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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**KAZAKHSTAN**

**DRAFT OPINION**

**ON THE DRAFT LAW**  
**“ON THE COMMISSIONER FOR HUMAN RIGHTS”**

**on the basis of comments by**

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## **I. Introduction**

1. By letter dated 23 September 2021, Mr Shakirov, Deputy Chairman Senate of the Parliament of Kazakhstan, requested an opinion of the Venice Commission on the “draft law on the Commissioner for Human Rights of the Republic of Kazakhstan” (CDL-REF (2021)087), hereafter “the draft law”.
2. Mr Jan Helgesen, Mr Jorgen Steen Sorensen and Mr Dimitris Christopoulos acted as rapporteurs for this opinion.
3. On 17 and 18 November 2021 the rapporteurs, along with Ms Caroline Martin and Mr Serguei Kouznetsov from the Secretariat, had online meetings with Mrs Azimova, Commissioner for Human Rights of Kazakhstan, Mr Shakirov, Deputy Chairman, Senate of the Parliament of Kazakhstan and representatives of different NGO’s. The delegation would like to thank the authorities for having organised the meetings.
4. This Opinion is based on an English translation of the draft law. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
5. *This Opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings. Following an exchange of views with Mr Shakirov (tbc) the Opinion was adopted by the Venice Commission at its xx Plenary Session (Venice/online, xxxx).*

## **II. Preliminary remarks**

### **A. Scope of the opinion**

6. This opinion analyses the draft law in light of applicable international standards related to the Ombudsman institutions.
7. In the context of the request for the opinion, the rapporteurs received draft amendments to numerous texts, such as the code on administrative offences and the budget code. These amendments are aimed at updating the legislation that may be affected by the introduction of the draft law on the Commissioner.
8. The rapporteurs were not able to analyse the relevance and consequences of the various amendments made to the different texts. Therefore, this opinion concerns only the draft law as such, as it appears in the document CDL-REF (2021)087.
9. The Rapporteurs were also informed that since the request for an opinion the draft law had undergone two readings and numerous amendments in the Lower House of Parliament. However, at the request of the Senate they still analysed the text sent by the Senate as it appears in the document CDL-REF (2021)087.
10. The Commission considers that before the adoption and promulgation of the draft law, the analysis and the recommendations of this opinion should be taken into account in the further legislative process.

### **B. Applicable International standards**

11. The draft law introducing the Commissioner for Human Rights (hereafter “the CHR”) of Kazakhstan as the National Human Rights Institution will be analysed in the light of the United

Nations “Paris Principles” on National Human Rights Institutions<sup>1</sup>. The current Commissioner enjoys status B<sup>2</sup>.

12. On 16 December 2020, the United Nations General Assembly adopted Resolution A/RES/75/186 on “The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law”.<sup>3</sup>

13. The UN Resolution A/RES/75/186 in its Preamble “*acknowledges the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)*”; in operative §2, it strongly encourages Members States to rend Ombudsman institutions “*consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)*”. In operative § 8 it “*Encourages Ombudsman and mediator institutions, where they exist, (a) To operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles.*”

14. Consequently, the Venice Principles will also serve as a reference standard for the analysis of the draft law. The Venice Commission adopted the Principles on the Protection and Promotion of the Ombudsman Institution (the “Venice Principles”) at its 118<sup>th</sup> Plenary Session (Venice, 15-16 March 2019). The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345<sup>th</sup> Meeting of the Ministers' Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, Resolution 2301(2019), on 2 October 2019; by the Congress of Local and Regional Authorities of the Council of Europe, Resolution 451(2019) on 29-31 October 2019<sup>4</sup>.

### **III. Analysis of the draft law on the Commissioner for Human Rights**

15. According to the authorities, the draft law was developed to improve the legislation in the field of the protection of human and civil rights by defining the main provisions governing the status of the Commissioner for Human Rights and his/her representatives in the regions.

16. It is meant to replace the Decree n° 947 by the Head of the State, dated 19.09.2002 which established the institution of the Commissioner for Human Rights.

#### **A. The constitutional basis of the CHR**

17. Since 2017, the institution of the Commissioner is reflected in the Constitution of Kazakhstan. However, it appears that the only constitutional provision which refers to the CHR is Article 55-1-1, under Section IV Parliament, which indicates as a competence of Parliament: “*1-1) election of the Human Rights Commissioner in Kazakhstan for a five-year term and his release from office upon the recommendation of the President of the Republic of Kazakhstan*”.

18. According to Principle 2 of the Venice Principles, “*The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.*”

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<sup>1</sup> See, United Nations, General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 of 20 December 1993, available at <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>.

<sup>2</sup> See, [OHCHR | GANHRI Sub-Committee on Accreditation \(SCA\)](#)

<sup>3</sup> See, United Nations, General Assembly, *The Role of Ombudsman Institutions in the Promotion and Protection of Human Rights, Good Governance and the Rule of Law*, Resolution adopted by the General Assembly on 16 December 2020 [based on the report of the Third Committee (A/75/478/Add.2, para. 89)

<sup>4</sup> CDL-AD(2019)005, *Principles on the Protection and Promotion of the Ombudsman Institution (“The Venice Principles”)*, adopted by the Venice Commission at its 118<sup>th</sup> Plenary Session (Venice, 15-16 March 2019), Principle 3.

19. Therefore, there should preferably be a constitutional provision to establish e.g the existence of the CHR, the basic mandate of the CHR and the basic procedure for election and dismissal of the CHR. These are the three main elements that should preferably be found at the constitutional level.

20. The Commission however welcomes that the legal basis of the institution will be strengthened, since the institution will be provided for in a law and no longer in a presidential decree as is the case today.

21. The Commission recommends that the institution of the CHR and his/her mandate be provided for in the Constitution, in addition to the current provisions on the procedure for his/her election and dismissal.

## **B. Jurisdiction of the Commissioner**

22. Article 1.1 of the draft law on the “Legal status and basis of activities of the Commissioner” reads as follows : *“The position of the Commissioner for Human Rights in the Republic of Kazakhstan (hereinafter - the Commissioner) is established in accordance with the Constitution of the Republic of Kazakhstan in order to ensure protection of human and civil rights and freedoms, as well as their observance and respect by state bodies, local government and self-government bodies, officials and civil servants of the Republic of Kazakhstan.”*

23. The Venice Commission welcomes that the draft law refers to the Constitution as a strong basis for the CHR (however, this should be seen in context with paragraph 18 above).

As concerns the other parts of Article 1.1, it appears that the Commissioner's field of competence is dealt with in different articles of the draft law. There is no general provision in the draft law on the jurisdiction of the CHR. The jurisdiction has been dealt with more in terms of defining the targets of the Commissioner's activities than in terms of the Commissioner's area of competence.

24. Article 1.1 refers to *“state bodies, local government and self-government bodies, officials and civil servants of the Republic of Kazakhstan”*. Further down the draft in Article 7.2 exempts certain institutions (the President of the Republic of Kazakhstan, the First President of the Republic of Kazakhstan - Elbasy) from the Commissioner's jurisdiction. Lastly, specific institutions are mentioned in Article 8 which deals with the *“Rights of the Commissioner when considering a complaint”* who has the right to under Article 1.1 of the draft : *“request and receive information from state bodies, local government and self-government bodies, officials and organizations necessary for consideration of the complaint. At that, cases and materials in the proceedings of the court cannot be claimed.”*

25. Furthermore, Article 1.4 reads as *“The Commissioner, within the framework of his activities, takes part in the work of international human rights organizations, other non-governmental human rights organizations”*.

26. Article 7.1 of the draft, for its part stipulates that *“1. The Commissioner, within the limits of his competence, considers complaints of citizens of the Republic of Kazakhstan and foreigners and stateless persons in the territory of the Republic of Kazakhstan (hereinafter referred to as the applicants)”*.

27. The jurisdiction of the Commissioner as provided for in the draft calls for several comments at different levels

1. At the level of legislative technique

28. In order to improve the legislative quality of the draft law, it would be preferable that the jurisdiction of the Commissioner be clearly defined in a single article or section and not addressed in different parts of the draft law, as it is currently the case.

2. At the substantive level

a. *With regard to the field of competencies*

29. Principle 1 of the Venice Principles recalls in a general way that “*Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms.*”

30. Venice Principle 12 states more precisely that “*The mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms.*”

31. As the Venice Commission has noted in previous opinions, the addition of the promotion to the protection of human rights in the Ombudsman's mandate is a provision particularly welcomed.<sup>5</sup>

32. The Venice Commission hence recommends adding the promotion of human rights and fundamental freedoms into the Ombudsman's mandate.

33. Additionally, under Principle 13.2, “*The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities.*”

34. The draft law should better reflect this principle in two respects.

35. First, Principle 13.2 includes in the jurisdiction of the Ombudsman all public services provided to the public both by public and by private entities. The draft should include private entities which deliver public services into the Commissioner's jurisdiction.

36. Second, activities of the President and First President, unless they are of an exceptional nature (e.g. declaration of war) or of a political nature (e.g. appointment of the Prime Minister) should fall within the monitoring competence of the Ombudsman.<sup>6</sup> The exception provided for in Article 7.2 should be reconsidered in this sense.

37. Last but not least, the current wording of the draft “*state bodies*” would seem to cover also the judiciary, which is not in accordance with Principle 13 of the Venice Principles. With regard to the judiciary, the Venice Principles state clearly that “*the competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system*”. During the discussions with the authorities, the rapporteurs understood that the judiciary was not part of the Ombudsman's remit, but as this is an important point, it would be preferable to make this clear in the draft law to remove any ambiguity.

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<sup>5</sup> See CDL-AD (2004)041 , *Joint Opinion on the Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe (Strasbourg, 24 November 2004)*, §7

<sup>6</sup> See *CDL (2001)083 - Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan adopted by the Venice Commission at its 47<sup>th</sup> Plenary Session (Venice, 6-7 July 2001)* §§ 6,7,18

b. *With regard to the applicants*

38. Article 7 of the draft law, "Consideration of a complaint", stipulates"1. *The Commissioner, within the limits of his competence, considers complaints of citizens of the Republic of Kazakhstan and foreigners and stateless persons in the territory of the Republic of Kazakhstan (hereinafter referred to as the applicants)*".

39. The Venice Commission recommends providing for the jurisdiction of the Commissioner to applicants under the jurisdiction of any individual under the jurisdiction of the authorities of the Republic of Kazakhstan. Instead of the clause "*in the territory of the Republic of Kazakhstan*" it would be better to refer to any individual under the jurisdiction of the authorities of the Republic of Kazakhstan. Such a wording would then include individuals under the jurisdiction of authorities such as Embassies and Consulates. It would also include individuals residing in other countries, but in need of, e.g., applying to domestic Kazakhstan authorities for certain permissions etc.

40. In conclusion, regarding the jurisdiction of the Commissioner, the Venice Commission recommends aligning the draft law with Venice Principles 13.2 and 13.3 of the Venice Principles. The promotion of Human Rights should be added in the jurisdiction of the CHR. Exemptions of jurisdiction to the activities of the President should be limited to those of an exceptional nature or of a political nature. The Commissioner's jurisdiction should be defined in one place and not scattered throughout the draft. The jurisdiction of the CHR should cover applicants under the jurisdiction of the Kazakh authorities. The competence over the judiciary should be confined to ensuring procedural efficiency and administrative functioning of that system jurisdiction.

**C. Activities of the Commissioner**

41. Article 1.4 of the draft law reads as "*The Commissioner, within the framework of his activities, takes part in the work of international human rights organizations, other non-governmental human rights organizations*".

42. Yet, in principle the CHR cannot take part in the work of civil society or international bodies, unless (s)he is invited to do so. Such a provision would be very intrusive, particularly with regard to civil society. It is therefore recommended rephrasing this paragraph.

43. Article 2 of the draft law reads: "*Principles of the Commissioner's activities*" *The activities of the Commissioner are based on the principles of: 1) legality; 2) objectivity and fairness; 3) openness; 4) independence, responsibility and impartiality in the interests of human and civil rights and freedoms*".

44. Ombudsman activities are based on the principles of the rule of law. The Venice Commission welcomes that the principles listed in the article represent the normative pillar of the rule of law. Furthermore, it would be appropriate to include the concept of the rule of law as such in this article.

45. The Venice Commission recommends revising or deleting paragraph 4 of Article 1 and including in Article 2 the principle of rule of law.

## D. Immunity

46. Immunity of the CHR institution is dealt with in Article 3.1<sup>7</sup>, 3.2<sup>8</sup>, 3.5<sup>9</sup>. Under Principle 23 of the Venice Principles, *“The Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity). Such functional immunity shall apply also after the Ombudsman, the deputies or the decision-making staff-member leave the Institution.”*

47. In view of this standard, the content of immunity as provided for in the draft law’s provisions appears either too narrow or too broad.

### 1. Too broad immunity

48. Under the wording of Article 3, immunity does not appear to be only functional; it also appears to apply to the private sphere. This should not be the case. Ombudsmen are responsible under the law as anyone else for actions not within their official capacity.

### 2. Too narrow immunity

#### a. *Unlimited criminal liability*

49. According to the letter of Art. 3.1 of the draft law, criminal liability is unlimited in case *“of a) detention at the scene of the crime, b) commission of a “serious or particularly serious crime” or “c) agreement of the Public Prosecutor”.*

50. The part of the provision concerning the agreement of the Public Prosecutor is not appropriate when it comes to activities in a professional capacity. This part effectively seems to indicate that the Public Prosecutor can cancel the immunity of the Commissioner in any case. This part of the provision should be deleted. It can be replaced by involving the Parliament to decide whether or not to remove the Commissioner’s immunity in accordance with the conditions set by international standards for removal of office (see below under 74-83).

51. With regard to the commission of a *“serious or particularly serious crime”*, under b), this is a very unclear definition. Specifying minimum sentences would clarify the definition.

52. The Commission recommends revising Article 3.1 in order to better circumscribe unlimited criminal liability, and hence the Commissioner’s immunity, by clarifying the notion of serious crime and by providing that it will be up to the Parliament and not to the Public Prosecutor to withdraw the immunity of the Commissioner.

#### b. *Immunity for the staff of the CHR*

53. According to Principle 23 of the Venice Principles, *“the ombudsperson, his or her deputies and the staff of the secretariat should be immune from legal process in respect of works spoken*

<sup>7</sup> Article 3.1 reads : *“The Commissioner shall have immunity during his term of office. The Commissioner during his term of office without the consent of the Prosecutor General of the Republic of Kazakhstan cannot be detained, held in custody, under house arrest, brought under police custody, and brought to criminal liability, except in cases of detention at the scene of a crime or the commission of a grave or a particularly serious crime.”*

<sup>8</sup> Article 3.2 reads : *“The procedure for bringing the Commissioner to criminal and (or) administrative responsibility is established by the laws of the Republic of Kazakhstan.”*

<sup>9</sup> Article 3.5 reads : *“The Commissioner shall have the right to refuse to testify in a civil or administrative case, an administrative offense case or a criminal case about the circumstances that became known to him in connection with the performance of his official duties.”*



or written and all acts performed by them in their official capacity and within the limit of their authority (functional immunity)<sup>10</sup>. This is all the more important since the Commissioner is also entrusted with the mandate of NPM.

54. As such, the legislation pertaining to the Commissioner should comply with the relevant provisions of the OPCAT that Kazakhstan has ratified in 2008, particularly its Article 35 which states that “[m]embers [...] of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions”.

55. In its Guidelines on National Preventive Mechanisms (2010),<sup>13</sup> the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has specified that both the members of the NPM and its staff shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions.

56. Article 3 of the draft law should thus be supplemented to expressly refer to the functional immunity of the Commissioner’s staff.

c. *Temporal aspect of the immunity*

57. According to Principle 23 of the Venice Principles, the functional immunity granted to the Ombudsman and extended to the staff must be extended in its temporal aspect in order to continue to be accorded after the end of the Ombudsman’s mandate or after the staff cease their employment with the Ombudsman Institution. The draft law doesn’t foresee the temporal aspect of the immunity. Immunity must apply also after leaving the institution, and this should be specified in the draft.

d. *Material aspects of the functional immunity*

58. In order to make the content of immunity even stronger and to meet good practice in this area, the draft law should also include official documents and the premises of the Institution in the scope of the protection. It is suggested to make it clear that this protection applies to all documents of the Institution, including correspondence and internal notes, as well as to the baggage and means of communication belonging to the Commissioner.<sup>11</sup>

59. To sum up, the Commission recommends circumscribing immunity to functional immunity, bringing the immunity provisions into line with Principle 23 of the Venice Principles by clearly including all the elements of functional immunity described therein and extending functional immunity to all staff of the institution as well as after leaving the institution.

60. The Venice Commission recommends also revising Article 3.1 in order to better circumscribe unlimited criminal liability, and hence the Commissioner’s immunity, by clarifying the notion of serious crime, by conferring to Parliament and not to the Public Prosecutor the withdrawal of the Commissioner’s immunity, in order to meet the requirements of Principle 11. Some specific material aspects of functional immunity could also be further developed in the draft in order to meet good practices in this important subject for the institution.

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<sup>10</sup> See CDL-AD(2004)041, *op.cit.* §7, §18 and CDL-AD(2016)033, *Opinion on the draft Constitutional Law on the Human Rights Defender, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016)*, §20

<sup>11</sup> See CDL-AD(2015)034, *Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015)*, §§67-69.

## E. The election of the Commissioner

61. Article 4 of the Draft deals with the procedure for election of the Commissioner.

### 1. With regard to the election procedure

62. Principle 6 of the Venice Principles states: *“The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.”*

63. According to Article 4.1 of the draft law, the Commissioner is elected by the Senate for a five years term period upon recommendation of the President of the Republic.

64. A presidential involvement at the election of an Ombudsman may be a sign of the importance and support for the authority of the institution. It is not a *priori* a sign of independence, though. While it is conceivable that the appointment of the CHR by the President of the Republic and then by the Upper House of Parliament could be seen as affording to *“highest possible extent the authority, impartiality, independence and legitimacy of the Institution”*, the Venice Principles provide for this election to be done by an appropriate qualified majority. Hence, the election by an increased majority could strengthen the Ombudsman’s impartiality, independence and legitimacy.

65. The Commission invites the drafters to consider the possibility of a selection by the Parliament, as envisaged in the Venice Principles, by a qualified majority, in order to strengthen the Ombudsman’s impartiality, independence and legitimacy.

### 2. With regard to the selection of candidates

66. According to Principle, *“7. The procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law. 8. The criteria for being appointed Ombudsman shall be sufficiently broad as to encourage a wide range of suitable candidates. The essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms.”*

67. The current draft under in article 4.2 does list a number of required qualifications which is to be welcomed. The Venice Commission has on previous occasions stressed the importance of specifying qualifications requirements but also the view that the criteria for eligibility should not be too restrictive<sup>12</sup>.

68. However, some of the requirements listed in the Venice Principles are not included, such as public call, testing and shortlisting which would respond to the requirements of *“merit based”* and *“objective and transparent”* provided for in the Venice Principles. The shortlist can be a practical working tool, not a binding limitation on candidates. This is essential for the democratic legitimacy of the office holder.<sup>13</sup>

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<sup>12</sup> See CDL- AD(2004)041 *op.cit.* §7; CDL-AD (2006)038 *Opinion on Amendments to the Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 69<sup>th</sup> Plenary Session (Venice, 15-16 December 2006) §§21-24*

<sup>13</sup> See CDL-AD(2015)035, *Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, adopted by the Venice Commission at its 104<sup>th</sup> Plenary Session (Venice, 23-24 October 2015); §§12,13*

3. With regard to the term of office

69. According to the Venice Principles, “10. *The term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for reelection; at any rate, the Ombudsman’s mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years.*”

70. Under Article 50.5 of the Constitution the term of the Senate is 6 years which is longer than the term of office of the CHR which is fixed by Article 4.1 at 5 years. This underlines that the term a five years mandate is too short, not only with regard to the Venice Principles but also with regard to the term of office of the Senators. The term of office should be fixed not below 7 years.

71. The draft should preferably also provide for a specific provision preventing re-election. Indeed, the principle of a single term provides a safeguard contributing to the CHR’s independence and precluding the risk of accusations that his/her decisions/recommendations might be influenced by an interest in being reappointed<sup>14</sup>.

72. The Commission recommends providing for a longer term of office, not below 7 years and preferably for a specific provision of no re-election.

73. To sum up, the Commission recommends revising the provisions concerning the election of the Commissioner in order to comply with those enshrined in the Venice Principles, in particular foreseeing a public and transparent selection procedure, comprising public call, testing and shortlisting, an election by qualified majority, a longer term of office and preferably a non-renewable term of office.

**F. Termination of powers**

74. According to Principle 11 of the Venice Principles, “*The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, “misbehaviour” or “misconduct”, which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.*”

75. This principle needs to be seen in the context with the situation in each individual country. Conditions as well as procedures appear to be of fundamental importance as they constitute strong guarantees for the independence of the Commissioner.

76. Article 5 of the draft deals with the “*Termination of powers of the Commissioner*” in a detailed way.

1. Grounds for early dismissal

77. Article 5.3 lists the “*Grounds for early dismissal*”.

78. While conditions 2), 4), 5), 6) and 7) appear reasonably precise, conditions 1), 3), and 8) appear problematic.

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<sup>14</sup> See CDL-AD(2015)017, *Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, adopted by the Venice Commission at its 103rd Plenary Meeting (Venice, 19-20 June 2015)* §45

79. a. Conditions 1) *“failure to comply with requirements and restrictions established by this law and the laws of the Republic of Kazakhstan”*. This sentence is *a priori* vague and open for many interpretations particularly in the light of the listed seven reasons for early dismissal which follow further down. This sentence should be deleted or at least narrowed down to “serious” failures in order to exclude petty infractions, like a failure to parking tickets.

80. b. Condition 3, on the state of health of the CHR, should probably be left out as condition 4) which deals on the entry into force of a court decision seem to suffice.

81. c. Condition 8) on committing misdemeanors should also probably be left out as condition 1) would seem to suffice.

## 2. Procedure for dismissal

82. In order to be in line with the Venice Principles, the draft should provide for a public and transparent procedure. The dismissal procedure should take place in Parliament, with a public hearing of the Commissioner. It is therefore recommended that a procedure be prescribed ensuring a public hearing so that the case, as well as the views of the Commissioner are made public.<sup>15</sup>

83. As stated in Principle 11 of the Venice Principles, the draft should provide for a required majority for termination which should be at least equal to (and preferably higher than) the qualified majority required for election. This is fundamental for protecting the legal status of Commissioner, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal.<sup>16</sup>

## 3. Mechanism for appeal to the judiciary

84. As the Venice Commission had previously stated in other occasions, a procedure for challenging the dismissal decision in courts (presumably the Constitutional Court) should be prescribed in the draft law.<sup>17</sup>

85. To sum up, with regard to the terminations of powers of the Commissioner, the Venice Commission recommends deleting the vague set of conditions set in Article 5.1 or at least narrowing them down in a clear manner. With regard to the procedure of dismissal, it should be brought in line with the Venice Principles by foreseeing public and transparent procedures as well as a qualified majority by the Parliament, preferably higher than the one required for the election. Providing for a mechanism for appeal to the judiciary should probably be prescribed and would reflect best practices in this area.

## **G. Incompatibilities**

86. According to the Venice Principles, *“9. The Ombudsman shall not, during his or her term of office, engage in political, administrative or professional activities incompatible with his or her independence or impartiality. The Ombudsman and his or her staff shall be bound by self-regulatory codes of ethics”*.

87. The draft law foresees in article 6 *“For the period of exercising his powers, the Commissioner suspends his membership in political parties”*.

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<sup>15</sup> See CDL-AD(2015)017, *op.cit.* §61

<sup>16</sup> See CDL-AD(2015)017, *op.cit.* §60

<sup>17</sup> See CDL-AD(2015)017, *op.cit.* §61

88. This provision is in line with the Venice Principles. The independence of the Ombudsman is a key element of the institution, and any provision aimed at reinforcing it is of course welcome, and to this end the requirement that the Ombudsman must not being a member of any political party for a period of two years before his appointment, would reinforce this aspect. This requirement could be inserted for instance in addition to the requirements listed in article 4.2 of the draft.

#### **H. Commissioner's own initiative investigations**

89. According to Principle 16 of the Venice Principles, *"The Ombudsman shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty. The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector."*

90. Under Article 8.2 of the draft, it appears that the Commissioner can investigate on his/her own initiative only based on information *"from official sources or the media"*.

91. This is an inappropriate limitation. For example, whistle-blowers are usually a very important source of information for own initiative investigations.

93. The Commission recalls that is quite unusual to have any limitations at all with regard to own initiative investigations and recommends bringing the own initiative investigations powers of the Commissioner in line with Principle 16 of the Venice Principles.

#### **I. Management process of complaints**

94. Article 9 called *"Peculiarities of consideration of a complaint"* of the draft deals with a number of elements of the complaint management process.

##### **1. Deadlines**

95. Article 9.2 of the draft law reads as follows: *"Recommendations and petitions of the Commissioner are subject to consideration within fifteen calendar days from the date of their receipt, following which the Commissioner is informed of the results of their consideration. In cases where it is necessary to conduct additional study, the period for consideration of the recommendation and petition of the Commissioner is extended by the subject to which they were sent, no more than for thirty calendar days, as reported to the Commissioner within three working days from the date of extension of the consideration period"*.

96. The Commission suggests introducing realistic deadlines that can be respected. Replacing the *"fifteen calendar days"* with a month and the *"thirty calendar days"* with sixty calendar days would seem more realistic.

##### **2. Disclosure of information**

97. Under Article 9.3 of the draft law reads *"Materials received during the consideration of the complaint before the Commissioner's final decision are not subject to disclosure"*.

98. Within usual principles of confidentiality concerning private information etc, it is up to the ombudsman to decide which information can be disclosed in connection with the publication of ombudsman's findings. Unless there is a particular background to this provision, it should be probably deleted.

99. Under Article 9.4 *"the Commissioner has no right to disclose information that has become known to him in the process of considering the complaint, about the private life of the applicant and other persons without their written consent"*.

100. Publication of the Ombudsman's findings is an essential part of the execution of the mandate. As said above, it is up to the Ombudsman to decide which information can be disclosed in connection with such publication, and it will often be necessary to publish the facts of the case. What should be prohibited (without consent) is only publication of private information in a non-anonymous form.

101. The Commission recommends revising the deadlines fixed under paragraph 2 and the limitations in paragraphs 3 and 4 of Article so as to give the Commissioner a free choice as to what information he or she may disclose publicly. The draft should prohibit the disclosure of non-anonymized private information without consent.

#### **J. Annual report**

102. Under Article 12.1 of the draft law, the CHR reports to the President of the Republic.

103. According to Principle 20 of the Venice Principles, *"The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities. This applies also to reports to be given by the Ombudsman appointed by the Executive."*

104. To maintain that the CHR is appointed by, and primarily responsible to, the Parliament, reporting should be made to the Parliament. Furthermore, providing for the Commissioner to report to Parliament would bring the provision of the law into line with international standards. The Commissioner can of course also inform the President of his/her report.

105. The Commission recommends that the draft provide for the CHR to report to Parliament, which does not preclude the Commissioner from reporting to the President.

#### **K. Budget of the institution**

106. The Principle 21 of the Venice Principles provides that *"Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent, and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate."*<sup>18</sup>

107. The Paris Principles on the NHRIs also give an important place to this aspect. Thus, in paragraphs 2 of the chapter "Composition and guarantees of independence and pluralism" it is

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<sup>18</sup> CDL-AD(2019)005, *op.cit.* Principle 21

provided that *“The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence”*<sup>19</sup>.

108. Article 16 *“Financial and logistical support”* of the draft law contains general provisions according to which the budget of the institution is provided for in the state budget, which must provide for a separate budget programme for the functioning of the institution. It is specified in Article 16.3 that the Commissioner may engage organisations and experts on a contractual basis.

109. The provisions of the article are welcome. However, it is worth underlining that the budget must be administered in accordance with Principle 21 of the Venice Principles and that it would be appropriate to provide for legislative provisions to this effect. The Law should also provide for the autonomous management, by the Office, of the budgetary allocation at its disposal.<sup>20</sup>

110. The draft could make explicit that the Commissioner shall propose his/her budget for the coming year.<sup>21</sup>

111. The Commission, while referring to the above-mentioned international standards and to its previous opinions, can only underline that the required independence of the institution is measured by the independence of its head, its staff, and its budget, both in terms of amount and administration.<sup>22</sup>

112. The Commission recommends the draft clearly specifies that the budget should be administered in an autonomous way and make explicit that the Commissioner should propose the budget of the institution for the coming year.

#### **L. National Center of Human Rights**

113. Article 17 of the draft law deals with a *“National Center of Human Rights”*. This article seems a little bit confusing but obviously it refers effectively to the secretariat of the CHR.

114. In this regard, Principle 22 reads as follows: *“The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff.”*

115. As the Venice Commission has had occasion to state recently, the independence of the staff is a key element of the Ombudsman institution required by international standards, whether the Paris or the Venice Principles.<sup>23</sup>

116. This independence should be reflected in the composition and rank of the staff.

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<sup>19</sup> United Nations, General Assembly, *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 of 20 December 1993, *Composition and guarantees of independence and pluralism, paragraphs 2*, available at <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>.

<sup>20</sup> See CDL-AD(2015)017, *op.cit* §74

<sup>21</sup> See CDL-AD(2007)020, - *Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71<sup>st</sup> Plenary Session (Venice, 1-2 June 2007)* §30

<sup>22</sup> See CDL-AD (2021)35 Armenia - *Opinion on the legislation related to the Ombudsman's staff, adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021)* §86

<sup>23</sup> See CDL-AD (2021) 35 *op.cit* §§16-19

### 1. The structure or the composition of the staff

117. Through Principle 22, the Venice Principles refer to one of the essential elements of the Ombudsman's independence, namely that of recruiting his or her deputies and staff.

118. Therefore, the Commissioner should not only appoint and dismiss the Head of the Center, but the entire staff.

### 2. The rank of the staff

119. Article 17 .6 foresees that *“Employees of the National Center are civil servants who carry out their activities on the legislation on public services”*.

120. As the Venice Commission had stated in different occasions, on the amendments to the law of the HRD of Armenia, *“Considering the exceptional role of the institution of the Human Rights Defender and its responsibilities, as well as the necessary safeguards for its independence, the staff, if it is not to be included under Civil Service, should have a distinct special status regulated by this Law.”<sup>24</sup>. The special status of the staff, should reflect Principle 3 of “the Venice Principles” which provides that “The Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation”. This principle refers to the head of the institution but should be understood as extending to all staff”<sup>25</sup>.*

121. The Commission recommends the draft be aligned with the requirements of Principle 22 of the Venice Principles and particularly that it provides that the Commissioner is able to recruit his or her staff. The staff should benefit, as the head of the institution, from an appropriate high rank, a distinct special status regulated by the law.

## IV. Conclusion

122. The Venice Commission welcomes that an important effort has been made to strengthen the legal basis of the institution of the Commissioner for Human Rights (CHR) since it will be provided for in a law and no longer in a presidential decree.

123. Nevertheless, the Venice Commission recommends that the existence of the institution of the CHR, his/her mandate and the procedure for his/her election and resignation be provided for in the Constitution.

124. In order to align the draft law with international standards, the Venice Commission recommends:

- with regard to the Commissioner's jurisdiction, including private entities which deliver public services, limiting the exemptions of jurisdiction, clarifying the jurisdiction over the judiciary and adding the promotion of Human Rights should be added in the mandate of the Commissioner;
- with regard to the election of the Commissioner, foreseeing a public and transparent selection procedure comprising public call, testing and shortlisting, an election by qualified majority by Parliament, a longer term of office and preferably a non-renewable term of office;

<sup>24</sup> See CDL-AD (2006)038, op.cit. § 78, CDL-AD (2021)35, op.cit §25

<sup>25</sup> See CDL-AD (2021)35, op.cit §26



- with regard to the Commissioner's immunity, circumscribing immunity to functional immunity, extending functional immunity to the staff of the institution, including after leaving the institution, providing for the lifting of the by qualified majority in Parliament;
- with regard to the Commissioner's term of office, the procedure of dismissal should foresee public and transparent procedures as well as a qualified majority by Parliament;
- with regard to the Commissioner's own investigations powers, removing limitations;
- with regard to the budget of the institution, providing that the budget is administered in an autonomous way and that the Commissioner proposes the budget of the institution for the coming year;
- with regard to the staff of the institution, providing for the ability for the Commissioner to recruit his/her staff according to ranks under a distinct special status regulated by the law;
- with regard to the annual report, providing for the Commissioner to report to Parliament.

125. The Venice Commission remains available to the Kazakh authorities for any further assistance.

Draft restricted