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REPORT ON THE ACTIVITIES OF THE COMMISSIONER FOR HUMAN RIGHTS IN THE AREA OF EQUAL TREATMENT IN 2017

AND ON THE OBSERVANCE OF THE PRINCIPLE OF EQUAL TREATMENT IN THE REPUBLIC OF POLAND

2017

SUMMARY

The Report has been drawn up pursuant to Article 212 of the Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended). The provision stipulates that the Commissioner shall annually inform the Sejm and the Senate of his activities and of the state of compliance with human and civil freedoms and rights, including, as per Article 19(1)(1)-(3) of the *Act on the Commissioner for Human Rights* of July 15, 1987 (Journal of Laws of 2018, item 2179), of his activities in the area of equal treatment and results thereof, the compliance with the principle of equal treatment in the Republic of Poland, and the conclusions and recommendations for actions to be taken to ensure that the principle of equal treatment is respected. In addition, the Report has been drawn up pursuant to Article 19(2) of the *Act on the Commissioner for Human Rights* which makes its publishing obligatory.

This English-language document is a summary of the Report on the activity of the Commissioner for Human Rights in the area of equal treatment in 2017. The full version of the Report is available only in Polish.

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Foreword by the Commissioner for Human Rights

The principle of equal treatment and non-discrimination is one of the basic constitutional values. The positive obligations of the State in this regard stem both from national and international legislation. By the decision of the Sejm and Senate, the Commissioner for Human Rights is an independent body overseeing the implementation of this principle and, in line with the Act implementing certain European Union regulations on equal treatment, is legally obliged to analyse, monitor and support equal treatment of all persons. According to the legislator's intention, the Commissioner is also required to submit to the Sejm and the Senate annual reports on his/her activities in this area, in addition to general reports on the observance of human and civil rights and freedoms.

It should be emphasized that behind violations of the constitutional principle of equal treatment and non-discrimination there are problems of citizens, in particular groups vulnerable to social exclusion, such as senior persons, persons with disabilities, representatives of national or religious minorities and LGBT. An important part of my work as Commissioner for Human Rights was the holding of regional meetings across the country. During almost each of them, the participants raised problems relating to discrimination or exclusion. Both I and the representatives of my Office made effort to ensure that every such case is properly examined.

The wide range of problems relating to the implementation of the principle of equal treatment is also reflected by the statistical data on applications filed with the Commissioner's Office. The largest number of the reported cases clearly related to the protection of the rights of persons with disabilities (nearly every third case reported). This is of particular concern given the fact that reduction of person's physical or intellectual abilities may become a problem of every citizen due to illness, accident or old age. Therefore, public authorities should intensify their activities aimed at developing and implementing a support system for persons with disabilities, in accordance with the standards set out in the Convention on the Rights of Persons with Disabilities. There has also been an increase in the number of cases concerning discrimination on the grounds of nationality, which should be related to the intensification of the phenomenon of hate speech present in public space, including on the Internet, and to crimes motivated by prejudice. This is another area which requires a strong response from the state.

The examined cases and the conducted analyses justify the conclusion that Poland lacks sufficient guarantees of equal and effective protection against discrimination, available to all persons. For this reason, the Commissioner for Human Rights has to take proactive steps aimed not only at combating discrimination but, primarily, at preventing it. I took such steps in 2017 and will continue to take them in 2018.

Commissioner for Human Rights

Adam Bodnar, Ph.D.

Foreword by the Deputy Commissioner for Human Rights on Equal Treatment

Ms Jolanta, a patient with visual impairment, registered for a visit to an ophthalmologist. The visit concerned an eye prosthesis. She informed the doctor that she would be accompanied by her guide dog. After receiving this information, the doctor cancelled the visit. Before, he had refused health service provision to another person with such disability who was accompanied by a guide dog. The woman was not offered any other date for the visit, or any further support. She had to use services provided by another institution and, as a result, she received a lower quality prosthesis made of acrylic material instead of glass.

In this case, we started civil proceedings against the doctor. In the statement of claim we emphasized that the doctor violated the patient's dignity, thereby making her feel humiliated and helpless. She also had to look for another health service provider. We won the lawsuit, and the ophthalmologist who refused to see the blind woman because of the fact that she was accompanied by a guide dog had to pay, as a penalty imposed by the court, the amount of PLN 10,000 for a social purpose.

The Commissioner for Human Rights as Poland's equality body protects the rights of persons who are discriminated against and excluded on the grounds of gender, race, ethnic origin, religion, creed, belief, age, sexual orientation or disability, as happened in the case of Ms Jolanta. To this end, we take part in court proceedings but first of all, we take steps to convince competent authorities to amend related legislation or the methods of its application in practice.

For the last several years, we have been monitoring cases of violation of human rights of people who experience discrimination in all areas of life, and have been reacting to them. We counteract discrimination against older persons in health care. We also take steps to ensure support provision to them in their place of residence instead of under institutional care systems. We seek full exercise of women's rights in the field of perinatal care, including access to anaesthesia during childbirth, and we oppose stereotypes concerning violence against women. We highlight the need to support the reconciliation of family and professional roles by women and men. We are concerned about the increase in the number of crimes motivated by prejudices or hatred, e.g. against people of other race, ethnic origin, nationality or religion, and we raise awareness of the problem among competent state authorities. We support the introduction of a procedure of gender recognition for transgender persons, which will not require them to start a lawsuit involving their parents and children and thus causing further traumatic experience. We speak out about violations of the right to privacy of gays and lesbians who do not even have the right to bury their partners. These are just selected examples of the Commissioner's involvement in counteracting discrimination, exclusion and violence.

The latest 3rd edition of the Congress of Persons with Disabilities was held in autumn 2017. Its motto, *For independent living,* may apply to the rights of persons with disabilities and senior persons. It is worth remembering that every person, regardless of gender, race, ethnic origin, nationality, religion, belief, age or sexual orientation has the right to a life free from discrimination, exclusion and violence motivated by prejudice or justified by stereotypes. Our experience gained in 2017 and in the earlier years shows that there is still a lot to do in this area, and thus as the equality body we have the obligation to take steps and we will continue our activities in the next years.

Deputy Commissioner for Human Rights on Equal Treatment

Sylwia Spurek, Ph.D.

I. Activities of the Commissioner of Human Rights in the field of equal treatment and results achieved: general interventions, selected individual cases and other actions

This chapter describes activities taken by the Commissioner with the aim to ensure equal treatment regardless of racial or ethnic origin, nationality, religion or belief, gender, sexual orientation, gender identity and age. Information is also provided on the Commissioner's actions aimed at protecting the rights of migrants and persons seeking international protection in Poland. Information on counteracting discrimination on the grounds of disability is presented in a separate chapter in view of the Commissioner's tasks relating to the promotion, protection and monitoring of the implementation of the *Convention on the rights of persons with disabilities*.

1. Counteracting discrimination on the grounds of racial or ethnic origin, nationality or religion

Attacks on racial, national, ethnic or religious grounds against foreigners residing in Poland

In 2016 the Office of the Commissioner recorded around 60 cases concerning acts of violence and hate speech motivated by one's nationality, ethnicity, race or religion. In 2017, the number increased to around 100. Some cases related to the hate speech, defined as public incitement to hatred or public insulting of individuals or groups of individuals on any of the above-mentioned grounds. Hate speech typically took the form of posts placed on internet forums or websites as well as anti-migration banners used during street demonstrations. The remaining cases were related to the use of violence against persons of different nationality or ethnicity or individuals associated with a different religion. The Commissioner intervened, among others, in cases of assault against a Bangladeshi citizen in Legnica, and beating of a Saudi citizen in Zakopane, a Hindu student in Poznań and a Ukrainian citizen in Warsaw. The Commissioner also intervened in the case of an assault on Israeli athletes in a hotel in Sochocin, beating of a Chechnya citizen in the Warsaw district of Wola, insult and violation of bodily integrity of a Ukrainian citizen in Opole and a group attack on foreigners in one of Wrocław kebab bars.

The Commissioner was also monitoring how representatives of authorities responsible for prosecution of such conduct comment on such phenomena in public. The Commissioner addressed the Commander-in-Chief of the Police regarding a message published on the website www.policja.pl, whose author called the increase in the number of hate crimes committed on Muslims and persons of Arab origin residing in Poland "alleged". In his intervention, the Commissioner observed that an increased number of hate crimes against Muslims and persons of Arab descent recorded by the law enforcement agencies is a fact that is confirmed, primarily, in statistics maintained and published by both, the Police as well as the Prosecution[1]. In reply, the Commander assured the Commissioner[2] that police actions in the field of hate crimes correspond to the scale of risk of that type of criminality.

Situation of the Muslim community in the context of hate speech and hate crimes

Despite the fact that Poland has not been affected by the migration crisis and has not even become the ultimate destination for migrants willing to settle in Europe, the issue of migration is present in the public and political domain. The economic, social or cultural aspects concerning the phenomenon of migration entered public discussion and become a subject of public debate. Unfortunately, in the view of the Commissioner, the quality of that debate quickly started raising serious concerns.

The language of the debate soon got radicalized. The phenomenon was described by the Public Debate Observatory of the magazine entitled *Kultura Liberalna* [*Liberal Culture*], in the report entitled: *Negative image of Muslims in the Polish press.* The report was developed and published in 2017 at the request of the Commissioner for Human Rights[3]. Based on the monitoring of texts published by over ten leading press titles on the market, conducted in the period from September 2015 to September 2016, researchers described the contexts in which topics concerning Muslims, migrants and refugees were presented (the context-building words, although not synonymous, were often used in the publications interchangeably). As it turned out, the picture painted by the media in articles about the migration crisis in Europe was dominated by the contexts (or metaphors) of *attack, invasion, civilization clash*, or even *alternative war* in which methods such as *terrorism* and "*social jihad*" were used. The radicalization of the media language was particularly visible in its hyperbolization, as observed by the researchers. It consisted in the gradual replacement of neutral terms with their negatively loaded equivalents (for example, the word *influx* in the context of migrants/refugees was replaced by such pejorative terms as a *wave, flood, tsunami, incursion or invasion*). In relation to the outcomes of the analysis, the Commissioner organized consultation meetings between the representatives of the Muslim community and journalists[4] as well as politicians from various parties[5].

1 XI.518.70.2016 of 23 January 2017.

2 Letter of 1 February 2017.

3 The English translation of the report is available on the website www.rpo.gov.pl, under: https://www.rpo.gov.pl/sites/default/files/The_Negative_Portrayal_of_Muslims_in_the_Polish_Press.pdf.

4 See: memo from the meeting held on 1 February 2017. Portrayal of Muslims in the Polish press. How can we counteract hate speech and support the presentation of reliable information:https://www.rpo.gov.pl/pl/content/sniadanie-prasowe-na-temat-jezyka-prasowego-opisujacego-spolecznosc-muzulmanska-w-polsce.

5 See:memo from the meeting held on 28 February 2017. Hate speech: meeting of politicians and representatives of the Muslim community in the Office of the Commissioner: https://www.rpo.gov.pl/pl/content/mowa-nienawi%C5%9Bci-spotkanie-polityk%C3%B3w-i-przedstawicieli-%C5%9Brodowis-

The radicalization of the media language and, consequently, of the society' attitudes becoming adverse towards migrants or persons of various national, ethnic and religious backgrounds was accompanied by an increase in the number of behaviours which are penalized by the Polish Criminal Code as hate crimes. The increasing scale of crimes against Muslims or persons of Arab descent is confirmed, among others, by data on the number of preparatory proceedings conducted by prosecutor's offices across the country in hate crime cases. The data is published annually by the National Prosecutor's Office[6]. In the report for 2017, the National Prosecutor's Office indicated that since 2016 Muslims or persons associated with this religion were the most frequent targets of attacks motivated by prejudice. In as many as 363 cases recorded in 2016 what motivated the perpetrators was the fact that the victim or victims were allegedly or actually Muslim. That number, in comparison with 2015, almost doubled. In 2017 the growing trend prevailed and Muslims were still the main target of hate-motivated crimes[7].

ka-muzu%C5%82ma%C5%84skiego-w-biurze-rpo.

6 See: www.pk.gov.pl.

7 The Prosecutor's Office recorded 328 of such cases, which constituted more than 20% of all (1 415) preparatory proceedings conducted at that time in hate crime cases.

Promoting good practices in order to limit the phenomenon of hate speech on the Internet

The Commissioner got involved in the promotion of the European Code of Conduct on countering illegal hate speech online which was prepared by the European Commission in 2016[8]. It was Commissioner's response to the phenomenon of hate speech online, that the State Prosecutor's Office also recorded. In the last report, the Prosecutor's Office compared data on hate crimes in the first half-years of 2017, 2016 and 2015 and demonstrated that the majority of offenses reported in that period was committed by means of the Internet - offenses committed online accounted for over 40% of preparatory proceedings conducted with reference to hate crimes at that time. The Code mentioned above constitutes a voluntary obligation of Internet operators to observe certain uniform rules of conduct in case of publication of hate-promoting entries on online portals. The rules of conduct proposed by the Code refer, among others, to the obligation to delete or block such entries, creation of notification procedures and dissemination of knowledge among Internet users about what content is prohibited and how one should react in case of encountering it. On 27 January 2017 the Office of the Commissioner was the venue for the conference which aimed at promoting the Code. The conference, apart from the Commissioner, was attended by experts from the European Commission, the European Parliament as well as the representatives of the Polish authorities, Internet portal operators and social organizations dealing with the discussed issue[9].

The Commissioner's comments concerning the implementation of the Programme for the integration of the Roma community in Poland in 2014-2020. Consequences of "positive actions"

Some local Roma communities, especially from the Małopolskie voivodeship, have been living in extremely poor housing conditions for many years and have been often totally excluded from social and economic life. Those communities are not able to improve their situation without external assistance. Therefore, their situation depends, to a large extent, on the support from the state and, in particular, the involvement of the local self-government units. The possibility to use funds secured under the *Programme for the integration of the Roma community in Poland in 2014-2020*[10] (hereinafter: the Roma Programme), which could also be allocated for the improvement of living conditions, seems to be significantly insufficient. No cooperation between local communities and local authorities or even an obvious conflict between them often make it impossible to deliver actual assistance to the Roma and use the funds from the Programme in an effective way.

The Commissioner has been monitoring the situation in Roma settlements for several years. Commissioner's representatives have, on multiple occasions, inspected settlements located in

8 See more: Countering illegal hate speech online #NoPlace4Hate: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300.

9 for details of the debate see the website: www.rpo.gov.pl/pl/content/konferencja-na-temat-nawolywania-do-nienawisci-w-internecie-27012017.

10 Resolution No. 202/2014 of the Council of Ministers of 7 October 2014.

Małopolskie voivodeship - in Koszary near Limanowa, Maszkowice, Ochotnica Górna, Krośnica, Czarna Góra and Zadział near Szaflary[11]. On 13 July 2017 such an inspection visit was performed again in the settlement in Maszkowice.

The settlement, inhabited by around 270 persons, comprises a group of residential and utility buildings that were largely constructed several decades ago[12]. The standard of those buildings is dramatically low. The quality of construction materials, the way they were used as well as the passage of time have rendered most of the buildings unsuitable for housing people. Most of them pose a real threat to the health of their residents. The authorities of the Łącko commune, by means of the funds from the Roma Programme, conduct repair and construction activities, which are supposed to improve the conditions prevailing in the settlement. Yet, work that has been performed so far was not comprehensive in nature. The local authorities of Łącko commune concentrated on the project associated with the relocation of at least part of settlement residents to new houses or apartments. In 2016 the commune received a subsidy from the Roma Programme for the purchase of real estate for Roma families living in the settlement. Some Roma, however, did not welcome that project - they were afraid that it would be the only form of assistance from the commune and its implementation would entail compulsory relocation for settlement inhabitants. Ultimately the project was not implemented and the commune returned the majority of received funds. Some resources were allocated for the purchase of one residential container for the family who lost their home in a fire. A little child was the casualty in the said fire.

What still remains to be solved is the problem of land use violations. This is the status of some buildings in the settlement. In February 2017 the District Inspector of Building Control in Nowy Sącz issued decisions ordering the demolition of as many as 34 of such unpermitted structures. The head of the Łącko commune appealed against those decisions as the commune, the owner of the land on which the settlement is located, is a party to the said decisions. At the same time, the Commissioner received information about instances of fines amounting up to 40 thousand zloty that were imposed on Roma residing in unpermitted buildings. The Commissioner is investigating that case and is awaiting detailed information in that respect[13].

Observations made during inspection visits made the Commissioner believe that dreadful living conditions prevailing in Roma settlements are not attributable to the lack of financial resources for assistance measures. Such resources are, namely, provided under the Roma Programme. What constitutes a problem, however, is the lack of a comprehensive strategy that could be initiated, under the current conditions, by local authorities who, in most cases, own the real estate on which the settlements are located. The inspection visit also showed that the suggestions concerning modifications in the Roma Programme, put forward by the Commissioner in previous years, remain relevant. Talks with representatives of Łącko commune gave

11 See: Report on the visits to Roma settlements, Office of the Commissioner for Human Rights, Warszawa 2014.

12 The settlement dates back to the end of 1940's.

13 XI.816.1.2018.

rise to the idea that legal conditions should be created to allow individuals (e.g. inhabitants of the Roma settlements) to apply for funding.

The problem of living conditions prevailing in Roma settlements, in particular the issue of allocating funds from the Roma Programme for the improvement of those conditions, will still be monitored.

Since 2015, the Commissioner has been conducting explanatory proceedings concerning a project implemented by the municipal authorities of the town of Limanowa aimed at the improvement of conditions in which several Roma families from that town live[14]. The authorities of Limanowa purchased new houses, including one in the town of Czchów (commune of Czchów) for the Romani who used to reside in the council building. The purchase was co-funded under the Roma Programme. The mayor of Czchów, having learned about the plans to relocate the Roma from Limanowa to his municipality, issued a prohibition to use the building purchased by Limanowa authorities for residential purposes[15]. The governor of Małopolskie Voivodeship, as a supervisory body, challenged the prohibition and the approving resolution of the Czchów Municipality Council before the Voivodeship Administrative Court in Kraków, and the Commissioner joined the proceedings initiated by the Court[16].

The Voivodeship Administrative Court in Kraków declared the prohibition issued by the mayor of Czchów and the resolution of the Czchów Municipality Council approving the prohibition null and void. [17]. The court ruled that none of the above acts met the requirements specified in the Local Government Law[18] authorizing local authorities to issue order regulations. In the opinion of the court, the challenged order as well as the approving resolution, by prohibiting the use of the building, in an unjustified manner restricted the constitutional right to property which is guaranteed in Article 21 of the Constitution. Moreover, what the Voivodeship Administrative Court also saw in the conduct of the mayor and city council of Czchów was a violation of the constitutional principle of equality before the law and the non-discrimination in political, social or economic life, which principle arises from Article 32(1) and (2) of the Constitution. The prohibition to use the property also violated Article 52(1) of the Constitution which provides for the freedom of movement and selection of the place of residence as well as Article 47 of the Constitution and Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms[19], which protect the right to private life against unjustified interference from public authorities. Since the challenged prohibition to use the property referred only to individuals of Roma nationality and the local authorities of Czchów were aware of that and confirmed that in justifications to the two acts they passed,

14 S. Information on the activity of the Commissioner for Human Rights in 2016, p. 424.

15 Order of the mayor of Czchów No. 12/2016 of 17 February 2016, approved by the resolution of the City Council in Czchów No. XIII/139/2016 of 16 March 2016.

16 XI.816.13.2015, letter of 30 June 2016.

17 Judgement of 1 February 2017 (case file No. III SA/Kr 679/16).

18 Act of 8 March 1990 (Journal of Laws - Dz.U. of 2016, item 446, as amended).

19 Convention of 4 November 1950 (Journal of Laws - Dz.U. of 1993, No. 61, item 284, as amended).

the Voivodeship Administrative Court determined that by violating Article 8 of the Convention which provides for the protection of private life, the two bodies also breached Article 14 of the said Convention which stipulates that enjoyment of rights and freedoms specified in that act should be possible without any discrimination on such grounds as race, nationality or belonging to a given national minority.

The mayor of Czchów made a cassation appeal to the Supreme Administrative Court. In response, the Commissioner argued for the dismissal of the appeal[20].

In 2017 legal proceedings were pending before the District Court in Limanowa. The proceedings brought by the Commissioner against the Limanowa municipality concerned the discontinuation of enforcement of enforceable titles based on which prior enforcement proceedings were instigated with the aim to make Roma residents vacate the building and hand it over[21]. The District Court dismissed the actions brought by the Commissioner[22]. The Commissioner appealed against that decision[23].

2. Protection of the right of migrants and persons applying for international protection in Poland

Annulment of the Polish migration policy document by the Council of Ministers and work on the new programme

The Council of Ministers, following the request of the Minister of the Interior and Administration, annulled the document entitled *Poland's migration policy* which was in force since 2012 and constituted the first attempt at creating a comprehensive state strategy in the field of migration. That strategy, among others, recommended facilitating the legalization of foreigners' stay in Poland, streamlining their access to the labour market and creating systemic integration programmes. The document also emphasized the need to undertake measures aimed at promoting the idea of intercultural dialogue and disseminating reliable information about the phenomenon of migration, at the same time giving consideration to the issue of state security, the need for effective border protection and counteracting unregulated migration. The Commissioner shared the opinion of the Minister of the Interior and Administration that the document in question, which was adopted in 2012, fails to address the challenges associated with the migration crisis in Europe. Still, the Commissioner[24] requested the Minister to present an estimated work schedule on the new migration policy and indicate its priorities and main assumptions.

20 In the judgement of 12 January 2018 the Supreme Administrative Court dismissed the cassation appeal (case file No. I OSK 1633/17).

21 Cf. Information on the activity of the Commissioner for Human Rights in 2016, p. 424.

22 Judgement of 20 March 2018 (case file No. I C 3/17).

23 Letter of 8 May 2018.

24 XI.540.15.2017 of 13 April 2017 and 1 December 2017.

In reply, the Minister notified the Commissioner of the commencement of work on the said strategy as well as the adopted allocation of tasks between particular ministries and established work groups. He also assured the Commissioner that work on the migration policy will be comprehensive in nature. As he pointed out, it is one of the priorities for the work of the ministry in 2018[25]. The Commissioner is going to monitor the progress of work on the new migration policy in Poland.

The Minister of the Interior and Administration also informed[26] that work on the Polish accession to the Convention on the Reduction of Statelessness and on the Status of Stateless Persons - as postulated by the Commissioner - has been suspended until binding decisions are reached with respect to the new migration policy of Poland.

Crisis on the eastern border of the Republic of Poland - procedures exercised with respect to foreigners on border crossings in Terespol and Medyka

In 2017, just like in 2016, the Office of the Commissioner received information about a significant number of foreigners who attempted, unsuccessfully, to enter the territory of Poland through border crossings in Terespol (border with Belarus) or Medyka (border with Ukraine) with a view to applying for international protection (the refugee status) in Poland. Pursuant to the *Act on the protection of foreigners on the territory of the Republic of Poland*[27], declarations made at the border crossing during the clearance procedure concerning the intention to apply for this type of protection should result in foreigner's admission to Poland and acceptance by the Border Guard of a relevant application for this protection. The examination of the applications is the task of the Head of the Office for Foreigners and until the final decision is made a given foreigner can legally stay in Poland. Yet, as the complaints received by the Commissioner indicate, in many instances the Border Guard officers on duty during the clearance procedure at the border crossing failed to acknowledge the declarations made by foreigners and prevented them from submitting application for the protection in question. As a result, since foreigners did not have any documents authorizing them to cross the border, they were refused the right to enter Poland based on relevant administrative decisions and they were turned back to Belarus or Ukraine. Despite such refusals, foreigners repeated their attempts to cross the border, often with the same result. Complainants included persons who claimed that they had experienced violence or torture in their countries of origin. Sometimes foreigners had documentation, also photographic one, which could validate that fact.

The Commissioner has been monitoring the situation on the eastern border since at least 2015. That issue was also investigated by the representatives of the Office of the Commissioner during unannounced visits to Terespol and Medyka in 2016. Those visits revealed that there is a significant legal gap concerning the rights of foreigners undergoing border check

25 Letter of 5 December 2017.

26 Letter of 1 September 2017.

27 Act of 13 June 2003 (Journal of Laws - Dz.U. of 2016 1836, as amended).

who request international protection and the duties of Border Guard officers in the field of accepting declarations made by foreigners about the intent to seek such protection. No applicable legal provision specifies, namely, how the Border Guard officer conducting border check at the crossing should record the fact that a foreigner expressed the intention of applying for international protection in Poland. Performed visits explicitly demonstrated the need to make the obligations of officers with respect to documenting the interview with foreigners at the border check (the so called preliminary questioning) more precise and uniform. In the opinion of the Commissioner, interviews with foreigners during border checks should, as a rule, be documented using uniform interview forms that include, as an obligatory item, the question whether the foreigner intends to seek international protection in Poland. With that in mind, the Commissioner requested the Chief Commander of the Border Guard[28] to consider initiating actions aimed at amending the currently applicable procedures by, among others, preparing relevant guidelines.

The Chief Commander of the Border Guard did not share the view of the Commissioner concerning the need to draw up minutes from the interviews conducted with foreigners at the border check. In the reply addressed to the Commissioner, the Commander observed that[29] the interview is not an administrative task but an element of the border check, therefore preparing the minutes from the preliminary questioning is not justified. The Commander also assured the Commissioner that BG officers allow every foreigner turning up for the border check who has no legally required documents (e.g. visa) to state his/her intended purpose for coming to Poland. The Commissioner also referred to the situation on the eastern border of the Republic of Poland in an intervention to the Minister of the Interior and Administration[30]. The Commissioner, based on the results of inspection visits performed in 2016 on border crossings, argued for making applicable regulations more precise, also with regard to the method of documenting interviews (preliminary questionings) conducted during border checks by BG officers with foreigners who fail to meet the requirements for the entry on the territory of Poland. Just like in the correspondence with the Chief Commander of the Border Guard, the Commissioner emphasized again that it is necessary to establish a principle of documenting such interviews and asking foreigners about their intention to apply for international protection in Poland. The Minister of the Interior and Administration, however, failed to acknowledge Commissioner's request. In reply to the intervention made by the Commissioner, he only stated that BG officers draw up official memos describing the circumstances determined during the border check, also the declared purpose of foreigners' arrival to Poland.

28 XI.543.19.2017 of 7 April 2017.

29 Letter of 8 May 2017.

30 XI.543.10.2017 of 13 February 2017.

The refusal to apply interim measures recommended by the European Court of Human Rights or the UN Human Rights Committee

The Commissioner received further information about decisions refusing entry into Poland to foreigners with regard to whom the European Court for Human Rights or the UN Human Rights Committee had made recommendations to implement interim measures consisting in temporary postponement of deportation to a country from which they attempted to enter Poland. All reported cases referred to foreigners seeking to enter Poland via the railway border crossing between Poland and Belarus in Terespol. In complaints submitted to the Commissioner, foreigners, with regard to whom interim measures had been recommended, turned up for border control and the Border Guard denied them entry into Poland despite being aware of the nature of the recommended interim measures.

In the correspondence related to one of such cases the commander of the Border Guard Unit in Terespol presented the stance according to which the recommended interim measure could not have any impact on border check procedures as the foreigner only turned up for the border check and was not officially on the territory of Poland at that point.

Having analysed that standpoint, the Commissioner requested[31] the Chief Commander of the Border Guard to take a stance in that matter too. In his next interventions the Commissioner emphasized that even though the foreigner did not enter the territory of Poland, when he was being verified at the border crossing in Terespol, he remained under the jurisdiction of Polish authorities, i.e. the commander of the local Border Guard station. He was also a party to administrative proceedings conducted by that BG unit and it is based on the administrative decision that was passed in those proceedings that he was refused the right to enter. Under those circumstances, in the opinion of the Commissioner, the recommended application of interim measures, which was known to the authority conducting the procedure, could have been taken into consideration in the course of the proceedings that resulted in the said decision. According to the Commissioner, what should constitute the legal basis for granting permission for entry on the territory of Poland to a foreigner with respect to whom the above-mentioned interim measure was adjudicated, is Article 32 (1) of the *Act on foreigners*[32]. Pursuant to that provision, the commander of the Border Guard station, with the approval of the Chief Commander of the Border Guard, may grant a foreigner the right to enter and stay in Poland for the period of up to 15 days when the respective foreigner fails to meet other entry conditions. That provision is related to the Schengen Border Code[33] which provides for the possibility to allow a third party citizen, who fails to meet one or more conditions for admission to a member state, to enter that country if it is required, *inter alia*, pursuant to international obligations of that state. What constitutes such an obligation, in the opinion of

31 XI.543.33.2017 of 23 June, 1 August and 24 October 2017.

32 Act of 12 December 2013 (Journal of Laws - Dz.U. of 2017, item 2206, as amended).

33 Regulation of the European Parliament and the Council (EU) 2016/399 dated 9 March 2016 concerning the principles governing the free movement of individuals across borders (Schengen Borders Code, consolidated text OJ L.2016.77.1, as amended).

the Commissioner, is the cooperation with the European Court of Human Rights, Poland's submission to its jurisdiction and observance of its recommendations.

In response to successive interventions of the Commissioner, the Chief Commander of the Border Guard argued that[34] the solution provided for in Article 32 (1) of the *Act on foreigners* cannot be automatically equated with recommended interim measures. According to the standpoint adopted by the Chief Commander of the BG, when adjudicating interim measures, the European Court of Human Rights requests the Polish side not to deport a given person from the territory of Poland. Yet, a foreigner who has never crossed the border leading to the Republic of Poland cannot be deported from its territory. In that respect the Chief Commander of the Border Guard shared the view presented in an individual case by the commander of the Border Guard station in Terespol.

Refusal of access to classified information in proceedings concerning granting of international protection to foreigners on the territory of the Republic of Poland

The Commissioner joined the proceedings before the Voivodeship Administrative Court in Warsaw concerning the complaint made by the Helsinki Foundation for Human Rights regarding the decision of the Council on Refugees which upheld the decision of the Head of the Office for Foreigners. As a result of the said decision, the foreigner (a citizen of Iraq) was denied the status of a refugee and refused subsidiary protection. The reason for the Commissioner's intervention was that the representative of the foreigner in the administrative proceedings had no access to confidential information that had been gathered in the case and provided the grounds for the decisions that were unfavourable for the foreigner. Both, the Head of the Office for Foreigners and the Council on Refugees refused to provide factual justification of their decisions.

In the procedural document[35] the Commissioner acknowledged that national legislation, including the Administrative Proceedings Code [36] and the *Act on the protection of foreigners on the territory of the Republic of Poland*[37], applicable in this case, do provide for the refusal of access to confidential case files and for refusal to provide factual justification for an administrative decision insofar as it concerns confidential information. However, in the Commissioner's opinion, national legislation is at odds with the provisions of the Directive 2013/32[38], according to which access of a foreigner's representative to the case files may be limited only if the given Member State has implemented procedural guarantees that alleviate the consequences of such limitation, and according to which a Member State which has rejected an application

34 Letter of 4 July 2017.

35 XI.542.12.2016 of 8 November 2017.

36 Act of 14 June 1960 (Journal of Laws - Dz.U. of 2017, item 1257).

37 Act of 13 June 2003 (Journal of Laws - Dz.U. of 2016, item 1836, as amended).

38 The directive of the European Parliament and the Council 2013/32/EU dated 26 June 2013 on joint procedures for granting and withdrawing international protection (recast, OJ L.2013.180.60).

is obliged to provide factual and legal justification of the rejection in writing[39]. The procedural guarantee mentioned by the directive consists in granting access to information or sources which have impact on the provision of international protection to a counsel or authorized representative, who is subject to verification in terms of personal security.

According to the Commissioner, the fact that the authorities in the cited case have applied national legislation despite its inconsistency with EU law has resulted in the violation of Article 47 of the Charter of Fundamental Rights of the European Union[40], which guarantees the right to an effective appeal. In consequence, the Commissioner requested the dismissal of the challenged decision of the Council on Refugees and the preceding decision of the Head of the Office for Foreigners. If the Voivodeship Administrative Court had not shared the interpretation of the provisions of the directive 2013/32, adopted by the Commissioner, the Commissioner would have suggested referring a question to the Court of Justice for a preliminary ruling.

Ultimately the Voivodeship Administrative Court dismissed the compliant of the Helsinki Foundation for Human Rights and refused to acknowledge reservations made by the Commissioner[41]. In the opinion of the court, the Polish legal system guarantees the right to an effective appeal to a party of the proceedings as the complainant may use a number of means of challenge, i.e. appeal to the administrative body, complaint to the voivodeship administrative court as well as the cassation appeal and all bodies examining the above-mentioned means of appeal have access to classified files. No EU regulations, according to the court, provide for the obligation of a member state to share classified information, whose disclosure may be deemed by the respective country as inconsistent with its essential security interests. In the view of the court, what can constitute procedural guarantees, whose existence allows for restricting access to classified case files to a foreigner's representative pursuant to directive 2013/32, is the deformalized nature of the appeal procedure - the full appellate review may be initiated based only on dissatisfaction with the challenged decision. The appeal body is not bound by the argumentation contained in the appeal and it is obliged to examine the case from scratch, taking into account all factual circumstances, also those unknown to the claimant. The Voivodeship Administrative Court indicated the Commissioner as a body which in the Polish legal system should play the role of a "special representative" and thus realize procedural guarantees to defence, provided for the in the provisions of the directive 2013/32. Based on the foregoing, the court considered posing a question to the Court of Justice of the EU for a preliminary ruling groundless.

The Commissioner decided to make a cassation appeal to the Supreme Administrative Court in that case[42].

39 Article 23 (1) and Article 11 (2) of the directive 2013/32.

40 OJ. C.2007.303.1 of 14 December 2007.

41 Judgement of 24 November 2017 (case file No. IV SA/Wa 1612/17).

42 Letter of 5 January 2018.

Selected issues concerning the employment of foreigners

The Commissioner is monitoring changes in law concerning the legal employment of foreigners in Poland. That issue was discussed during the sitting of the Expert Committee on Migrants[43]. What was discussed together with experts and the representative of the Ministry of Family, Labour and Social Policy were changes in the *Act on the promotion of employment and labour market institutions*[44], introduced as an amendment to the above-mentioned act on 20 July 2017 in connection with the implementation to the Polish legal system of Directive 2014/36/EU of 26 February 2014 of the European Parliament and the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers[45]. Additionally, what was also discussed was the problem of a time-consuming and arduous procedure for obtaining temporary or permanent residence permit by foreigners. What poses a significant challenge is the organization of the voivodeship offices, lack of designated dates for accepting applications or correcting formal irregularities. Such a portrayal of major problems is also reflected in complaints made in the course of explanatory proceedings received by the Commissioner. That issue remains on the Commissioner's agenda.

The Commissioner once again[46] indicated that the problem of limited access of patients to medical specialists remains valid and employing doctors specializing in respective fields could alleviate it. Information presented by the Minister in response to the previous Commissioner's intervention shows that in Germany foreigners may apply for a permit to perform a profession - the so called *Berufserlaubnis*. It is a form of a limited right to perform a profession. A doctor may only exercise his/her profession in a place and on a position that was designated as his/her workplace (hospital or another unit) and on conditions specified in that document (scope of activities that a given doctor is authorized to perform). The Commissioner requested[47] the Minister of Health to analyse whether introducing an analogical solution to the Polish legal system could improve the accessibility of doctors and specialized doctors for patients under healthcare services financed from the state budget. The Minister informed[48], that the health ministry started adapting and incorporating German solutions to the Polish law with respect to granting work permits to foreigners wishing to work as doctors in a specified workplace and scope by amending the *Act on the professions of doctor and dentist*.

The Commissioner also pointed out the problem of restricted access to public service for judges, assistant judges and jurors resulting from the new requirement concerning the exclusive possession of the Polish citizenship[49]. In the opinion of the Commissioner, the rule of access to public service must be objective in nature and allow different candidates to apply for

43 See more: III part of this Information.

44 Act of 20 April 2004 on the promotion of employment and labour market institutions (Journal of Laws - Dz.U. of 2017, item 1065, as amended).

45 OJ L 94 of 28.3.2014.

46 Information of the Commissioner for 2016, p. 198.

47 V.7014.15.2016 of 24 February 2017.

48 Letter of 6 April 2017.

49 Cf. parliamentary document No. 2003 - draft act on the Supreme Court.

admission to such a service in accordance with the principle of equal opportunities, without any form of discrimination or unjustified restrictions. The Commissioner highlighted that the justification to the draft act on the Supreme Court fails to indicate any reason for the introduction of that requirement in relation to candidates. Pursuant to the provisions of the *Act on Polish citizenship*, a Polish national that also has a citizenship of another country has the same rights and obligations towards the Republic of Poland as an individual that has Polish citizenship only. Pursuant to Article 60 of the Constitution, Polish nationals with full citizens' rights have the right to access public service on equal principles. In this context the Commissioner requested[50] the Speaker of the Sejm of the Republic of Poland to acknowledge such reservations in the course of the legislative procedure. Unfortunately, the Commissioner's request was not fulfilled.

3. Combating discrimination on the grounds of gender

3.1. Protection against violence on the grounds of gender and domestic violence

Draft motion to denounce the Istanbul Convention

The Commissioner was alarmed by media reports according to which government ministries are working to denounce the Council of Europe Convention on Preventing and Combating of Violence against Women and Domestic Violence. The entry into force of the Convention was a breakthrough in ensuring the protection of the fundamental rights and freedoms of women suffering from gender-based violence. The Commissioner requested[51] the Minister of Justice to send a copy of the draft motion to denounce the Convention together with the justification and all other documents related to the denouncement. In response to the Commissioner's inquiry, the Minister of Justice[52], stated that no steps were being taken to denounce the Convention. The Commissioner did not receive any documents in that case.

Also, a non-governmental organization attempted to gain access to the documentation which constituted public information. Given that there was no response, a complaint about the failure to act was lodged and the Commissioner also got involved in the case[53]. The Voivodeship Administrative Court in Warsaw obliged the Minister to examine the request of the organization[54]. The case is still pending.

50 VII.561.8.2017 of 29 November 2017.

51 XI.816.1.2015 of 9 January 2017.

52 Letter of 13 February 2017.

53 VII.6060.42.2017 of 11 September 2017.

54 Judgement of 16 November 2017 (case file No. II SAB/Wa 306/17). The Minister of Justice made a cassation appeal to the Supreme Administrative Court (case file No. I OSK 416/18).

Difficulties in access to specialized support centres

The scope of tasks addressed to domestic violence victims is specified by the provisions of the *Act on counteracting domestic violence*[55]. Various forms of assistance offered to persons affected by domestic violence include provision of support in the process of obtaining an apartment or ensuring a safe shelter in a specialist centre supporting domestic violence victims. In line with the statutory authorization, a regulation[56] should establish a standard for basic services provided by the specialist centres supporting domestic violence victims. In the opinion of the Commissioner, the legislation raises concerns with respect to the fulfilment of requirements specified in the Constitution which stipulates that regulations are adopted for the purpose of implementing an act. Delegated legislation, namely, fails to provide for any rules concerning, for example, the mode and method of admitting persons in need to the specialist centre supporting domestic violence victims. What is also alarming is information reaching the Commissioner that persons requiring specialized support are refused admission to specialist centres without providing any justification for such a refusal. Such persons are ultimately sent to centres which are not able to offer specialized assistance. Arbitrary method of extending stays in specialist centres is also raising concerns.

Correctional and educational programmes for domestic violence perpetrators

The scope of the *Act on counteracting domestic violence* also includes persons using violence against family members. The provisions of the act do not specify, however, the nature of the correctional and educational measures that violence perpetrators should be subject to. Moreover, detailed directions of how those correctional and educational measures should be implemented with respect to violence perpetrators as well as the qualifications of persons conducting correctional and educational activities have been agreed to be determined in a regulation. Application of correctional and educational measures imposes certain limitations and obligations on citizens. Pursuant to the Constitution, however, limitations concerning the enjoyment of constitutional rights and freedoms can only be imposed by an act. Transferring full mandate for determining the details of correctional and educational measures in a regulation may, in the opinion of the Commissioner, raise concerns as to the compliance of the delegated legislation with constitutional norms. Moreover, in the opinion of the Commissioner, one should consider applying less formal admission and participation rules in relation to individuals who sign up to take part in the correctional and educational programme of their own volition. The Commissioner requested[57] the Minister of Family, Labour and Social Policy to take a stance on the discussed issues.

55 Act of 29 July 2005 (Journal of Laws - Dz.U. of 2015, item 1390).

56 Regulation of the Minister of Labour and Social Policy of 22 February 2011 on the Standard of Basic Services Provided by Specialist Centres Offering Support for Domestic Violence Victims, on the Qualifications of Staff Employed in those Centres, on the Details of Correctional and Educational Measures with regard to Domestic Violence Perpetrators and on the Qualifications of Staff Responsible for Correctional and Educational measures (Journal of Laws - Dz.U. of 2011, No.50, item 259).

57 III.518.16.2016 of 24 November 2017.

Also people serving prison terms for committing violence against women and for domestic violence should be covered, during their stay in penitentiary institutions, by measures aimed at preventing them from further use of violence. The court may impose an obligation on the domestic violence perpetrator to participate in the correctional and educational programme. Yet, statistical data show that the number of cases in which criminal courts impose such an obligation remains low. It is necessary to step up efforts aimed at increasing the number of requests directed to courts in that matter as well as increasing the number of court rulings imposing the said obligations on domestic violence perpetrators. Furthermore, it can be argued that courts should obligatorily impose an obligation to take part in the correctional and educational programme on domestic violence perpetrators who received a suspended sentence. Given the above, the Commissioner requested [58] the Minister of Justice to take actions aimed at increasing the effectiveness of measures addressed at domestic violence perpetrators. Moreover, the Commissioner observed that the applicable regulations do not provide for the possibility to impose the obligation to participate in the correctional and educational programme on perpetrators who received an absolute penalty of the deprivation of liberty. The Commissioner believes that all domestic violence perpetrators should be referred, as a rule, to participate in the correctional and educational programmes. In case of applying probation measures, the participation in the programme should be mandatory. An analogical solution should be applied with respect to perpetrators who received a penalty of the deprivation of liberty, whose execution was not suspended. The Commissioner requested[59] the Minister of Justice to undertake a legislative initiative to amend applicable regulations.

The Minister informed[60] that he fully accepts all actions leading to the most effective realization of the tasks arising from the *Act on counteracting domestic violence*. The Prison Service is now performing tasks allocated to the Minister of Justice in the National Programme for the Prevention of Domestic Violence. They are organizing correctional and educational as well as therapeutic, psycho-therapeutic and educational-prophylactic measures. In the opinion of the Minister judges have been trained in that field as well. Therefore, according to the Minister there is no need for introducing any legislative changes.

Lengthy procedures in cases related to the order to vacate residential premises by the domestic violence perpetrator

What still poses a problem are lengthy judicial proceedings instigated at the request domestic violence victims ordering the perpetrator to vacate the premises, pursuant to Article 11a of the *Act on counteracting domestic violence*. In practice, it is very difficult to meet the deadline for the hearing, that is specified in the act,[61] and to promptly conclude judicial proceedings.

58 IX.517.3085.2016 of 13 April 2017.

59 Letter of 4 October 2017.

60 Letter of 18 May 2017.

61 The hearing should take place within one month from the receipt of the request of the person affected by violence to impose an obligation on the family member to vacate the dwelling on the grounds of particularly burdensome co-habitation caused by using domestic violence.

In the opinion of the Commissioner, what could contribute to speeding up the procedure in such cases is handing such cases over for examination by family divisions of common courts of law. Pursuant to the Law on the organization of common courts[62] a district court may create a family and minors' division. Another solution may consist in granting a special status to this category of cases in the regulation of the Minister of Justice - Rules governing the operation of common courts of law[63] – as "urgent cases". The Commissioner requested [64] the Minister of Justice to consider taking relevant legislative steps.

The Minister informed that[65], the Team for monitoring the Rules governing the operation of common courts of law approved the extension of the catalogue of urgent cases to also include cases pending pursuant to Article 11a of the *Act on counteracting domestic violence*. The Minister assured the Commissioner that the possibility of entrusting family and minors' divisions with the examination of such cases is being analysed.

Lengthy procedures in cases concerning sexual offences

In case of sexual offences it is important not to inflict additional suffering on victims as a result of prolonged and inadequately conducted proceedings. The victims of rape should be questioned in court once, without unreasonable delay. In such cases, the provisions stipulate that hearing should be conducted while paying special attention to the observance of victims' rights[66], yet they fail to specify when such a hearing should take place. As a result - as research conducted by the Commissioner indicates - in many cases even three months pass between the moment of crime commission and the hearing. Therefore, the practice of applying the regulation remains at odds with its objective, i.e. striving to avoid secondary victimization. Already in 2016 the Minister of Justice acknowledged, in response to Commissioner's recommendations[67], that there is a need to make the process of determining dates for court hearings more precise[68]. Yet, despite declarations legislative action has not been initiated. For this reason the Commissioner was repeatedly asking about the time for the implementation of changes[69].

62 Act of 27 July 2001 (Journal of Laws - Dz.U. of 2018, item 18, as amended).
63 Regulation of 23 December 2015 (Journal of Laws - Dz.U. of 2015, item 2316, as amended).
64 IV.7214.62.2014 of 6 February 2017.
65 Letter of 12 June 2017.
66 S. art. 185c of the Code of Criminal Procedure.
67 BPK.518.5.2015 of 8 September 2016.
68 Letter of 10 October 2016.
69 Letter of 22 May 2017, 8 August 2017.

3.2. Protection of reproductive rights

Low effectiveness of statutory solutions

The Commissioner conducted an analysis of the governmental reports on the implementation of the *Act on family planning, protection of the human foetus and conditions for termination of pregnancy*[70] and provided the Minister of Health with critical remarks related to a number of issues, where, regrettably no progress was observed. The issues that the Commissioner referred to included, in particular, limitations in the access to contraception, prenatal tests and legal pregnancy termination procedures as well as the quality of care during pregnancy and perinatal period and the lack of proper sexual education that would also prepare individuals for parenting roles[71]. The Commissioner pointed out that in order to make a proper evaluation of the act one needs to have relevant data, which, regrettably, is not gathered at the moment. The lack of data makes it impossible to properly diagnose problems associated with the adequate realization of the act. As a result, it is impossible for the state to take effective measures that would address existing irregularities and guarantee the full realization of the fundamental human rights, including the right to healthcare and the right to privacy. The explanations provided by the Minister of Health[72] are, in the opinion of the Commissioner, a valuable addition to the governmental report. Yet, they fail to remove established irregularities.

Limited access to ellaOne medication

In his intervention addressed to the Minister of Health, the Commissioner pointed out a number of issues associated with the restricted access to ellaOne which became a prescription medication. Restricted access to that medication, resulting from the need to obtain a prescription from a doctor, given the waiting times for an appointment with a gynaecologist and the fact that ellaOne is effective within 120 hours from the moment of sexual intercourse, will, in fact, prevent patients from using this type of contraception. What may additionally extend the waiting time for the healthcare service is the availability of the medication in pharmacies as well as the possibility of invoking the "conscience clause" by doctors. Therefore, it may happen that a patient will not obtain the medication within the time which guarantees its effectiveness. The Commissioner[73] requested the Minister of Health to demonstrate how the Ministry is planning to mitigate the negative consequences of the limited availability of ellaOne pills. In the letter to the Commissioner the Minister[74]only indicated that various opinions were voiced in relation to the changed status of the discussed medicinal product and the Ministry was always providing reliable answers to all queries.

70 Act of 7 January 1993 on family planning, protection of human foetus and pregnancy termination conditions (Journal of Laws - Dz.U. of 1993, No. 17, item 78, as amended).

71 Report of the Council of Ministers on the realization as well as the outcomes of the application in 2014 of the act of 7 January 1993 on family planning, protection of human foetus and pregnancy termination conditions (Journal of Laws - Dz.U. of 1993, No. 17, item 78, as amended) – VII.5001.2.2016 of 18 November 2016, the analysis of the report for 2016 – letter of 21 March 2018.

72 Letter of 29 March 2017.

73 VII.5001.1.2017 of 20 February, 21 April 2017 and 19 July 2017.

74 Letter of 9 August 2017.

Pharmacists' invocation of the "conscience clause"

According to media reports there are pharmacies in Poland which do not sell contraceptives due to the invocation of the "conscience clause" by the pharmacists who work there. In the view of the Commissioner, such a practice runs counter to the applicable law and may result in limiting the patient's right to healthcare services. The Pharmaceutical Law[75] lacks regulations analogical to those contained in the *Act on the professions of doctor and dentist*[76] which would allow for the refusal to sell a medicinal product on grounds of conscience. Ethical norms contained in the Code of Ethics of a Pharmacist in the Republic of Poland do not provide for such a possibility. Also in terms of the objective of the "conscience clause", i.e. the protection of moral integrity, it is difficult to specify which moral norm could be violated as a result of selling medicinal products. The European Court of Human Rights indicated[77] that preventing a pharmacist from refusing to sell medications does not constitute a violation of the Convention on the Protection of Human Rights and Fundamental Freedoms. The court pointed out that as long as the sale of contraceptives, as prescribed by a doctor, is legal and those products can only be obtained in a pharmacy, the pharmacists have no right to impose their moral beliefs on others by refusing to sell the medication. The Commissioner believes that the decision not to have certain medicinal products which serve the contraceptive purpose in stock is at odds with the regulation contained in the Pharmaceutical Law, pursuant to which open-access pharmacies are obliged to keep a supply of medicinal products and medications which meets the health-related needs of the local population. The Commissioner addressed[78] the Main Pharmaceutical Inspector and requested him to take a stance in that case as well as share the information about the estimated scale of the discussed phenomenon in the country.

The Main Pharmaceutical Inspector informed [79] that a pharmacist may only refuse to sell a medicinal product in duly justified cases, e.g. when its sale may pose a threat to the life or health of the patient or in case of a justified suspicion concerning the authenticity of the prescription or the patient's need. Taking into account the respect for the rights of an individual in light of the Constitution, it seems reasonable to allow for the possibility to refuse the sale of contraceptives by a pharmacist on the grounds of the "conscience clause". Yet, an entrepreneur who runs a pharmacy where such a situation occurs should be obliged to make sure that a given medication is available in another pharmacy. However, the legal basis for such an obligation is not known as the "conscience clause" is not regulated in the provisions of the statutory law. Given the above the Commissioner requested[80] the Minister of Health to take a stance in that regard.

75 Act of 6 September 2001 (Journal of Laws - Dz.U. of 2017, item 2211, as amended).

76 Act of 5 December 1996 (Journal of Laws - Dz.U. of 2017, item 125, as amended).

77 Judgement of the European Court of Human Rights of 2 October 2001 in the case Pichon and Sajous v. France, application No. 49853/99.

78 VII.5002.3.2017 of 13 April 2017.

79 Letter of 15 May 2017.

80 VII.5002.3.2017 of 25 September 2017.

The Minister informed[81] that the performance of the profession of a pharmacist entails observing the obligation to comply with the professional deontology established by the self-government of that occupational group which is entitled to evaluate how the profession is exercised by pharmacists. The body which supervises the sale of medicinal products and controlling pharmacies is, in turn, the State Pharmaceutical Inspectorate. As long as in the assessment of the bodies listed above there is no breach of generally applicable provisions and the internal corporate law, it is not possible and admissible to interfere with the conduct of an individual who exercises the profession of a pharmacist.

Lack of institutions performing pregnancy termination procedures in cases allowed by the law

The Commissioner was alarmed about media reports that in Podkarpackie voivodeship there were no healthcare institutions performing free-of-charge abortions in cases provided for in the *Act on family planning, protection of the human foetus and conditions for termination of pregnancy*. The provisions of the above-mentioned act guarantee that persons covered by the social insurance as well as individuals entitled to free-of-charge healthcare pursuant to separate provisions have the right to terminate pregnancy for free in a public healthcare institution in cases provided for in the act. The state is obliged to establish a system that ensures a real and non-discriminatory access to that procedure. Moreover, the state is obliged to organize the provision of healthcare in such a way which does not prevent patients from using services to which they are entitled despite the existence of the "conscience clause", whose goal is to respect the freedom of conscience of doctors. It is of particular significance in case the continuation of pregnancy poses a risk to the life or health of the mother. Failure to ensure access to the termination procedure in such an instance constitutes a violation of the woman's right to healthcare and life. The Commissioner requested[82] the President of the National Health Fund to provide information concerning the accessibility of the abortion procedure and to indicate what measures are taken by the Fund to ensure patients' access to pregnancy termination procedure which is provided for on the statutory level.

The President of the National Health Fund assured[83] that the fundamental task of the operation of every voivodeship division of the Fund is to secure the healthcare needs of beneficiaries on the territory of a given voivodeship. At the same time he emphasized that the conclusion of agreements for the provision of healthcare benefits belongs to the main tasks of the Directors of Voivodeship Divisions of the National Health Fund who take into account optimum safeguarding of beneficiaries' healthcare needs.

81 Letter of 5 October 2017.

82 VII.7010.1.2016 of 10 January 2017.

83 Letter of 19 January 2017.

Perinatal care standards

The cases that were presented to the Commissioner revealed that hospitals fail to implement perinatal care standards that are specified in the regulation of the Minister of Health with regard to medical procedures provided to women in the course of physiological pregnancy, delivery, puerperium period and newborn baby care[84]. Also information presented by the National Health Fund and the results published by the Supreme Chamber of Control concerning the inspection of perinatal care on obstetrics wards confirm that the standards of perinatal are not observed and the knowledge about them is insignificant not only among patients but also medical staff. There are also cases of providing healthcare services to women who give birth in conditions which violate their right to dignity and intimacy. The Commissioner believes that what could prove useful in the assessment of the effectiveness of the perinatal care standards is a periodical evaluation of regulations and their effectiveness, made by the Minister of Health with consideration given to the opinions of medical staff and women in labour. The Commissioner addressed[85] the Minister of Health as well as the National Consultant for obstetrics and gynaecology and requested them to take a stance on the presented issue and indicate what specific measures are undertaken by the Ministry of Health in the discussed field.

In response the Minister[86] informed about the commencement of work on the determination of new organizational standards in perinatal care. What will be taken into account in the course of the regulation's preparation are the recommendations of the team responsible for monitoring and preparing solutions for the improvement of the perinatal care standard. The Ministry of Health has decided to concentrate on measures aimed at the development of occupational competencies and qualifications of medical staff under the Operational Programme Knowledge, Education, Development. It aims to influence the undergraduate training of nurses and midwives and in a longer perspective - increase the number of nursing and midwifery graduates. The Minister emphasized that the provisions of the regulation of the Minister of Health concerning the standards for rendering services in the area of perinatal care constitute generally applicable regulations. That means that all medical staff is obliged to apply the said provisions in practice and the work of employees of healthcare facilities is subject to the supervision exercised by their superiors.

Availability of effective methods of alleviating birth pain to pregnant women

The problem that the Commissioner brought up again in 2017 was the access to pharmacological anaesthesia for women in labour as well as the significant variation in the availability of this type of pain relief across the country. The lack of the actual possibility to administer anaesthesia, when it is guaranteed under law, may constitute a violation of patients' rights -

84 Regulation of 20 September 2012 (Journal of Laws - Dz.U. of 2016, item 1132).

85 V.7010.112.2015 of 11 April 2017 and 16 October 2017.

86 Letter of 16 May 2017.

the right of women in labour to dignity and intimacy as well as the right to healthcare services that correspond with the requirements of the current medical knowledge. The right of the patient to pain relief is inextricably linked to his/her sense of dignity as a human being. Forcing a patient to give birth without anaesthesia, if there are no contraindications for its administration, may be considered indicative of inhuman and degrading treatment, in particular in light of Article 3 of the Convention on the protection of human rights and fundamental freedoms. The correspondence exchanged with the Minister of Health so far did not present any clues as to measures undertaken by the ministry in order to increase the availability of effective pain relief for pregnant women. It also failed to indicate whether the ministry is examining and analysing the implementation of provisions with regard to informing pregnant women by staff taking care of them during pregnancy about pharmacological and non-pharmacological pain relief options available in the planned place of birth. Given the above the Commissioner requested[87] the Minister of Health to present detailed comments on the presented problem.

The Minister assured[88] that the ministry is taking all effort to give every woman the possibility to use a pain relief option of choice during labour if there are no medical contraindications What plays a decisive role in the selection of a pain relief method during delivery is the health status of a particular woman. The decision on the course of the labour, including on the administration of anaesthesia, is taken by the person providing medical assistance to the woman during childbirth. Work is underway on the draft regulation of the Minister of Health concerning the organizational standards for medical procedures provided to women in the course of physiological pregnancy, delivery, puerperium and newborn baby care. Discussions related to the provisions that are directly associated with pain relief during delivery will be held in the course of work on the said regulation.

3.3. Equal rights and obligations of women and men with regard to family life

Unequal treatment of women and men entering into marriage at a young age

Applicable regulations allow guardianship courts to grant permission for entering into marriage for a woman who turned sixteen. Yet, such a possibility has not been foreseen for a man at the same age. In the opinion of the Commissioner, one should consider the abolishment of the exceptions to the lowest matrimony age, determined to be 18. Such a solution would be compliant with the general constitutional principles of non-discrimination as well as with international law, including with the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages as well as the Convention on the Elimination of

87 V.7010.70.2016 of 25 April 2017.

88 Letter of 26 May 2017.

All Forms of Discrimination against Women. The Commissioner requested[89] the Minister of Justice to undertake a legislative initiative to amend applicable regulations.

The Minister informed[90] that in 2016 the Senate of the Republic of Poland rejected the draft act on amending the Family and Guardianship Code as well as the Code of Civil Procedure. The above stance of the Senate reflects the belief in accordance with which the solution provided for in Article 10(1) of the Family and Guardianship Code with respect to obtaining a consent for entering into marriage before a woman comes of age is not discriminatory. Differentiation of the legal situation of women and men in that respect, admissible in view of the Constitution, is justified, *inter alia*, by biological differences between males and females concerning the moment of achieving maturity required for performing obligations related to starting a family. Given the above, the Ministry of Justice does not perform nor plan any legislative work with respect to amending legal provisions in that regard.

Measures undertaken to minimize the problem of avoidance of payment of maintenance for children and former spouses

According to available data, one million children in Poland do not receive child maintenance. That accounts for every tenth child and young person under the age of 25. There are even more persons affected in the age group up to 18 years, where as many as 14% of children do not receive child maintenance. The total debt of parents towards their children exceeds 10 billion PLN, and the average amount due to a child from maintenance non-payer is 33 thousand PLN. Several thousand parents fail to pay child support. Fathers constitute as much as 96% of the non-payers.

Therefore, the scale of the problem is significant and it has a systemic nature. Failure to pay child maintenance should be considered economic violence — not only towards the child but also towards the parent taking care of the child, in most cases the mother. It is also associated with social attitudes and well-rooted stereotypes related to sexes.

Given the above the Commissioner for Human Rights as well as the Children's Ombudsman established[91] a Team on Child Maintenance, whose task is to find effective and feasible solutions to improve the enforcement of child support obligation on one hand and to promote the idea of child maintenance payment by obliged parents[92] on the other.

In 2017 the Commissioner took a number of actions aimed at minimizing the problem of child maintenance payment avoidance.

The Commissioner addressed[93] the Minister of Justice with a request to consider taking a legi-

89 IV.501.12.2015 of 10 January 2017.

90 Letter of 22 March 2017.

91 In February 2016.

92 Reports on the activity of the team in 2016 and 2017 is available on the website www.rpo.gov.pl, under the following link: https://www.rpo.gov.pl/pl/content/dwa-lata-zespolu-do-spraw-alimentow-efekty-i-postulaty.

93 IV.7022.35.2016 of 1 February 2017.

slative initiative that would result in the creation of a central register of notorious maintenance non-payers (RNANP). In response, the Minister failed to agree that the register would be a tool that could contribute to the increased sense of responsibility of persons obliged to pay child maintenance[94]. Yet, that stance was changed and work was initiated to create a register maintained in the ICT system by the Minister of Justice[95].

The Commissioner requested the Minister of Family, Labour and Social Policy to provide information on the current status of legislative work concerning occupational activation of maintenance debtors[96] and consider introducing an obligation for Employment Offices to share information with social welfare institution about the change of debtor's status as an employed person[97]. The Minister informed[98] that the Council of Ministers adopted a document entitled: *Review of family support systems* comprising, *inter alia*, recommendations concerning additional sanctions for maintenance debtors and guidelines on how to improve the child maintenance enforcement. The Minister explained that systemic changes in the area of enforcing child maintenance payments require broader consultations and cooperation with the Ministry of Justice.

The Commissioner for Human Rights and the Children's Ombudsman[99] addressed the President of the Association of Polish Cities, the President of the Board of the Polish Towns Union and the President of the Board of the Association of Rural Communes of the Republic of Poland with a request to explain the reasons why not all local government units perform their statutory obligation to provide data of maintenance debtors to business information registers. The Director of the Office of the Association of Polish Cities informed[100] that the issue in question is beyond the competencies of the Association of Polish Cities. The President of the Board of the Polish Towns Union[101] informed that communes concluded agreements with the National Debt Register and once the provisions of the *Act on exchange of economic information* changed, they did not automatically establish cooperation with remaining registers. The above situation could be remedied by notifying communes of the existing list of Economic Information Registers maintained by the Ministry of Development and reminding them about the statutory obligation to perform that task.

In May 2017, on the initiative of the Commissioner, a survey[102] was conducted with respect to the attitudes of Poles towards non-payment of child maintenance. The results of the analysis made it possible to formulate comments concerning the operation of the *Act on support*

94 Letter of 23 March 2017.

95 Letter of 5 March 2018.

96 III.7064.121.2016 of 26 January 2017.

97 Letter of 9 March 2017.

98 Letter of 28 April 2017.

99 V.7100.6.2017 of 16 March 2017.

100 Letter of 26 April 2017.

101 Letter of 11 July 2017.

102 The survey was conducted by the employees of the Kantar Millward Brown S.A. at the request of the National Debt Register BIG S.A. and the National Council of Judicial Officers (under the honorary patronage of the Commissioner for Human Rights and the Children's Ombudsman).

for persons entitled to child maintenance[103]. The Commissioner for Human Rights and the Children's Ombudsman requested[104] the Minister for Family, Labour and Social Policy to provide information concerning work on comprehensive solutions to ensure a more effective implementation of the provisions of the *Act on support for persons entitled to child maintenance* as well as measures aimed at strengthening supervision over the performance of the act's provisions by self-government units. In reply the Minister informed[105] that more emphasis should be placed on increasing the effectiveness of child maintenance enforcement. Yet, he also pointed out that this task is beyond the power of employees of local government units. At the same time, in connection with information received from communes with respect to the common practice of prosecutors to refuse to instigate or discontinue proceedings in cases of non-payment of child maintenance, the Minister of Family, Labour and Social Policy pointed out to the Minister of Justice that there is necessity to change the attitude of the prosecutor's offices to proceedings in cases of child maintenance payment avoidance.

The Ombudsman and the Commissioner also appealed to the President of the Council of Ministers to conduct a nationwide social campaign concerning the problem of child maintenance non-payment and the need to encourage maintenance debtors to perform obligations towards their own children[106]. In response, the Minister of Family, Labour and Social Policy informed that the decision on the rationale for the social campaign dedicated to child maintenance non-payment will be taken after the conclusion of current work on legislative solutions concerning the improvement of the situation of persons entitled to child maintenance who do not receive it due to ineffective enforcement[107].

The Commissioner and the Ombudsman also consistently asked[108] the President of the Council of Ministers to take actions aimed at improving the situation of children who are not covered by the state support system due to income criterion which has not been changed for many years but which determines one's right to benefits from the child maintenance fund.

103 Act of 7 September 2007 (Journal of Laws - Dz.U. of 2017, item 489, as amended).
104 III.7064.176.2017 of 4 October 2017.
105 Letter of 9 November 2017.
106 XI.7064.1.2016 of 4 September 2017.
107 Letter of 2 March 2018.
108 III.7064.175.2015 of 21 December 2017.

3.4. Equal treatment of women and men in the field of education and employment

Vocational education free from gender-related stereotypes

The Commissioner was monitoring work on the reform of vocational education and the vocational counselling system in Poland. The recommendations of international institutions concerning vocational education state, *inter alia*, that there is a need to consider the issue of gender, at every stage of education. As complaints sent to the Commissioner indicate, gender-related stereotypes are still encountered, *inter alia*, in the attitudes of teachers or in educational materials. There is a need to promote female education in the field of technical sciences and engineering as well as new technologies. There is also a need to review curricula and school handbooks in order to eliminate content that is stereotypical and discriminatory towards girls and women. The Commissioner requested[109] the Minister of National Education to consider taking measures to reduce the disproportions between the numbers of males and females studying exact sciences and technical disciplines in the course of preparing and implementing the announced reform of vocational education and vocational counselling in schools.

The Minister [110] ensured that all students attending a particular type of school have the same learning goals and learning contents, as provided for in the core curriculum. That means that they have equal opportunities as far as preparation for further education or chances on the job market are concerned. Detailed solutions concerning vocational counselling are being developed by experts under the project *Effective educational and vocational counselling for children, teenagers and adults* executed by the Education Development Centre in Warsaw. The project will result, *inter alia*, in the preparation of vocational counselling materials as well organizational solutions that may be used within internal school vocational counselling systems aimed at the adequate selection of the career path. The Commissioner is going to evaluate the outcomes of undertaken measures.

Counteracting sexual harassment

Sexual harassment is one of the forms of gender-related discrimination[111], which, due to its special nature as well lack of awareness concerning particular types of conduct, results in the passivity of the victims. The lack of adequate tools for responding to sexual harassment also contributes to victims' unwillingness to report irregularities. For those reasons, the Commissioner intensified his involvement in that area.

109 XI.800.15.2016 of 7 April 2017.

110 Letter of 18 May 2017.

111 Pursuant to the definition contained in Article 3(4) of the Act on equal treatment, sexual harassment means a strongly undesired act of sexual nature performed in relation to an individual or relating to sex, which results in the violation of dignity of such a person, in particular by creating an atmosphere that is intimidating, hostile, degrading, embarrassing or derogatory towards that person; such conduct may comprise physical, verbal and non-verbal elements.

In 2017 the Commissioner commissioned the performance of an anti-discrimination study concerning molestation, including sexual harassment, experienced by male and female students of schools of higher education. In the quantitative part of the study a representative sample of schools of particular type was ensured. Around 4 thousand male and female students participated. That study was an addition to research conducted in that regard until that time. The study from 2012 constituted a point of reference[112]. The goal of the Commissioner's study was to obtain declarations about the experiences of male and female students of various types of schools of higher education as well as to identify various responses to molesting and sexual harassment, including methods of coping with such a situation on a personal level and with the assistance of external support. The purpose of the study was also to evaluate the operation of current standards or support systems available to persons affected by harassment, including sexual harassment in schools of higher education. Commissioner's report will be published in 2018.

Moreover, based, *inter alia*, on correspondence with the heads of all uniformed services and materials that they provided, the Commissioner prepared a publication entitled: "Prevention of mobbing and discrimination in uniformed services. Analysis and recommendations"[113]. The specific nature of uniformed services makes them hierarchical, hermetic institutions with robust vertical subordination structures. Under such circumstances there is a potential risk for infringement or even violation of rights and freedoms. The existence of internal anti-discrimination procedures allows for an objective explanation of improper conduct and taking relevant personnel-related decisions. An ongoing analysis of cases of improper behaviour combined with practical training of interested parties may contribute to the reduction of such behaviour in the future. Following his analyses the Commissioner recommended in the report that uniformed services should consider introducing certain adjustments to adopted regulations and the methods of their application.

The Commissioner also intervened in the case of sexual harassment and offenses of sexual nature committed on athletes and members of one sporting association. As could be concluded from media reports, the victims of sexual violence had reported incidents to the association's authorities several times but no steps were taken in order to reliably explain the situation and bring perpetrators to justice. Therefore, the Commissioner requested the Minister of Sport and Tourism to provide information about actions that he took in that case. The Commissioner also wanted to be informed about measures taken to prevent and combat gender-related violence, including sexual violence, in sport and promote knowledge in that regard in Polish sporting associations[114]. Law enforcement agencies have also instigated their proceedings in that case[115].

112 Prof. Janina Czapska, Ph.D., Jagiellonian University, Gender-based violence, stalking and fear of crime: Country report for Poland, 2012 https://vmits0151.vm.ruhr-uni-bochum.de/gendercrime.eu/pdf/gendercrime_country_report_poland_polish.pdf.

113 T. Olejniak, K. Wilkołaska-Żuromska, Prevention of mobbing and discrimination in uniformed services. Analysis and recommendations. The report is available on the website www.rpo.gov.pl, under the following link: https://www.rpo.gov.pl/sites/default/files/Przeciwdzia%C5%82anie_mobbingow-i_i_dyskryminacji_w_s%C5%82uzbach_mundurowych.pdf.

114 XI.566.2.2017 of 4 December 2017.

115 Letter of 4 December 2017.

Reconciliation of family and professional life by men and women

As announced by the Ministry of Family, Labour and Social Policy the Labour Law Codification Committee[116] was supposed to work, *inter alia*, on the issues of reconciling family life and professional careers. Moreover, the Committee was supposed to review regulations of the labour law pertaining to parental leaves, also in the context of promoting a more equal distribution of such leaves between both parents. In the opinion of the Commissioner, increasing the scope of parental rights vested in fathers, irrespective of rights to which mothers are entitled - such as a longer paternity leave without an option to waive it to the benefit of the mother - would significantly contribute to a greater involvement of fathers in family life. The Commissioner requested the Minister of Family, Labour and Social Policy[117] to provide information about the current state of work performed by the Labour Law Codification Committee on the issues related to reconciling family life and professional careers. The Minister[118] stated that the issues of reconciling family life and professional career would be analysed by the Team for drafting the Labour Code, operating within the Labour Law Codification Committee.

What is conducive to the reconciliation of professional career with family life is, *inter alia*, greater involvement of fathers in childcare. In 2017 the Commissioner received complaints concerning unavailability of childcare facilities to men. In a number of service outlets (shops, restaurants) there is infrastructure making it possible to change babies in comfortable conditions. Yet, it is located in places that are unavailable for men, for example in ladies' toilets. The Commissioner welcomed the entry into force as of 1 January 2018 of an amendment to the regulation of the Minister of Infrastructure on technical conditions of buildings and their location[119] pursuant to which newly erected gastronomy, commerce and service outlets with a 1000 m^2 of usable area as well as petrol stations with a usable area exceeding 100 m^2 should have a separate room adapted for the purposes of feeding and changing babies.

Wage gap

In relation to the fact that the Ministry of Family, Labour and Social Policy made available an application serving the purpose of estimating the difference in remuneration of men and women, the Commissioner emphasized that its effectiveness largely depends on the awareness of the existence of such a tool among its addresses - employers. Therefore, it is essential to disseminate knowledge about that application among a broader group of recipients. What constitutes a problem not only in Poland but also in other EU member states is a low level of transparency of information concerning remuneration. Employees are refused the right to receive benchmarking information in that regard and the amount of remuneration often results

116 Established in September 2016.

117 XI.420.1.2016 of 10 August 2017.

118 Letter of 25 September 2017.

119 Regulation of 12 April 2002 (Journal of Laws-Dz.U. of 2015, item 1422, of 2017, item 2285).

only from individual negotiations between the employer and employee. Such a mechanism more often entails negative consequences for women, especially those working in the private sector. Greater accessibility to remuneration-related information may substantially reduce differences concerning the conditions offered to men and women on the labour market. For those reasons the Commissioner[120] requested the Minister of Family, Labour and Social Policy to provide explanations concerning the current actions associated with the dissemination of knowledge about the negative phenomenon of wage gap and about the application developed by the ministry for the purpose of assessing the difference in income of men and women.

The Minister explained that[121] the tool *Equality of wages,* intended for measuring the wage gap, may be used on the ministerial website. Interested parties may download the application for free and perform the test. The Minister also informed about the plans to review available international practices in that regard and discuss related issues in the next edition of the National Programme of Action for Equal Treatment.

60 years of age accepted as mandatory retirement age for female judges

The Commissioner received complaints concerning the adoption of a provision ordering female judges at the age 60 to retire. In the opinion of claimants Article 69 (1) of the Law on the common courts system[122], amended on 1 October 2017 in the scope in which it stipulates that a female judge shall retire at the age of 60 and a male judge at the age of 65, is incompliant with the Constitution. Unconstitutionality of that provisions results also from the fact that the decision with respect to the continuation of judicial office is taken by the Minister of Justice. In light of the well-established body of rulings, reaching a retirement age and obtaining the right to retirement cannot be the sole reason for terminating an employment contract by employer. The situation of judges in that regard is less favourable than employees subject to the Labour Code provisions, as in that case, the negative decision of the Minister of Justice concerning the continuation of work, excludes a given judge from professional activity. It constitutes a violation of the constitutional principle of equal treatment. Given the above the Commissioner requested[123] the Minister of Justice to take a stance in that regard.

120 XI.816.9.2016 of 31 July 2017.

121 Letter of 31 August 2017.

122 Act of 27 July 2001 (Journal of Laws - Dz.U. of 2016, item 2062, as amended).

123 III.7044.83.2017 of 19 December 2017.

3.5. Discrimination on the grounds of gender in access to services

Non-discrimination on the grounds of gender also includes the prohibition to discriminate due to maternity

The Commissioner joined the proceedings before an appellate court with regard to preventing a woman from breastfeeding freely in one of the restaurants in Sopot[124]. The Commissioner challenged the judgement of the district court and accused it of violating the provisions on equal treatment. He emphasized that non-discrimination on the grounds of gender, in the scope of access to and conditions of using services that are generally available, also covers the prohibition to discriminate on the grounds of maternity. In the opinion of the Commissioner, shaming a mother nursing her baby in a public place constitutes an illegal form of gender -related unequal treatment. Breastfeeding in a place and at a time that is convenient for the mother and her baby is not only compliant with law but it is also advisable for the child's health. Making women feel that breastfeeding is a shameful activity and they cannot nurse in a place and at a time convenient for them and babies may lead to the limited participation of women in social life or to shortening of the breastfeeding period.

The Appellate Court acknowledged the appeal, adjudicated a compensation of 2000 PLN and ordered the owner of the restaurant to apologize to the customer[125]. It is one of very few judgements that have been passed based on the *Act on equal treatment* since 2011.

4. Counteracting discrimination on the grounds of sexual orientation and gender identity

Presenting online images and banners that insult homosexuals

The Commissioner challenged[126] before the Supreme Court the valid decision of the District Court in Wodzisław Śląski[127], which discontinued proceedings in a minor offence case against Mateusz S. from the Pride and Modernity movement. At the end of 2016 the Pride and Modernity movement published a series of stickers online with indecent and offensive inscriptions styled as prohibitory traffic signs. The images, among others, presented two humans in the specific position, and the inscription read: "No faggots, homosexuals of all countries, undergo treatment". The police determined that those stickers were published by the movement's leader. Therefore, he was charged with placing indecent images and inscriptions in a public place. The court in Wodzisław Śląski admitted that the drawings "may be deemed indecent by some viewers" but placing them online does not have attributes of an offence.

124 XI.815.37.2016 of 28 November 2017.

125 Judgement of 14 December 2017 (case file No. I ACa 187/17).

126 BPK.511.37.2017 of 26 July 2017.

127 Judgement of 26 April 2017 (case file No. II W 33/17).

According to the Commissioner, the court wrongly assumed that the Internet is not a public place, and therefore deemed that the act of the accused did not constitute an offence. As a result, the proceedings against Mateusz S. were groundlessly discontinued. An internet website is a public place in the meaning of Article 141 of the Misdemeanours Code. Acting "in a public place" means space that is generally accessible and can be entered by an unspecified number of people. The owners of internet websites as well as publishers are accountable for the content that is published there. In its judgement, the Supreme Court ruled that the Internet is a public place[128].

The need to extend the group of persons who may decide about a funeral of a deceased person, listed in the *Act on cemeteries and burial of deceased persons*

The Commissioner received complaints concerning problems with respecting the right to organize a funeral for a deceased person by his/her closest ones who are not related by kinship or affinity. Pursuant to the current wording of the provisions of the *Act on cemeteries and burial of deceased persons*[129] the closest remaining family has the right to organize the funeral. The provisions include a list of persons considered "the closest family": spouse, relatives in the descending and ascending line, side-line relatives to the fourth degree of affinity as well as direct relations to the first degree. Later on, it is also stated that also persons who voluntarily wish to do so have the right to organize the funeral. Currently applicable regulations do not directly indicate that the group includes a person remaining in a cohabitation relationship with the deceased. Informal partners may only be allowed to bury the body of the deceased as persons "who voluntarily wish to do so". In practice - as complaints sent to the Office of the Commissioner show - public entities deny that right to cohabiting partners if any family member, even a very distant relative, directly specified in the *Act on cemeteries and burial of deceased persons* expressed the wish to organize the funeral. The same applies even if such a distant relative failed to express the wish to arrange the burial but administrative bodies informed him/her about the death.

In connection with the planned, significant reconstruction of regulations governing the burial of the deceased, the new provisions should be shaped in such a way to ensure full protection of the cohabitants' right to bury their deceased partners. The new provision may completely omit listing all categories of persons entitled to organize the burial and instead use a general term "one's nearest and dearest" with an explanation of its meaning, which will directly include, *inter alia*, a cohabitant. Another possibility is to add *expressis verbis* "a person remaining in a cohabitation relationship with the deceased" to the current catalogue of persons entitled to bury the deceased person in the first place (as the spouse). The definition of the person

128 The judgement of 17 April 2018 passed by the Supreme Court repealed the discontinuation of proceedings against the leader of the Pride and Modernity movement - the district court will examine the issue of stickers with indecent inscriptions published online by S.

129 Act of 31 January 1959 (Journal of Laws - Dz.U. of 2017, item 912).

remaining in a cohabitation relationship contained in the new *Act on cemeteries and burial of deceased persons* should include, in compliance with the judicial decisions of the Supreme Court, partners of the same sex. The Commissioner requested[130] the Minister of Health to include the changes discussed in this intervention in the draft *Act on cemeteries and burial of deceased persons*.

In response the Minister indicated[131] that the preliminary draft of the new *Act on cemeteries and burial of deceased persons* does not provide for amending the literal wording of the provision specifying the group of people entitled to bury the deceased person. Yet, the minister admitted that granting the right to bury one's life partner to cohabitants is undoubtedly a significant social problem that deserved consideration.

Equal treatment in employment regardless of gender identity

Studies concerning the situation of transgender individuals on the job market conducted at the request of the Commissioner gave rise to a report entitled: "Equal treatment in employment regardless of gender identity". The most significant conclusion that could be drawn from the performed analysis is the fact that the right of transgender people to perform a job of their choice is limited by the lack of regulations for changing the registered gender. The biggest challenge faced by professionally active transgender individuals is that their identity documents state biological sex which does not match their gender identity. The documents of transgender people during the transition process include personal details that do not correspond to their looks. This makes finding a job really difficult for them and also intensifies the sense of exclusion. It is urgent to allow for issuing and correcting certificates of employment in order to make it possible to change personal details of people who have obtained a court ruling on gender change. What also poses a problem is low awareness among transgender individuals about the fact that discrimination in employment on the grounds of gender identity is prohibited.

The main conclusions of the report, concerning the special status of transgender individuals on the job market were presented by the Commissioner[132] to the Minister of Family, Labour and Social Policy as well as the Government Plenipotentiary for Equal Treatment. In response, the Minister of Family, Labour and Social Policy shared[133] the opinion of the Commissioner concerning the rationale for amending the regulation with respect to certificates of employment[134] in order to ensure that transgender persons receive equal treatment at the stage of applying for a job with the next employer. The Commissioner was assured that the issue of introducing provisions allowing for changing personal details in the certificate of employ-

130 XI.501.3.2015 of 18 December 2017.

131 Letter of 24 January 2018.

132 XI.411.2.2017 of 7 August 2017.

133 Letter of 12 September 2017.

134 Regulation of the Minister of Family, Labour and Social Policy of 30 December 2016 concerning certificates of employment (Journal of Laws - Dz. U. item 2292, as amended).

ment of transgender persons who received a valid court ruling would be addressed in the next amendment of the considered regulation.

Gender recognition procedure by court

The Commissioner is receiving more complaints concerning gender recognition of trans individuals - what poses a problem is the lengthiness of the procedure as well as the scope of people on the defendant's side.

The Commissioner joined the proceedings in the gender recognition case[135] concerning a transgender individual who was obliged by the District Court to file a suit not only against own parents but also against own children. The belief that an action for gender recognition of a trans individual should be brought not only against one's parents but also one's children was expressed by the Supreme Court in the judgement[136] of 6 December 2013. In the opinion of the Commissioner, participation of children of a transgender individual in the proceedings concerning gender recognition in the role of defendants leads to the violation of dignity and the right to have private and family life respected, not only of the claimant but also his/her children. It is in their interest to make sure that a parent's sex, which is stated in his/her identification documents, corresponds to the desired gender identity that defines his/her everyday life. In gender recognition cases courts should, naturally, consider the child's best interest. Yet, it can be done without making the child appear in court on the opposing side to his/her parent. The District Court failed to acknowledge the arguments presented by the Commissioner and dismissed the action. As a result of an appeal brought by the Commissioner[137], the Appellate Court changed the ruling of the District Court and acknowledged the action. The Appellate Court did not only rule that in the gender recognition procedure the woman was not obliged to bring a suit against her children but it also changed the judgement of the District Court and reassigned the gender of the claimant exclusively on the basis of medical documentation that accompanied the lawsuit[138].

135 In such a procedure an interested party brings an action for recognition pursuant to Article 189 of the Code of Civil Procedure.

136 In the case with file No. I CSK 146/13.

137 XI.501.6.2016 of 7 March 2017.

138 Judgement of 15 December 2017 (case file No. I ACa 531/17).

5. Counteracting discrimination on the grounds of age

Work on a new international tool for the protection of rights of older persons

The demographic trend of population aging that can be attributed to rising life expectancy as well as declining fertility rates, can be observed not only on national, but also on the global level. Seniors in Poland experience a variety of limitations in the performance of everyday tasks. Moreover, with age people are becoming more reliant on healthcare services. Therefore, measures should be taken to increase legal awareness on discrimination. What may address such problems is the initiative to draft a Convention on the Rights of Older Persons. Such a document would play a significant role in the context of problems associated with the observance of fundamental rights of the elderly as well as the implementation of the principle of equal treatment, regardless of age. The Commissioner is monitoring the progress concerning the preparation of the draft convention. At the same time he stresses the importance of Poland's involvement in the work on that document.

The correspondence exchanged so far between the Commissioner and the Ministry of Family, Labour and Social Policy with respect to seniors may bring one to the conclusion that the ministry fails to acknowledge the scale and scope of social exclusion experienced by the elderly as well as barriers that such individuals encounter due to their advanced age. The Commissioner requested[139] the Government Plenipotentiary for Civic Society and Equal Treatment to give consideration to provided information and correspondingly address highlighted problems in the course of implemented actions.

The Commissioner applied[140] to the Minister of Family, Labour and Social Policy and stressed the need to develop a document that would specify particular objectives and tasks associated with the policy for the elderly and entities responsible for their implementation. He also wished to know whether the document *Social Policy for the elderly until 2030. Safety – Participation – Solidarity* would oblige individual ministries to take strategic actions. What ties in with the discussed issue is the problem of measures taken by the Ministry with respect to standardization of care and assistance services for the elderly as well as training in the field of their provision. Therefore, the Commissioner inquired about the established standards and strategic recommendations and requested to make them available to him. He also wanted to know whether actions have already been taken to ensure their proper implementation. What is also essential is increasing the protection of seniors against discrimination and violence as in the *Act on the elderly*[141] among 13 areas that are subject to annual governmental review there is no mention of counteracting violence addressed at older persons. One should consider amending the act in that scope.

139 XI.503.2.2016 of 7 June 2017.

140 XI.503.2.2016 of 24 October 2017.

141 Act of 15 September 2015. (Journal of Laws - Dz. U., item 1705).

The Plenipotentiary[142] shared the opinion of the Commissioner concerning the need to ensure seniors' right to a decent life and their inclusion is social life. The Minister explained[143] that the adoption by the Council of Minister of the document *Social Policy for the elderly until 2030. Safety. Solidarity. Participation* was planned by the end of 2017. The document is supposed to also address the issue of increasing physical safety - preventing violence and negligence towards the elderly. The project *Professionalization of assistance and care services for dependent persons – new training and care standards,* in turn, is at the stage of implementation. Its completion is planned at 30 June 2019. At the same time, the Commissioner was notified of the amendment of the *Act on the elderly* that is being prepared in the ministry. The Minister did not address the issue of Poland's involvement in the UN debate on the new international law instrument concerning the protection of the rights of seniors.

Research on community support provided to the elderly

Predictions on population aging should make us undertake comprehensive measures in order to prepare support infrastructure for the elderly. The elderly belong to one of the groups that is most exposed to the risk of discrimination. Due to demographic changes the number of people at risk of social exclusion and its other consequences is constantly on the rise. International documents, including resolution 46/91 adopted by the general assembly of the UN and the Madrid Plan indicate values and principles which should be followed by countries and decision-makers of various levels of administration in the creation of a senior-friendly state. Given the above, the Commissioner commissioned the performance of a social survey whose aim was to check how they are understood and implemented in practice. The research findings were analysed in terms of implementation of those principles in the context of human rights. The findings are contained in the report entitled: *Availability of community support for the elderly from the point of view of representatives of municipalities of the Dolnośląskie province* and in the monograph entitled: *System of supporting the elderly in their place of residence. Review of the situation. Model proposal.* The conclusions from the discussed study demonstrate that there is a need to explicitly express values and principles which need to be followed when acting for the benefit of the elderly in the national senior policy. The assumptions to a long-term policy for the elderly for years 2016-2020, adopted by a resolution of the Council of Ministers in December 2013, lack an introduction or a preamble that would indicate such principles, even though they should constitute a foundation for all strategic documents or - if there is no strategy as such - for assumptions to this type of documents. Moreover, it is essential for the national policy, employing relevant strategies and action plans, to oblige local self-governments to prepare local development strategies that also take into account the issue of population aging on the basis of a reliable diagnosis of needs of senior inhabitants of a given commune. Local strategies should outline priorities and developmental goals in a spe-

142 Letter of 13 July 2017.

143 Letter of 14 November 2017.

cific timeframe and indicate methods for their implementation. A direction for development should also be established on a national level and promote the move away from institutional care and support the community care model. Given the above, the Commissioner requested[144] the Minister of Family, Labour and Social Policy to present information on the work schedule related to the preparation of the assumptions for the policy for the elderly up to 2030 and a relevant strategy for seniors, including planned social consultations.

The Minister responded[145]by informing that the Ministry is preparing a document outlining the policy for the elderly in Poland, entitled *Social Policy for the elderly until 2030. Safety – Participation – Solidarity*. That document is a strategic project in the Strategy for Responsible Development until 2020. In order to achieve that goal, as part of the Council for the Senior Policy operating under the Minister of Family, a team for the development of social policy for the elderly was established in order to verify and update the assumptions of the policy for seniors.

Geriatric care under the network of hospitals

Several problems came to light in the context of the new principles for the operation of hospital care[146]. The Commissioner believes that the criteria for qualifying to the network of hospitals comprised in the act do not directly apply to wards within hospitals. As a result, in many cases hospitals were qualified to the network "in part", without all wards remaining in the hospital structure. Further operation of wards that do not belong to the network will depend on the results of the competitions for the provision of healthcare services organized by the National Health Fund. In case of liquidation or reorganization of wards (e.g. fusion) there may be practical problems with access to healthcare services for patients waiting in queues. Adopted systemic solutions raise concerns, especially when it comes to the place of administratively and financially separate geriatric care within the network of hospitals. The adopted act does not, namely, take account of geriatric wards when determining different levels of hospital specializations. Geriatric healthcare services are to be provided, for example, on internal medicine wards, outside the hospital under outpatient specialist care or in hospital clinics, which raises serious concerns from the point of view of the wellbeing and health safety of the elderly. The Commissioner observed that the Polish healthcare system lacks a well-established model for comprehensive and coordinated geriatric care and the failure to take geriatric wards into account in the network of hospitals may be another step away from the creation of such a model. Moreover, the Commissioner supported the suggestion to add a new service to the so called "basket of guaranteed services". The working name of that additional service is the Geriatric Centre of Day Rehabilitation. Services provided in the Centre would be addressed

144 XI.420.1.2017 of 22 May 2017.

145 Letter of 26 June 2017.

146 On 4 May 2017 an act which amended the provisions on publicly funded healthcare benefits entered into force - act of 23 March 2017 (Journal of Laws - Dz. U. of 2017, item 844), which introduced a system for securing basic hospital healthcare services known as the "network of hospitals". The National Health Fund has concluded work on the list of hospitals that were qualified to be included in the network.

at persons at the age of 65+ with diseases typical for advanced age, who were diagnosed with locomotive and intellectual capacity deficits which pose a risk of further exacerbation or the loss of functional independence.

Given the above, the Commissioner requested[147] the Minister of Health to take a stance on issues presented above.

6. Counteracting discrimination - general issues

Protection measures against discrimination in the field of access to services

The Commissioner is receiving more and more complaints concerning discrimination in the field of access to services on the grounds of gender, nationality, ethnic origin, disability, sexual orientation and age. Complainants contacted the Commissioner in relation to the refusal to provide a service - for example, the Commissioner received a case of an individual on a wheelchair who was denied entry to a club where a concert was taking place, even though the premises were wheelchair accessible. Some other cases involved the denial of entry to a fitness club to individuals with visual impairment or refusal to provide services to the poor. The Complainants also addressed the Commissioner in case of discrimination that was manifested by the provision of services of worse quality - as an example, what was posing a problem was the lack of baby changing facilities in male toilets in service points, different admission prices to clubs for men and women, or the fact that one day a week only women were admitted to a sauna place.

The Act implementing certain European Union regulations prohibits discrimination in the access to services but exclusively on the grounds of gender, race, ethnic origin or nationality. Persons who experienced discrimination on other grounds are forced to use legal protection remedies provided for in other acts. In the opinion of the Commissioner, discrimination in the access to services may constitute a violation of consumer rights.

If the violation of the non-discrimination principles takes place between private entities, the Commissioner for Human Rights may only investigate the operation of institutions and bodies whose statutory tasks include discrimination prevention and who are entitled to intervene in case a private entity commits an act of discrimination.

Given the above, the Commissioner forwarded the complaints about discrimination in the access to services to the Office of Competition and Consumer Protection (UOKiK) as well as municipal and district consumer ombudsmen competent for the protection of rights and interests of consumers. Yet, UOKiK has for many years consistently refused to be perceived as a competent body in cases of discrimination in the access to services. In the opinion of the

147 V.7012.1.2017 of 7 July 2017.

President of UOKiK, it intervenes, as part of its powers, in cases concerning the protection of collective interests of consumers "regardless of motives that guide entrepreneurs who commit such violations. Yet, actions of entrepreneurs, consisting in treating certain individuals less favourably than others in a comparable situation, even though indicative of the violation of the equal treatment principle, do not constitute, as a rule, actions that compromise the collective interests of consumers in the meaning of Article 24 of the Act of 16 February 2016 on the protection of competition and consumers"[148]. Also consumer ombudsmen considered themselves in many cases incompetent to intervene - in the opinion of some of them, they deal with the protection of consumer rights, i.e. the rights of individuals who concluded an agreement with an entrepreneur. Therefore, "the basis for ombudsman's intervention is a specific agreement and ambiguities that stem from it, including actions of the entrepreneur which violate the rights of the weaker party to the agreement, that is the consumer"[149]. Therefore, consumer ombudsmen are not competent bodies to investigate cases of discriminatory commercial offers or rules and regulations (e.g. an offer addressed solely at heterosexual couples, with the exclusion of same-sex couples or store's rules and regulations whereby access is denied to persons with dogs - including blind individuals with guide dogs). Yet, discrimination in the field of access to services very often occurs at the stage of agreement's conclusion or the lack of its conclusion due to discriminatory practices of the service provider.

Given presented doubts concerning competent bodies which should intervene in cases of discrimination in the field of access to services the Commissioner asked for the preparation of an expert opinion on the application of norms for the protection of competition and consumers in the event of violation of non-discrimination principles by entrepreneurs. The expert opinion has been drawn up by the Centre for Antitrust and Regulatory Studies[150]. It can be concluded from that opinion that the body that is competent in cases of discrimination in the field of access to services is, by principle, the Office of Competition and Consumer Protection - in the opinion of CARS' experts, this type of discrimination may constitute a violation of collective interests of consumers. In this regard the Commissioner will take further actions aimed at increasing the effectiveness of available legal remedies protecting against discrimination in the access to publicly offered services.

Measures against prejudice-motivated violence

There are numerous arguments indicating the need to strengthen the scope and effectiveness of legal and criminal protection of persons affected by prejudice-motivated crimes[151]. Further arguments are provided by the results of social studies conducted at the request of the Commissioner[152]. As the study revealed, the psychological and social consequences for victims of

148 E.g. letter of the President of UOKiK to the CIMMISSIONER of 14 July 2017.

149 E.g. letter of the Municipal Consumer Ombudsman in Wrocław to the CIMMISSIONER of 26 July 2017.

150 http://www.cars.wz.uw.edu.pl/badania-22.html.

151 Cf. recommendations indicated in the Introduction to this Information.

152 See the CIMMISSIONER's report Prejudice motivated crimes. Analysis and recommendations. Principles of equal treatment. Law and practice, Warsaw 2017.

prejudice-motivated crimes, and in particular for LGBT people and representatives of ethnic minorities, are much more serious than the consequences of crimes that are similar, but are not motivated by prejudice. The differences noted included a higher intensity of PTSD symptoms, less support for the victims and a lower level of recognition by the public of the harm done to the victims of prejudice-motivated crimes. The report focused on prejudice-motivated crimes committed against the elderly, persons with disabilities, non-heterosexual and transgender individuals. In Polish penal law, the level of protection against prejudice-motivated crimes against those groups is lower than the level of protection against crimes motivated by prejudice against people of different nationality, ethnicity or religion, or irreligious people. It is, therefore, necessary, as the Commissioner observes, to take further actions in order to ensure adequate response to every case of a prejudice-motivated incident.

Protection of rights of the aggrieved party in criminal proceedings

The Commissioner shows continuing interest in the position of the aggrieved party in criminal proceedings. Standards arising from the "victims' rights directive"[153] of the European Parliament and the European Council constitute a significant factor that determines that position. The fundamental aim of the directive is to ensure meeting individual needs of the crime victims and strengthen their rights so that every crime victim in Europe could receive a minimum level of protection, information, support and access to justice system, irrespective of nationality and place of residence within the EU. Additionally, special attention was devoted to the support and protection of victims of some crimes, who are especially exposed to the risk of secondary and repeated victimization, intimidation or even revenge from the perpetrator, e.g. victims of violence on the grounds of gender or violence victims in close relationships.

Pursuant to Article 27 (1) of the directive, member states were obliged to bring into force the statutory laws, executive regulations and administrative provisions necessary to comply with this Directive by 16 November 2015. Actions have been taken to implement the principles arising from the directive, in particular by passing the *Act on the protection of offence victims and witnesses* as well as introducing changes to the Code of Penal Procedure and the Criminal Code. Despite that, the Commissioner voiced doubts as to whether a full transposition of the directive to the Polish legal system took place.

The directive indicates directly that when making an assessment of the needs of the crime victim one should take into account such personal characteristics as age, sex, gender identity, race, religion, health status, relationship with the perpetrator or dependence on him/her or past crime experience. Yet, the provisions implementing the directive fail to explicitly specify victim's personal characteristics that should always be taken into consideration when assessing special needs of that individual related, *inter alia*, to his/her participation in the proceedings. What also raises Commissioner's doubts is the method of implementing regulations concer-

153 Directive 2012/29/EU of 25 October 2012. OJ L 315/57 of 14.11.2012.

ning the provision of help to violence victims as far as ensuring their right to understand and to be understood from the first contact with a competent authority is concerned. Similarly, the Commissioner voiced doubts concerning the provisions specifying the rights of victims of crimes committed in a member state, other than victim's country of residence, to submit a relevant notification to competent authorities in a member state where the victim lives. What also requires improvement are the provisions governing to possibility to avoid contact between victims, and if needed, their families and the perpetrators in venues where the criminal proceedings are conducted. The victim's right to be questioned by the same persons and in case of sex violence victims, gender violence or violence in close relationships - by persons of the same sex as the victims is not always respected. Reservations presented previously with regard to the need to create adequate and children-friendly conditions for questioning minors as well as avoid repeated questioning are still valid. The Commissioner emphasized that in compliance with the directive, member states should encourage civil society organisations to get involved in those matters and closely cooperate with them. The Commissioner[154] asked the Minister of Justice to comment on the presented reservations and provide relevant explanations.

Education concerning non-discrimination and human rights

The Commissioner believes that the issues of human rights, multiculturalism, combating discrimination and stereotypes are not sufficiently represented in the draft core curriculum for general education provided at the level of kindergartens, primary schools, vocational schools of the 1st degree, special and post-secondary schools as well as secondary schools, technical schools and vocational schools of the 2nd degree. The Commissioner requested[155] the Minister of National Education to expand the core curriculum in that regard. In the opinion of the Commissioner, such topics should be included in the curricula for teaching various subjects from the earliest stages of education, in compliance with the recommendations of the Committee of Ministers of the Council of Europe. In response to remarks of the Commissioner, the Minister of National Education stated[156] that the issue of human rights is included in the core curriculum in an adequate scope.

154 XI.518.39.2017 of 10 August 2017.

155 XI.800.3.2017of 20 March 2017 and 25 August 2017.

156 Reply of 10 October 2017.

II. Activity of the Commissioner for Human Rights aimed at promoting, protecting and monitoring the implementation of the provisions of the Convention on the rights of persons with disabilities and the prevention of discrimination on the grounds of disability

1. Equality and non-discrimination (Article 5 CRPD)

The scope of legal protection against discrimination due to disability and its inconsistency with the Convention

The only regulations pertaining to the prohibition of discrimination due to disability in the Polish legal system are provided for in the Labour Code and the *Act on equal treatment*. The latter act ensures the most extensive legal protection against discrimination on the grounds of race, ethnic origin or nationality. Yet, the protection it offers to the victims of discrimination due to disability, religion, belief, age and sexual orientation is weak. Individuals with disabilities who experience discrimination in such fields of social life, like the education and higher education, healthcare or access to goods and services are not covered by such protection. In the opinion of the Commissioner, the discrimination prevention system in Poland fails to meet the standards established by the Convention.

What also poses a problem is the application of the *Act on equal treatment* as such, in particular the differences in the interpretation of its scope. The Commissioner believes that damages mentioned in Article 13(1) of the Act should not only be construed as a legal remedy striving to make up for the material damage but also as a compensation for non-material damage.

A special type of discrimination foreseen in the Convention is the denial of "reasonable accommodation", understood as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. That institution is limited in the Polish legal system to the area of employment. Pursuant to the Convention, however, it should be applied, without exception, in the area of politics, economy, social life, culture, civil policy and all others.

The Commissioner requested[157] the Government Plenipotentiary for the Disabled to initiate relevant legal changes concerning the scope of protection from discrimination due to disability in Poland. In reply the Plenipotentiary informed[158] that he submitted a letter to the Government Plenipotentiary for Civil Society and Equal Treatment with a request to take a stance on the issues which indicate the need to include in the Polish legal system missing solutions concerning equal treatment which will ensure that the disabled are protected against discrimination, as required by the Convention. Regrettably, no suggested actions were undertaken by the end 2017[159].

Denial of reasonable accommodation in the access to services

The Commissioner filed a suit for damages for the infringement of patient and personality rights of a person with visual disability who was refused access to the non-public healthcare facility with a guide dog[160]. The person, on behalf of whom the Commissioner instituted the suit, made an appointment to see a doctor in order to select a prosthetic eye. Later the healthcare facility was informed by email that the patient will be accompanied to the appointment by a guide dog. In reply to that email, the woman received information about the cancellation of the appointment. The key issue in that case was access to goods and services for persons with visual impairments using the assistance of a guide dog as well as the non-discrimination of persons with disabilities while using healthcare services provided from public funds. Pursuant to Article 25 of the Convention on the rights of persons with disabilities, persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. For this purpose, public bodies and institutions are obliged, *inter alia*, to provide persons with disabilities with the same range, quality and standard of healthcare as other individuals and prevent instances of denial of healthcare services on the grounds of patient's disability. The provisions of national law and international standards converge in that regard. Equal access to healthcare services financed from public resources is guaranteed to all citizens in Article 68 of the Constitution of the Republic of Poland. The provisions of Article 68(3) of the Constitution additionally oblige public authorities to ensure special healthcare services, *inter alia*, to persons with disabilities. Pursuant to Article 6(1) of the *Act on patients' rights and Patient Ombudsman*[161] a patient has the right to healthcare services that conform to the requirements of the contemporary medical knowledge. The principles of equal treatment and social solidarity as well as equal access to healthcare services for the insured and the right to select service providers from those who concluded an agreement with the Fund constitute the basis for the operation of the health insurance system,

157 XI.816.8.2017 of 25 April 2017.

158 Letter of 23 May 2017.

159 BON.V.071.1.2017.MS of 10 January 2018.

160 XI.812.1.2015 of 18 October 2016.

161 Act of 6 November 2008 on Patients' Rights and Patient Ombudsman (Journal of Laws -Dz.U. of 2017, item 1318, as amended).

pursuant to Article 65 of the *Act on publicly funded healthcare*[162]. Depriving a patient with a disability of the access to such services should be, therefore, deemed an act of discrimination. It should be emphasized at this point that what also constitutes discrimination is the denial of "reasonable accommodation", understood as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. The court of first instance partially agreed with the suit brought by the Commissioner and granted damages for the violation of patient's rights, yet it refused to adjudicate an amount of money that should be paid for the social cause mentioned in the suit[163]. As a result of an appeal made by the Commissioner[164] the appellate court changed the challenged judgement and acknowledged the claim for the payment of a certain amount to a charity[165].

2. Accessibility (Article 9 CRPD)

Architectural solutions applied in the Mieszkanie Plus programme

Media reports indicate that blocks of flats constructed under the governmental programme Mieszkanie Plus are going to be erected with the use of modern, yet cheap and quick technologies. Optimization of costs related to the investment may mean a complete abandonment of such solutions as underground garages or elevators. While looking for savings one should, however, keep in mind residential needs of persons experiencing special circumstances: families with small children, persons with disabilities or the elderly. In reference to information that residential buildings constructed under the programme are supposed to be 3-storey high, which would make it possible to resign from the installation of elevators, the Commissioner highlighted that in compliance with the Convention[166] the principles of universal design should be observed. Upon ratifying that legal act, Poland accepted the obligation to design products, the surroundings, programmes and services in such a way which makes them usable by all, to the largest extent possible, without the need for adaptations or special design. Moreover, human bodies do not always experience limited capabilities from birth, disability may affect individuals also later in life. Due to the aging population, the number of persons with special residential needs in the Polish society will be constantly growing. The Commissioner requested[167] the Minister of Infrastructure and Construction to indicate whether the National Residential Programme gave consideration for the special needs of seniors, persons with

162 Act of 27 August 2004 on publicly funded healthcare benefits (Journal of Laws - Dz. U. of 2017, item 1938, as amended).

163 Judgement of the District Court for Kraków - Podgórze in Kraków of 31 July 2017 (case file No. I C 2080/16/P).

164 Letter of 9 October 2017.

165 Judgement of the District Court in Kraków of 27 March 2018. (case file No. II Ca 2471/17).

166 Convention of 13 December 2006 (Journal of Laws - Dz.U. of 2012, item 1169).

167 XI.7215.1.2017 of 13 March 2017.

disabilities and families with small children.

The Minister explained that[168] the draft act on the National Housing Fund and assignment of State Treasury property for residential purposes provides for measures taken by the Fund to facilitate the usability of housing, *inter alia*, by fully acknowledging residents' need to access required social infrastructure. Therefore, the fund will be promoting solutions which allow for the creation of the environment that is accessible to all users, including seniors and persons with disabilities. Flats constructed under the Mieszkanie Plus [Apartment Plus] programme will meet all current urban planning and architectural standards as well as satisfy the requirements arising from the current legal provisions in the field of construction and accessibility for persons with limited mobility. Cost optimization will not affect the functionality and quality of new apartments. Furthermore, at the moment, a financial programme supporting the creation of a council housing pool is being implemented. It is also addressed to persons with disabilities (as far as sheltered housing is concerned).

Unavailability of the search engine of the National Court Register for blind and visually impaired persons

The Commissioner received complaints concerning the inaccessibility of the search engine of the National Court Register for persons with visual disability. Obtaining information from the database is, namely, dependent on entering the displayed code - the form is secured with the CAPTCHA mechanism. Unfortunately, the CAPTCHA cannot be read by screen readers, which makes it impossible for the visually impaired to use the search engine.

This lack of the possibility for the blind and visually impaired to use the content available in the online database of the National Court Register limits the access of some citizens to information and electronic services offered by public bodies. This may, in turn, result in the allegation of unequal treatment of persons with such disability. The Commissioner requested the Ministry of Justice to urgently introduce alternative solutions on websites that it administers and make sure they are adapted to the needs of the visually impaired, in compliance with the applicable provisions on the accessibility of websites[169].

The Ministry decided that ICT systems of entities performing public tasks should be adapted to the requirements not later than on the date of their first, significant modernization after the entry into force of the regulation.

The Commissioner did not agree with such a stance and requested[170] the Government Plenipotentiary for Disabled People to consider taking relevant measures aimed at ensuring a uniform interpretation of the regulation of the Council of Ministers by government bodies. The

168 Letter of 7 April 2017.

169 Regulation of the Council of Ministers of 12 April 2012 on the National Interoperability Framework, minimum requirements for public registers and sharing information in the electronic form as well as minimum requirements for ICT systems (Journal of Laws - Dz.U. of 2016, item 113, as amended) - § 19.

170 XI.815.34.2016 of 12 April 2017.

Plenipotentiary forwarded the intervention of the Commissioner to the competent body, that is the Minister of Digitalization and informed[171] that he shares the view of the Commissioner. The Minister of Digitalization, in a letter addressed to the Minister of Justice reminded[172] that ICT systems of entities performing public tasks should be adapted to the requirements of the regulation of the Council of Ministers on the National Interoperability Framework not later than within 3 years from its entry into force, i.e. by 30 May 2015. Thus, also the Minister of Digitalization shared the interpretation of the regulation of the Council of Ministers presented by the Commissioner.

With consideration given to the stances of the Government Plenipotentiary for Disabled People and the Minister of Digitization, the Commissioner repeated his intervention before the Minister of Justice with regard to the obligation to adapt the search engine of the National Court Register to the needs of the blind[173].

Obligations of television broadcasters with respect to ensuring accessibility of programmes for persons with disabilities

The Commissioner believes that the broadcasting act[174] should precisely specify the obligations of television broadcasters with respect to ensuring accessibility of programmes for persons with disabilities. The act should separately address the needs of persons with vision as well as hearing impairment. Precise determination of the types and percentage share of various adaptations of programmes to the needs of persons with disabilities in the total broadcasting time should also be explicitly specified in the act. Moreover, in the opinion of the Commissioner, the authorization of the National Broadcasting Council to reduce, by way of executive provisions, the percentage share of shows adapted to the needs of the disabled raises reasonable concerns. Only by regulating that issue in an act can the risk of unjustified and disproportional complete lack of access to some programmes for the deaf, hard of hearing and with visual imairment be averted. When amending the act, one should also make sure that copyright regulations are formulated in such a way as not to constitute an actual barrier in the adaptation of a given production to the needs of persons with vision or hearing disabilities. The above reservations were presented[175] to the Chairman of the Legislation Committee of the Senate of the Republic of Poland in the hope that they will be taken into account in the course of work on amending the broadcasting act[176].

171 Letter of 4 May 2017.
172 Letter of 29 June 2017.
173 Letter of 27 November 2017.
174 Act of 29 December 1992 (Journal of Laws - Dz.U. of 2016, item 639 and 929).
175 XI.815.5.2017 of 2 March 2017.
176 Senate paper No. 366, Sejm paper No. 1607.

3. Access to justice (Article 13 of the CRPD)

Accessibility of the system of justice for persons with disabilities

The Commissioner receives information on problems and impediments encountered by persons with disabilities in the sector of justice. The existence of the problems was confirmed by the results of social research conducted by the Commissioner. The results were presented in the report entitled *Accessibility of the system of justice for persons with disabilities - analysis and recommendations*. The key conclusion from this research is that the system of incapacitation in its present form should be abolished, and should be replaced with a system of supported decision making. Persons with intellectual or mental disabilities who are legally incapacitated do not, as a rule, have the capacity to be a party to legal proceedings. This seems to be a too strong and ungrounded limitation of the constitutional right to court. It is of great importance to respect the will of persons with disabilities with regard to matters that concern them personally.

A serious obstacle in accessing the system of justice by persons with intellectual or mental disabilities is related to the possibilities to use special forms of expression of will. The legislation that sets out the rules for expression of will should provide for different forms of communication with persons with disabilities, such as the Braille alphabet, tactile communication, large print, etc. Furthermore, it is necessary to popularize methods that enable hearing a witness remotely or taking evidence remotely by means of various technical devices, and to consider possible legislative changes in regulations that limit the possibility for persons with disabilities to testify as a witness before a court.

Changes in the access to information and in communication with judicial authorities are also necessary. Measures aimed at digitization of the system of justice should necessarily be continued to make a large share of procedural documents available in the electronic form. Access to assistance of sign language interpreters in court proceedings and in contacts with employees of courts, prosecutor offices or professional legal representatives also remains a problem. In this context, it is necessary to amend the *Act on the sign language and other methods of communication*, so that all institutions financed with public funds, including justice institutions, are required to provide assistance of sign language interpreters. Moreover, it is necessary to develop a national certification system for sign language interpreters.

Limitations in the access to the system of justice by persons with disabilities can be observed also in the field of architectural barriers that exist in court buildings and prosecutor office buildings. There are also cases when persons with guide dogs are not allowed to enter such buildings despite the fact that according to the law, they have the right to enter all places. The Commissioner requested the Minister of Justice[177] to provide information on current measures and planned works aimed at ensuring full access to the system of justice for persons with disabilities[178].

177 XI.411.1.2017 of 13 April 2017 and 13 December 2017.

178 The issues were also a subject of the seminar entitled Accessibility of the system of justice for persons with disabilities – our common matter, held at the

4. Liberty and security of the person (Article 14 of the CRPD)

Situation of persons with intellectual or mental disabilities, held in penitentiary establishments

Among the issues of particular interest for the Commissioner is the situation of persons with intellectual or mental disability who are held in penitentiary establishments. In the Commissioner's opinion, activities taken by courts in this regard are insufficient. This is also confirmed by the results of a study carried out by the Office of the Commissioner for Human Rights, that concerned the situation of 120 people deprived of their liberty, of whom some were diagnosed as having moderate intellectual disability and others were undergoing psychological or psychiatric examinations. Analysis was also carried out of court files on 80 proceedings against 33 convicts, from the point view of the possibility to identify grounds for filing a cassation appeal or for requesting competent courts to resume the proceedings. As a result, 34 judgments were challenged, and in 22 cases the Commissioner appealed to the presidents of competent courts to consider resuming the proceedings. He indicated that after the issuance of the judgments, new circumstances were identified which were significant but not known by the adjudicating courts before, and thus the judgments were issued in violation of regulations on the necessity to ensure a public defender. The conducted analysis of the court proceedings identified a number of cases of transgression of civil rights and freedoms, which was disturbing. The Commissioner requested the Minister of Justice[179] to consider taking actions within the scope of his competences and to present his position on the matter in question[180].

In response, the Minister pointed out[181] that the very fact of intellectual or mental disability of a convicted person does not constitute, in itself, circumstances eliminating the person's guilt and, therefore, does not exclude the possibility of the person's responsibility under criminal law. Thus, this fact does not automatically eliminate situations in which such persons can be sentenced to imprisonment. If a penalty of imprisonment is adjudicated, every such prisoner, upon his/her placement in a penitentiary establishment, is examined by a doctor who issues recommendations for further measures including, for example, placement in a cell adapted to the needs of persons with disabilities, or free provision of necessary support aids such as prostheses, orthopaedic equipment and other items if so required by accompanying physical disability. In the case of doubt as to the prisoner's health condition, information about it should be provided to a penitentiary judge who is responsible for the legality and correctness of the enforcement of the sentence. If the judge concludes that the prisoner has been deprived of his/her liberty without legal grounds, he/she notifies a competent authority and, if necessary, orders a dismissal of the prisoner.

Office of the Commissioner for Human Rights on 4 September 2017 and attended by representatives of numerous institutions.

179 IX.517.2.2015 of 6 March 2017.

180 More details are available in a monograph: People with intellectual or mental disability, held in penitentiary establishments – a report taking into account the results of a study conducted by employees of the Commissioner Office.

181 Letter of 26 May 2017.

Health care and the use of direct coercion in relation to persons with mental disability, held in pre-trial detention centers and penitentiary establishments

The Prison Service is facing problems with proper medical care provision to prisoners who require it. The problem particularly affects people who suffer from mental illnesses. Hospital wards in which 24-hour psychiatric care is provided exist in only five penitentiary establishments. These facilities do not have conditions necessary for the treatment and rehabilitation of mentally ill people, i.e. they lack necessary facilities and equipment, as well as specialized teams of therapists and social workers. The cases of preventive use, in relation to mentally ill persons held in the psychiatric wards, of direct coercion in the form of handcuffs in each case when the patient is leaving his/her cell, cause concern. The Prison Service takes the position that the regulations allow the use of direct coercion measures against mentally ill persons, under the provisions of the *Act on coercive measures and firearms*, even for preventive purposes. In the Commissioner's opinion, the use of direct coercion measures in relation to mentally ill people should be in line with the standards of therapy, including those indicated in the *Act on mental health protection*. Only such approach can prevent situations of violation of personal liberty, bodily integrity and inhuman treatment. In view of the above, the Commissioner requested the Patients' Ombudsman[182] to present his position on the issue and to consider the possibility of conducting inspection visits to all entities that provide 24-hour psychiatric care for persons deprived of their liberty.

Employees of the Commissioner Office carried out inspection visits to the penitentiary establishments in which hospital wards operate. On the sites, the cases of use of direct coercion in relation to persons held in prisons ad pre-trial detention centres were examined, from the perspective of the provisions of the *Act on mental health protection*[183]. Numerous irregularities, including incidents of degrading and inhumane treatment of patients, were revealed during those inspection visits.

In the opinion of the Commissioner for Human Rights, it is advisable that prison hospitals that have psychiatric wards or units where patients are placed in relation to whom direct coercion may potentially be used, have special rooms for isolating such patients. Isolation is a more effective measure and less difficult for the patient to stand than drug administration with the use of force, or than restraining the patient. In addition, all rooms for restrained patients, in penitentiary establishments and pre-trial detention centres, should be equipped with monitoring devices recording image and sound. For the lawful use of direct coercion, it is of great importance to carry out controls in this area by the competent persons: the head of the prison hospital, the district inspectorate of the Prison Service, the Central Prison Service Board, and the competent penitentiary judge and family court judge. Therefore, it seems reasonable to introduce the subject of the use of direct coercion into the scope of plans of controls conducted by the superior penitentiary authorities in penitentiary units with hospital wards.

182 IX.517.1564.2017 of 6 December 2017 r.

183 The Act of 19 August 1994 (Dz.U. [Journal of Laws] of 2016, item 546).

The Commissioner also drew attention to the urgent need to ensure that psychiatric hospital patients ombudsmen who are responsible for geographical areas in which there exist penitentiary establishments with hospital units with psychiatric wards extend the scope of their work so as to cover the patients of these wards. Moreover, prison administrators and prison health care services should take initiative to ensure that patients of prison hospitals' psychiatric wards may exercise their right to assistance provision by psychiatric hospital patients ombudsmen. Therefore, the Commissioner requested Director General of the Prison Service[184] to provide information on his position on the issue.

In reply, the Director General assured[185] that heads of medical units operating within penitentiary establishments supervise, on an ongoing basis, the use of direct coercion measures there. He also explained that the need to modernize the existing monitoring systems in psychiatric wards of prison hospitals was mentioned among the investment needs of individual regional inspectorates of the Prison Service. The Director General also informed that Prison Service regional directors responsible for territories with prison hospitals were instructed to carry out staff training on the subject of use of direct coercion in line with the *Act on mental health protection,* in relation to persons deprived of liberty. They were also instructed to verify whether in all such health care units there is information available to prisoners about patient's rights, including information on the institution of the Patients Ombudsman and the regional psychiatric hospital patients ombudsmen.

In his intervention letter to the Minister of Health, the Commissioner emphasized the need to regulate the powers of Prison Service officers relating to the use of direct coercion. Under the current legislation, Prison Service officers use such measures in line with the applicable regulation issued by the Minister of Health[186]. Yet, the Commissioner is of the opinion that the matter should be regulated by way of a parliamentary act. The Commissioner requested the Minister take relevant legislative initiative.

The minister informed[187] that the Commissioner's postulate to regulate, by way of a parliamentary act, the said powers of the Prison Service officers and their obligation to provide assistance to a physician, nurse or other person conducting a medical rescue operation, has been accepted. The relevant provisions will be changed during the upcoming amendment of the *Act on mental health protection*.

184 IX.517.3524.2016 of 17 January 2017.

185 Letter of 10 February 2017.

186 Regulation of the Minister of Health of 28 June 2012 on the use and documentation of direct coercion and the assessment of the necessity of its use (Dz. U. [Journal of Laws], item 740).

187 Letter of 9 February 2017.

Supervision by penitentiary authorities regarding persons with intellectual or mental disabilities

The issue of the legality and adequacy of detaining persons with intellectual or mental disabilities is subject to constant supervision by penitentiary judges. This supervision is not limited to persons convicted under the provisions of the Penal Code. There are also regular inspections to verify the appropriateness of placement of such persons in penitentiary establishments. Attention is paid to the correctness of assessment of those persons' mental health condition, and the possibility to held them in detention in view of their illnesses. The role of penitentiary supervision authorities is to ensure institutional protection of prisoners' rights. This protection, as the main task of the penitentiary supervision authorities, is constantly monitored by the National Preventive Mechanism.

The Commissioner's Office analysed 149 reports on inspection visits and supervision visits carried out by penitentiary judges. The analysis showed that the inspection visit reports did not cover the subject of situation of persons with mental or intellectual disabilities at all. This means that the judges did not pay attention to this group of prisoners, and did not evaluate or verify their situation, despite the fact that it is a particularly sensitive group as compared to the overall population of persons held in penitentiary establishments. Information contained in reports on supervision visits, in turn, sometimes related to people with mental or intellectual disabilities, but was most often very brief and superficial and did not examine situation of this group. Some of the penitentiary judges conducting the supervision visits relied solely on documentation provided by the penitentiary establishment. They did not speak with the prisoners concerned, although they were expected to assess their situation. Moreover, the findings of the penitentiary judges often differed from the findings of other authorities. Reports on those supervision visits during which the judges tried to assess the situation of prisoners with intellectual or mental disabilities showed that the assessment focused primarily on the convicts' living conditions and psychological support provided to them. The judges did not take any attempts to verify the adequacy of imprisonment of the convicts in view of their specific mental health condition or intellectual possibilities, or their ability to live in detention. The Commissioner requested[188] the Minister of Justice to take a position on the work of the penitentiary supervision authorities in practice and, possibly, to take action to improve their work in the future.

Penitentiary establishments: space accessibility for persons in wheelchairs

Inspection visits conducted by the National Preventive Mechanism justify the general conclusion that although cells for people using wheelchair exist in the inspected places of detention, architectural barriers have not been fully eliminated. The establishments are only partly accessible for such detainees who, as a consequence, cannot fully exercise their rights. The

188 IX.517.2.2015 of 15 December 2017.

infrastructure of the establishments does not make it possible for persons in wheelchairs to leave their cells without support from other persons. A prisoner who wants to get to an outdoor walking area, to a room for meetings with visitors, or to a common room for prisoners often has stairs on the way, and has to request assistance of other detainees.

The Commissioner is of the opinion that the Order of the Head of the Prison Service on the designation of prisons and pre-trial detention centres[189] should be updated so as to ensure that cells where people on wheelchairs are to be placed are fully adapted to their needs so that they can move around unassisted. The Commissioner requested[190] Director General of the Prison Service to take relevant action and to present his position on the issue.

In response, the Director General assured[191] that the Prison Service regularly implements modernization and repair projects to improve the living conditions of prisoners in Poland. Within the funds available, works are carried out to eliminate architectural barriers for wheelchair persons, and when constructing every new penitentiary establishment, cells adapted for prisoners with disabilities are built.

Long-term placement in a psychiatric hospital as a security measure

The problem of convicts' long-term placement in psychiatric hospitals as a security measure is a subject of the Commissioner's constant interest. Particular concern, in the context of the effectiveness of such persons' treatment and therapeutic procedures, is caused by cases of placements for very long periods such as, in the extreme cases, 42 years or 47 years. In certain cases of long-term internment it is doubtful whether the purpose of the security measure, referred to in Article 202 of the Executive Penal Code, i.e. improvement of the health and behaviour of the offence perpetrator to the extent making it possible for him/her to live among members of the society without a risk of violation of legal regulations, or, in the case of a perpetrator placed in a psychiatric institution, to the extent enabling him/her to undergo further treatment outside the institution, is achieved. Psychiatric hospitals are also used for non-medical purposes. The issue of funding available to medical facilities where the security measures are carried out is connected with their ability to ensure sufficient numbers of staff. Psychiatric wards where detainees' internment takes place report, as one of the main problems faced by them, the insufficient number of medical personnel. The shortages concern, in particular, nurses for night duties, as well as physicians actually available within the institutions. The Commissioner requested the Minister of Health [192] to present his position on the issue.

The minister considered[193] that the argumentation that prices of forensic psychiatry services are not related to the effectiveness of treatment, is incorrect. The long-term (often multiannu-

189 Order no. 30/15 of 1 July 2015.
190 Letter no. KMP.571.2.2017 of 24 January 2017.
191 Letter of 8 February 2017.
192 IX.517.1476.2017 of 28 June 2017.
193 Letter of 12 July 2017.

al) stay of detainees in psychiatric institutions as a result of the adjudicated security measure is sometimes not in proportion to the gravity of the committed offence (as the offence is subject to significantly less severe penalties). Sometimes it results from the necessity of further treatment in hospital conditions as there is no adequate social support available for such persons after releasing them from detention. The court's decision to end the detention takes into account not only the presence of mental illness as such, but also the possibilities for the patient's independent living and the continuation of treatment in non-hospital conditions in a way eliminating any risk to health or life of the patient or other persons. The suggested reduction of the funding of treatment which, over time, proves to be ineffective could lead to applying the incorrect but economically forced solution of terminating the detention despite the fact that the detainee has not been treated and still poses a risk to public safety.

Rules of placing legally incapacitated persons in social welfare homes

As a result of the Constitutional Tribunal's judgment[194] on the case considered upon the application filed by the Commissioner, a significant amendment to the *Act on mental health protection* was passed. The *Act amending the Act on mental health protection and certain other acts*[195] changed, inter alia, the system of placement of legally incapacitated persons in social welfare homes, and gave them the possibility to apply to a court for reconsidering the need for their further stay there. According to the amendment, in the case of a person's placement in a social welfare home without his/her consent but with a consent of his/her statutory representative, a decision of the guardianship court is required. An obligation for the court to hold a hearing of a legally incapacitated person who is to be placed in a psychiatric hospital or a social welfare home has been introduced. Moreover, in order to ensure additional and full legal protection for people with intellectual or mental disabilities, for a person placed in a social welfare home or a psychiatric hospital without his/her consent the court is under the obligation to appoint (instead of "may appoint", as under the former regulations) a lawyer or a legal counsel ex officio, without any application submitted. According to the amendment, a person (also a legally incapacitated one), admitted to a social welfare home based on a decision of a guardianship court, has a right to apply for changing the decision.

194 Judgment of 28 June 2016, case file no. K 13/15.

195 The Act of 24 November 2017 (Journal of Laws [Dz. U.] item 2439).

5. Living independently and being included in the community (Article 19 of the CRPD)

deinstitutionalization

There are still many persons with disabilities and senior persons who have no possibility to take free decisions and exercise control over their own lives. Real support is not available to them, or depends on their living in social welfare institutions. These people are often only "cared for" rather than exercising their own rights and obligations. The response to this situation should be the process of deinstitutionalization. It means transition from institutional care to support at the local community level, with due respect for the subjectivity and inherent dignity of all people, including their right to take decisions regarding their own rights. To make deinstitutionalization effective, it is necessary to adopt the National Deinstitutionalization Programme, with specific goals, a realistic implementation schedule and a set of indicators. The plan should cover persons with disabilities, mentally ill persons, seniors and children.

The Commissioner, together with 54 social organizations, appealed to the Prime Minister for adopting such a programme in Poland[196] and stressed that the current solutions, including those included in the government programme "For Life" are insufficient. The process of deinstitutionalization should also cover the mental health care system in which large-size psychiatric hospitals continue to play a dominant role. The process of transferring to local communities the responsibility for providing assistance to mentally ill patients under the National Mental Health Programme encounters a number of obstacles and is delayed[197].

Assistant to a person with a disability

Personal assistance is an important element of ensuring independent living to persons with disabilities. Such living is understood as the possibility to exercise control over their own lives and make decisions regarding their matters. Independent living should not be interpreted as the ability to perform everyday activities by oneself. Independence as a form of autonomy means that a person with a disability is not subject to control exercised by other people who make choices for the person take decisions about his/her lifestyle. In Poland, there is a lack of a comprehensive model of personal assistance and such services are provided only within individual projects by some local governments and non-governmental organizations. The need for the adoption of comprehensive solutions in this regard has been highlighted in the Commissioner's report[198].

196 XI.503.4.2016 of 20 November 2016.

197 The subject was also discussed in a seminar held at the Commissioner's Office on 5 December 2017 with the participation, among others, of an expert who presented information about the programme implemented in this field in Hungary.

198 See: Personal assistance to people with disabilities. Analysis and recommendations, The principle of equal treatment. Law and practice, Warsaw, 2017.

6. Respect for privacy (Article 22 of the CRPD)

Placing the code of disability cause in disability certificates

The Commissioner joined[199] the proceedings before the Constitutional Tribunal in the case concerning the placement of the code of disability cause in disability certificates. The Commissioner for Human Rights indicated that the provision of the *Regulation on certificates of disability and degree thereof*[200] is inconsistent with the constitutional right to privacy, personal data protection and the principle of proportionality in so far as it provides for obligatory indication of the code of the cause of disability in the disability certificate.

The provisions of the Act[201] do not require disclosure of a specific cause of disability in the disability certificate. The Act's provision which requires the issue to be governed by way of a regulation does not justify the limitation of the rights and freedoms of a person and a citizen. The purpose of issuing decisions on the degree of disability is to determine the rights and obligations of both the employee and the employer. Relevant regulations should protect the right of people with disabilities to privacy, as well as justified interests of employers who seek e.g. subsidies to co-finance salaries of their disabled employees. The proceedings are still ongoing[202].

7. Respect for home and the family (Article 23 of the CRPD)

Lack of systemic solutions regarding community support for parents with disabilities who face barriers in performing their parental tasks

The Commissioner drew attention to the problem of the lack of systemic solutions regarding the scope and forms of community support to parents with disabilities who, due to the specificity of their disability, encounter serious barriers in the performance of their parental tasks. The key instruments of international law guarantee the right of the child to live in a family, and point to the need to avoid placing children outside their natural families, and to ensure all possible assistance to the parents. The Constitution guarantees that the good of the family will be taken into account in the policy of the state, and that special assistance for families in a difficult financial and social situation will be provided. Respecting the rights of parents with disabilities and their children requires the development of a consistent system and comprehensive solutions. A specialized support system needs to be built to eliminate barriers to the

199 XI.501.8.2015 of 25 August 2017, ref. no. SK 19/17.

200 Regulation of 15 July 2003 (Dz.U. [Journal of Laws] of 2015, item 1110).

201 Act of 27 August 1997 on occupational and social rehabilitation and on employment of disabled persons (Dz.U. [Journal of Laws] of 2018, item 511).

202 After the hearing on 21 March 2018, the Tribunal adjourned the proceedings for indefinite time. The Tribunal decided that in order to fully consider all aspects of the case, it will exercise its right provided for in Article 71 of the Act of 30 November 2016 on the organization of proceedings before the Constitutional Tribunal, and will request other bodies to present their position on the subject of the constitutional complaint.

performance of parental tasks. The Commissioner requested[203] the Government Plenipotentiary for Persons with Disabilities to consider the holding of a meeting and a joint discussion to examine the aforementioned problems.

In reply, the Government Plenipotentiary for Persons with Disabilities pointed to the existing government programmes providing support for people with disabilities who raise children. However, he did not directly relate to the matter raised by the Commissioner[204].

8. Education (Article 24 of the CRPD)

Transport of students with disabilities to schools and other educational institutions

The Commissioner received complaints from parents of pupils/students with disabilities regarding problems connected with their transport to schools or other educational institutions. The transport problems can lead to situations in which such pupils/students have no possibility to attend schools. The provision of access to educational facilities for students with disabilities is a tool ensuring their right to education without discrimination as well as equal opportunities as compared with other pupils/students.

The largest number of the complaints concerned the fulfilment by municipalities of their obligation to finance the transport of children with disabilities and their carers to kindergartens, schools or other specialized centres. The *Act on the system of education* (hereinafter: ASE)[205] points to two forms of fulfilling this obligation: by providing the children with free-of-charge transport and care during transportation, or by reimbursing the costs of the child and its carer's transport, in line with the rules laid down in the agreement concluded between the head of the municipal government (head of rural municipality's governing body/ town mayor) and the parents if they provide the transport themselves. In practice, the rules for reimbursement of transport costs are often determined unilaterally by the head of the municipality. Individual municipalities have different regulations concerning the method of calculating the costs, including different rates reimbursed to the parents per kilometre. The rates per kilometre, as calculated by municipalities, in many cases do not cover the actual costs incurred by the parents/carers who provide transport to the child. In the opinion of the Commissioner, in order to conclude that the municipality correctly and effectively implements its statutory obligation to organize transport of persons with disabilities to relevant facilities, it is not enough if it reimburses only the costs of travel during which the parent provides care to the child. It is also necessary to cover the costs of the carer's travel back from school, and then from home to school to collect the child. This interpretation was confirmed by a court in a case that was

203 III.502.7.2017 of 23 October 2017.

204 BON.II.071.2.2017.GG of 29 December 2017.

205 The Act of 14 December 2016 (Dz.U. [Journal of Laws] of 2017, item 59, as amended).

joined by the Commissioner. The judgments issued by the courts of two instances may be referred to by other persons applying for reimbursement of the costs of transporting their disabled children to school[206].

Another identified problem is the wording of the currently applicable Article 39(4) of the ASE. It stipulates that the transport of pupils/students with multiple disabilities and intellectual disability is obligatory until the age of 24 or 25, if they are transported to "revalidation and caretaking centers". In relation to the previous wording of the provision, the number of entities to which the disabled persons had free transport guaranteed, has been significantly reduced.

For many parents of pupils/students with disabilities and for many responsible municipal authorities, the term "the nearest school" is also unclear. Although many municipalities accept the view that the nearest school should be one that is the closest and that that fulfils the recommendations concerning the provision of special education to the pupil/student, this position is not taken by all municipalities. Many local governments guided by concerns about public finances use the interpretation according to which the regulation refers to the school which is the nearest one in the geographical sense.

The problem is also the lack of precise indication in the ASE provisions of special requirements that should be met by the means of transport by which pupils/students with disabilities are transported to schools within the system of transport organized by local governments, and what qualifications should be required of persons taking care of such pupils/students during their transport. The Commissioner requested[207] the Minister of National Education to take a position on the issue and to take appropriate legislative measures.

In reply the Minister stated[208] that the regulations on the transport of children do not prevent children and youth with disabilities from fulfilling their school obligations and from studying. As regards the lack of precise criteria for the reimbursement of the costs of transport of the children and their carers, the Minister stated that this issue should be dealt with in regulations other than the ASE because it relates to tasks and competences of local governments. He explained that there are no grounds for stating that children and youth with severe intellectual disability, with intellectual disability and with multiple disabilities have different rights in terms of their transport to preschools and schools, and thus different rights to study. The provisions of ASE do not change the type of the educational institution but only refer to it more precisely. There are no reasons to conclude that reference is made to any other facility such as a special schooling centre. However, the Ministry agreed with the Commissioner that the term "the nearest school" should be clarified in the context of regulations on the provision by municipalities of free transport to schools and educational institutions

206 XI.7036.40.2016, judgment of the District Court for Krakow-City Centre of 12 July 2017 (case file no. IC2401/16/S) and judgment of the District Court for Krakow-City Centre of 14 February 2018 (case file no. II Ca 2202/17).

207 XI.7036.61.2017 of 24 November 2017.

208 Letter of 28 December 2017.

The current position of the Ministry of National Education on the matter is not satisfactory and therefore the Commissioner will continue his activities.

Non-availability of individual tuition for children with disabilities in educational institutions

The regulation of the Minister of National Education on individual tuition within the system of mandatory one-year preschool education and school education does not include the possibility of tuition provision to an individual pupil/student, as part of one-year preschool education or school education, inside public preschools and schools. Pupils/students with disabilities can be provided with this form of education only in their place of residence.

At the stage of designing the current solutions, the Commissioner reminded about the state's obligation to ensure an inclusive system enabling integration at all levels of education. Individual tuition should take place in exceptional cases when it is truly necessary and justified by the special needs of the child and based on an informed decision of its parents or legal guardians. Individual education provided at home should not be the only solution available. Parents who select the option of their child's individual tuition should also have the possibility to choose a pre-school or a school as the place at which such tuition will be provided. The introduction of the changes proposed by the Ministry of Education may result in isolating children with disabilities, and thus, intensify the phenomenon of social exclusion of this group. Moreover, the lack, in the education system, of the possibility of individual tuition of pupils/students with disabilities, provided within a pre-school or a school, may bring about consequences for their parents' social and professional lives. The option of individual tuition provided only at home, and thus the need to ensure care provision for the child may result in a situation in which a parent will have to give up professional work. The Commissioner requested the Minister of National Education[209] to present a detailed position on the problem and to explain the reasons for introducing such a significant change in the system of individual tuition.

The Ministry explained that the reason for the change is to ensure that individual tuition is provided only to those pupils/students who truly cannot be transported to educational institutions. For this group of pupils/students, various forms of participating in school life will be ensured. The possibility of return to school to study together with the peers will also be monitored. The Commissioner will monitor the operation of the new system in practice.

Protection of the rights of children of deaf parents

Data collected by non-governmental organizations indicate that over 90% of deaf parents have children who can hear well [210]. The specific situation of such families poses challenges for

209 XI.7036.12.2017 of 13 May 2017.

210 *CODA – English: Child of Deaf Adults, aged below 18.

their members in the fields of communication, education and unique identity of children raised in them. CODAs* are, in fact, children with special educational needs just like bicultural or bilingual children. In Poland, they are not yet considered to have a special status so they do not receive necessary support from schools or from specialist institutions.

Hearing children of deaf parents often have additional duties. They often act as interpreters, guides or guardians of their deaf mother or father, sometimes without any additional assistance. Schools happen to request them to act as interpreters for their parents. The Commissioner also received disturbing information about cases in which a hearing child of a deaf parent was asked to act as the parent's interpreter in his/her contacts with health care services, even in connection with medical examinations or consultations. Acting as interpreters in such situations may have a negative impact on the children's development due to the need to come into contact with medical details of health condition of their parents. Such situations are also against the *Act on the sign language and other methods of communication*. In addition, CODAs may become victims of a specific type of discrimination i.e. discrimination on the grounds of parent's disability. The Commissioner requested[211] the Minister of National Education to take a position on the issue of support to CODAs in educational institutions and to inform about the actions taken.

The Minister informed[212] that in the opinion of the Ministry of Education, support for CODAs in preschools, schools and other educational institutions should be provided within the system of adequately organized psychological and welfare assistance. Furthermore, in connection with the work carried out by the Ministry of Education on a new system of education for pupils/students with special educational needs, problems of this group of children will be analysed. Consideration will be given to improving the system of diagnosing their needs and possibilities, and providing adequate support. The Commissioner will monitor the works carried out in this area.

9. Adequate standard of living and social protection (Article 28 CRPD)

Situation of carers of persons with disabilities who, after the end of care provision, seek allowances due to their incapacity to work

The Commissioner received complaints from disabled persons' carers who, after the end of care provision, applied for allowances on the grounds of their incapacity to work. One of such complaints was filed by a person who was considered fully incapable of work but who proved that social insurance benefits were due to her, in total, for over 30 years (including periods

211 XI.7036.41.2017 of 29 September 2017.

212 Letter of 31 October 2017.

in which the insurance contribution was paid, and those in which they were not paid). For 29 years, the contributions were paid. However, the social insurance institution refused the allowance. It stated that one of the conditions laid down in the *Act on retirement pensions and disability pensions paid by the Social Insurance Fund*[213] was not met, according to which the applicant is required to have a 5-year contribution period within the decade preceding the application for the allowance or directly before the day on which the incapacity for work occurred. In the Commissioner's opinion, in the case of persons who gave up employment in order to take care of a family member, and whose social insurance period exceeds 25 years (including contribution payment periods and non-payment periods), the only condition for entitlement to the allowance should be certificate of full incapacity to work. The Commissioner requested[214] the Minister of Family, Labour and Social Policy to present his position on the issue.

In reply, the Minister informed[215] about the establishment of an Interministerial Team for the development of solutions to improve the situation persons with disabilities as well as their family members. The Team's tasks are to conduct an analysis of the current situation of people with disabilities and their families and to develop comprehensive solutions to improve their situation. The work, in accordance with the Minister's declaration, will be carried out by the Team.

Implementation of the Constitutional Tribunal's judgment concerning nursing benefits

In October 2017 three years passed since the judgment in which the Constitutional Tribunal considered[216] that the differences in the entitlement to nursing benefit of people who provided care to a person with disability, depending on the time of the occurrence of the disability, are inconsistent with the Constitution. Despite the Tribunal's recommendation to urgently take legislative work, the works were not completed. In the opinion of the Commissioner, the long period of non-compliance with the Constitution increases negative social attitudes among the carers. Such attitudes have existed since the Constitutional Tribunal's judgment of 5 December 2013, which concluded[217] that the expiration of the right to nursing benefit on 30 June 2013 was inconsistent with the Constitution. The beneficiaries expected to get the nursing benefit back. The activities of the legislator who introduced a new benefit for the concerned group of carers were assessed as insufficient. In the Commissioner's opinion, the state's activities concerning carers of persons with disabilities should have as their priorities: enforcement of the Constitutional Tribunal's judgment of 21 October 2014 to ensure equal treatment of carers of persons with disabilities, to eliminate restrictions in the access to the benefits by persons not required to pay child maintenance, and to introduce more precise regulations on the entitlement to the benefit by parents who themselves have a significant

213 The Act of 17 December 1998 (Dz.U. [Journal of Laws]of 2016, item887, as amended).

214 III.7060.470.2016 of 29 May 2017.

215 Letter of 20 June 2017.

216 Constitutional Tribunal Judgment of 21 October 2014 care ref. no. K 38/13.

217 Case ref. no. K 27/13.

degree of disability. The Commissioner requested[218] the Prime Minister to supervise the legislative works aimed at restoring equal treatment of carers of persons with disabilities.

The minister informed[219] that the ministry conducts analyzes of possible changes in the support system for people with disabilities, their families and carers. In the course of the conducted works, all proposed solutions are analyzed, including the elimination of differences in the size of benefits paid to carers of adults with disabilities and carers of persons who have been disabled since their childhood. The minister also pointed out that a significant improvement in financial support for persons with disabilities and their families is achieved by increasing the nursing benefit, the minimum retirement pension and the social allowance. Support for families with persons with disabilities is also provided within the Family 500+ programme.

10. Compliance with the provisions of the Convention on the Rights of Persons with Disabilities - examination of Poland's report on measures taken to implement its obligations under the Convention on the Rights of Persons with Disabilities

As part of his work, the Commissioner formulates numerous recommendations regarding the support system for persons with disabilities, in line with the standards laid down in the Convention. In 2017, work was carried out, in cooperation with an expert committee, on an up-to-date report for the Committee on the Rights of Persons with Disabilities on the situation in Poland. In 2018, the Committee will consider the report, taking into account the Commissioner's alternative reports[220].

218 III.7064.257.2014 of 2 October 2017.

219 Letter of 6 November 2017.

220 XI.411.1.2018 of 30 July 2015 and of 31 January 2018; see: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1249&Lang=en.

III. International activity of the Commissioner for Human Rights in the area of equal treatment

In the area of implementation of the principle of equal treatment, the Commissioner conducts active international cooperation with foreign entities. Among the Commissioner's main partners in this area is EQUINET, the European Network of Equality Bodies [221], of which the Commissioner has been a member since 2011. The organization is a professional platform for cooperation and mutual support on the issues of legal interpretation and practical implementation of European Union anti-discrimination directives. It gathers 46 national equality bodies from 34 European countries. Since 2013 Dr Sylwia Spurek, Polish Deputy Commissioner for Human Rights for Equal Treatment has been a member of the 9-member board of the organization.

In 2017, the Commissioner's representatives took part in a number of training sessions, seminars and conferences, including: *Equinet Conference, Advancing Equality: the potential of equality duties*[222]; *How to build a case on equal pay*[223], *Breaking the glass ceiling: career progress for women*[224], *Inclusion of and discrimination against migrants in Europe*[225]. The Commissioner's Office staff also took an active part in the activities of three EQUINET working groups analysing the practical application of anti-discrimination legislation in the member states (*Working Group on Equality Law*), equal treatment of men and women (*Working Group on Gender Equality)* and the anti-discrimination policy of the European Union (*Working Group on Policy Formation*), as well as two temporary working groups working on anti-discrimination research (*Cluster on Research and Data Collection*) and strategic litigation (*Cluster on Strategic Litigation*). On 4-5 December 2017, the working group on strategic litigation organized a training course on the subject at the Commissioner's Office, with the participation of over ten representatives of institutions – members of EQUINET.

In 2017, the Commissioner continued the implementation of a two-year project funded by the European Union and aimed at supporting the Ombudsman of the Republic of Azerbaijan.[226] One component of the project is dedicated to the protection of the rights of seniors and persons with disabilities in Azerbaijan. Experts from the Commissioner's Office e.g. conducted training on the implementation of the Convention of the Rights of Persons with Disabilities, prepared an analysis of legal gaps and urgent needs in this field and developed strategies and action plans for the Ombudsman's Office in Azerbaijan in these fields.

221 website: http://www.equineteurope.org/.

222 3-4 May 2017.

223 31 August – 1 September 2017.

224 13-14 November 2017.

225 6-7 December 2017.

226 Support to the Strengthening of the Ombudsman of the Republic of Azerbaijan.

In cooperation with the Office for Democratic Institutions and Human Rights (ODIHR), the Commissioner continued the implementation of a European Commission-funded project on comprehensive response to crimes motivated by prejudice: *Building a Comprehensive Criminal Justice Response to Hate Crime*. The Commissioner coordinates national-scale research work on the so-called "dark number" of crimes motivated by prejudice, that is prohibited acts that have not been reported to any law enforcement authorities. In 2017, the research methodology was developed, a research agency to conduct field research was selected, cooperation was established with the Centre for Migration Research of the University of Warsaw, the qualitative part of the survey was conducted and the research tool was tested. The results of the research project will be presented in 2018.

IV. Conclusions and recommendations of actions to be taken to ensure observance of the principle of equal treatment and protection of the rights of persons with disabilities

The Commissioner regularly monitors court proceedings relating to the violation of the *Act of 3 December 2010 on the implementation of certain European Union regulations on equal treatment*. In Poland, there have been only a few proceedings that concerned infringement of the principle of equal treatment and ended with a compensation adjudicated by a court. This proves that the protection measures provided for under the Act are not sufficiently effective. The Commissioner's basic objection relates to the limited scope of application of the Act and the different scope of legal protection, depending on the specific grounds on which the principle of equal treatment was violated.

The Commissioner's priority areas include the problem of prejudice-motivated crimes not only against people of different national or ethnic origins or religions, but also against elderly persons, persons with disabilities, non-heterosexual and transgender persons. According to the report published by the Commissioner, the psychological and social consequences for the surveyed persons who have experienced prejudice-motivated crimes are significantly more serious than the consequences of similar crimes not motivated by prejudice. The identified differences include the victims' more severe PTSD symptoms, less support received from others and the society's less serious approach to the impact of crimes motivated by prejudice. In view of the above, the Commissioner recommends amending the Penal Code and the *Act of 28 November 2014 on protection of and assistance to offence victims and witnesses*, monitoring the dark number of prejudice-motivated crimes and constant improvement of competences of police officers, prosecutors and judges in this field.

The Commissioner receives an increasing number of complaints about discrimination in access to services. The Commissioner reports such cases to city or district consumer ombudsmen, and some were reported to the Office of Competition and Consumer Protection. In 2017, the Centre for Antitrust and Regulatory Studies (CARS) was awarded, by the Commissioner, a contract for drawing up an expert opinion on the applicability of the competition and consumer protection standards to cases of violation of anti-discrimination standards by companies. According to the opinion, multiple discrimination in access to services should be considered as a practice that violates collective interests of consumers. Thus, relevant Competition and Consumer Protection inspectorates should react to it.

In 2017, the Commissioner continued his anti-discrimination education activities. He also wrote to the Minister of National Education with regard to non-inclusion of this subject in the new core curriculum and to the withdrawal of the requirement to carry out anti-discrimination actions, which was included in a regulation specifying various requirements to be met by schools and other educational institutions. The Commissioner explained again that the obligation to include the topic in the process of education and to counteract discrimination in this area is the state's responsibility under numerous instruments of international law. The withdrawal of the related provisions from the regulation does not annul the obligation to implement it, but hinders the monitoring of its implementation.

1. Protecting the rights of migrants and national and ethnic minorities. Counteracting discrimination on the grounds of race, ethnicity or nationality

In 2017, the public debate on migration continued to be dominated by the refugee crisis that peaked in 2015 when over 1 million people arrived to Europe by sea. Most of them came from the so-called refugee-producing countries, mainly from Syria, Afghanistan and Iraq. In 2017, the figure was significantly lower: around 170,000 people came to Europe. The inflow of potential refugees to Europe was not accompanied by a proportional increase in the number of people seeking international protection (i.e. the refugee status) in Poland. In 2015, about 12,000 people applied for such protection in our country, and in 2017 the number of the applicants was close to 5,000. Therefore, the annual figures are lower than, for example, in 2013 when as many as 15,000 people sought the refugee status. In recent years there has been, however, a growth in the number of foreigners whose stay in Poland is legalized by way of the typical procedure of granting a residence permit: in 2016, about 140,000 foreigners applied for the permits, and in 2017 the number exceeded 185 thousand.

According to the information received by the Commissioner, in 2018 a priority for the Ministry of the Interior and Administration will be to draw up a new Migration Policy for Poland, a strategic document defining the Polish state's approach to migration. It is already known that the work on the document will be of multidisciplinary character and will cover both voluntary migration caused by economic reasons and refugee migration. The Commissioner recognizes the need to monitor the process of developing the Polish migration strategy. Undoubtedly, the final version of the document will have to take into account the existing guarantees of human rights and freedoms of foreigners who arrive and stay in the territory of Poland.

A specific manifestation of the migration crisis was the situation at Polish border crossings, mainly in Terespol (a crossing with Belarus), but also in Medyka (a crossing with Ukraine). Throughout 2017, the Commissioner received information about large numbers of foreigners

who unsuccessfully attempted to enter the territory of Poland with the intention of filing application for international protection (seeking the refugee status). According to that information, Border Guards officers responsible for border controls in many cases did not accept the foreigners' declarations that they were seeking protection, did not make it possible for them to file relevant applications and did not permit them to enter the territory of Poland. Despite multiple refusals, the foreigners took further attempts to cross the border, often unsuccessfully. Among such foreigners were persons with regard to whom the European Court for Human Rights or the UN Human Rights Committee had recommended to implement interim measures. By recommending such measures, the international institutions requested Poland to postpone deportation from Poland of specific persons whose names were indicated. The Border Guard, despite having knowledge about the nature of the interim measures, still refused entry to the country to them.

In the opinion of the Commissioner, the situation at the border crossings over the last two years has demonstrated the existence of significant legislative gaps in the regulations on border control procedures. During the border control, foreigners are interviewed about the purpose of their arrival to Poland. They have no evidence confirming the course of those interviews, which evidence could be demonstrated in the case of their appeal against the decision refusing entry to Poland to them. In the opinion of the Commissioner, it is therefore necessary to establish clear and consistent rules regarding the procedures to be followed by Border Guard officers in such situations. The taking of minutes of the aforementioned interviews, as well as to adopt a single-type document form and to ensure that the form contains the obligatory question about the intention to seek international protection in Poland should be introduced as requirements under the law. Only such a change in the applicable regulations will allow for effective implementation of foreigners' right to apply for international protection, as guaranteed under Article 56(2) of the Constitution of the Republic of Poland.

For many years, the Commissioner has been closely monitoring the situation of the Roma community from the Małopolskie Voivodeship, who lived in extremely poor housing conditions and were often totally excluded from social and economic life. In the Commissioner's view, whether or not the living conditions of that community are improved depends greatly on assistance provision by the state, and in particular on involvement of the local authorities. Proper use of assistance funds available under the *Programme for the integration of the Roma community in Poland in* 2014-2020 is also of great importance. The Commissioner is of the opinion that the programme's efficiency should be increased by adequate corrections. Among others, the Commissioner recommends allocating a part of the programme's funds to investments, to develop mechanisms that would encourage local governments to take part in the programme, and to improve control over the spending of money within it. Legislative conditions should also be created to allow individuals (e.g. inhabitants of the Roma settlements) to apply for funding themselves. These postulates will remain valid during the discussion on the evaluation of the Programme and the future of this form of assistance, which will proba-

bly start in 2018.

In 2017, about 100 cases were registered in the Office of the Commissioner that related to hate crimes on the grounds of nationality, ethnicity, race or religion. The majority of cases proceeded by the Commissioner concerned aggression towards persons of different national or ethnic origin or persons of different religions. The Commissioner's interventions also frequently related to hate speech i.e. public incitement to hatred or public insulting of individuals or groups of individuals on any of the abovementioned grounds. The Commissioner noted with concern situations in which, during public gatherings, some fascist, racist or anti-Semitic content was publicly presented. The presence of such content in the public space, according to the Commissioner, indicates a growing activity of extremist groups and organizations that refer to totalitarian methods and practices of Nazism or fascism, or whose programmes or activities include or permit hatred on the grounds of race or nationality. This alarming phenomenon requires a strong reaction by the state. It is necessary not only to increase civic and history-related educational activities but also to critically analyze the applicable laws and procedures. The analysis should answer the question whether the legal regulations and their application allow the competent authorities to sufficiently early detect activities of such organizations and whether communication between authorities competent to take action does not encounter unnecessary obstacles. In the first place, however, consideration should be given to the implementation of the solutions provided in the General recommendation No. 35 of 23 September 2013: Combating racist hate speech, published by. the UN Committee on the Elimination of Racial Discrimination, which recommend that states to penalize membership in organizations promoting or inciting hatred on the grounds of race, or participation in any such actions.

2. Preventing discrimination on the grounds of religion, creed or belief

The Commissioner notes with great concern a wave of aversion or even hostility towards people or groups of different ethnic or national origin or people of different religions. According to the statistics of the National Prosecutor's Office, in the first half of 2017, the victims of crimes were most often representatives of minority religions, Muslims and Jews. Hatred is often increased by the irresponsible debate that is taking place around the phenomenon of migration, and in particular by unjustified fears or prejudices existing in the Polish society against migrants often automatically identified as Muslims.

The radicalization of public debate is also visible in the language used by the media. In 2017, this phenomenon was described in a report drawn up for the Office of the Commissioner by the Public Debate Observatory of the magazine entitled *Kultura Liberalna* [*Liberal Culture*],

in the report entitled: *Negative image of Muslims in the Polish press.* Based on the monitoring of texts published in several press titles, carried out from September 2015 to September 2016, the researchers described the contexts in which subjects related to Muslims but also migrants or refugees were discussed by the media. It was found that the articles regarding the situation in Europe in the era of the migration crisis were dominated by the contexts (metaphors) such as invasion, clash of civilizations or even alternative war conducted by methods such as terrorism. Undoubtedly, such a language of public debate translates into an increase in prejudices and stereotypes existing in the Polish society, which is confirmed by data from studies on the society's distance towards various groups.

In the opinion of the Commissioner, it is necessary for the authorities to take all measures to counteract the growing number of hate crimes as well as hate speech. According to e.g. Recommendation No. 15 of the European Commission against Racism and Intolerance on combating hate speech, it is necessary to provide adequate legal protection against hate speech, to examine the causes of this phenomenon and to collect data. The effective implementation of the measures depends on ensuring proper coordination and cooperation between public authorities and collaboration with other state institutions, such as, in particular, law enforcement agencies or national human rights institutions and non-governmental organizations.

The education system is of particular significance from the point of view of freedom of conscience and religion. The postulate to require school directors to reliably inform parents and students about the possibilities and principles of attending ethics lessons and minority religion lessons is still valid. The change in the regulations on the organization of retreats for members of the Roman Catholic Church should be assessed positively. First of all, students will be able to attend them also on other days, which means advent retreats may be held. Secondly, students will be able to use attend retreats which constitute a practice of a given church, and not a requirement of the church. A provision was also introduced that during the retreats the school is still responsible for its care and education function. Since in the opinion of the Ministry of National Education it is not possible to hold retreats across the country according to the same pattern, it is necessary to monitor the practical application of the regulations and respect the rights of students and teachers, including to freedom of conscience and religion.

3. Counteracting discrimination on the grounds of gender

An important issue in the Commissioner's work was the prevention of gender-based violence and domestic violence. The imperfect provisions of the Act on Counteracting Domestic Violence constitute, in fact, a declaration of intent to take action, rather than a legal norm. As a consequence, there are significant doubts relating, in particular, to proper fulfilment of the obligation to ensure, to violence victims, safe shelter in specialist support centres for victims

of domestic violence. There are no minimum standards for basic services provided by such specialist support centres, either. The provisions on corrective and educational measures for persons using violence against their family members remain imprecise. Of importance is also the problem of the lengthiness of court proceedings regarding applications filed by persons affected by domestic violence who seek a court order for the violence perpetrator to vacate the family dwelling.

It is also necessary to ensure real possibilities of pregnancy termination in cases permitted by the law. This is of particular importance in situations when the continuation of pregnancy poses a risk to the life or health of the mother. Failure to guarantee access to the abortion procedure in such cases constitutes a violation of woman's right to health and life. The Commissioner has emphasized a number of times the need for urgent action to establish a mechanism that would allow patients to obtain information on where they can realistically obtain a specific health care service that has been refused to them on the grounds of the conscience clause.

As regards reproductive rights, the Commissioner emphasized that health care services for women during childbirth should be provided in conditions not violating their right to dignity and intimacy. The implementation of perinatal care standards has not brought the expected results. There are still problems with access to pharmacological anaesthesia for women during childbirth, and the considerable differences in the availability of the procedure across the country.

The Commissioner took action aimed at improving the situation of children for which no child maintenance is paid by the obliged persons. It is necessary to strengthen the impact of the labour market policies on increasing the employment rate of child maintenance debtors who are unemployed. Systemic measures should be taken towards increasing public awareness of the consequences of failure to fulfil child maintenance obligations as well as reducing public acceptance for non-payment of maintenance.

The Commissioner also drew attention to the need to ensure equal access of women and men to vocational education and the occupational counselling system in Poland. It is necessary to take measures to ensure equal participation of women and men in education in the fields of science and technology.

The Commissioner continued to monitor activities of the Minister of Family, Labour and Social Policy in the area of highlighting the negative phenomenon of the gender wage gap, and drew attention to the need to disseminate information about the application, developed by the Ministry, for estimating wage differences between men and women.

The Commissioner also focused on the issue of combining professional work with private life and family responsibilities. Situations in which women bear the main responsibility for taking care of their children and for performing unpaid work at home lead to their discrimination on the labour market. In the Commissioner's view, broadening the scope of autonomous pa-

rental rights of fathers, irrespectively of the rights held by mothers, e.g. by introducing longer paternity leaves not transferable to the mother of the child in question, would significantly contribute to fathers' greater engagement in the family life and thus facilitate mothers' professional work.

4. Counteracting discrimination based on sexual orientation and gender identity

The Commissioner's priorities also include ensuring the possibility to exercise the right to respect for private and family life, without discrimination on the grounds of sexual orientation and gender identity. In 2017, the Commissioner was notified of cases of refusal to confirm citizenship based on transcription of foreign birth certificates indicating same-sex persons as the parents, and refusal of transcription of birth certificates of children born by surrogate mothers. In the opinion of the Commissioner, because of the interest of the child, there are no grounds for refusing to confirm citizenship or to transcribe the certificates as such refusal makes it impossible to issue identity documents for such children and to assign citizen ID numbers to them.

There was an increase in the number of complaints received by the Commissioner with regard to determination of gender by transgender persons; lengthiness of the proceedings remains a problem. In addition, in one of the cases of which the Commissioner is aware, the court dismissed the application because in his opinion the lawsuit should be not only against the parents, but also against the children. As a result of the appeal filed by the Commissioner, the court of appeal found that in gender determination cases, there is no obligation to bring a lawsuit against children. However, the prosecutor's office filed a cassation complaint. In the Commissioner's opinion, the gender determination procedure should be conducted outside -litigious proceedings, in a quick and transparent manner.

The Commissioner monitored the situation of homosexual men - Russian citizens of Chechen nationality, who report that they are persecuted in their country of origin due to their sexual orientation. In the opinion of the Commissioner, they may seek international protection in Poland, given that for years, the largest group of foreigners applying for such protection in Poland have been citizens of the Russian Federation who are of Chechen nationality. The Commissioner pointed out to the competent authorities that persecution based on sexual orientation could be a reason for granting international protection to them.

The Commissioner also monitored preparatory proceedings in cases related to homophobic crimes and offenses. In some of those cases, law enforcement authorities concluded that the perpetrators were motivated by homophobia. Thus, the offences that were subject to private prosecution became offences subject to prosecution ex officio (e.g. in the case of insulting the

participants of the "rainbow families picnic"). The Commissioner also filed a cassation complaint against the decision to discontinue the proceedings regarding the sale of stickers with the words "no faggots" on the internet.

The Commissioner received an increasing number of complaints about discrimination based on sexual orientation in the area of health. In particular, the complaints concern suggestions by psychologists or physicians that homosexual orientation is a disease. The Commissioner conducted correspondence with the Minister of Health regarding the exclusion of homosexual men as bone marrow donors, as well as correspondence with the National Center on AIDS, regarding the growing number of HIV infections in the MSM group.

Finally, the Commissioner received complaints relating to freedom of speech that happens to be limited, and in other cases abused. For example, the Commissioner was looking into the issue of cancellation of the presentation of the film "Article 18" about same-sex couples and their families. The film was to be shown in a cultural establishment run by a local government, but its showing was cancelled due to statements made about it by the mayor of the city. The Commissioner also receives complaints about homophobic statements by persons holding public functions, including one of the former judges of the Constitutional Tribunal.

5. Counteracting discrimination on the grounds of age

The Commissioner paid attention to specific problems related to the observance of older people's rights. The problems related to violence and to discrimination on grounds of age. The Commissioner emphasized that it is necessary to develop a comprehensive national strategy and policy for senior persons, with the participation of all institutions operating at the central and local government levels. The Commissioner inquired about the document *Social Policy for the elderly until 2030. Safety – Participation – Solidarity,* and was informed that it will indicate specific goals and tasks concerning policy on senior citizens, as well as entities to implement those tasks.

The Commissioner forwarded to the Minister the conclusions of the research report on environmental support for the elderly in the Dolnośląskie province. The document indicated e.g. low awareness of local level decision-makers of the issue of discrimination of older people by the existence of infrastructural barriers as well as stereotypes limiting seniors' participation in the society

The Commissioner will continue his work to strengthen the support for the UN Convention on the Rights of Older Persons, which is being drafted by the UN. Related discussions will be held during meetings of the Expert Committee. The Commissioner will encourage the Polish government to join the works on this legislative instrument.

6. Counteracting discrimination on the grounds of disability, and implementation of the provisions of the Convention on the Rights of Persons with Disabilities

The implementation of the Convention on the Rights of Persons with Disabilities requires the development of an effective and coherent system of support for persons with disabilities. Such a system should ensure to those persons the possibility to use their full potential in professional and social life. Further, the needs of people who require more intensive support, as well as their families, should specifically be taken into account. In Poland, such a system has not been introduced and has not yet been designed and planned. Currently, work is under way on the *Strategy for persons with disabilities for 2018-2030*. Its focus on the real implementation of the standards set out in the Convention should be ensured.

It is also necessary to introduce a change in the form of a uniform system of disability classification, which should focus on the potential of a person with disability rather than on his/her dysfunctions. The Commissioner monitors the work carried out by the *Interministerial team for developing a system of issuing certificates of disability and incapacity to work*.

A source of concern is the lack of measures aimed at replacing the system of incapacitation with a system of supported decision-making, which for many years has been the postulated by the Commissioner.

Full access of persons with various disabilities to the system of justice has not yet been ensured. There are few institutions in which it is possible to hold a hearing of a witness remotely or to testify remotely with the use of technical equipment. The judicial authorities are not obliged to use the Polish sign language, the Braille alphabet or augmentative or alternative communication system when communicating with people with disabilities. A major obstacle is the lack of architectural accessibility of many buildings of courts and prosecutors' offices. Additionally, there is no system of regular trainings for the justice system employees on the issue of protection of the rights of persons with disabilities.

The institutional care model is still dominant as there is no system of support services provided at the local community level. The growing number of social welfare homes (801 in 2012, 815 in 2015 and 817 in 2016) increases although the number of their users has decreased slightly (85,007 in 2012, 86,502 in 2015 and 83,977 in 2016). The average number of residents per social welfare home is 103 which is very high. The role of social welfare homes is more and more frequently taken over by nursing and treatment establishments (30.1 thousand beds in 2014). This is caused by a better system of funding residents' stay, looking from the perspective of local governments, residents themselves and their families. The degree of development of supported housing is highly unsatisfactory. There is no strategy or plan for de-institutiona-

lization of the care system in Poland, and no activates are taken to develop such documents.

An important change was the amendment of the *Act on mental health protection*, which changed the system of placement of legally incapacitated persons in social welfare homes, introduced the obligation to hold a hearing of such persons, and gave them the possibility to apply to court to assess the need for their further stay there. However, a significant problem is a disproportionate limitation of the rights of residents of such homes, e.g. of the possibility to leave the home's premises.

The Commissioner points to the lack of systemic solutions in the area of personal assistance. Until now, the service, required by many persons with disabilities to ensure their independent living, has been available only within certain projects carried out by local governments or non-governmental organizations and financed mainly from EU funds. No stable system for its provision exists.

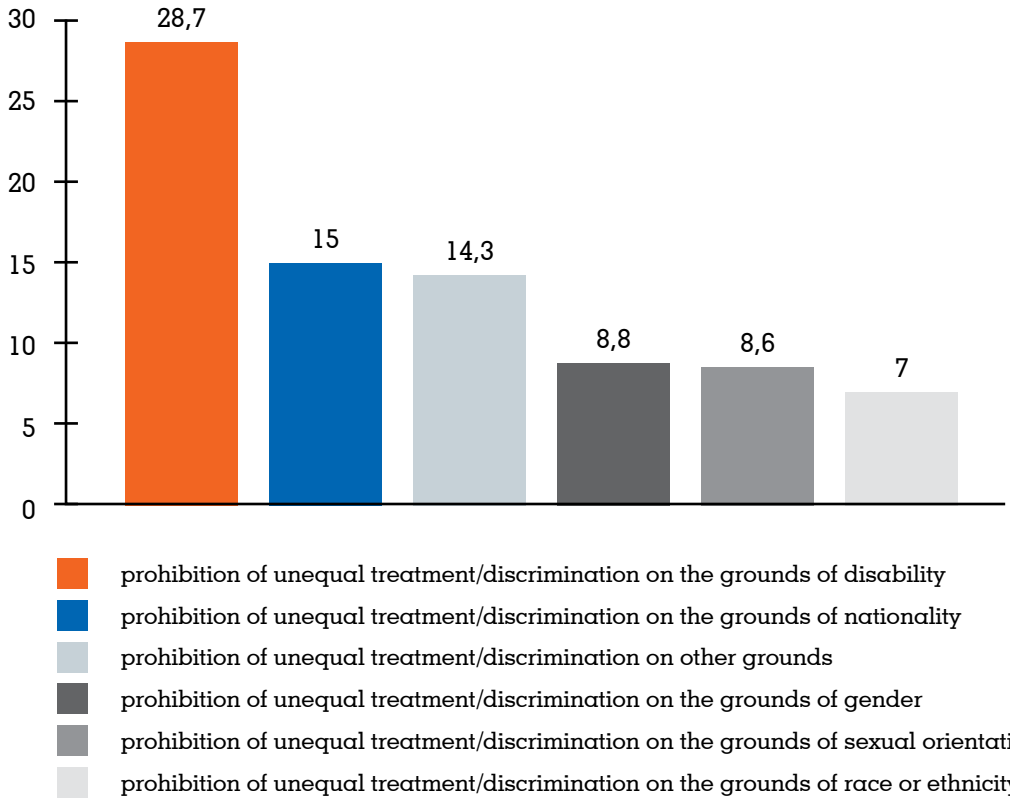
The construction law and other regulations on technical matters do not provide for the obligation to design space, programmes and services in accordance with the principles of universal design. This should be a necessary requirement of the programme *Accessibility Plus*.

The information about the challenges existing in Poland was presented by the Commissioner to the UN Committee on the Rights of Persons with Disabilities. In 2018, the Committee will review Poland's report on the current state of implementation of the Convention on the Rights of Persons with Disabilities and will issue its recommendations.

V. Statistical data and other information regarding implementation of the equal treatment principle

1. Received applications concerning equal treatment and prohibition of discrimination

In 2017, the Commissioner received 560 complaints in cases concerning equal treatment.



2. New cases (complaints) addressed to the Commissioner with regard to equal treatment and non-discrimination (by discrimination type)

Item	Type of discrimination	Number of cases	% share
1.	4 Principle of equality before the law	6	1.1
2.	4.1 Prohibition of unequal treatment/discrimination	18	3.2
3.	4.1.3 Prohibition of unequal treatment/discrimination on the grounds of gender	49	8.8
4.	4.1.4 Prohibition of unequal treatment/discrimination on the grounds of religion or belief	23	4.1
5.	4.1.5 Prohibition of unequal treatment/discrimination on the grounds of sexual orientation	48	8.6
6.	4.1.6 Prohibition of unequal treatment/discrimination on the grounds of age	24	4.3
7.	4.1.7 Prohibition of unequal treatment/discrimination on the grounds of nationality or race	84	15.0
8.	4.1.8 Prohibition of unequal treatment/discrimination on the grounds of disability	161	28.7
9.	4.1.9 Prohibition of unequal treatment/discrimination of social and professional groups	1	0.2
10.	4.1.10 Prohibition of unequal treatment/discrimination in the area of taxes	2	0.4
11.	4.1.11 Prohibition of unequal treatment/discrimination of persons with no registered address	4	0.7
12.	4.1.13 Prohibition of unequal treatment/discrimination on the grounds of race or ethnic origin	40	7.0
13.	4.1.14 Prohibition of unequal treatment/discrimination on the grounds of belief (including lack of religious belief)	1	0.2
14.	4.1.15 Prohibition of unequal treatment/discrimination on the grounds of political views	1	0.2
15.	4.1.16 Prohibition of unequal treatment/discrimination on the grounds of gender identity	9	1.6
16.	4.1.17 Prohibition of unequal treatment/discrimination on the grounds of material and legal status	8	1.4
17.	4.1.18 Prohibition of unequal treatment/discrimination on the grounds of education or profession	1	0.2
18.	4.1.20 Prohibition of unequal treatment/discrimination on the grounds of other grounds	80	14.3
Total		**560**	**100**

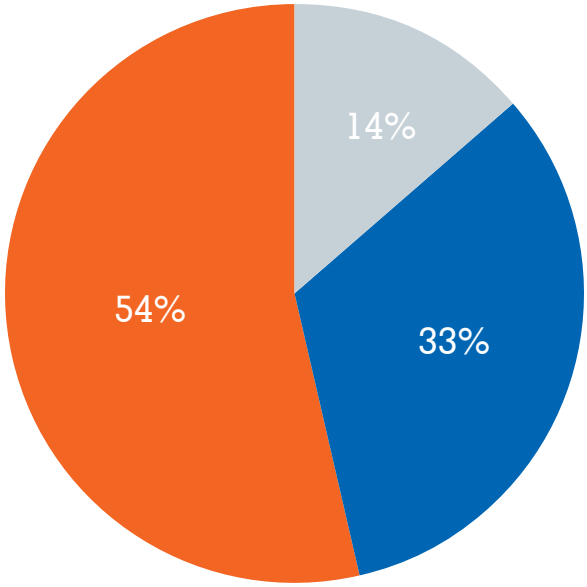
3. The Commissioner for Human Rights submitted:

	2017
problem interventions	24
complaints to voivodeship (provincial) administrative courts	4
joined court proceedings	4
Total	**32**

4. Cases examined (initiated in 2017 or earlier)

		Manner of consideration	Number of cases	% share
1		2	3	4
cases accepted for further proceeding	1	Total (2+3)	305	53.5
	2	cases accepted for further proceeding	277	48.6
	3	within Commissioner's general intervention	28	4.9
provision of information, indication of measures the complainant may take	4	Total (5)	187	32.8
	5	provision of information, indication of measures the complainant may take	187	32.8
other	6	Total (7+9)	78	13.7
	7	complaint referred to a competent authority	17	3.0
	8	complaint returned to the complainant for addition of necessary information	10	1.8
	9	not accepted for further proceeding	51	8.9
Total			**570**	**100**

Manner of consideration

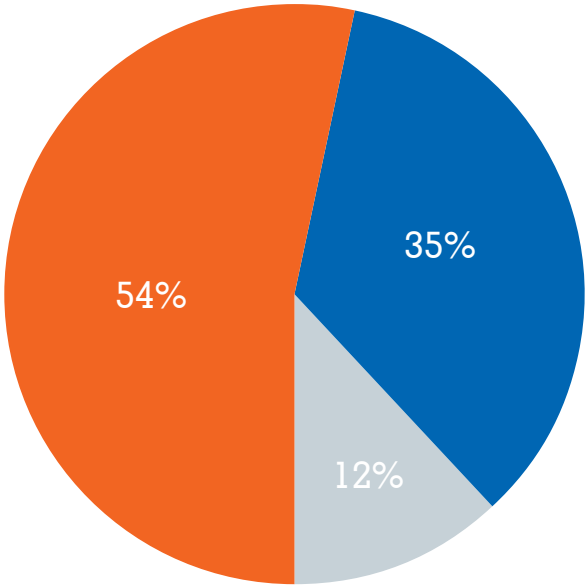


- cases accepted for further proceeding
- provision of information, indication of measures the complainant may take
- other

5. Completion of case proceedings

Result		Manner of completion	Number of cases	% share
1		2	3	4
Outcome expected by the applicant achieved	1	Total (2+3)	67	34.5
	2	Applicant's claim confirmed	36	18.5
	3	Commissioner's general intervention successful	31	16
Proceedings discontinued	4	Total (5+6)	23	11.8
	5	Proceedings pending (ongoing procedure)	9	4.6
	6	Commissioner's discontinuation of proceedings (due to objective reasons)	14	7.2
Outcome expected by the applicant not achieved	7	Total (8+9+10)	104	53.7
	8	Applicant's claim not confirmed	78	40.3
	9	Commissioner's general intervention not successful	21	10.8
	10	Measures available to the Comissioner exhausted	5	2.6
Total			**194**	**100**

Completion of case proceedings



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