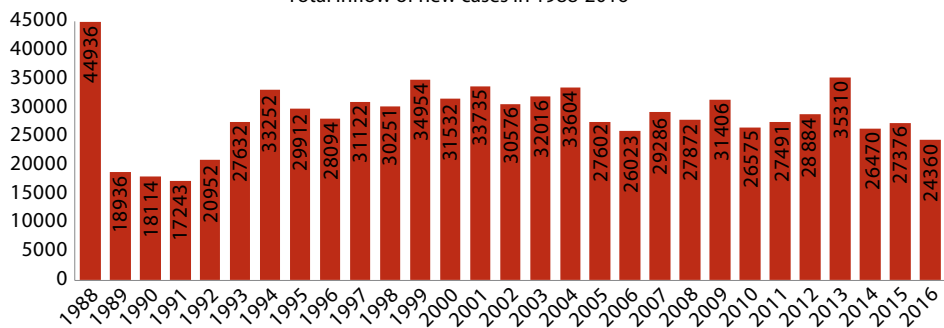
## Statistical information and data

### Applications received by the Commissioner for Human Rights

	2016 1.01. – 31.12.
Applications in total	52 551
New cases	24 360
Replies in cases in which the CHR intervened	13 841

**In 2016, employees of the Office of the Commissioner for Human Rights met with 5 195 applicants and answered 36 782 telephone calls, providing relevant explanations and advice.**

Total inflow of new cases in 1988-2016



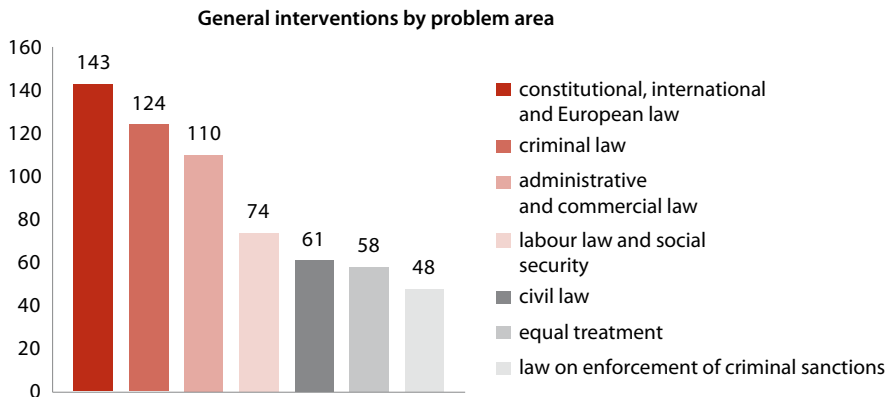
The Commissioner for Human Rights		2016
1)	submitted problem-related interventions, – including motions to take legislative action	441 196
2)	submitted applications to the Constitutional Tribunal for adjudicating laws and regulations' inconsistency with higher-level legislation	24
3)	notified the Constitutional Tribunal of his joining the proceedings initiated by constitutional appeals	12
4)	notified the Constitutional Tribunal of his joining the proceedings initiated by questions of law	13
5)	notified the Constitutional Tribunal of his joining the proceedings initiated by motions	6
6)	addressed questions of law to the Supreme Court	1
7)	filed cassation complaints	66



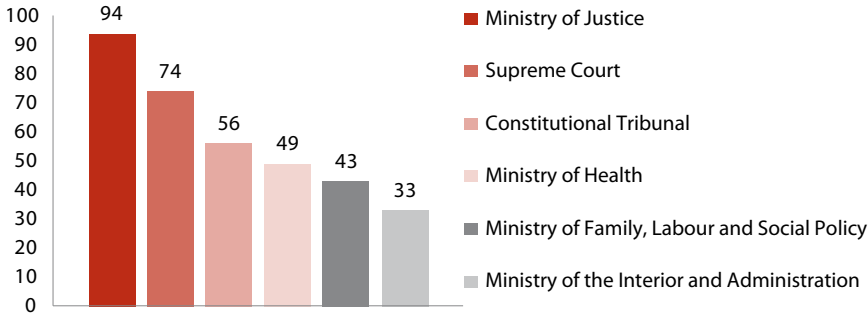
8)	filed cassation appeals to the Supreme Court in civil cases	4
9)	filed cassation appeals to the Supreme Court in labour law cases	2
10)	filed cassation appeals to the Supreme Administrative Court	17
11)	filed applications to the Supreme Administrative Court for interpretation of laws and regulations	3
12)	filed complaints to Voivodeship Administrative Courts	18
13)	joined court proceedings	39
14)	joined administrative proceedings	3
15)	requested initiation of civil proceedings	1

*Of 650 general interventions and specific remedies taken by the Commissioner for Human Rights in 2016, most related to:*

Problem area	Number of cases	% share
constitutional, international and European law	143	22.0
criminal law	124	19.1
administrative and commercial law	110	16.9
labour law and social security	74	11.4
civil law	61	9.4
equal treatment	58	8.9
law on enforcement of criminal sanctions	48	7.4



**Main addressees of the Commissioner for Human Rights' interventions**

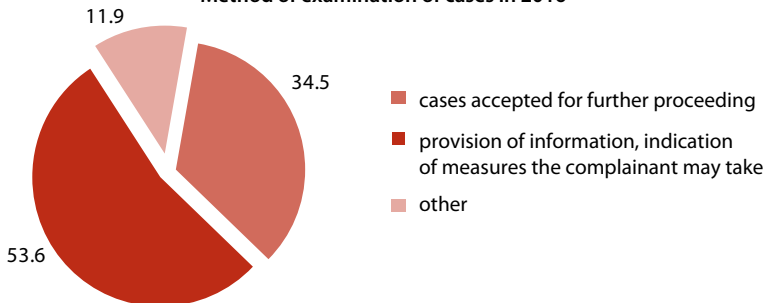


**Cases examined in 2016**

*In the period covered by this Report, 25 642 cases were examined, of which:*

1	Method of examination		Number of cases	% share
	2			
Cases accepted for further proceeding	1	<b>Total</b>	<b>8 834</b>	<b>34.5</b>
	2	cases accepted for further proceeding, including on the CHR's initiative	7 786	30.4
	3	in the form of general intervention	1 048	4.1
Provision of information, indication of measures the complainant may take	4	<b>Total</b>	<b>13 740</b>	<b>53.6</b>
	5	Provision of information, indication of measures the complainant may take	13 740	53.6
Other	6	<b>Total</b>	<b>3 068</b>	<b>11.9</b>
	7	complaint referred to a competent authority	671	2.6
	8	complaint returned to the complainant for adding necessary information	1 013	4.0
	9	not accepted for further proceeding <sup>7</sup>	1 384	5.3
<b>Total</b>			<b>25 642</b>	<b>100.0</b>

**Method of examination of cases in 2016**



<sup>1</sup> Complaints forwarded to the Commissioner as c/o; and complaints with unintelligible content.





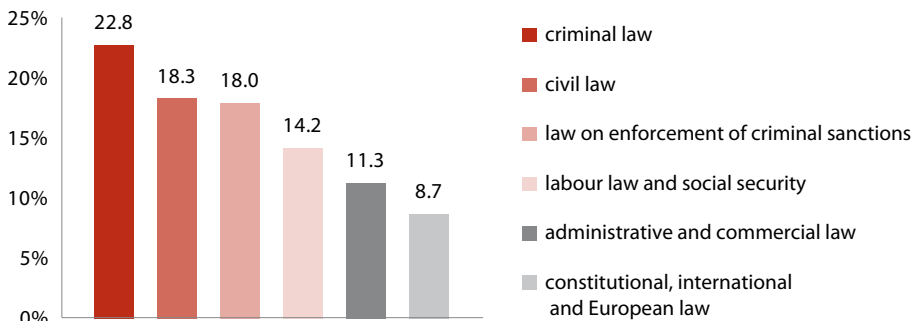
*Of 25 642 cases examined, most related to:*

Problem area	Number of cases	% share
criminal law	5 659	22.1
civil law	5 258	20.5
law on enforcement of criminal sanctions	4 800	18.7
administrative and commercial law	3 710	14.5
labour law and social security	3 429	13.4
constitutional and international law	1 523	5.9
other	1 263	4.9

*Of 25 642 cases examined in 2016, 8 834 were accepted for further proceeding; most of them related to:*

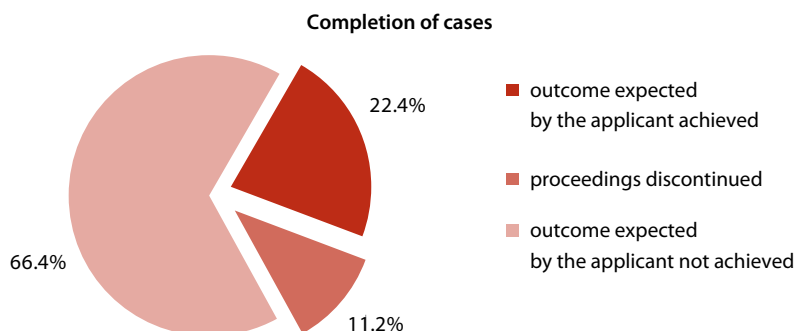
Problem area	Number of cases	% share
criminal law	2 014	22.8
civil law	1 617	18.3
law on enforcement of criminal sanctions	1 580	18.0
administrative and commercial law	1 257	14.2
labour law and social security	998	11.3
constitutional and international law	772	8.7
other	596	6.7

**Examined cases by problem area**



### Proceedings were completed in 7 377 cases initiated in 2016 and in previous years.

Result	Reason for completion	Number of cases	% share
1	2	3	4
Outcome expected by the applicant and the CHR achieved	1 <b>Total (2+3)</b>	<b>1 653</b>	<b>22.4</b>
	2 Applicant's claim confirmed	880	11.9
	3 CHR's general intervention successful	773	10.5
Proceedings discontinued	4 <b>Total (5+6)</b>	<b>829</b>	<b>11.2</b>
	5 Proceedings pending (on-going procedure)	305	4.1
	6 CHR's discontinuation of proceedings (due to objective reasons)	524	7.1
Outcome expected by the applicant not achieved	7 <b>Total (8+9+10)</b>	<b>4 895</b>	<b>66.4</b>
	8 Applicant's claim not confirmed	4 123	55.9
	9 CHR's general intervention not successful	700	9.5
	10 Measures available to the CHR exhausted	72	1.0
<b>Total</b>		<b>7 377</b>	<b>100.0</b>

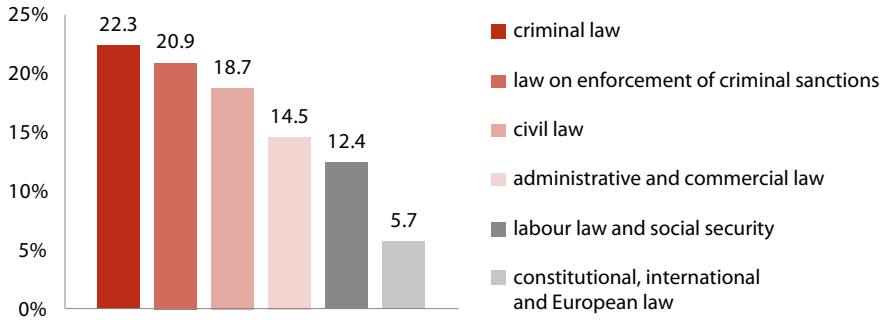


### New cases (applications) in 2016 by problem area.

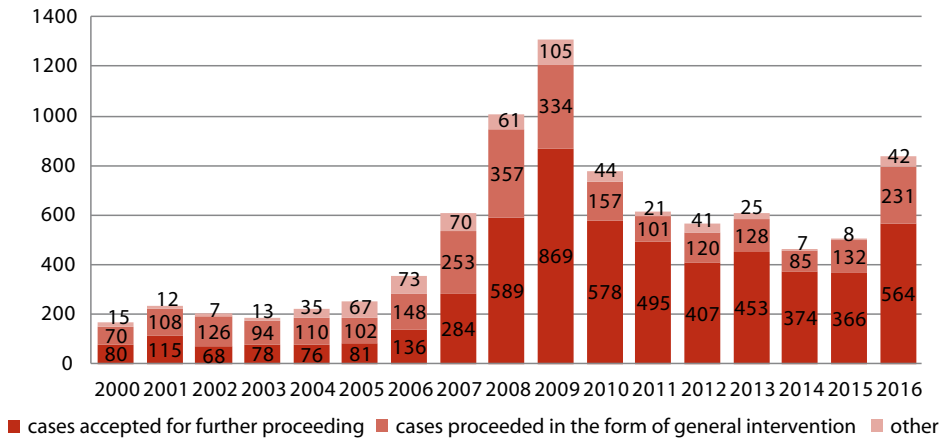
	Problem area	Number of cases	% share
1	constitutional, international and European law	1 382	5.7
2	criminal law	5 432	22.3
3	law on enforcement of criminal sanctions	5 083	20.9
4	labour law and social security	3 032	12.4
5	civil law	4 561	18.7
6	administrative and commercial law	3 543	14.5
7	equal treatment	725	3.0
8	National Preventive Mechanism	104	0.4
9	protection of the rights of soldiers and officers	306	1.3
10	other	192	0.8
<b>11</b>	<b>Total</b>	<b>24 360</b>	<b>100.0</b>



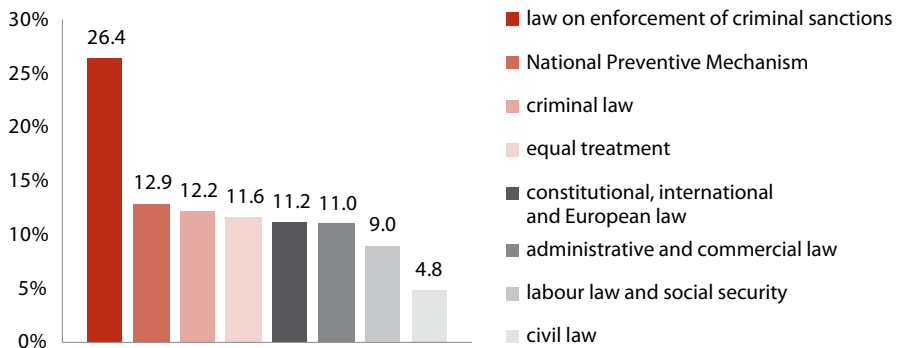
**Main problem areas of new cases in 2016**



**Cases examined on the initiative of the Commissioner for Human Rights**

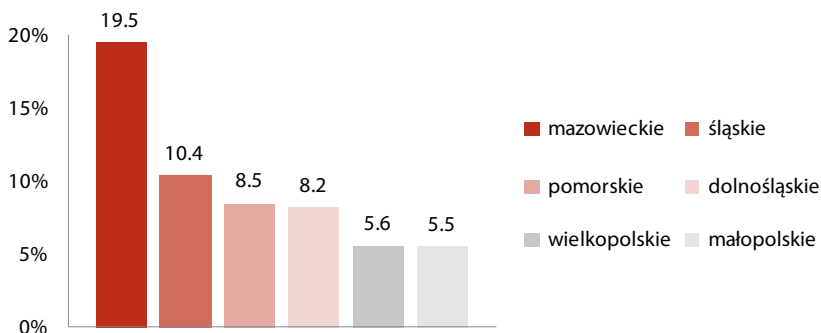


**Cases examined on the initiative of the Commissioner for Human Rights by problem areas**

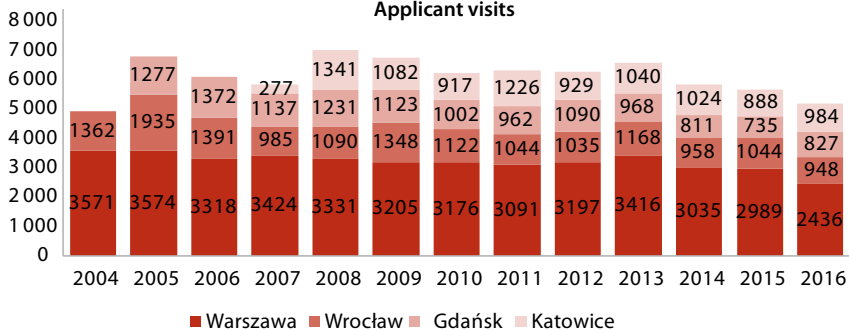




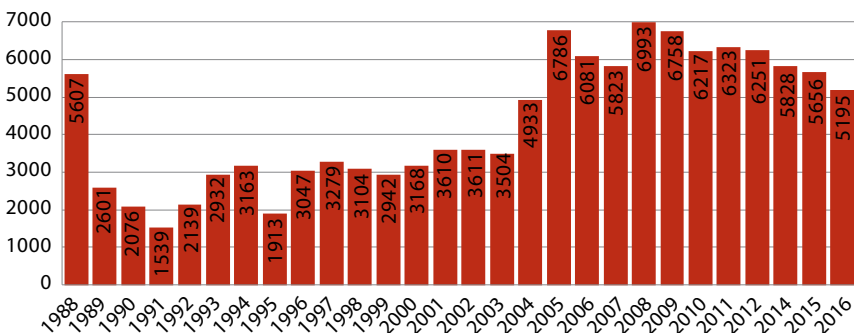
### Voivodeships with largest inflow of new cases

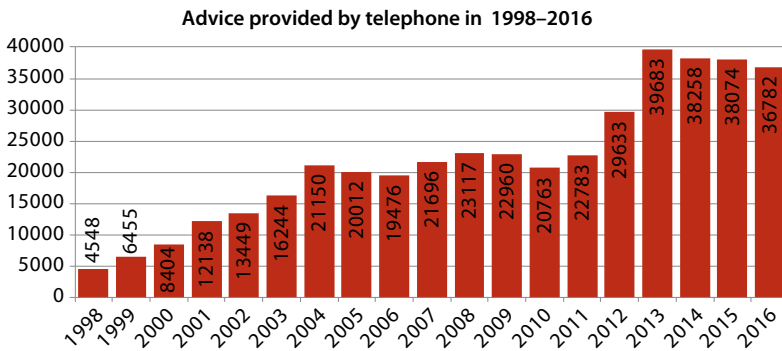


### Applicant visits



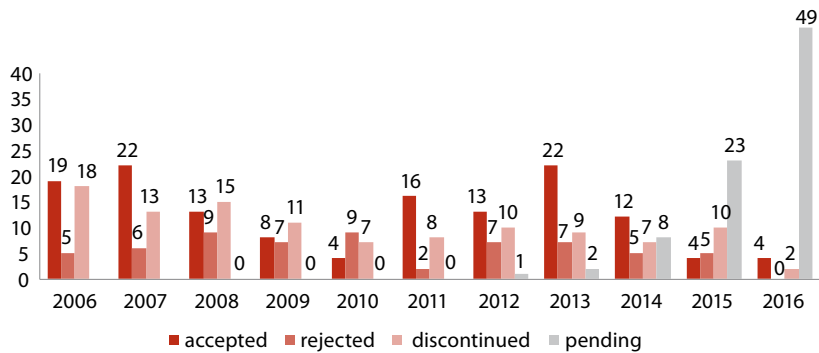
### Applicant visits in 1988–2016





- TKZ - applications to the Constitutional Tribunal for adjudicating laws and regulations' inconsistency with higher-level legislation
- SK - notifications to the Constitutional Tribunal about joining the proceedings initiated by constitutional appeals
- TKP - notifications to the Constitutional Tribunal about joining the proceedings initiated by questions of law
- WTK - notifications to the Constitutional Tribunal about joining the proceedings

**Number of applications to the Constitutional Tribunal for adjudicating laws and regulations' inconsistency with the Constitution, constitutional appeals and questions of law joined by the CHR<sup>2</sup>**

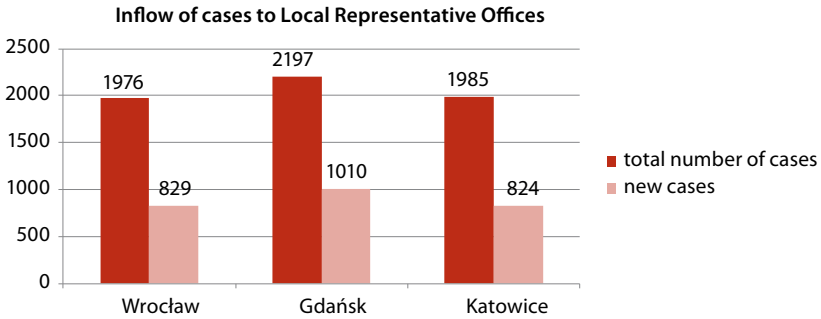


**CHR Local Representative Offices**



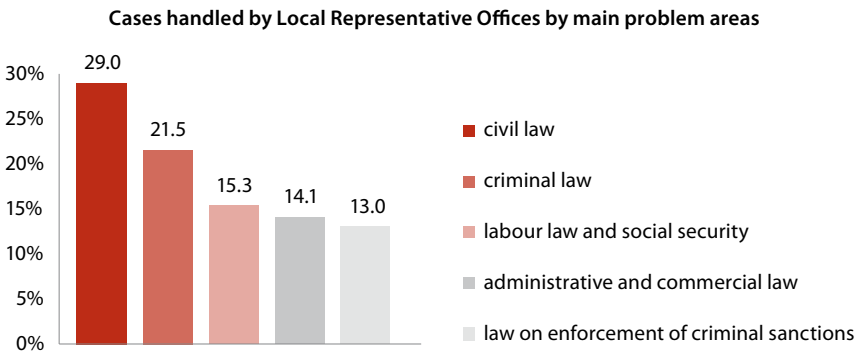
- Local Representative Office in Wrocław established on 2 August 2004
- Local Representative Office in Gdańsk established on 16 May 2005
- Local Representative Office in Katowice established on 14 September 2007
- The CHR's Headquarters Office in Warsaw

<sup>2</sup> As of 31 December 2016. Data are presented by years when the applications were submitted by the Commissioner for Human Rights.



**Inflow of new cases to Local Representative Offices by main problem areas:**

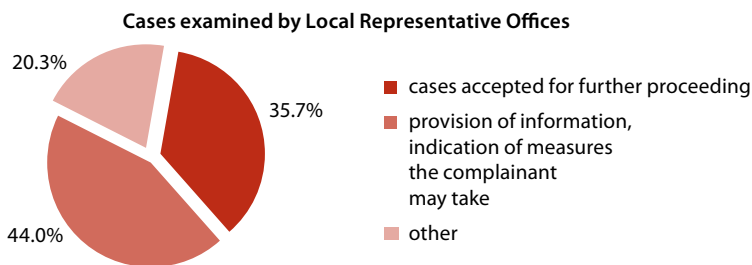
Problem area	Number of cases	% share
civil law	772	29.0
criminal law	574	21.5
labour law and social security	407	15.3
administrative and commercial law	376	14.1
law on enforcement of criminal sanctions	347	13.0



**In the period covered by this Report, 2 879 cases were examined by Local Representative Offices, including:**

Manner of examination	Number of cases	% share
cases accepted for further proceeding	1 028	35.7
– provision of information, indication of measures the complainant may take	1 266	44.0
– complaint referred to a competent authority	39	1.4
– complaint returned to the complainant for addition of necessary information	105	3.6
– not accepted for further proceeding <sup>9</sup>	441	15.3

<sup>9</sup> Complaints forwarded to the Commissioner as c/o; and complaints with unintelligible content.



**CHR Local Representative Offices completed 841 proceedings in cases initiated in 2016 and in previous years.**

Result	Reason for completion		Number of cases	% share
1	2		3	4
Outcome expected by the applicant achieved	1	<b>Total (2+3)</b>	<b>161</b>	<b>19.1</b>
	2	Applicant's claim confirmed	147	17.5
	3	CHR's general intervention successful	14	1.6
Proceedings discontinued	4	<b>Total (5+6)</b>	<b>72</b>	<b>8.6</b>
	5	Proceedings pending (ongoing procedure)	16	1.9
	6	CHR's discontinuation of proceedings (due to objective reasons)	56	6.7
Outcome expected by the applicant not achieved	7	<b>Total (8+9+10)</b>	<b>608</b>	<b>72.3</b>
	8	Applicant's claim not confirmed	587	69.8
	9	CHR's general intervention not successful	1	0.1
	10	Measures available to the CHR exhausted	20	2.4
<b>Total</b>			<b>841</b>	<b>100.0</b>

