



# WHAT IS BEHIND AND BEYOND THE AVERAGE?

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## IMPRESSUM

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**Effectiveness of NHRIs in Western Balkan countries**  
Albania, Bosnia and Herzegovina, Kosovo,  
Montenegro, North Macedonia, Serbia

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## Comparative Report

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## Acronyms and Abbreviations

<b>ALB</b>	Albania
<b>APDP-FAI</b>	Agency for Personal Data Protection and Free Access to Information (Montenegro)
<b>BiH</b>	Bosnia and Herzegovina
<b>CoE</b>	Council of Europe
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CJEU</b>	Court of Justice of the European Union
<b>CPAD</b>	Commission for Protection against Discrimination (North Macedonia)
<b>CPE</b>	Commissioner for Protection of Equality (Serbia)
<b>CRC</b>	Convention on the Rights of the Child
<b>CRD</b>	Civil Rights Defenders
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CSO</b>	Civil Society Organisation
<b>EB</b>	Equality body
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>FAI</b>	Institution on Free Access to Information
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GANHRI</b>	Global Alliance for National Human Rights Institutions
<b>GDPR</b>	General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)
<b>EPI</b>	European Policy Institute - Skopje
<b>EU</b>	European Union
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>KOMSPI</b>	Commission for the Protection of the Right to Access to Public Information (North Macedonia)
<b>KOS</b>	Kosovo
<b>MKD</b>	North Macedonia
<b>MNE</b>	Montenegro
<b>MS</b>	Member States
<b>NGO</b>	Non-governmental Organisation
<b>NHRI</b>	National Human Rights Institutions
<b>OHCHR</b>	The UN Office of the Commissioner for Human Rights
<b>OP-CAT</b>	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>SA</b>	Supervisory Authority
<b>SADP</b>	Supervisory Authority for Data Protection
<b>SRB</b>	Serbia
<b>UN</b>	United Nations
<b>UNHRC</b>	UN Human Rights Committee
<b>WB</b>	Western Balkans

## INTRODUCTION

This regional report is the result of the research project which included independent institutions established by the state to protect and promote human rights in Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia.

The research took place in the period from July – November 2019 and July – November 2020. It was first conducted in 2019 in Montenegro, North Macedonia and Serbia and then in 2020, it was expanded to Albania, Bosnia and Herzegovina and Kosovo. A comprehensive methodology for assessing and evaluating the effectiveness of national human rights bodies that enabled ranking and regional comparability was developed. Consequently, research was conducted by independent experts for Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia, including data collection, analysis and ranking.

The six countries have established an ombudsperson as the main national human rights institution. In addition, specialised human right bodies that deal with non-discrimination/equality (EBs), data protection (SADP) and free access to information (FAI)<sup>1</sup> – some of them with a double or triple mandate, have been created.

In Albania, besides the Ombudsperson – People’s Advocate (PA), there are two other NHRIs – the Commissioner for Protection against Discrimination and the Information and Personal Data Protection Commissioner.

In Bosnia and Herzegovina, the Ombudsperson has a triple-mandate and is also an equality body and freedom for access to information authority. Besides this institution, there is also the Personal Data Protection Agency.

In Kosovo, the situation is like the one in BiH. The Ombudsperson is a triple-mandate institution, also serving as an equality body and freedom for access to information authority. In addition, the National Agency for the Protection of Personal Data has been established.

From Montenegro, two double-mandate bodies are considered as NHRIs in the scope of this research: the Ombudsperson (also having the mandate of an EB) and the Agency for Personal Data Protection and Free Access to Information.

Four single-mandate bodies have been established in North Macedonia as NHRIs: the Ombudsperson, the Commission for Protection against Discrimination, the Commission for Protection of the Right to Free Access to Public Information and the Data Protection Directorate.

In Serbia, in addition to the Ombudsperson - Protector of Citizens (PC), the Commissioner for Protection of Equality and the Commissioner for Information of Public Importance and Personal Data Protection) have the position of an NHRI.

Effectiveness was assessed in four domains:

- (1) Independence and ability to work without pressure,
- (2) Availability of resources and capacities,
- (3) Information, accessibility and cooperation with other relevant actors, and
- (4) Mandate and powers.

The assessment was based on a previously defined set of indicators derived from relevant international standards.

Research results per country were synthesised in six country reports, elaborated by Armela Xhaho (Albania), Aida Malkic (Bosnia and Herzegovina), Edona Ahmetaj and Nat Avdiu (Kosovo), Jelena Djankic (Montenegro), Biljana Kotevska (North Macedonia) and Ivana Krstic (Serbia). Based on these reports, this regional report provides a comparative overview of the NHRIs in Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia<sup>2</sup>.

In this regional report, we present the methodology, research findings, as well as recommendations. The research findings are presented comparatively per each domain. This approach was taken as it was considered more appropriate to focus on comparative analysis of the subject matters, resulting in a more comprehensive presentation of the status quo, while also providing and discussing the results per country within the domain.

<sup>1</sup> In this report, the term “NHRI” is used for all NHRIs included in the research. EB is used for the mandate of an equality body (anti-discrimination body), SADP – for the mandate of supervisory authority for data protection and FAI for the mandate for free access to public information.

<sup>2</sup> In the 2020 updated version of this report we include minor corrigenda to the last year regional and national (Montenegro, North Macedonia and Serbia) reports.

## METHODOLOGY

### BACKGROUND AND RATIONALE

#### Development of NHRIs in the Western Balkans

National human rights institutions in the Western Balkans were established in the context of transition to pluralist democracy. Human rights were the flagship of transition to pluralist democracy and have been at the core of the transition process. The start of the democratic transition processes in the Western Balkans coincided with the major efforts in the international community to strengthen the protection of human rights at the global level. In the early 1990s, the United Nations started promoting National Human Rights Institutions (NHRIs), independent national agencies specifically designed to protect and promote human rights, in order to “bridge the gulf between international law and domestic practices”<sup>3</sup>.

However, these global trends did not have an immediate impact in the Western Balkans, as most countries in the region were part of the dissolution process of former Yugoslavia, accompanied by war, violence and massive infringements of human rights. All of the countries covered by this research, except North Macedonia, were involved in the Yugoslav dissolution wars. North Macedonia managed to avoid the wars that followed the Yugoslav break-up. Still, it experienced an inter-ethnic conflict in 2001, which had a significant impact on the exercise of human rights in the country.

Only after the conflicts ended - in the late nineties and the beginning of the new millennium - the focus in the WB turned to establishment/re-establishment of the institutions, including the NHRIs.

The Ombudspersons as bodies protecting human rights in the WB countries were established in the period 1996-2013.<sup>4</sup> All the WB countries adopted the Ombudsperson institution as a main national human rights body.

The following table presents the human rights institutions in all the WB countries, their year of establishment, the accreditation status with the Global Alliance for National Human Rights Institutions (GANHRI) and the year of its achievement/confirmation.<sup>5</sup>

Civil Rights Defenders – Effectiveness of Human National Rights Institutions				
Country	Title of the body	Year of establishment	Accreditation	
			Status	Year
Albania	Republic of Albania People’s Advocate	2000	A	2003; 2014
Bosnia and Herzegovina	The Institution of Human Rights’ Ombudsperson of BiH	1996	A	2001; 2017
Kosovo	The Ombudsperson Institution of Kosovo	2000	Observer	
Montenegro	Protector of Human Rights and Freedoms – Ombudsperson	2013	B	2016
North Macedonia	Ombudsperson	1997	B	2011
Serbia	Protector of Citizens – Ombudsperson	2007	A	2010; 2015

Since then, the establishment and functioning of NHRIs in the Western Balkans had been mainly under the influence of the European integration process, which includes the assessment of the NHRIs in its political conditionality.

Moreover, the EU conditionality has directly triggered the creation of specific human right bodies – for data protection, free access to public information, non-discrimination, etc. While the countries had some autonomy in the manner of organising these functions and structuring the bodies, they had no choice in introducing them.

All the NHRIs became subject to rigorous monitoring and assessment by the European Commission – through their monitoring and reporting mechanism (findings presented in the annual report). Moreover, they are subject to the benchmarking mechanism, in which, in addition to the European Commission, the Member States have an increased role. Since 2013, the EU established the “fundamentals first” approach, focusing on democracy and the rule of law, consequently, more rigorous conditionality was introduced for the functioning of the NHRIs, which are all part of the “fundamentals first” approach.<sup>6</sup>

<sup>3</sup> U.N. Centre for Human Rights, National Human Rights Institutions: A handbook on the establishment and strengthening of national human rights institutions for the promotion and protection of human rights, U.N. SALES NO. E.95.XIV.2 (1995).

<sup>4</sup> Croatia, which until its accession to EU in 2013 was part of the Western Balkans, established the Ombudsman in 1993, which has an A accreditation status.

<sup>5</sup> The column “Year” in Table 1 refers to when the institution was first accredited and when it was last accredited. The column “Status” refers to the current status of the institution, at the cut-off date for the report. Source: Global Alliance of National Human Rights Institutions, Chart of the Status of National Institutions, <https://ganhri.org/accreditation/>.

<sup>6</sup> Communication from the Commission to the European parliament and the Council Enlargement Strategy and Main Challenges 2013-2014, Brussels, 16.10.2013 COM(2013) 700 final.

## Current context

The political landscape in the region is rather complex, and all the countries included in this research are experiencing backsliding in the state of democracy.<sup>7</sup>

This trend is not specific to the WB, but rather a global movement, as illustrated by Freedom in the World, which “has recorded global declines in political rights and civil liberties for an alarming 13 consecutive years, from 2005 to 2018”.<sup>8</sup> The Report has recorded a decline of the share of “free countries” to 44,1% in 2018 from 46,1% in 2008 and increase of “non-free” countries to 25,6% in 2018 from 21,8% in 2008. All countries subject to this research are in the group of “partly free” countries.

While the EU conditionality has been strengthened, the perspectives of EU membership for the WB countries are weakening, and the credibility of the EU commitment is fading<sup>9</sup>; consequently, the external impetus for democratic reforms is waning, which can also have a direct impact on the performance of the NHRIs.

The EU conditionality is the main “umbrella” for the development of NHRIs in the WB. However, it serves as a “prism” through which the global standards are incorporated and embedded. Consequently, the functioning of the NHRIs is generally assessed in the context of the international framework under the UN, EU and CoE.

The economic context is also highly relevant for the effectiveness of the NHRIs, which need resources to fulfil their mandate. The lack of resources in general on the national level can be an excuse for not equipping the NHRI with the necessary resources, which is essential for their capacity. While the WB countries are experiencing growth in GDP (3,8% in 2018), this growth is not sufficient to ensure fast catching up with the EU average. Moreover, with the new enlargement methodology, democracy and the rule of law belong to the Cluster 1 “Fundamentals” which must now be opened first in the negotiations.<sup>10</sup>

## The state of monitoring and research on NHRIs in the WB

Systematic monitoring of NHRIs is a part of the already established comprehensive monitoring system by civil society organisations (CSOs) of the state of human rights in the WB. It has also become a part of the established system of independent civil society monitoring of the EU accession process, mainly through regular shadow reporting, as NHRIs are part of the EU conditionality. In recent years CSOs in the WB have begun to turn focus specifically to issues related to the effectiveness of independent bodies in the area of democracy and the rule of law, seeing them as a potential stronger pillar and ally against authoritarian tendencies.<sup>11</sup>

The most relevant sources of independent monitoring are presented below, with a focus on the newest publications.

In Albania, the monitoring of NHRIs is done almost exclusively by CSOs. However, this monitoring is mainly focused on the right to information. There are several CSOs monitoring this right and the work of the Commissioner, such as Respublika.<sup>12</sup>

There is very little research on NHRIs and their effectiveness in Bosnia and Herzegovina as well. Most of it is done by international organisations, think-tanks and CSOs. A Council of Europe’s 2018 report discussed the efficiency of the Ombudsperson,<sup>13</sup> and a 2019 report presented findings on institutions in combating discrimination in BiH in 2018.<sup>14</sup> The Centre for Social Research Analitika looked at the Ombudsman in the system of protection against discrimination<sup>15</sup> and published a brief regarding its mandate on FAI.<sup>16</sup>

In Kosovo, the research on NHRI effectiveness is mainly conducted by CSOs. Substantial work was done around the “human rights package”. For example, the Youth Initiative for Human Rights researched the work of the Ombudsperson.<sup>17</sup> The equality mandate by the Ombudsperson was discussed in an Advocacy Centre for Democratic Culture brief.<sup>18</sup> Regarding the NAPPD, no research was identified.

7 Freedom House, country data, <https://freedomhouse.org/report/countries-world-freedom-2019>; accessed on 20.07.2019 and 22.09.2020

8 Freedom House, Democracy in Retreat, Freedom in the World Report 2019 (2019) p.4.

9 Jelena Džankić, Soeren Keil, Marko Kmezić (eds.) The Europeanisation of the Western Balkans; A Failure of EU Conditionality? (Palgrave, 2019).

10 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Enhancing the accession process – A credible EU perspective for the Western Balkans COM(2020) 57 final.

11 E.g. Ana Medarska-Lazova, Efficiency of Independent Human Right Bodies in the Republic of Macedonia, (Foundation Open Society Macedonia, 2017).

12 <http://www.respublika.org/al/>

13 <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be> and <https://rm.coe.int/comparative-study-on-advocacy-capacities-of-the-ombudsman/16808f13c0>

14 <https://www.osce.org/files/f/documents/3/a/414671.pdf>

15 [https://www.analitika.ba/sites/default/files/publikacije/analitika\\_-\\_report\\_-\\_ombudsman\\_10may2013\\_eng.pdf](https://www.analitika.ba/sites/default/files/publikacije/analitika_-_report_-_ombudsman_10may2013_eng.pdf); [http://www.analitika.ba/sites/default/files/publikacije/analitika\\_-\\_policy\\_brief\\_-\\_ombudsman\\_24april2013\\_eng.pdf](http://www.analitika.ba/sites/default/files/publikacije/analitika_-_policy_brief_-_ombudsman_24april2013_eng.pdf)

16 [https://www.analitika.ba/sites/default/files/publikacije/right\\_to\\_information\\_eng\\_brief\\_-\\_web.pdf](https://www.analitika.ba/sites/default/files/publikacije/right_to_information_eng_brief_-_web.pdf)

17 Youth Initiative for Human Rights, An Insight into the Work of the Ombudsperson Institution, June 2013

18 Advocacy Centre for Democratic Culture, Policy Brief - The Ombudsman in the system of protection against discrimination, September 2018, Chapter 7 - Recommendations

In Montenegro, research on the NHRIs is scarce. The NGO Network for the Affirmation of NGO Sector (MANS) recently published a report on the role and capacity of the Agency for Free Access to Information and Data Protection.<sup>19</sup>

In North Macedonia, the European Policy Institute – Skopje has been publishing regular annual monitoring reports of the Network 23 on Chapter 23 Judiciary and Fundamental Rights, including the NHRI’s role in the protection of fundamental rights.<sup>20</sup> A specific monitoring report on the Ombudsperson by NGO Infocentar from 2018 covered several aspects relevant for the institution’s effectiveness – legal framework, regional offices, as well as communication and cooperation with NGOs and media.<sup>21</sup> The Non-discrimination Network has been monitoring the implementation of the Anti-discrimination Law since 2011, including the operation of the Commission for Prevention and Protection of Discrimination<sup>22</sup>, while the Helsinki Committee for Human Rights published an annual information bulletin on discrimination.<sup>23</sup> The think-tank Analytica has set out a framework for monitoring the Commission on Free Access to Public Information and the Data Protection Directorate.<sup>24</sup>

In Serbia, a regular annual report on the state of human rights is published by the Centre for Human Rights, which includes observations and assessments on the NHRIs.<sup>25</sup> In addition, an annual shadow report on the state of democracy in Serbia is published, which includes findings on the NHRIs.<sup>26</sup> There is also a comprehensive study on the effectiveness of anti-discrimination legal framework, including the work of the Commissioner for Protection of Equality (CPE).<sup>27</sup> The Coalition prEUgovor has been regularly monitoring progress in Chapters 23 and 24 of the EU accession process, through structured monitoring of the implementation of the Action Plans for fulfilling the EU interim benchmarks, resulting in Alarm reports. The rising interest for issues relevant to the effectiveness of NHRI is evident in the recent Working report on the role and status of Ombudsperson and Commissioner for the protection of equality.<sup>28</sup> However, the academic research literature on NHRI’s is limited, having only one comprehensive study on independent institutions in Serbia.<sup>29</sup>

The European Network of Legal Experts in the Non-discrimination field annual reports on non-discrimination inspect the compliance of the equality body with EU directives’ standards. It has published reports on all Albania, Montenegro, North Macedonia and Serbia.<sup>30</sup>

A valuable source on the public opinion on the ombudsperson institution in the WB countries – on the level of public trust and independence – is the annual public opinion survey of the Regional Cooperation Council.<sup>31</sup>

International donors fund all monitoring efforts; consequently, sustainability is questionable, as we have not recorded any systematic monitoring effort funded by national institutions.

Relevant global and regional reviews of literature do not record regional studies pertinent to the six countries. Two papers relevant for Bosnia and Herzegovina are included.<sup>32</sup> However, with donor support, some research has resulted in relevant comparative studies, such as a regional study on non-discrimination in 2016.<sup>33</sup>

19 Snezana Bajceta and Vuk Jankovic, Analysis of the Role and Capacity of the Agency for Free Access to Information and Data Protection (in Montenegrin), (MANS, Podgorica, 2019) <http://www.mans.co.me/wp-content/uploads/2019/04/analizaAZZLP.pdf>.

20 Simonida Kacarska and Uranija Pirovska, eds., Shadow Report on Chapter 23 covering the period June 2018 – March 2019, European Policy Institute – Skopje, 2019, <https://epi.org.mk/wp-content/uploads/2019/05/Shadow-Report-Eng-1.pdf>.

21 Biljana Bejkova and Uranija Pirovska, Civil Monitoring of the Ombudsman, Skopje, 2019, <http://nvoinfocentar.mk/wp-content/uploads/2018/04/Naroden-Pravobranitelj-Book-web1.pdf>.

22 Igor Jetrović, Jovana Jovanovska Kanurkova and Marija Gelevska, Report on the Implementation of the Law on Prevention and Protection against Discrimination [http://coalition.org.mk/wp-content/uploads/2019/07/Diskriminacija\\_web.pdf](http://coalition.org.mk/wp-content/uploads/2019/07/Diskriminacija_web.pdf).

23 Macedonian Helsinki Committee, Annual Information Bulletin on Discrimination - 2018, (Skopje, 2019) (in Macedonian) <https://mhc.org.mk/reports/godishen-informator-za-diskriminacija-za-2018/>.

24 Magdalena Lembovska, Basic Documents for Monitoring of the Work of the Commission for the Protection of the Right to Free Access to Public Information and the Data Protection Directorate, (Analytica - think-tank 2017).

25 Vesna Petrović, ed. Human Rights in Serbia 2018: law, practice and international human rights standards, (The Belgrade Centre for Human Rights, Belgrade, 2019).

<http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2014/01/Human-Rights-in-Serbia-2018.pdf>.

26 Nikola Burazer, Aleksandar Ivković, Shadow Report, State of Democracy in Serbia 2018, Centre for Contemporary Politics, Belgrade, 2018 <https://europeanwesternbalkans.com/wp-content/uploads/2018/10/Shadow-Report-State-of-democracy-in-Serbia-2018.pdf>.

27 Equal Rights Trust, Equality in Practice, Implementing Serbia’s Equality Laws, London, 2019, [https://www.equalrightstrust.org/sites/default/files/ertdocs/Serbia%20report\\_EN.pdf](https://www.equalrightstrust.org/sites/default/files/ertdocs/Serbia%20report_EN.pdf).

28 Milijana Trifković M, Dario Curčić and Marko Vasiljević, Working report on the role and status of Ombudsperson and Commissioner for the protection of equality, (Belgrade, 2019) <https://crt.rs/wp-content/uploads/2019/01/Role-and-status-of-ombudsman-and-commissioner-for-the-protection-of-equality.pdf>.

29 Marko Davinić, Independent Controlling Bodies in the Republic of Serbia, Dosije studio, Belgrade, 2018.

30 [www.equalitylaw.eu](http://www.equalitylaw.eu)

31 Regional Cooperation Council, Balkan Barometer 2019, Public Opinion, Analytical Report, (Sarajevo, 2019) [https://www.rcc.int/seeds/files/RCC\\_BalkanBarometer\\_PublicOpinion\\_2019.pdf](https://www.rcc.int/seeds/files/RCC_BalkanBarometer_PublicOpinion_2019.pdf).

32 Steven L.B. Jensen, Lessons from Research on National Human Rights Institutions, A desk review on findings related to NHRI effectiveness, (the Danish Institute for Human Rights, 2018) <https://www.humanrights.dk/publications/lessons-research-national-human-rights-institutions>

33 Legal Protection Against Discrimination in South-East Europe, Regional Study, Centre for South-east European Law School Network (2016).

## AIM OF THE RESEARCH

This research aims to assess the effectiveness of the human rights institutions in Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia, based on a pre-defined set of indicators.

## KEY TERMS

National human right bodies

The definition of NHRI is based on global standards. The definition has been developed within the UN system, where an NHRI is defined as “a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights<sup>34</sup> or as “state bodies with a constitutional and/or legislative mandate to protect and promote human rights, that are part of the State apparatus and are funded by the State.<sup>35</sup>

Two elements of the definition can be distinguished:

- NHRIs are state bodies;
- Their mandate (constitutional or legislative) is to protect and promote human rights.

The NHRIs are neither judicial nor law-making, rather - administrative in nature.

The second element of the definition is their mandate - to protect and promote human rights. The mandate can be determined either in Constitution or in Law.

Consequently, in this research, we apply the following definition of an NHRI:

***A National Human Rights Institution is a body established by the state with the mandate to protect and promote human rights.***

At the global level, six structural models of NHRIs can be distinguished: commissions; ombudsperson institutes; hybrid institutions; consultative and advisory bodies; research institutes and centres; civil rights protectors; public defenders; and parliamentary advocates.

### Effectiveness of NHRIs

The organisational theory provides different approaches to the definition of “effectiveness” – the goal approach, the resources approach, the internal process approach, and the strategic constituencies approach. The analysis of the current standards for NHRIs indicates that a combined approach has been applied in setting the framework for assessing the effectiveness of NHRIs.

Determinants and definitions of effectiveness are found both in international standards, as well as in academic literature.

ECRI defines that “effectiveness means that the equality body implements its functions and competences in a way and to a scale and standard that make a significant impact on the achievement of equality and the elimination of discrimination and intolerance.<sup>36</sup>

Similar is the definition by the CoE Commissioner for human rights on national structures for promoting equality, which states that “ Effectiveness requires that such structures are able to deploy all of their functions and powers to a scale and a standard that ensures impact and the full realisation of their potential.”<sup>37</sup>

34 U.N. Centre for Human Rights, National Human Rights Institutions: A handbook on the establishment and strengthening of national human rights institutions for the promotion and protection of human rights, U.N. SALES NO. E.95.XIV.2 (1995).

35 Office of the United Nations High Commissioner for Human Rights, National Human Rights Institutions, History, Principles, Roles and Responsibilities, UN, 2010, p. 13.

36 Council of Europe, ECRI, General policy recommendation no. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CRI(2018)06, Article 16.

37 Commissioner for human rights, CoE, Opinion of the Commissioner for human rights on national structures for promoting equality, CommDH(2011)2, Strasbourg 21 March 2011.

The Report on Assessing the Effectiveness of National Human Rights Institutions identified the factors of effectiveness of NHRI's. The NHRIs tend to be more effective if they:

- Enjoy public legitimacy
- Are accessible
- Have an open organisational culture
- Ensure the integrity and quality of their members
- Have diverse membership and staff
- Consult with civil society
- Have a broad mandate
- Have an all-encompassing jurisdiction
- Have the power to monitor compliance with their recommendations
- Treat human rights issues systemically
- Have adequate budgetary resources
- Develop effective international links
- Handle complaints speedily and effectively.<sup>38</sup>

The most recent trends in standards, as well as academic literature, tend to emphasise the impact of NHRIs and, in this line, determine the factors for effectiveness.

The CoE Commissioner for human rights classifies the main factors for the effectiveness of equality bodies in the following manner:

- Depending on authorities: level of resources made available to the bodies and the functions accorded to them
- Depending on the equality bodies: being strategic, accessibility of their services, stakeholder engagement in their work and networking.
- The “functions” are sometimes more broadly defined as “mandate, tasks and powers”<sup>39</sup> or “functions and powers”.<sup>40</sup>

In the *evaluation of the effectiveness of NHRI*, three approaches can be distinguished:

- Structural;
- Mandate-based;
- Impact-based.<sup>41</sup>

The structural approach, which dominated in the early years – in the 90s – focuses on the compliance of NHRI with the main legal norms – the Paris Principles. Academic research, on the one hand, points out to the importance of the institutional design for the effectiveness of NHRIs<sup>42</sup>. At the same time, it concludes that while the current standards (such as the Paris Principles) “provide a yardstick against which to measure compliance, the criteria by which performance should be assessed are less clear”.<sup>43</sup> However, studies have confirmed that “formal institutional safeguards influence human rights outcomes, in part because formal institutional design remains relatively stable over time.”<sup>44</sup>

The mandate-based approaches are performance-based and focus on the success in performing the mandate of the NHRI.

Impact-based approaches focus on what effect an NHRI has in improving respect for human rights. While recent definitions of effectiveness emphasise impact, this approach has most practical obstacles, as it is challenging to isolate the factor of NHRI effectiveness as a determinant for a situation of the human rights and “the lack of a general measure of respect for human rights means that determining the impact of an NHRI across the board is impossible at the present time”.<sup>45</sup>

38 Richard Carver, Assessing the Effectiveness of National Human Rights Institutions, International Council on Human Rights Policy, Office of the United Nations High Commissioner for Human Rights, (Versoix, Switzerland, 2005).

39 As in the CoE, ECRI, General policy recommendation no. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CRI(2018)06.

40 As in the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4/5/2016.

41 Julie A. Mertus, “Evaluating NHRIs: Considering Structure, Mandate, and Impact,” in Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions, Goodman, R. and Pegram, T. (eds.) (New York: Cambridge University Press, 2012) p. 75.

42 Katerina Linos and Tom Pegram, What works in Human Rights Institutions?, The American Journal of International Law, Vol. 111:3 (2017), p. 679.

43 Sara Spencer, Context, institution or accountability? Exploring the factors that shape the performance of national human rights and equality bodies, Policy and Politics, Vol 42 No 1 (2014), p. 91.

44 Katerina Linos. and Tom Pegram, What works in Human Rights Institutions?, The American Journal of International Law, Vol. 111:3 (2017), p. 680.

45 Richard Carver, Measuring the impact and development effectiveness of national human rights institutions, A proposed framework for evaluation, (2014) p. 16. [https://www.academia.edu/27945167/Measuring\\_the\\_impact\\_and\\_development\\_effectiveness\\_of\\_national\\_human\\_rights\\_institutions\\_a\\_proposed\\_framework\\_for\\_evaluation](https://www.academia.edu/27945167/Measuring_the_impact_and_development_effectiveness_of_national_human_rights_institutions_a_proposed_framework_for_evaluation).

Consequently, measuring effectiveness that combines the structural and the mandate-based approach is the only feasible for the NHRI institutions in the given context and current state of development of and research on NHRIs in the Western Balkans.

By taking into account the context, the scope and the aim of our research, we define the **effectiveness** of the NHRI as “**the capability of the NHRI to independently perform its mandate and powers, with the aim to make a significant impact on the achievement of human rights**”.

#### Scope of the research

The following institutions in Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia were included in this research:

#### Albania

- People’s Advocate
- Commissioner for Protection against Discrimination
- Information and Data Protection Commissioner

#### Bosnia and Herzegovina

- The Institution of Human Rights Ombudsman of BiH
- Personal Data Protection Agency

#### Kosovo

- Ombudsperson Institution
- National Agency for the Protection of Personal Data

#### Montenegro:

- Ombudsperson,
- Agency for Personal Data Protection and Free Access to Information;

#### North Macedonia:

- Ombudsperson,
- Commission for Protection against Discrimination,
- Commission for Protection of the Right to Free Access to Public Information,
- Data Protection Directorate.

#### Serbia:

- Ombudsperson (Protector of Citizens),
- Commissioner for Protection of Equality,
- Commissioner for Information of Public Importance and Personal Data Protection.

In the following table, the bodies are presented per mandate for each country and year of establishment/awarding the mandate:



	ALB	Year	BiH	Year	KOS	Year	MNE	Year	MKD	Year	SRB	Year
<b>NHRI</b>	People's Advocate [Avokati i Popullit]	1999	The Institution of Human Rights Ombudsman of BiH [Institucija ombudsmena/ombudsmana za ljudska prava Bosne i Hercegovine]	1996	Ombudsperson Institution [Institucioni i Avokatit të Popullit; Institucija Ombudsmana]	2000	Ombudsperson [Zaštitnik/ca ljudskih prava i sloboda Crne Gore]	2003	Ombudsperson [Народен правобранител]	1997	Protector of Citizens [Zaštitnik građana]	2007
<b>Equality body</b>	Commissioner for Protection against Discrimination [Komisioneri për Mbrojtjen nga Diskriminimi]	2010	The Institution of Human Rights Ombudsman of BiH [Institucija ombudsmena/ombudsmana za ljudska prava Bosne i Hercegovine]	1996	Ombudsperson Institution [Institucioni i Avokatit të Popullit; Institucija Ombudsmana]	2004	Ombudsperson [Zaštitnik/ca ljudskih prava i sloboda Crne Gore]	2014	Commission for Protection against Discrimination [Комисија за заштита од дискриминација]	2010	Commissioner for Protection of Equality [Poverenik za zaštitu ravnopravnosti]	2011
<b>Data protection supervisory authority</b>	Information and Data Protection Commissioner [Komisioneri për të Drejtën e Informimit dhe Mbrojtjen e të Dhënave Personale]	2008	Personal Data Protection Agency in Bosnia and Herzegovina [Agencija za zaštitu ličnih podataka u Bosni i Hercegovini]	2006	National Agency for the Protection of Personal Data [Agjencia Shtetërore për Mbrojtjen e të Dhënave Personale; Državna agencija za zaštitu ličnih podataka]	2010	Agency for Personal Data Protection and Free Access to Information [Agencija za zaštitu ličnih podataka i slobodan pristup informacijama]	2009	Data Protection Directorate [Дирекција за заштита на личните податоци]	2005	Commissioner for Information of Public Importance and Personal Dana Protection [Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti]	2009
<b>Institution for free access to information</b>	Information and Data Protection Commissioner [Komisioneri për të Drejtën e Informimit dhe Mbrojtjen e të Dhënave Personale]	2014	The Institution of Human Rights Ombudsman of BiH [Institucija ombudsmena/ombudsmana za ljudska prava Bosne i Hercegovine]	1996	Ombudsperson Institution [Institucioni i Avokatit të Popullit; Institucija Ombudsmana]	2010	Agency for Personal Data Protection and Free Access to Information [Agencija za zaštitu ličnih podataka i slobodan pristup informacijama]	2012	Commission of Protection of the Right to Free Access to Public Information [Комисија за заштита на правото на слободен пристап до информациите од јавен карактер]	2006	Commissioner for Information of Public Importance and Personal Dana Protection [Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti]	2005

Table 2: Mandate and year of establishment/mandate awarded



## INTERNATIONAL STANDARDS RELATED TO NHRIS

The international standards and their interpretations are the basis for developing the indicators for the evaluation of the effectiveness of the NHRI. In this section, an overview of the relevant standards is presented.

### UN standards on national human right bodies

The UN standards on national human right bodies have been developed against the perceived need to develop instruments for effective implementation of the UN general framework for the protection of human rights.

The main document, setting the standards is the General Assembly Resolution 48/134 of 20 December 1993 - Principles relating to the Status of National Institutions, widely known as the **Paris Principles**.<sup>46</sup>

The Paris principles set up the following main criteria that NHRIs should fulfil:

- Mandate and competence: a broad mandate, based on universal human rights norms and standards;
- Autonomy from Government;
- Independence guaranteed by statute or Constitution;
- Pluralism;
- Adequate resources; and
- Adequate powers of investigation.

These criteria have been the primary basis for defining and further developing the domains of the effectiveness of NHRIs.

The Paris Principles are an important example of UN normative influence - as “In developing the Paris Principles, the UN General Assembly used its principle leverage tool—normative influence—with far more specificity than is typical. In so doing, it triggered global diffusion of administrative agencies with highly specific safeguards.”<sup>47</sup>

Furthermore, the Paris Principle had an additional high impact on the functioning of the NHRIs around the world through the fact that “The UN system has strongly promoted the role of the SCA as a third-party monitor of NHRI design integrity and performance. Delegation of monitoring duties to a third party can enhance compliance, especially where—as is the case of the SCA—a central body collects information from diverse sources and issues particular assessments in the form of letter grades to individual NHRIs.”<sup>48</sup>

The Global Alliance for National Human Rights Institutions (GANHRI), set up in 1993 as an international association of national human rights institutions (NHRIs) from all parts of the globe<sup>49</sup> has developed a system of accreditation of national human right bodies, through its Sub-Committee on Accreditation, granting A or B status to the applicants. The Sub-committee issues general observations, which are considered an “interpretative tools of the Paris Principle”.<sup>50</sup>

General Observations are structured into two categories: 1. Essential requirements of the Paris Principles and 2. Practices that directly promote Paris Principles compliance.

1. “Observations on essential requirements of the Paris Principles” include the following issues:

1.1 The establishment of NHRIs; 1.2 Human rights mandate; 1.3 Encouraging ratification or accession to international human rights instruments; 1.4 Interaction with the international human rights system; 1.5 Cooperation with other human rights bodies; 1.6 Recommendations by NHRIs; 1.7 Ensuring pluralism of the NHRI 1.8 Selection and appointment of the decision-making body of NHRIs; 1.9 Political representatives on NHRIs; 1.10 Adequate funding of NHRIs; 1.11 Annual reports of NHRIs.

2. “Practices that directly promote Paris Principles compliance” are identified relating to the following issues:

2.1 Guarantee of tenure for members of the NHRI decision-making body; 2.2 Full-time members of an NHRI; 2.3 Protection from criminal and civil liability for official actions and decisions undertaken in good faith; 2.4 Recruitment and retention of NHRI staff; 2.5 NHRIs during the situation of a coup d'état or a state of emergency; 2.6 Limitation of power of NHRIs due to national security; 2.7 Administrative regulation of NHRIs; 2.8 Assessing NHRIs as National Preventive and National Monitoring Mechanisms; 2.9 The quasi-judicial competency of NHRIs (complaints-handling).<sup>51</sup>

<sup>46</sup> <https://nhri.ohchr.org/EN/AboutUs/Pages/ParisPrinciples.aspx>.

<sup>47</sup> Katerina Linos and Tom Pegram, What works in Human Rights Institutions?, The American Journal Of International Law, Vol. 111:3 (2017), p. 688.

<sup>48</sup> Ibid, p. 687.

<sup>49</sup> Until 2013 – International Coordinating Committee of national institutions for the promotion and protection of human rights (ICC).

<sup>50</sup> Global Alliance for National Human Rights Institutions, General observations of the Sub-Committee on Accreditation, adopted by GANHRI Bureau, 21 February 2018 [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf).

<sup>51</sup> Ibid.

Within the UN system, specific recommendations/interpretations have been issued for implementation of the UN human rights conventions that have a direct impact on creating specific NHRIs or broadening the mandate of the existing NHRIs.

The Committee on Economic, Social and Cultural Rights has concluded that the role in promoting and ensuring the indivisibility and interdependence of all human rights “has too often either not been accorded to the institution or has been neglected or given a low priority by it” and therefore recommended that “full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions”.<sup>52</sup>

The Committee on the Rights of the Child, with responsibilities related to the implementation of the Convention on the Rights of the Child (CRC) stated that “every State needs an independent human rights institution with responsibility for promoting and protecting children’s rights’, which should be able “independently and effectively, to monitor, promote and protect children’s rights”.<sup>53</sup> Furthermore, it advised on the basic standards to be fulfilled by the NHRI (which are largely in line with the Paris Principles) and the activities it should pursue in the implementation of the rights of the child. The growing international commitments and activities in the area of the rights of the child resulted in creating specific institutions or yet broadening the mandate and creating particular units with the already existing NHRI (“general NHRI”).

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), adopted in 2002, obliges State Parties to designate or establish an “independent national preventive mechanism” to prevent torture and stipulates that this shall be done with “due consideration” to the Paris Principles (Article 18 (4)).<sup>54</sup> In the WB countries, this obligation was implemented mainly through incorporating this responsibility within the NHRI and establishing a national preventive mechanism within the Institution.

The Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, obliges State Parties in Article 33 (2) to take the Paris Principles into account when designating or establishing an “independent mechanism” to promote, protect and monitor the implementation of the Convention.<sup>55</sup>

The CoE encouraged the application of the Paris Principles in the CoE Member States through the Recommendation of the Committee of Ministers on the establishment of independent national institutions for the promotion and protection of human rights.<sup>56</sup> This brief document is not setting or interpreting standards, but rather inviting the Member States to draw on the experience of human right commissions and the ombudsmen.

The Paris Principles or more precisely, the GANHRI General Observations are taken as a basis for the matrix of indicators in this Methodology, as the most recognised and highest global standard for NHRIs.

### Specific standards for equality bodies

In addition to the general framework on NHRIs, the UN bodies have recommended the establishment of “national commissions or other bodies” charged with the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>57</sup>, which resulted in the creation of particular commissions/bodies more specifically designated as “equality bodies” or incorporating this responsibility within the NHRI.

In the European context, the equality bodies were created to respond to the more elaborated requirements for the implementation of the EU acquis related to non-discrimination – widely referred to as the “equal treatment directives”<sup>58</sup>, as well as the implementation of the European Convention on Human Rights (ECHR). In most European countries, new bodies have been created to deal with equal treatment – multi-ground or single-

<sup>52</sup> UN, Committee on Economic, Social and Cultural rights, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, General comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights, 14/12/1998, E/C.12/1998/25.

<sup>53</sup> UN, Committee on the Rights of the Child, General comment No. 2 (2002), The role of independent national human rights institutions in the promotion and protection of the rights of the child, 15/12/2012, CRC/GC/2002/2.

<sup>54</sup> UN, OHCHR (2002), Art. 17.

<sup>55</sup> UN, Convention on the Rights of Persons with Disabilities (CRPD) (2006), Art. 33 (2). See also the OHCHR thematic study on the structure and role of national mechanisms for the implementation and monitoring of the Convention, for example, para. 78, A/HRC/13/29, 22 December 2009.

<sup>56</sup> CoE, Committee of Ministers, The Recommendation No. R (97) 14 of the Committee of Ministers to Member States on the establishment of independent national institutions for the promotion and protection of human rights, 30 September 1997.

<sup>57</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XVII, Establishment of national institutions to facilitate implementation of the Convention, (Forty-second session, 1993), A/48/18

<sup>58</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

ground. In some countries, the national human rights institutions took over the mandate for promotion of equal treatment, thus becoming “multi-mandate” bodies.<sup>59</sup>

### EU equal treatment directives

The following equal treatment directives, which are obligatory for the EU Member States, constitute provisions on equality bodies:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Article 13);
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Article 12);
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006; on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Article 20);
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (Article 11).

Each of the directives contains an identical provision “1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of .....”. The directives explicitly allow that “these bodies may form part of agencies charged at the national level with the defence of human rights or the safeguard of individuals’ rights”.

In addition to the general requirement for an establishment or mandating a body, the directives set out the following mandatory responsibilities of these bodies:

- providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.<sup>60</sup>

As obligatory EU law, the directives set out only minimum requirements for equality bodies, and they do not “guarantee complete independence, effectiveness, sufficient powers and adequate resources for equality bodies.”<sup>61</sup>

### EU soft law

Comprehensive standards related to equality bodies are set out in the Commission Recommendation of 22 June 2018 on standards for equality bodies, which stipulates that the equality bodies established in the MS in line with the equality directives should carry out their functions in an independent and effective way.<sup>62</sup> The document, which is of non-obligatory nature, “goes further in recommending a mandate that encompasses the grounds of gender, racial or ethnic origin, religion or belief, disability, age and sexual orientation, in the areas of employment and occupation, access to and supply of goods and services, education, social protection and social advantages. This is in line with the pending proposal of 2 July 2008 for a Council Directive on implementing the principle of equal treatment between persons, which covers all these grounds and it also reflects the situation already established for equality bodies in most Member States.”<sup>63</sup> These standards were developed following the observations provided by the EC in its reports on the implementation of the equality directives, as well as the European Parliament resolution of 2015, which called on the EC “to introduce common standards and checks to ensure the independence and effectiveness of national equality bodies”.

<sup>59</sup> Neill Crawley, Equality bodies making a difference, (European Commission, 2018) p. 47.

<sup>60</sup> In addition, the Directive 2010/41/EU includes the responsibility of “exchanging, at the appropriate level, the information available with the corresponding European bodies, such as the European Institute for Gender Equality”.

<sup>61</sup> Equinet, Developing Standards for Equality Bodies, Working Paper, (2016), p.2.

<sup>62</sup> Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, C/2018/3850, OJ L 167 4.7.2018, Ch I, (2).

<sup>63</sup> Neill Crawley, Equality bodies making a difference, (European Commission, 2018) p. 121.

The Recommendation includes standards in the areas of mandate, independence, effectiveness, accessibility and coordination, categorised by domains as follows:

1. Mandate:
  - 1.1. Grounds and scope covered by the equality bodies’ mandate
  - 1.2. Functions covered by the equality bodies’ mandate
    - Independent assistance
    - Independent surveys
    - Independent reports
    - Recommendations of equality bodies
    - Promotion of equality
2. Independence and effectiveness
  - 2.1. Independence
  - 2.2. Resources
  - 2.3. Complaint submission, access and accessibility
3. Coordination and cooperation

### CoE standards

Comprehensive and elaborate standards on equality bodies are contained in the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the Council of Europe.<sup>64</sup> In addition to the implementation of functions and powers, the standards are accorded in line with legislation, and the Opinion puts focus on the advancement of their mandate and especially on the potential of the equality bodies for broader impact in society and encouraging social change. The document has a unique approach since it examines the two key indicators of independence and effectiveness “in relation to the conditions created for such structures by external actors and in relation to the operation of the structures and the factors which lie within the control of these bodies”.<sup>65</sup>

The Revised General Policy Recommendation No. 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE contains elaborate standards on NHRIs.<sup>66</sup> Along with the EC Recommendation of 2018, these standards “have created a new context full of potential for equality bodies” and “valuably address equality bodies as institutions with a necessary role to play in the creation of more equal, inclusive, cohesive, and democratic societies”.<sup>67</sup>

The most recent trends in developing the standards for NHRIs undoubtedly demonstrate the striving to create the potential of the NHRIs for broader impact in society and encouraging social change.

The standards set in the EU soft law (Commission Recommendation of 22 June 2018) and the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the CoE, as well as the Revised General Policy Recommendation No. 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE are taken as a basis for the matrix of indicators in this Methodology, as the most elaborate and highest standards for equality bodies. In addition, the explanations provided by FRA and CoE have been taken into account.<sup>68</sup>

### Standards for Data Protection Authorities

General Data Protection Standards, including standards for Data Protection Authorities, are primarily developed at the level of the EU.

The principle of independence of the supervisory data authority is enshrined in the Charter of Fundamental Rights of the European Union – Article 8(3), which sets out that compliance with data protection shall be subject to control by an independent authority.<sup>69</sup>

<sup>64</sup> Commissioner for human rights, CoE, Opinion of the Commissioner for human rights on national structures for promoting equality, CommDH(2011)2, Strasbourg, 21 March 2011.

<sup>65</sup> Article 4.3.

<sup>66</sup> Council of Europe, ECRI, General policy recommendation no. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CRI(2018)06.

<sup>67</sup> Niall Crawley, Equality bodies making a difference, (European Commission, 2018) p. 65.

<sup>68</sup> FRA and CoE, Handbook on European Non-Discrimination Law (2010).

<sup>69</sup> Charter of Fundamental Rights of the European Union, OJ EU 2012/C 326/02.

An independent supervisory authority for data protection was introduced with the Data Protection Directive from 1995<sup>70</sup> and wider elaborated in the new 2016 EU Regulation (General Data Protection Regulation – GDPR).<sup>71</sup>

The elaborated GDPR rules on the Supervisory Authority (SA) are classified into two categories: 1) independent status and 2) mandates, tasks and powers. The set standards relate to:

1. Independent status

1.1. Independence

1.2. General conditions for the members of the supervisory authority

1.3. Rules on the establishment of the supervisory authority.

Independence is defined in terms of the Supervisory Authority and its Members. The Supervisory Authority's independence should be "complete" in performing its tasks and exercising its powers". (Article 52, para. 1.). The notion of "complete independence" incorporates the previous judgements of the Court of Justice of the European Union (CJEU).<sup>72</sup> Its members should "remain free from external influence, whether direct or indirect and shall neither seek nor take instructions from anybody" (Article 52, para. 2.). Incompatibility of actions and occupations for members is also prescribed (Article 52, para. 3.). The other provisions on independence are obligations of the Member State to ensure that the supervisory authority:

- is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers;
- chooses and has its staff which shall be subject to the exclusive direction of the member or members;
- is subject to financial control which does not affect its independence and that it has separate, annual public budgets, which may be part of the overall state or national budget.

Strict conditions are set out for the members of the SA:

- They should be appointed in a transparent procedure. The Regulation does not prescribe that the Parliament exclusively appoints members; it provides the possibility that they are also appointed by the Government, President, or a special appointment body.
- Qualifications, experience and skills, in particular in the area of the protection of personal data are required from the members.
- GDPR prescribes that the duties of a member would end "in the event of the expiry of the term of office, resignation or compulsory retirement, in accordance with the law of the Member State concerned".
- A member shall be dismissed only in cases of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties.

In line with the GDPR, the MS must regulate by Law:

(a) the establishment of each supervisory authority;

(b) the qualifications and eligibility conditions for appointment of member/s

(c) the rules and procedures for the appointment of the member/s

(d) the duration of the term of the member/s, which could be no less than four years, except for the first appointment after the entry into force of the Regulation,

(e) whether and, if so, for how many terms the member or members of each supervisory authority is eligible for reappointment;

f) the conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office and rules governing the cessation of employment.

<sup>70</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23/11/1995.

<sup>71</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4/5/2016.

<sup>72</sup> CJEU, C-518/07, European Commission v. Federal Republic of Germany [GC], 9 March 2010, CJEU, C-614/10, European Commission v. Republic of Austria, 16 October 2012, CJEU, C-288/12, European Commission v. Hungary [GC], 8 April 2014.

The most elaborate provisions of the GDPR refer to the tasks and powers of the Supervisory Authority. The tasks could be classified in the following categories:

1) Monitoring:

- In general, the implementation of the Regulation
- Developments relevant to data protection
- Keeping internal records from infringements

2) Promoting awareness:

- Of the public in general (with specific attention to children)
- Of controllers and processors

3) Advisory

- Advise national authorities
- Provide advice on processing operations

4) Handling complaints

5) Investigations

- Conduct investigations on the application of this Regulation, including based on information received from another supervisory authority or other public authority;

6) Regulatory/authorisations

- Encourage the drawing up of codes of conduct pursuant to Article 40(1) and provide an opinion and approve such codes of conduct which provide sufficient safeguards, pursuant to Article 40(5);
- Encourage the establishment of data protection certification mechanisms and data protection seals and marks pursuant to Article 42(1), and approve the criteria of certification pursuant to Article 42(5);
- Publishing the criteria for the accreditation of a body for monitoring codes of conduct and a certification body; conduct their accreditations

- Authorisation of contractual clauses and provisions referred to in Article 46(3);

- Approving binding corporate rules pursuant to Article 47;

- Adopt standard contractual clauses referred to in Article 28(8) and point (d) of Article 46(2);

- Establish and maintain a list in relation to the requirement for data protection impact assessment pursuant to Article 35(4);

7) Information and cooperation

- Upon request, provide information to any data subject concerning the exercise of their rights under the Regulation and, if appropriate, cooperate with the supervisory authorities in the other Member States to that end

- Cooperate with, including sharing information and provide mutual assistance to, other supervisory authorities to ensure the consistency of application and enforcement of the Regulation;

- Contribute to the activities of the Board.

The SA powers precisely defined in the GDPR correspond to the tasks and are classified into three categories – a) investigative, b) corrective and c) authorisation and advisory powers.

The EU further "exports" the standards set in through its bilateral agreements with third countries, and in the framework of the conditionality policy in general.

In the Council of Europe context, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) itself did not initially provide for the setting up of national supervisory authorities. The 2001 Additional Protocol to Convention 108, however, enhanced the data protection guarantees by setting up supervisory authorities that "shall exercise their functions in complete independence". Finally, the Modernised Convention 108+ from 2018<sup>73</sup> includes a chapter on supervisory authorities, which proclaims the principle of complete independence and sets out the mandate and powers these institutions should have. Its provisions, although less elaborated and more generalised, essentially correspond to the EU GDPR.

As this Convention is open for accession by non-Contracting Parties of the CoE, it's the only legally binding international instrument on data protection and is assessed as a potential for a universal standard.<sup>74</sup>

In this Methodology, the GDPR and the Convention 108+ are taken as primary standards for setting the indicators for data protection supervisory authorities.

<sup>73</sup> CoE, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), 10.10.2018.

<sup>74</sup> European Union Agency for Fundamental Rights and Council of Europe, Handbook on European data protection law, 2018 Edition (2018) p. 24 and p. 28.

## Standards for bodies on free access to public information

From NHRIs whose performance has been assessed in this research, the international legal framework on free access to public information is the least developed one regarding independent authorities.

The primary source of the right to free access to public information is the International Covenant on Civil and Political Rights<sup>75</sup> (ICCPR) which provides that: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.<sup>76</sup>

The UN Human Rights Committee General Comment No. 34 adopted in 2011<sup>77</sup>, which is an authoritative interpretation on the scope and limits of the right to information under Article 19 of the ICCPR further elaborated the free access to information, but still did not include any recommendation on the independent body for free access to information.

The Special Rapporteur has further developed the standards set out by the Committee on the promotion and protection of the right to freedom of opinion and expression in his 2013 Report to the General Assembly on the right to access information and its relationship with the right to truth.<sup>78</sup> In this Report, the Special Rapporteur recommended that:

“101. National laws should establish the right to lodge complaints or appeals to independent bodies in cases in which requests for information have not been dealt with properly or have been refused” and

“103. States should, in particular, consider the appointment of a focal point, such as an information commissioner, to assist in the implementation of national norms on access to information or the creation of a State institution responsible for access to information. Such mechanisms could be mandated to process requests for information, assist applicants, ensure the proactive dissemination of information by public bodies, monitor compliance with the law and present recommendations to ensure adherence to the right to access information.”<sup>79</sup>

The joint declaration by the international freedom of expression rapporteurs from the UN, OAS, AU and OSCE on access to information and secrecy legislation declared that “Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints”.<sup>80</sup>

The CoE Convention on free access to information does not entail an obligation to establish an independent body.<sup>81</sup> Implicitly, it notes that the review procedure could be “before a court or another independent and impartial body established by law”.<sup>82</sup>

An essential document for free access to information is the UNECE Convention on Access to Information, Public Participation, and Access to Justice in Environmental Matters (The Aarhus Convention), which is detailed in terms of the rights and procedures for access to environmental information. However, just as the CoE Convention, it neither recommends nor comprises standards of an independent body. As the European Community has acceded to the Convention<sup>83</sup>, the EU Member States are obliged to implement it.

The EU, through its conditionality policy, has favoured the creation of independent bodies for free access to public information and includes an assessment on their functioning in the annual report on the Western Balkan countries.

As there are no explicit international standards for the independent bodies on free access to information, in this Methodology, the general standards for NHRI are adapted for the matrix of indicators in this case. In terms of powers and mandate – they have been derived from the content of the right for free access to information, as described in the standards above, focusing on:

- Monitoring and oversight of the implementation of the Law on Free access to information;
- Complaints handling;

<sup>75</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>76</sup> ICCPR, Article 19.

<sup>77</sup> UN HRC, General comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.

<sup>78</sup> UN, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362, 4 September 2013.

<sup>79</sup> Ibid, p. 21.

<sup>80</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004, in Joint Declarations of the representatives of intergovernmental bodies to protect free media and expression, OSCE, The representative on the freedom of the media, Vienna, 2013, p. 35.

<sup>81</sup> Council of Europe Convention on Access to Official Documents, CETS 205, 11 June 2008.

<sup>82</sup> Art 8, para. 2.

<sup>83</sup> 2005/370/EC: Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.5.2005, p. 1–3.

- Promotion and training;
- Promotion of pro-active dissemination of information by public bodies;
- Advisory role – recommendations, opinions and initiatives; instructions.

## DOMAINS/DIMENSIONS OF THE EFFECTIVENESS OF NHRI

Existing literature provides a variety of approaches to the classification of domains/dimensions of the effectiveness of NHRI.

The Report on Assessing the Effectiveness of National Human Rights Institutions has determined the following domains:

- a) The character of the national institution<sup>84</sup>
- b) Mandate
- c) Public accountability.<sup>85</sup>

Richard Carver, at the same time, develops a slightly distinct approach that measures the effectiveness of NHRIs, classifying the following dimensions:<sup>86</sup>

- 1) Independence
- 2) Resources and planning
- 3) Diversity, civil society and accessibility
- 4) Mandate and powers.

The latter approach is most similar to the classification of domains provided in the call for experts for this research, which is the basis for the established classification:

- (1) Independence and ability to work without pressure,
- (2) Availability of resources and capacities,
- (3) Information, accessibility and cooperation with other relevant actors, and
- (4) Mandate and powers.

The third domain has been slightly modified – information and accessibility have been added to the title. This “broadening” of the domain enabled us to capture essential aspects of the work of NHRI’s – such as to standards on providing public information to citizens, accessibility to specific target groups, etc.

## MATRIX OF INDICATORS

The matrix of indicators has been designed for each of the NHRIs.

The matrix of indicators includes:

- Domain;
- Indicators per domain;
- Explanation of value of indicators;
  - Indicators are tied to scores. Each value is described as a certain state/level of the indicator.
- Data type
  - *What* data are to be collected. For example, number of years of the mandate; the existence of a legal provision; the number of full-time employees at the NHRI, or annual budget of the NHRI as a per cent of the overall national budget;

<sup>84</sup> Includes independence.

<sup>85</sup> Richard Carver, Assessing the Effectiveness of National Human Rights Institutions, International Council on Human Rights Policy, Office of the United Nations High Commissioner for Human Rights, (Versoix, Switzerland, 2005)

<sup>86</sup> Richard Carver, Measuring the impact and development effectiveness of national human rights institutions, A proposed framework for evaluation (2014). [https://www.academia.edu/27945167/Measuring\\_the\\_impact\\_and\\_development\\_effectiveness\\_of\\_national\\_human\\_rights\\_institutions\\_a\\_proposed\\_framework\\_for\\_evaluation](https://www.academia.edu/27945167/Measuring_the_impact_and_development_effectiveness_of_national_human_rights_institutions_a_proposed_framework_for_evaluation)

- Source of data
  - *Wherefrom* the data are to be collected: Constitution/law; another legal provision; strategic documents; public survey, etc.
- Data collection method
  - *Manner of* collecting the data: mostly, it will be collected through desk research. It is important to identify the existence of data, before the scoring exercise, so that a request for free access to information can be sent if data is not available from public sources. Consequently, the request for free access to information is an alternative method of data collection.
- Value of indicators (MNE, MKD, SRB, ALB, BiH, KOS).
  - These are the scores given by the researches, based on the research.

### Indicators

The indicators have been defined based on the approach to the evaluation of effectiveness, which is a combined structural and mandate-based approach. The specific indicators per domain are constructed from the standards referring to the relevant bodies, which are elaborated under the Subtitle of the Methodology: International standards related to NHRIs.

While many indicators are identical for some of the bodies, or similar, they still are nuanced, as the standards are different – especially related to the mandate and powers they have.

Both quantitative and qualitative indicators are applied in this research.

All indicators refer to the year 2018, which is taken as baseline. The only exceptions are indicators on public opinion polls, which can be from the last three years, as it was recognised that such polls are generally lacking in the region.

Indicators are presented in Annex

### Coding values and scoring

The coding methodology draws on the methodology established by Carver.<sup>87</sup> Consequently, the coding values have been set from 0-2. This approach was considered most applicable and relevant, as it provides a limited, but still sufficient range of options for the definition of the indicators.

All scores feed into a scale which shows a measurement of each separate indicator per country, as well as per domain. The values of indicators are weighed, depending on the number of indicators per domain. In addition, some indicators have been broken down to sub-indicators, to capture the specifics of a particular issue.

The indicator per domain is estimated as a sum of the values of indicators in the domain. Finally, an overall indicator is estimated and an overall score of the effectiveness for each national human rights body in each country, which is a sum of the indicators per domain. Each domain participates equally in the final score – 25%, as all domains are considered equally important for the effectiveness of the NHRI. Consequently, the scale of indicators per country per body is 0-8.

Suppose an NHRI body is a multi-mandate body than it was scored both in terms of each mandate it has and as an institution. The score of a multi-mandate body as an institution is based on the average of the total sum of indicators per each mandate.

## LIMITATIONS TO THE METHODOLOGY

Relevant studies on the international level, including developed methodologies with specific indicators, are available, but similar research for the Western Balkans is lacking.

The standards taken as a basis for the indicators are the highest standards available at global or European level. Some of them are relatively new, and their application has been taking up at European level very recently – such as the GDPR. Consequently, comparability with other research at the global level will be limited to the indicators which are based on similar standards.

For qualitative indicators, an objective assessment by the national experts was needed, as well as consistency to be ensured across the country assessments. As standard in the use of such methods, the personal positioning of the expert may have influenced the assessment. In the future, a panel of experts or peer review could contribute to alleviating these factors.

The selected indicators depended on the nature of the domain, but also on the availability of data and resources, such as time and researchers. Consequently, in domains 1. Independence and ability to work without pressure and 4. Mandate and powers, more indicators are connected to the structural nature of these domains. They are based on fulfilling standards that are legislative requirements, which, in the regional context, seem easier to fulfil. This means that full proportionality in types of indicators between domains could not be ensured. Proportionally, inclusion of more performance indicators or qualitative indicators would probably change the final scores per domains.

The results of the research provide a snapshot for 2018, which was set as a baseline year. While this approach provides comparability between the countries and NHRIs, it could not fully take into account the complexity and dynamics of development of NHRIs in the WB since their establishment. However, it presents a sound basis for further national in-depth and/or comparative research.

The fact that the research for three countries – Albania, Bosnia and Herzegovina and Kosovo was done additionally in 2020, while the national and regional reports were already published for the first three countries in 2019, could also have an impact on the results of the research, even though the research was done for the same year – 2018.

<sup>87</sup> Ibid.

## RESEARCH FINDINGS

Effectiveness of NHRIs in the Western Balkan countries – general scores

The general scores per institution per country are within the range from the highest 5.49 (Equality Body – Serbia) to lowest 2.95 (Commission for Protection against Discrimination - MKD).

Table 3: General scores per institution

Min: 0; Max: 8

ALB	Score <sup>88</sup>	BiH	Score	KOS	Score	MKD	Score	MNE	Score	SRB	Score
<b>People's Advocate</b>	4.68	<b>The Institution of Human Rights Ombudsman of BiH</b>	4.29 (NHRI 4.33; EB 5.04; FAI 3.49)	<b>Ombudsperson Institution</b>	5.33 (NHRI 5.80; EB 5.59; FAI 4.59)	<b>Ombudsperson</b>	4.71	<b>Ombudsperson</b>	5.24 (NHRI 5.20; EB 5.28)	<b>Protector of Citizens</b>	4.99
<b>Commissioner for Protection against Discrimination</b>	5.08	<b>Personal Data Protection Agency</b>	4.18	<b>National Agency for Protection of Personal Data</b>	3.32	<b>Commission for Protection against Discrimination</b>	2.95	<b>Agency for Personal Data Protection and Free Access to Information</b>	4.25 (SADP 4.22; FAI 4.28)	<b>Commissioner for Protection of Equality</b>	5.49
<b>Information and Data Protection Commissioner</b>	4.60 (SADP 4.54; FAI 4.66)					<b>Commission for Protection of the Right to Free Access to Public Information</b>	3.71			<b>Commissioner for Information of Public Importance and Personal Data Protection</b>	4.38 (SADP 4.42; FAI 4.34)
						<b>Data Protection Directorate</b>	5.25				

Most of the bodies across the countries (six out of eight) have scored within the range 4.18-5.49, only two falling below 4.00 and 3.00 points. The average score of all institutions in the region is 4.53, illustrating that they have scored slightly above the average of scores (4.00).

The average score per country ranges from 4.95 in Serbia to 4.16 in North Macedonia. The lower score for MKD is due to the weak legislative framework and inactivity of the Commission for Protection against Discrimination, as well as lack of effectiveness of the Commission for Protection of the Right to Free Access to Public Information, which was practically non-operational in 2018.

The scores for multi-mandate bodies per each mandate are very similar, almost identical in Serbia, Montenegro and Albania (the cases of the Ombudsperson and the Agency for Personal Data Protection and Free Access to Information in MNE and the Commissioner for Information of Public Importance and Personal Data Protection in Serbia, the Information and Data Commissioner in Albania). However, the Kosovan Ombudsperson Institution demonstrates a great difference in the performance of its mandates – 1.22 and a lower score for access to public information than for the ombudsperson mandate, which is relatively high. Moreover, the allocation of mandates to separate bodies – such as the case of North Macedonia does not seem to lead to more effective institutions performing those mandates. On the contrary, the difference in effectiveness per mandate in North Macedonia is the highest (2.30). The difference per mandate is also high in Kosovo (2.01 points), where the Ombudsperson has significantly higher scores than the National Agency for the Protection of Personal Data. Differences between mandates can be considered medium in Serbia (1.11) Montenegro (0.99) and Albania (0.41) The institutions of Ombudsperson and SADP in Bosnia and Herzegovina scored almost evenly, with a negligible difference of 0.11 points.

The results indicate that the effectiveness of the institutions does not correlate to the years of existence of the institution. This (non)correlation leads to the conclusion that other factors, rather than the years of existence, are prevailing for the effectiveness of the institution.

<sup>88</sup> For multi-mandate bodies firstly the total score is presented, while the separate scores per mandate are presented in brackets.

Presented by rank, the scores of institutions are as follows:

Institution/country	General score ↓ <i>min: 0; max:8</i>
Commissioner for Protection of Equality – SRB	5.49
Ombudsperson Institution – KOS	5.33
Data Protection Agency – MKD	5.25
Ombudsperson – MNE	5.24
Commissioner for Protection Against Discrimination – ALB	5.08
Protector of Citizens -SRB	4.99
Ombudsperson – MKD	4.71
People’s Advocate – ALB	4.68
Information and Data Protection Commissioner – ALB	4.60
Commissioner for Information of Public Importance and Personal Data Protection – SRB	4.38
The Institution of Human Rights of Ombudsman of BiH	4.29
Agency for Personal Data Protection and Free Access to Information – MNE	4.25
Personal Data Protection Agency – BiH	4.18
Commission for Protection of the Right to Free Access to Public Information – MKD	3.71
National Agency for the Protection of Personal Data – KOS	3.32
Commission for Protection against Discrimination – MKD	2.95

Table 4: Ranking of institutions by score

The ranking demonstrates the highest convergence in scores of the Ombudsperson, ranging from 5.33 in Kosovo to 4.29 in Bosnia and Herzegovina (difference of 1.04 points). In contrast, the highest variances are observed in the effectiveness of the equality body – highest in Serbia (5.49) and lowest in North Macedonia (2.95 points) – 2.53 points. The divergence is also high (1.93) in the bodies for free access to public information and data protection – between the highest score of 5.25 for the Data Protection Agency in North Macedonia and the 3.32 points scored by the National Agency for Protection of Personal Data of Kosovo.

As to the lowest-ranked institution – the Commission for Protection against Discrimination in North Macedonia, it should be noted that the new 2019 anti-discrimination law brought many improvements to the legal framework, but since this research is a snapshot of 2018, these are not taken into regard.<sup>89</sup>

#### Effectiveness per domain

We have presented here the comparative findings for all the mandates of the NHRIs for the six countries in each domain.

The table below shows the average scores per domain.

	<i>Min: 0; Max: 2</i>
(1) Independence and ability to work without pressure	1.32
(2) Availability of resources and capacities	1.04
(3) Information, accessibility and cooperation with other relevant actors	1.01
(4) Mandate and powers	1.23

Table 5: Average scores per domain

It is evident that the average scores are higher for independence and ability to work without pressure, as well as mandate and powers. It might be partly due to the more structural character of the indicators under these domains, as more indicators in these domains are defined based on legal provisions, and not actual compliance/performance.

<sup>89</sup> The Anti-Discrimination Law from 2019 was annulled by the Constitutional Court on procedural basis and re-adopted in September 2020..

At the beginning of each section, the scores per mandate per country are presented. In the discussion that follows, the scores and findings for each indicator are elaborated. At the end of each section, the main conclusions are extrapolated.

### Domain 1. Independence and ability to work without pressures



The Ombudspersons scored highest in this domain: 1.20 to 1.60. The Kosovo Ombudsperson scored highest at 1.60 and the Albanian Ombudsperson - lowest at 1.20. The equality bodies cut between 1.00 and 1.60. The data protection supervisory authorities scored between 0.89 and 1.33, whereas the institutions for free access to information between 1.22 and 1.67. The relatively high scores in this domain are because many of the indicators set for this domain are based on legal provisions, which, in fact, are based on relevant international standards.

The average value per institution for this domain is 1.32.

The NHRIs in the six countries have an **independent statutory basis**, which granted them all the highest score on this indicator (2), except for the three data protection authorities in Albania, Bosnia and Herzegovina and Kosovo which scored 1. The ombudspersons in all the countries are based on the constitutions, while all other NHRIs are established by Law. The data protection authorities in Albania, Bosnia and Herzegovina and Kosovo, while established under law, do not contain all provisions required in the GDPR, thus scoring 1.

The situation is somewhat different concerning the **appointment** process. Only in Montenegro, the Ombudsperson satisfies the highest standard - appointment “by the Legislature after public nomination, in participatory and transparent procedure”. The Montenegrin practice established since the Law on 2014, which foresees the participation of civil society, requires parliamentary approval and a public nomination by the President, so from the herein analysed institutions it can be emphasised as a best practice in the region. In all other countries, when the appointment procedure for the ombudspersons and the equality bodies comes to the responsible committee in the parliament, it is very much closed and non-transparent, so they scored 1. The SADP and FAI bodies all scored generally high (2), except for the Kosovan SADP and the Albanian SADP and FAI which scored zero (0) due to lack of a transparent procedure and overly decisive role of the governments in the appointment. The SADP and FAI bodies are generally appointed by an independent body (parliament), through a transparent procedure, but the standards are not explicitly set as requiring a “participatory” approach.

On **clear criteria for membership**, all Ombudspersons scored highest (2), except for Serbia. The highest score is due to the law requiring specific human rights expertise. In contrast, the Serbian law resorts to a more general provision of experience on legal affairs “within the competence of the PC” and consequently scored medium (1) in this indicator. Specific human rights expertise is required for all equality bodies in all of the countries, resulting in high scores (2). North Macedonia scored only 1 since the provision is watered down by the ‘or social sciences’ education part<sup>90</sup>, which made the criteria porous to unqualified persons.<sup>91</sup> The data protection supervisory authorities in all countries received a medium score (1), as none of the relevant laws requires a more specialised experience in data protection. The Macedonian Commission for Free Access to Public Information is the only FAI body that scored high (2) since the legal requirements are explicit as to the relevant experience in freedom of expression or public information.

<sup>90</sup> ADL 2010 Art.18.

<sup>91</sup> Biljana Kotevska, North Macedonia Country Report.

The **term of office** for the Ombudsperson in North Macedonia (8 years) exceeds the recommendation by GAHRI (5-7 years), unlike all five other countries, which scored 2 as their ombudsperson have mandates of 6 and 5 years, respectively. All the other NHRIs are also within the range for the highest score on this indicator and have mandates of either 5 and 6 years. For all the institutions, the term of office may be renewed once, which is also in accordance with the highest standards.

On **avoidance of conflict of interest**, the ombudspersons in Bosnia and Herzegovina and Serbia received the highest score, as they have specific provisions regulating the avoiding of conflict of interest. All other institutions scored medium (1), due to the less specific legal requirements. The Bosnia and Herzegovinian SAMP scored the lowest score (0) since the law provides no provision regarding conflict of interest. Specific legal guarantees for extending the conflict of interest provision beyond the term of office for SAMP and the FAI are provided for FAI in Bosnia and Herzegovina and Kosovo, whereas for the other institutions, such guarantees are lacking.

Related to **immunities**, only the Kosovan Ombudsperson scored the highest (2) since it has both functional immunity and protection against threat and coercion. Most of the institutions of ombudspersons and EBs (for which the international standard for immunity has been established) scored medium (1) since they lack protection against threat and coercion in the relevant laws.

Regarding the criterion **‘no instruction from government’**, the ombudspersons in Bosnia and Herzegovina, Kosovo, North Macedonia and Serbia, the EB in Albania and the SAMP in Serbia received the highest score attainable (2) because of explicit provisions on the prohibition of interference, albeit not explicitly quoting “the Government”, but rather stating that “no one has the right to influence his/her work...”<sup>92</sup> All other institutions got a medium score (1), as the laws contain only general legal provisions on independence.

All institutions, except for the Montenegrin and the Kosovan ombudsperson and the Albanian EB and FAI received a medium score on **removal from office**, since the legal provisions are not assessed as clear enough to avoid arbitrariness in removal. In practice, the national authorities do not resort to removal, but rather to direct or indirect pressure, as shown by the scores on the indicator **submission/agreement to pressure**. The ombudspersons in all countries except Albania, the EBs in all countries except North Macedonia, the SAMP in Albania, Bosnia and Herzegovina, Kosovo and North Macedonia and the FAI in Albania, Bosnia and Herzegovina and Kosovo showed no submission/agreement to pressure in 2018. The Ombudsperson of Albania, the EB and the FAI institution in North Macedonia, as well as the SPDP-FAI in Montenegro and Serbia, were all subject to pressure in 2018<sup>93</sup>, thus leading to the medium score for the Albanian Ombudsperson and the Montenegrin SAMP-FAI (1) and lowest scores (0) for the other institutions. All cases deserve specific attention and further analysis. In Albania, the score was brought down by prolonged appointment procedures, which can be considered as a form of pressure.<sup>94</sup> In Montenegro, the case referred to rejection of 90 requests for free access to information on finances of political parties submitted by NGO MANS, which occurred two days after the Special prosecutor for anti-corruption initiated an investigation on donations to the ruling Democratic Party of Socialists (DPS). The NGO maintained that free access to information had been politicised, given the upcoming local elections (May 2018).<sup>95</sup> In the case of the equality body in North Macedonia, the most contested case was the Opinion the CPAD adopted in the case of the runaway former Prime Minister - Nikola Gruevski. The opinion, which was later used as one of the critical proofs by Gruevski in his asylum claim in Hungary, the CPAD found that Gruevski was subjected to direct discrimination on the grounds of personal and social status in the area of justice and administration.<sup>96</sup> In the case of the FAI in North Macedonia, the lack of appointment of commissioners practically resulted in blocking the functioning of the institution for more than six months during 2018. By refusing to cooperate, the competent or controlled authorities often made it difficult or even impossible for the SAMP – FAI in Serbia to take legal action, or the measures taken had no effect.<sup>97</sup>

Finally, on the indicator of **public opinion on independence**, none of the institutions managed to reach 50%, which was the set minimum, so all scored 0. The Montenegrin Ombudsperson is the closest to this minimum, as 48% of the respondents consider the institution to be independent, whereas in the other countries the situation is as follows: Albania – 33%, Bosnia and Herzegovina – 38%, Kosovo – 47%, North Macedonia – 33%, and Serbia – 31%.<sup>98</sup> The Balkan Barometer of the Regional Cooperation Council survey is the only public opinion poll available for the six countries, measuring public opinion on independence and trust in the Ombudspersons. No public opinion polls measuring opinion on independence or trust in the other NHRIs in the region are publicly available. It seems the NHRIs themselves have not taken any actions to measure the attitudes of citizens towards them.

92 Serbia, Law on Protector of Citizens, Art. 2, para. 1.

93 In Serbia pressure on the previous PC culminated in 2017, due to which he resigned from office.

94 Armela Xhaho, Albania Country Report.

95 MANS, Transparency International: Rejecting requests for access to information causes concern (2018). Available at: <https://www.mans.co.me/odbijanje-zajtjeva-za-pristup-informacijama-izaziva-zabrinutost/>

96 Commission for Protection of Discrimination, Opinion No. 0801-295/1 from 05.11.2018.

97 Commissioner for Free Access to Information and Data Protection, Annual report 2018, 4.

98 Regional Cooperation Council, ‘Balkan Barometer’ (2019), p. 97 Available at: [https://www.rcc.int/download/docs/Balkan-Barometer\\_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf](https://www.rcc.int/download/docs/Balkan-Barometer_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf).

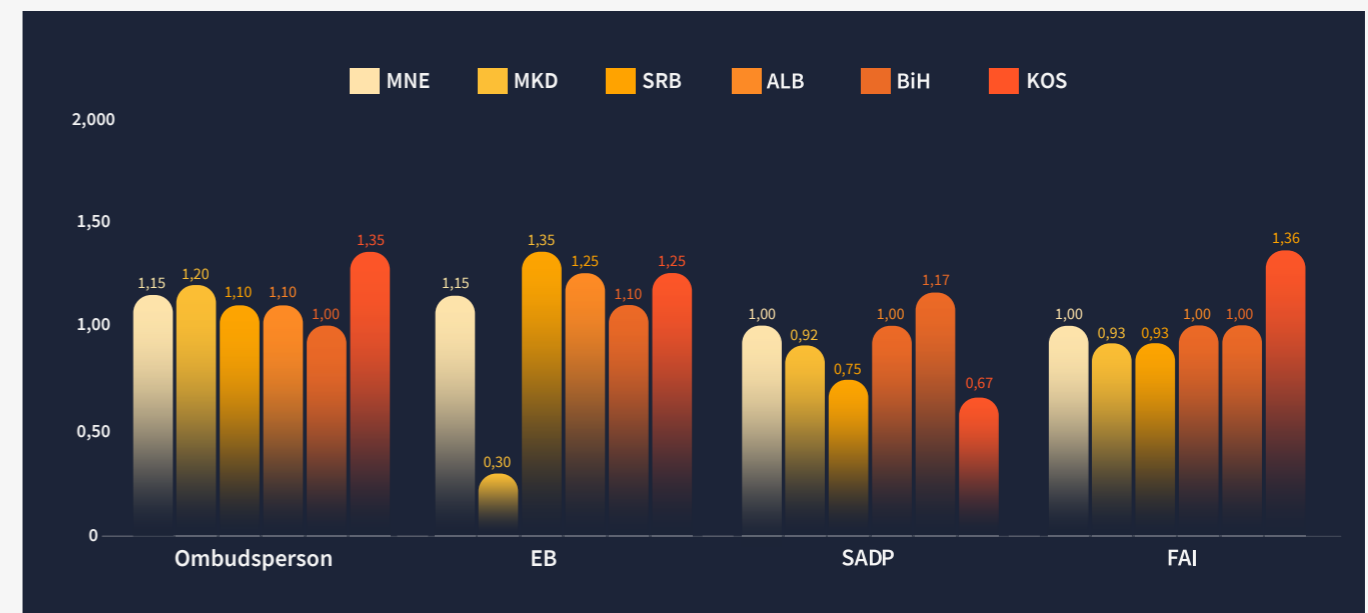
While the scores show little variance, it can be observed that this small variance refers to the score on the domain in general, not to all or majority of the indicators, as differences and nuances in separate criteria and for specific institutions are evident. This is mainly observed with the indicators on critical issues regarding independence – clear criteria for membership, the appointment process, no instruction from the government, removal from office, avoidance of conflict of interest. In all these indicators, which are based on legal provisions, there are significant differences between countries and between bodies. Only specific provisions on individual bodies can be extrapolated as best practices, but this cannot be generalised for any of the countries, or type of bodies. Such a situation points out to a lack of a systematic approach towards the NHRIs in the region.

The comparative analysis leads to the conclusion that the statutory framework in the Western Balkan countries has established the basis for independence, which is above the minimum. However, key challenges still pertain in the appointment process and the appointment criteria, leaving room for arbitrariness and influence. Challenges also remain regarding specific safeguard mechanisms for independence – such as the absence of protection from threat or coercion, lack of explicit ban on instruction from the government, or not sufficiently precise definition of conflict of interests.

The practice shows that authorities would rather resort to explicit or implicit pressure than to removal, thus avoiding the international criticism of direct interference in the independence of the NHRIs, but still effectively and essentially harming independence. This can be illustrated by the cases of the Serbian Protector of Citizens, who resigned following constant pressures in 2017 and the institutions’ persisting uncertainty as regards financial resources,<sup>99</sup> blockage of the institution by non-appointment of members as in the case of the Macedonian FAI<sup>100</sup>, etc.

Finally, little attention is paid to the legitimacy of the NHRIs. The public opinion on the independence of the ombudspersons has still not reached 50% in any of the countries, while polls are lacking for all other NHRIs. However, it should be noted that slightly below half of the Montenegrin and Kosovan respondents consider their ombudsperson independent (48% and 47% respectively), while in all the other countries this % is below 40%.<sup>101</sup> It could be stated that the citizens’ opinion corresponds to the ranking in this domain.

## Domain 2. Availability of resources and capacities



The average score per institution in this domain is 1.04, which is 0.27 points lower than for domain 1. The Ombudspersons scored very similarly to each other also in this domain: from 1.00 (Bosnia and Herzegovina) to 1.35 (Kosovo).

The variances are broadest for equality bodies. While the Serbian EB has the highest score in this domain – 1.35, it is closely followed by the Albanian EB and the Kosovan ombudsperson in its mandate as an EB (both scoring 1.25). The Montenegrin Ombudsperson scored the same for this mandate – 1.15. The EB in North Macedonia has scored the absolute minimum of 0.30 (also from all domains). The score of the EB in North Macedonia is due

99 Ivana Krstic, Serbia Country Report.

100 Biljana Kotevska, North Macedonia Country Report.

101 Regional Cooperation Council, ‘Balkan Barometer’ (2019), p. 97.



to two main factors: (1) the EB is, under law, not allowed to employ people<sup>102</sup> and, basically, functions with the help of volunteers and “borrowed staff” from the Ministry of Labour and Social Policy; (2) the EB has a meagre budget (almost three times lower than the other lowest budget of an NHRI in the country – the budget of the FAI authority), which prevents this body from exercising most of its mandate.<sup>103</sup>

The scores for data protection supervisory authorities and institutions for free access to information are within the range from 0.67 to 1.17, except for the Kosovan Ombudsperson in its mandate as an FAI, scoring 1.36. SADPs have the lowest average.

Regarding the indicator **separate and independent budget**, three aspects were taken into account: whether the NHRI has a separate budget line; whether the budget is decided by parliament (not government); and whether the NHRI is involved in budgetary preparations. The parliament decides on the budget for all NHRIs in the six countries. However, their involvement in budgetary preparation is mainly assessed as inadequate. In Serbia, all NHRIs have a separate budget line, which is not the case in North Macedonia, as only the Ombudsperson has it. All NHRIs have scored medium related to this criterion, except for the EB in Albania, which scored 2 and the EB in North Macedonia which got the score 0. The Albania report states that all national NHRIs “have a say on the drafting of budget requests, regardless of the fact their request could be dismissed or pending for years”.<sup>104</sup> However, reports also indicate to underspending of the budget resources, as was the case with the Ombudsperson in Montenegro.<sup>105</sup> In addition, the vast part of the budget is spent on salaries, as also shown in the country report for Montenegro.

The Kosovan Ombudsperson is the only NHRI, which got the highest score on the indicator of **adequate financial resources**. Medium grade (1), which meant that the institution “had enough financial resources for some parts of its mandate, but not for all” was assigned to all other ombudspersons, as well as to all other equality bodies, except for the Macedonian one, which scored 0. All SADPs received a medium score, while the situation is more diverse in the case of the FAI, which in the cases of Montenegro, Albania and BiH are medium, maximum for Kosovo, and minimum for North Macedonia. SADP- FAI in Serbia and the SADP and FAI in North Macedonia scored the lowest (0), which means that they do not have enough financial resources to fulfil their legal mandate. The case of the SADP - FAI explained in the country report on Serbia is illustrative: according to the Commissioner, the funds in the Budget for 2018 were not sufficient even for the salaries of the existing number of employees, despite the fact that in all the programming documents of the Government and the National Assembly, as well as in the Action Plan for the Chapter 23 it is stipulated that one of the goals is to strengthen the institution’s staff resources. Funds were secured last-minute from budgetary reserves before payments were due.<sup>106</sup> However, the example of the Kosovan law on the ombudsperson might be interesting in terms of safeguarding NHRI’s financial independence: the Ombudsperson prepares its budget and presents it to the Assembly for approval; it may be less than the last years’ budget only if approved by the Ombudsperson; if the Ombudsperson’s responsibilities increase, then its budget should increase.<sup>107</sup>

In the table below, the budgets of all NHRIs in the six countries are presented for 2018, as a sum (in EUR) and as a percentage of the national budget.

	MNE		MKD		Serbia		ALB		BiH		KOS	
<i>in EUR</i>	The budget of the NHRI	% of the National Budget	The budget of the NHRI	% of the National Budget	The budget of the NHRI	% of the National Budget	The budget of the NHRI	% of the National Budget	The budget of the NHRI	% of the National Budget <sup>108</sup>	The budget of the NHRI	% of the National Budget
Ombudsperson	672,175.68	0.0369	1,178,292.00	0.0342	1,651,233.26	0.016	937,523.44	0.023	1,369,239.66	0.137	1,137,358.68	0.055
EB			90,081.00	0.0026	771,647.63	0.0076	541,148.00	0.013				
SADP	617,323.69	0.03387	278,211.00	0.0080	1,682,897.67	0.017	354,626.49	0.0088	698,936.00	0.0698	253,785.00	0.012
FAI			267,967.00	0.0078								
<b>Total</b>	<b>1,289,499.37</b>	<b>0.07</b>	<b>1,814,551.00</b>	<b>0.05</b>	<b>4,105,778.56</b>	<b>0.04</b>	<b>1,833,297.9</b>	<b>0.04</b>	<b>2,068,175.66</b>	<b>0.2068</b>	<b>1,391,143.68</b>	<b>0.07</b>

102 According to Article 30 of the ADL (2010), “the expert, administrative and technical tasks are to be conducted by the Commission [the commissioners themselves]”.

103 It is worth noting that in October 2020, outside of the cut-off date for this report a new Law on Prevention and Protection against Discrimination was adopted remedying majority of these deficiencies.

104 Armela Xhaxho, Albania Country Report.

105 Marijana Lakovic Draskovic, Daliborka Uljarevic, Boris Maric, Wanda Tiefenbacher, and Maja Stojanovic, Short guide through legislative and institutional framework of human rights protection in Montenegro (Centre for Civic Education, 2015). <http://media.cgo-cce.org/2015/05/cgo-cce-short-guide-through-legislative-and-institutional-protection-of-human-rights-in-montenegro.pdf>

106 Serbia, Commissioner, Annual Report 2018, 1.

107 Kosovo, Law on Ombudsperson, Article 35.

108 The comparably higher percentage of NHRI budgets of the national budget in BiH is due to the highly decentralised budget in this country and comparably lower budget at the level of BiH.

The total percentage of each national budget spent for the NHRIs in the country ranges from 0.04% in Serbia to 0.07% in Montenegro and Kosovo and is in the middle for North Macedonia – 0.05%. The differences seem logical, taking into account the size of the countries and the size of their national budgets. However, no proportionality can be observed in the individual allocations to the NHRIs in each country, except in the case of Montenegro, where both NHRIs (which have double mandates) have been allocated almost equal funds.

In some cases, there is little correlation between the amount allocated to the NHRI and the effectiveness as assessed by this research. Such is the case, e.g. with the EB in Serbia, which scored highest as an individual body, as well as the SADP in North Macedonia, which scored second high, although these institutions have received relatively lower funds from the national budgets than the other NHRIs. In North Macedonia, the discrepancy in this correlation is high between the SADP and FAI – they both received almost equal funds, but the FAI has scored much lower in this research. The data protection authority in Kosovo received the least amount of funds and has low effectiveness – the same correlation is valid for the EB in North Macedonia, which received the least amount of funds in the country and is the least effective.

While it is challenging to set a quantitative standard for sufficiency of the allocated funds to the NHRIs, the presented data and the evident discrepancies demonstrate the need for introducing more objective and measurable indicators for funding the functioning of the NHRIs.

On the indicator **transparent and meritocratic recruitment procedures**, none of the NHRIs scored maximum 2, as none was assessed as recruiting staff independently, in a transparent and meritocratic manner. Most NHRIs are ranked medium (1), meaning that the NHRIs recruits its staff, but there are modes for transfer of staff by the government or other forms of influence on staff recruitment exerted by the government. The Data Protection Directorate of Kosovo scored 0. The score for the EB in North Macedonia is also 0, as it simply did not have any staff, only commissioners were appointed. As noted in the Albania Country Report, although the procedure seems *de jure* transparent, there is always the possibility of the technical staff to be appointed based on political affinity.<sup>109</sup> This observation is also valid for the other NHRIs in the region.

The Kosovan Ombudsperson and the Albanian EB had the highest score on the sub-indicator **sufficient human resources**, signifying that the institution has enough staff to carry out its mandate fully. The most frequent is the medium score (1), meaning that the NHRIs have a sufficient number of staff for some parts of their mandate, but not for all. Such is the case with ombudspersons in all countries, except for Kosovo; with EBs in Montenegro, Serbia and Bosnia and Herzegovina, as well as with SADP-FAI in Montenegro, Albania, Bosnia and Herzegovina and North Macedonia. The EB in North Macedonia, the SADP-FAI in Serbia and SADP in Kosovo do not have enough staff to carry out their mandates fully and are consequently assigned 0. As stated previously, the EB in North Macedonia did not have any staff.

The Ombudsperson in Montenegro and the EB in Serbia got the maximum value (2) for the sub-indicator **adequate human resources**, as it was assessed that *they had recruited sufficiently qualified staff members, from a variety of fields, providing expertise in all aspects of their work*. The EB and the FAI in North Macedonia, as well as the SADP in Kosovo, are graded with a minimum (0), meaning that *the current staff does not have the expertise for all aspects of the institution's mandate. All other NHRIs were graded medium (1), meaning that current staff has the expertise for carrying out the basic mandate, but the institution lacks specialised staff*. The growing requirements for expertise in data protection in the relevant NHRI pose an additional challenge, especially that the needs of the private sector have also increased.

The issue of **pluralism**, which is a specific indicator for the ombudspersons and the EBs, based on defined international standards, is the most unified for the countries, as they were all assessed with the medium score of 1, meaning that *the composition of (members and) staff reflects the diversity in society to some extent and not fully*. As illustrative we present here the Macedonian case of the Ombudsperson.<sup>110</sup> There is diversity concerning gender, although women are somewhat overrepresented; as for ethnicity, Albanians are overrepresented, whereas some of the other ethnicities (such as the Turks) are underrepresented.<sup>111</sup> In Bosnia and Herzegovina, the structure of employees follows the “national key” logic.<sup>112</sup> It is indicative that all the countries lack information as to other diversity – such as disability, sexual orientation or age.

As for **training**, most NHRIs in the region were graded medium. As indicated in the Montenegro country report, the funds allocated for training in the budget are scarce. The situation in Serbia seems to be different, as all institutions have received the maximum score (2), meaning that the NHRI has a training programme including the NHRI members and staff and key target groups. The Ombudsperson in BiH and the EB in North Macedonia got the minimum score (0).

The specific indicator **Internal structure enables the focus on each part of the mandate** for Ombudsperson and EB is satisfied highly by ombudspersons in four countries (2). At the same time, in two (Bosnia and Herzegovina and Kosovo) it is medium, meaning that the internal structure and distribution of responsibilities of the NHRI units cover all parts of the mandate, but do not enable the appropriate focus to each part of the mandate. Such as the Ombudsperson in Kosovo did not have a dedicated unit for its access to information mandate. The EBs show more variances, as Montenegro and Serbia have scored maximum, while Albania, Bosnia and Herzegovina and Kosovo have scored medium. The EB in North Macedonia scored the minimum 0.

On another specific criterion for ombudspersons and EBs **regional offices/outreach**, the ombudsperson in North Macedonia and Kosovo scored the maximum 2, as the Macedonian Ombudsman has six and the Kosovan – even eight regional offices spread throughout the territory of the country. In Serbia and Albania, both the ombudsperson and EB have some regional offices, but they do not cover the whole territory of the Republic of Serbia or Albania. In Montenegro, the situation is specific due to its small size. Although the institution does not have offices outside of the capital city, it has “postal boxes” and has organised the “Days of the Ombudsperson” in several Montenegrin municipalities.<sup>113</sup> In Bosnia and Herzegovina, the plans to establish three additional offices (adding to the three existing regional and one local offices) were never realised, but “office days” in six locations are periodically held.<sup>114</sup>

**Learning and change** were also assigned with an indicator. The scores are diverse and do not seem to correlate to the other indicators in this domain. The EB in Serbia, the SADP and FAI in North Macedonia and SADP in Bosnia and Herzegovina scored highest (2), meaning that these *NHRIs have an established system of regular strategic planning, with output and impact indicators and an evaluation system*. The medium score was assigned to both NHRIs in Montenegro and the Ombudsperson and EB in North Macedonia for not carrying out the strategic planning regularly. The Ombudsperson in Serbia and the SADP in Kosovo scored lowest (0) due to lack of strategic planning overall and/or an evaluation framework.

There is few public information on **financial control**, mainly from the state audit office reports. Most NHRIs were rated medium (1) as their state audit offices perform audit once in several years, depending on their plans, or do not have established internal control. In Bosnia and Herzegovina and Kosovo, the state audit institution is obliged to audit the annual financial statements of the NHRIs, and they have established internal control, which in the case of Bosnia and Herzegovina is done by the internal audit unit of the Parliamentary Assembly. Therefore, the NHRIs in these two countries scored the maximum. The EB in North Macedonia scored 0 since it lacks both external and internal control. Although internal control is established in most NHRIs in the region, it seems to be weak. The SAPD-FAI in Serbia is a positive example, having adopted several documents related to internal financial control.<sup>115</sup>

In sum, Domain 2 ‘Availability of Resources and Capacities’ presents some of the key challenges for the effectiveness of the NHRI. The insufficiency of financial, including human resources is a serious issue, which can also indicate the lack of political will to increase the effectiveness of the NHRI. However, the scores in this domain also point to the insufficient capacity of most NHRIs in the region to further improve their effectiveness by themselves, illustrated by the lack of strategic vision, low capacity for appropriate spending of the available funds, insufficient capacity building and professionalism, inadequate internal organisation and distribution of resources, etc. Furthermore, politicisation in the recruitment process in the NHRIs in the region and lack of pluralism of employees on all grounds are also of concern.

109 People's Advocate. Strategic Plan of the People's Advocate of the Republic of Albania 2019-2022, Tirana, 2018.

110 The principle of equitable representation in relation to ethnicity is a constitutional principle in North Macedonia.

111 The 2018 Annual Report - Ombudsperson (n 85) 161-162.

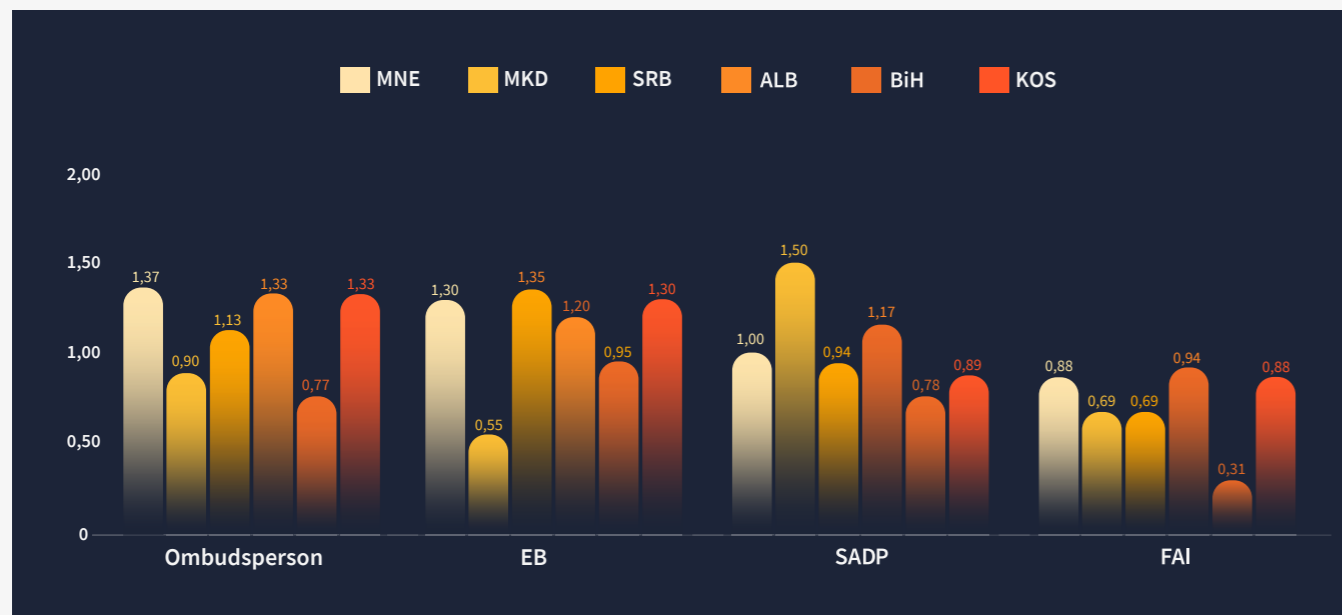
112 Aida Malkic, Bosnia and Herzegovina Country Report.

113 Protector of human rights and freedoms of Montenegro, Annual Report (2018), p. 23. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf).

114 OSCE - Assessment of the Work of Bosnia and Herzegovina Institutions in Combating Discrimination.

115 Ivana Krstic, Serbia Country Report.

### Domain 3. Information, accessibility and cooperation with other relevant actors



While the average scores of indicators in this domain (1.02) is very close to that of Domain 2, the single scores vary much more significantly both in terms of NHRI mandate, as well as in terms of countries.

The Montenegrin Ombudsman has scored best among ombudsmen (1.37), followed by the Albanian, Kosovan (1.33) and Serbian Ombudsman (1.13). The Ombudsman of North Macedonia and Bosnia and Herzegovina scored significantly lower than their peers – only 0.90 and 0.77 respectively, which are by far the lowest grades per domain for both institutions. The equality bodies/mandates in Albania, Kosovo, Serbia and Montenegro are almost at the same level of effectiveness for this domain: 1.20, 1.30, 1.35 and 1.30. The Bosnian and Herzegovinian and Macedonian EBs scored the lowest also in this domain – 0.95 and 0.55 respectively. On the contrary, the Macedonian SAMP has a maximum score – 1.50, in advance of Albania – 1.17, and well in advance of the SAMPs of all other countries – Bosnia and Herzegovina – 0.78, Kosovo – 0.89, Montenegro – 1.00, and Serbia – 0.94. FAI scores are relatively even and low on average: 0.94 for Albania, 0.31 for Bosnia and Herzegovina, 0.88 for Kosovo and for Montenegro and 0.69 for North Macedonia and Serbia.

The indicator on **parliamentary scrutiny** was based on the deliberation of the NHRI reports in the parliaments – in parliamentary bodies or plenary session. Some NHRIs have not even met this rather formal criterion. Without debate in the Parliament, neither in plenary session nor in the parliamentary bodies, has resulted in the lowest score (0) for the Ombudsman and the SAMP in Bosnia and Herzegovina and the SAMP-FAI in Serbia. The EB Report in North Macedonia and the SAMP report in Albania were only debated in parliamentary bodies (thus receiving the score 1). The reports of the Serbian Ombudsman and EB were debated only in the parliamentary bodies and not in plenary session not only in 2018, but three years before and thus scored 1 on this indicator. All other NHRI reports were subject to parliamentary plenary debate (hence, the value 2 was assigned). However, as the Montenegrin report points out, “even if the reports of the NHRI are commonly on the agenda of the plenary sessions of the national Parliament, in most cases such plenary debates tantamount to the presentation of the institution’s activities, rather than true scrutiny of its activities”. Hence the high score (2) “may reflect the adequate legislative framework rather than a substantial mechanism of checks and balances”.<sup>116</sup>

On **cooperation with Government**, we looked at the issue of consultation of NHRI on government policy proposals related to human rights. In Montenegro and North Macedonia there is no obligation by the Government to consult the NHRIs, although the specific laws may provide the opportunity for NHRIs to contribute to laws and policy proposals, as is the case in Montenegro. Consequently, the ombudsmen and EB in Montenegro and North Macedonia received a minimum score (0). In Serbia, the Government has an obligation to receive an opinion from bodies on the draft laws and strategies within their jurisdiction, according to special laws,<sup>117</sup> but there is no obligation to provide feedback on the provided proposals due to which all NHRIs got the middle score (1). The situation is similar in Albania, so the Albanian Ombudsman also scored 1 on this indicator. The indicator was set slightly lower for SAMPs and FAIs, due to the less explicit requirements in international standards. The SAMP and FAI all received the middle score, except for the SAMP in Kosovo, which scored 2 and the FAI in North Macedonia, which scored 0.

116 Jelena Dzankic, Montenegro Country Report.

117 Serbia, Government’s Rules of Procedure, Art. 39a para 4.

The specific indicator set for ombudsmen and EBs **providing information to NHRI** refers to the obligation to provide data to the NHRI – in general, or related to specific cases. All ombudsmen, as well as EB in all countries, scored highest (2) as the executive and other branches/bodies have an obligation to provide relevant data to the NHRI, as well as data for evidence on specific cases. The score assigned to the EB in North Macedonia was 1, as there is an only general obligation to provide relevant data, but not data for evidence on specific cases.

**Cooperation with other NHRIs** is existing, but mainly not in a structured manner. The indicator itself was not set as a formal requirement for memoranda of understanding or other signed documents but looked into actual proof of such cooperation. On this indicator, only the Montenegrin Ombudsman scored 2. The Serbian NHRIs cut medium (1), as the cooperation usually means participation in conferences, round tables, meetings and expert meetings in the organization of NHRIs or other organisations,<sup>118</sup> referral to reports of other NHRIs,<sup>119</sup> rejection of complaints if citizens did not use the opportunity to address specialized NHRIs first,<sup>120</sup> joint initiatives, etc. Unstructured cooperation was also the reason for a medium score (1) for all NHRIs in Kosovo, as well as in Albania. In North Macedonia, the Ombudsman and the EB scored 1, while the SAMP and FAI scored 0. In Bosnia and Herzegovina, there is an absence of cooperation between the NHRIs in general, so all institutions scored 0. This is assessed as “one of the weakest elements for all NHRIs in this domain is their mutual cooperation”, as the only sign of cooperation is the memorandum for understanding signed by the Ombudsman and the CPAD, as well as forwarding cases which do not fall within Ombudsman’s competence to the CPAD.<sup>121</sup>

The scores on **cooperation with NGOs** vary across countries and NHRIs, depending on whether the cooperation in fact existed at all, and whether it was well structured or not. While the Montenegrin Ombudsman scored highest (2), the Macedonian scored lowest (0), and all other countries received a middle score (1). The high score of the Montenegrin Ombudsman is due to having “actively and frequently teamed up with NGOs and the media, thus promoting its activities, especially as regards the rights of the child”<sup>122</sup>. The Macedonian EB score is explained by the very superficial and sporadic cooperation with NGOs and deliberate acts of exclusion.<sup>123</sup> The other lowest score – the FAI in North Macedonia is due to the fact that even though this institution had cooperated more with NGOs in the previous years, in 2018 this cooperation was lacking. All other NHRIs scored 1, as cooperation existed, but it was not pursued in a structured manner.

The indicator **providing information on rights** was based on the standard on publishing information on rights in an easy-to-read language, as well as the provision of translation into “all languages commonly used in the country” for the ombudsmen and EBs, as the latter is an explicit standard for them. The Albanian, Bosnian and Montenegrin ombudsmen scored middle (1), since information is not in all languages commonly used in the country. The Serbian Ombudsman, the Kosovan Ombudsman and SAMP, and the Macedonian Ombudsman and EB scored 0, as the information is not in an easy-to-read language, but rather formal. Except for Kosovo and Albania, all SAMPs and FAIs scored 1, as they published information on rights, but they are not in an easy-to-read language. Upon the specific **sub-indicator for SAMP providing information for data subjects**, the Macedonian SAMP scored highest (2), the Kosovan SAMP lowest (0) compared to the other SAMPs, which cut middle (1), which means that Macedonian SA has publicised the rights of data subjects contained in the Modernised Convention 108, as well as the manner of assisting non-residents.

The indicator on **accessibility** was broken down to sub-indicators for different NHRIs, to reflect the more precise requirements in international standards for specific categories. The general accessibility of the institution was measured through easily accessible premises (as physical positioning), online, email and telephone services. According to this indicator, all NHRIs in Serbia, the ombudsmen of Kosovo, Montenegro and North Macedonia and the SAMP of Albania scored high (2). The Montenegrin EB and SAMP-FAI, the SAMP in North Macedonia, the ombudsmen and EBs of Albania and Bosnia and Herzegovina scored 1. The EB and FAI in North Macedonia scored the lowest (0). **Accessibility for persons with disabilities** remains an issue. Most NHRIs are accessible to persons with physical disabilities, but not other types of disabilities, such as sensory disabilities, resulting in a middle score (1) for the ombudsmen of Albania, Montenegro, North Macedonia and Serbia, EB in Albania and Serbia and all SAMP FAI except for Kosovo. The ombudsmen of Bosnia and Herzegovina and Kosovo, the EB in North Macedonia and the SAMP of Kosovo are inaccessible for physical disability, as well. It is worth mentioning that some NHRIs make serious efforts to increase accessibility for persons with disabilities, such as the EB and the SAMP-FAI in Serbia, “as their websites are accessible for persons with disabilities, the latter also having a listening option”.<sup>124</sup> On **accessibility for children**, as a specific sub-indicator for ombudsmen, all ombudsmen scored differently – Albania, Kosovo and Montenegro the highest (2), Bosnia and Herzegovina and Serbia in the middle (1) and North Macedonia – lowest (0).

118 Serbia, Commissioner, Annual report 2018, 79

119 Serbia, CPE, Annual report 2018, 211.

120 Serbia, PC, Annual report 2018, 104.

121 Biljana Kotevska, North Macedonia Country Report.

122 Jelena Dzankic, Montenegro Country Report.

123 Biljana Kotevska, North Macedonia Country Report.

124 Ivana Krstic, Serbia Country Report.

Most NHRIs are active in **international networks and activities**. All of the NHRIs received a high score on **membership** in relevant international organisations/networks (2), except for the Montenegrin SAMP-FAI, and Kosovan SAMP which scored low (0) since they are members in less than two relevant international organisations or bodies. Concerning **participation in international activities**, all ombudspersons and EBs scored high (2), while EB in North Macedonia scored medium (1). The SAMPs in Bosnia and Herzegovina, North Macedonia and Serbia scored high (2), and the SAMP in Albania and Kosovo cut middle (1). Having participated in less than five international events, the SAMP in Montenegro scored low (0). All countries scored low in international activities concerning the mandate of FAI, which apart from their low activity in this field, could also reflect the fact that official international activities are much less frequent than in the other areas. As the indicators on international activities were set as quantitative, generally based on the number of relevant organisations in which the NHRI is a member/observer or the number of relevant international events in which it has participated, it does not provide an insight in the quality and actual contribution and achievements from the membership/participation. Such assessment cannot be derived from the reports and public information of the NHRIs in the region, as they mainly list the activities, but do not assess the substance of their contribution or achievements from the international activities. Consequently, additional research is needed to evaluate the level of socialization of the NHRIs from the region in the international human rights sphere. Under the specific indicator for **transnational cooperation on specific cases for the SAMPs**, which was quantitatively set based on the number of cases, ranked the Macedonian SAMP highest (2), the Albanian, Serbian and Montenegrin SAMP scored middle and the Bosnian and Herzegovinian and Kosovan SAMP scored zero.

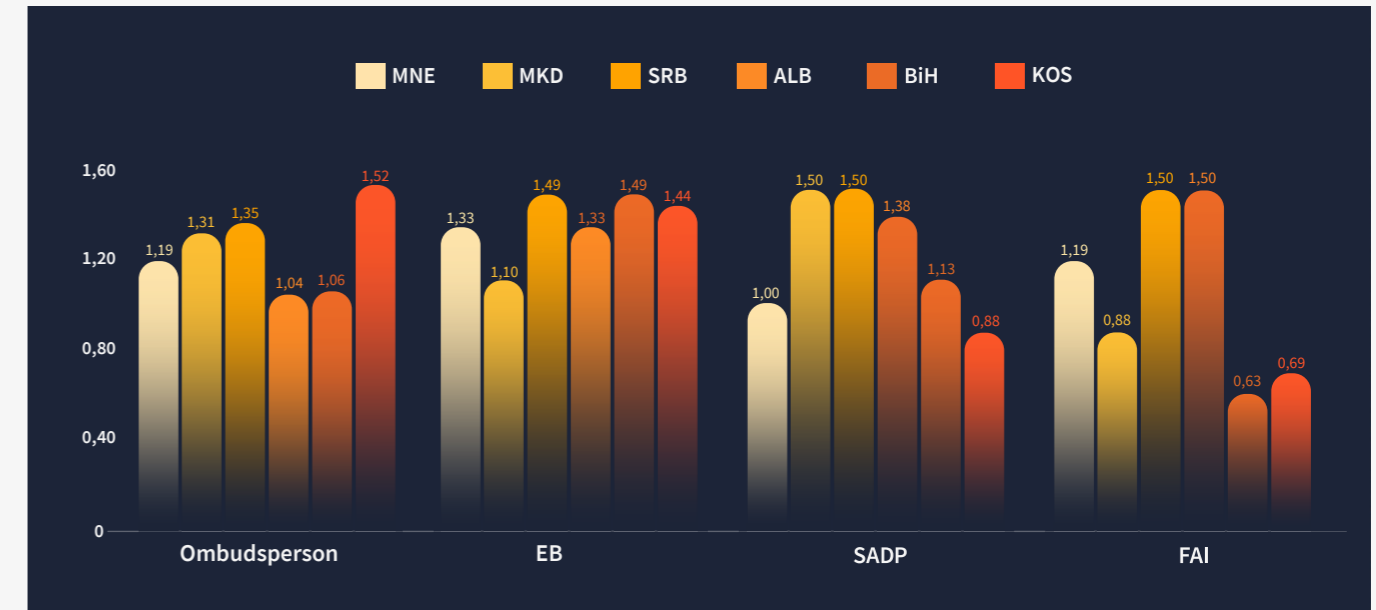
None of the ombudspersons and none of the EBs except for the Ombudsperson of Kosovo and the EB of Serbia (scoring highest – 2) has a **communication strategy**. None of the SAMPs and FAIs, except for the Macedonian ones has a communication strategy (SAMP was assigned 2 and FAI 1, since its communication strategy did not have a reference period). It also has to be noted that the indicator was set in such a way not to insist on a separate document, but rather practically on a strategy, regardless in what form/which document it is presented. This situation is worrying, as one of the key mandates of NHRIs is the promotion of human rights and therefore, the NHRIs need to approach their target groups and the broader public in a well-planned manner.

**On confidentiality/protection** with the Ombudspersons and EBs, it was checked whether and to what extent confidentiality to witnesses and whistle-blowers is provided. Half of the ombudspersons (Bosnia and Herzegovina, Montenegro and North Macedonia) and all of the EB scored middle (1), as they ensure confidentiality to a limited extent, mainly referring to the general legal framework. The Albanian, the Kosovan and the Serbian ombudspersons scored highest (2), as they have a prescribed obligation to protect whistle-blowers. The SAMPs have the obligation for safeguarding professional secrecy with and after the term of office, which is sufficiently guaranteed in all countries (2), and to a limited extent in Serbia, which scored middle – 1.

While the status and challenges in this domain somewhat vary per country and per body, some common issues can be extrapolated.

Challenges in the region are still pertaining even to a basic standard as debating the reports of NHRIs in parliament, while substantial parliamentary scrutiny is missing. Cooperation with government through contribution to policy and law proposals is ongoing. Still, in many cases, there is no formal requirement for the governments to request an opinion from NHRI and no obligation for feedback. Structured cooperation with other NHRIs and with NGO is generally lacking. While international cooperation is rather vivid, NHRIs do not provide information on the substance of their contributions and achievements of the international socialisation. Although NHRIs provide information on the rights, they are mostly in a formal, rather than easy-to-read language. Accessibility for persons with disabilities, primarily sensory disabilities is an issue for all NHRIs. Only three NHRIs (and no ombudsperson) in the region have established a communication strategy, which points out to a low level of capacity of NHRIs to approach their target groups and citizens. The protection of witnesses and whistle-blowers, as well as professional secrecy rules for SAMP in most cases, need to be strengthened.

## Domain 4: Mandate and powers



The average score of indicators in this domain is 1.22. The maximum score is 1.52, while the minimum 0.63, thus a difference of 0.89 points can be observed.

The Ombudspersons score within a range 1.04-1.52, the Kosovan scoring highest (1.52), and the Albanian and BiH – lowest (1.04 and 1.06). Variances are smaller with the EBs, the EB in Serbia scoring highest – 1.49 and the EB of North Macedonia scoring the lowest 1.10. The SAMP mandate and powers are more robust in North Macedonia and Serbia – 1.50 versus the lowest 0.88 in Kosovo. The FAI mandate in Serbia and Albania is scoring the same (1.50), followed by 1.19 of Montenegro and the low 0.88, 0.69 and 0.63 of the Macedonian, Kosovan and BiH FAI, respectively.

The indicators in this domain are more diversified, as the mandates and powers are specific for each body. Consequently, we present the findings for each body/mandate, comparatively for all the countries.

### Ombudspersons

In practice, all ombudspersons exercise a broad mandate on human rights promotion in line with the Paris principles: competence to freely address public opinion, raise public awareness on human rights issues, carry out education and training programs and making use of the press. Out of these, only the Albanian Ombudsperson does not have this mandate explicitly stated in the law.

The ombudspersons of Montenegro, North Macedonia, Serbia and Kosovo have an explicit mandate to promote and ensure **ratification and harmonization** of national legislation, regulations and practices **with the international human rights instruments** and to promote and ensure their effective implementation, but not an explicit obligation to contribute to the reports which states are required to submit to international bodies and institutions and express an opinion on the subject, with due respect for their independence. Thus they all scored medium (1). The ombudspersons of Albania and BiH scored 0, as they do not have an explicit mandate for these actions.

On the indicator **coverage of sectors**, ombudspersons in Albania, Bosnia and Herzegovina and Kosovo scored high 2, as they cover both the public authorities and the private sector performing public functions. Ombudspersons in Montenegro, North Macedonia and Serbia cut medium as they cover the public authorities, without significant exceptions, but do not cover the private sector performing public functions.

Regarding **powers for human rights protection**, in all the countries the ombudsperson has both the power to obtain statements to assess situations raising human rights issues and the authority to compel witnesses, thus scoring 2 on the sub-indicator **investigation**. All ombudspersons have the power of unannounced and free **access** to inspect and examine any public premises, documents, equipment and assets, resulting in the score 2 to each of them. While equipped with other relevant powers for complaints, none of the Ombudspersons in the region has the ability to settle complaints through a binding determination, does scoring medium (1) on the **powers on complaints**. The ombudspersons in North Macedonia and Bosnia and Herzegovina have an unlimited authority to **join or initiate action in court**, achieving 2 on this sub-indicator, as opposed to Serbia, Montenegro and Kosovo, which do not have this authority and scored the minimum. The Kosovan ombudsperson can only act as an *amicus curiae* in courts but does have standing before the Constitutional Court on constitutionality issues.<sup>125</sup>

<sup>125</sup> Natyra Avdiu and Edona Ahmetaj, Kosovo Country Report.

An important indicator for ombudspersons is the **follow-up of its recommendations**. The reports of the Ombudsperson in North Macedonia and Bosnia and Herzegovina do not reveal this data and were therefore assigned the minimum 0. The Serbian Ombudsperson scored 2, as 93,15 % of his recommendations were accepted by public bodies in 2018.<sup>126</sup> The Montenegrin, Albanian and the Kosovan Ombudsperson scored 1 (meaning that less than 90% of its recommendations were followed). The Montenegrin Ombudsperson highlighted that one of the key challenges the institution faces is the ‘attitude towards the unfulfilled recommendation of the Ombudsperson’.<sup>127</sup>

Concerning **initiatives to national authorities**, half of the ombudspersons in the region scored high, being very active in submitting initiatives and proposals (Serbia, Bosnia and Herzegovina and Kosovo), while the ombudspersons from Montenegro, North Macedonia and Albania scored medium. They all scored high (2) in submitting **special reports**, in addition to the annual report.

The mandate and powers of the ombudspersons as a **national prevention mechanism** in all the countries, except for Bosnia and Herzegovina, are entirely in line with the OP-CAT, resulting in the maximum grade of 2 for the three institutions. The ombudsperson institution of Bosnia and Herzegovina does not have a basis for this mandate in law.

Concerning the mandate on the **rights of the child**, the Macedonian Ombudsperson has scored highest (2), as it also has the authority to bring cases to court, which is not the case in Montenegro, Serbia, Albania and Kosovo, which have scored medium (1), since they have the mandate for prevention, promotion and protection of children’s rights, but not to bring cases to court. The ombudsperson institution in Bosnia and Herzegovina has a very vague mandate regarding children’s rights.<sup>128</sup>

The **assessment of progress in the EC annual report** in 2018 was graded as maximum 2 in North Macedonia and Kosovo, and medium 1 for the other countries.

According to the RCC Balkan Barometer survey, only the Montenegrin Ombudsperson passed the threshold of more than 50% having **trust in the institution** – 58%. The Kosovan Ombudsperson is on the margin – 50% trust, while the others lag behind – Bosnia and Herzegovina, North Macedonia, Serbia and Albania with 40%, 38%, 36%, and 34 % respectively.<sup>129</sup> However, what is interesting about the results of this survey is that the ombudspersons in Montenegro and Kosovo had the highest trust compared to other institutions (courts, parliament, government, audit institution). This is the case also with Serbia, although the level of trust is significantly lower. In Albania and Bosnia and Herzegovina, the level of trust was about equal with the audit institution and higher than in the other institutions, while in Montenegro and North Macedonia the scores compete with those of the Government. In North Macedonia, the share of respondents, who do not have a position on the trust to the Ombudsman (have opted for the “I do not know” answer) is the highest – 23%.

There are no public opinion surveys for the other NHRIs.

### **Equality bodies**

All EBs have scored high – 2 on the indicators **coverage of grounds**. The same is for the status on the specific standards on **equal treatment of all persons without discrimination on the grounds of sex**. As to the **areas/ fields of discrimination**, all EB except for Kosovo scored 2, as they cover a wide range of issues, still leaving the list open, as well as all areas noted in the ECRI GPR. The Kosovan mandate of EB does not cover hate speech; hence it has scored medium 1.

The legislative framework ensures a full mandate on **promotion and prevention** to all EBs as it includes promotion and achievement of equality, prevention and elimination of discrimination and intolerance, including structural discrimination and hate speech and promotion of diversity and good relations between persons belonging to all the different groups in society. In addition, the EBs have an obligation to promote equality through training, raising awareness and developing standards. Consequently, all institutions/mandates scored high (2), except for Albania, which scored medium.

However, there are differences in how EBs perform in practice. The Serbian, Albanian, Kosovan and the EB of Bosnia and Herzegovina were pro-active and thus scored high (2) on **initiatives to national authorities**, while both institutions in Montenegro and North Macedonia, scored low - 0, with no initiatives submitted.

When it comes to **responsibilities for independent assistance** of the EB, in Montenegro and Albania they include all relevant responsibilities: receiving and handling individual or collective complaints; providing legal advice to victims, including in pursuing their complaints; engaging in activities of mediation and conciliation; representing complainants in court, and acting as amicus curiae or expert where required and scored the maximum (2). In the other countries, the EB has an only limited mandate to act as amicus curiae or expert and scored 1. The Serbian EB has actually engaged in cases of **strategic litigation**, thus scoring 2. One case was initiated in 2018, and several were ongoing.<sup>130</sup> All the other EBs achieved medium score (1) as strategic litigation is provided in the legal framework, but their bodies did not engage in such a case. The Macedonian EB did not have the right to **issue recommendations**, nor **legally binding decisions** on specific cases, thus scoring the lowest (0). In contrast, the EBs in Montenegro, Serbia, Albania and Kosovo have the right to issue recommendations, but not legally binding decisions on specific cases (achieved middle mark – 1). Only the Ombudsperson in BiH in its mandate as an EB has the right to issue recommendations and legally binding decisions on specific cases, subject to judicial review. On the actual follow-up of recommendations, the Serbian and the BiH EB scored highest (2) as more than 90% were followed, while the Montenegrin, Macedonian and Albanian score is medium (1), due to less than 90% recommendations followed. The Kosovan Ombudsperson in its mandate as an EB scored lowest (0), as no public data are available on the follow-up, despite the legal obligation for its monitoring.<sup>131</sup>

All EBs allow all **manners of submission of complaints**: orally, in written form or online and have achieved the highest grade. However, in Montenegro and Serbia, complaints can be submitted “in a **language** of the complainant’s choosing which is common in the country where the equality body is located” (maximum 2 points assigned). Albania and BiH also scored the maximum 2, while in the Macedonian and Kosovan case this is not ensured for all such languages (thus, 1 was assigned). All EBs scored maximum on the sub-indicator **free of charge** since the procedure of submission does not impose any costs.

The mandate of the EB in North Macedonia does not explicitly include regular **independent surveys**, so it got the lowest grade (0). In all the other countries, they are included in the EB mandate but were not performed in 2018, resulting in a medium score (1). In Serbia they are conducted each third year, the last being conducted in 2016.<sup>132</sup> In Montenegro, Serbia, North Macedonia and Kosovo, findings from **independent research** were included in the reports, while in BiH and Albania they were not included.

The EBs in Albania and Kosovo submitted more than two submissions as a **contribution to an international body** thus scoring maximum 2 on this indicator, while the BiH institution submitted two, this scoring the medium 1. EBs in Montenegro, North Macedonia and Serbia did not submit such contributions in 2018, so they all scored 0.

No public polls are available on **public trust** specifically for EBs – only for ombudspersons, which have a mandate as an EB.

Only the Kosovan Ombudsperson, which is also acting as an EB, got a high score on the indicator **assessment in the EC annual report**. All other EBs got the medium score (1), as little or some progress was observed.

### **Supervisory authorities on data protection**

Supervisory authorities on data protection in Montenegro and Serbia have full mandate and powers for **monitoring and enforcement** of the Data Protection Law and all relevant developments for data protection, so they scored 2. All other SADPs were marked medium (1), as they do not encompass all the powers enlisted under the GDPR.

The Macedonian, Serbian, Albanian and BiH SADPs carried out **promotional** activities for both the general public and for data controllers and processors, getting the highest mark 2. Montenegro and Kosovo scored 1, as in Montenegro only trainings were organised, and no other activities of promotion, while the Kosovan SADP organised limited promotional activities.

The Serbian SADP- FAI performs a strong **advisory role**, as it submitted 59 opinions on draft-laws and four initiatives to challenge constitutionality (for the two mandates).<sup>133</sup> The SADPs of North Macedonia and Albania also scored high, having submitted more than five initiatives, while Montenegro had less and scored medium (1). The SADP in BiH submitted only one initiative, while the Kosovan institution did not provide a breakdown of data in its report, so it is not clear whether it took the initiative itself; hence, they scored lowest – 0.

<sup>126</sup> Serbia, Protector of Citizens, Annual report (2018), 16.

<sup>127</sup> Protector of human rights and freedoms of Montenegro, Annual Report (2018), p. 203. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf).

<sup>128</sup> Aida Malkic, Bosnia and Herzegovina Country Report, p.22.

<sup>129</sup> Regional Cooperation Council, Balkan Barometer 2019, Public Opinion, Analytical Report, Sarajevo, 2019, [https://www.rcc.int/seeds/files/RCC\\_BalkanBarometer\\_PublicOpinion\\_2019.pdf](https://www.rcc.int/seeds/files/RCC_BalkanBarometer_PublicOpinion_2019.pdf).

<sup>130</sup> Ivana Krstic, Serbia Country Report.

<sup>131</sup> Natyra Avdiu and Edona Ahmetaj, Kosovo Country Report.

<sup>132</sup> CPE, The Attitude of Citizens Towards Discrimination in Serbia, 2016, <http://ravnopravnost.gov.rs/izvestaj-o-istrzivanju-javnog-mnjenja/>

<sup>133</sup> Serbia, Commissioner, Annual Report, 68-74.

All SADPs have full mandate and powers for **investigations**, in line with the GDPR. All SADPs in the region, except for Montenegro, have the full mandate and powers to **handle complaints** by data subjects, issue binding decisions, as well as the obligation to inform the data subject on the progress and outcome of the complaint. In Montenegro, there is no power to issue a binding decision, which is resulting in a middle score (1).

On the **regulatory functions/authorisations**, the SADPs mainly scored medium (North Macedonia, Albania, BiH and Kosovo), meaning that they have some, but not all the functions and authorisations required by the GDPR. The SADP in Serbia scores high (2), as it has full mandate and powers for authorisations of codes of conduct, certifications, standard, authorisation of contractual clauses and administrative arrangements and approval of binding corporate rules. Montenegro scored low (0), as the mandate of its SADP does not include such powers.

Good **progress in the EC report** was observed for SADP in North Macedonia, which scored high (2), Montenegro, Serbia and Albania scored medium (1), while the Serbian and Kosovo institutions scored low (0).

**No survey on public trust** in the SADP was carried out in any of the countries in the region.

#### **Institution for free access to information**

FAIs in Montenegro, Serbia, Albania and Kosovo (marked 2) have the full mandate for **monitoring and oversight**, meaning that they “can process requests for information, assist applicants, ensure the proactive dissemination of information by public bodies, monitor compliance with the law and present recommendations to ensure adherence to the right to access information”. The FAI of North Macedonia seems to be missing the mandate for assistance to applicants and proactive dissemination. According to the laws, the BiH institution does have a full mandate. However, in practice, this cannot be realized because public institutions do not fulfil their obligation to deliver data to the Ombudsman, and there are no sanctions.<sup>134</sup> Thus, North Macedonia and Bosnia and Herzegovina have been graded medium (1) regarding this indicator.

The Serbian, Macedonian and Albanian FAI have carried out **promotional** activities for both the general public and public information holders and scored 2, while in Montenegro only trainings were organised, and in Bosnia and Herzegovina and Kosovo, only some public awareness activities were organised, resulting in the medium score (1).

The FAIs in Serbia and Albania were pro-active in submitting their initiatives to national authorities and thus scored 2 on the indicator **advisory role**, while the score for the other countries is 0.

The scores are relatively high concerning the procedures for **complaints handling** in Montenegro, North Macedonia and Serbia. In all countries, they are **free of charge**. FAIs in Montenegro, Serbia and North Macedonia have the right to issue binding decisions. They have scored high on this indicator (2), while Albania, Bosnia and Herzegovina and Kosovo scored medium as their FAIs cannot issue binding decisions. However, the FAI of Montenegro also scored medium on the **manner of submission**, unlike the FAIs of the other two countries, which scored high.

The **assessments in the EC annual report** were relatively low, resulting in the score 0 for North Macedonia, Serbia, Bosnia and Herzegovina and Kosovo and medium score for Montenegro and Albania.

In sum, the main legislative framework for the mandates and powers of NHRIs in the six countries is established, but there are variances, even more so in their performance. Complaints handling seems to be already an established practice, but key issues relate to the follow-up of recommendations. There is room for more pro-activeness of NHRIs on promotion, submission of initiatives to the government, special reports and strategic litigation.

<sup>134</sup> Analitika, The right to access to information in BiH: towards a more effective institutional framework, 2015.

## CONCLUSIONS AND RECOMMENDATIONS

The conclusions and recommendations in this report do not repeat the recommendations from the country reports, addressed to the national authorities, national NHRIs and NGOs. They exclusively focus on issues within the regional, European or global scope and further research.

**The general scores and scores across domains tend towards the average.** However, the analysis demonstrates that some fundamental issues related to the effectiveness of NHRIs remain challenging in all domains, but those regarding independence are of critical importance. As these issues have been identified in the sphere of informality rather than formality (non-transparent appointment procedures, actual pressure, actual blocking of the work of the institution, etc.), it is recommended to perform in-depth case studies and further qualitative research to identify and address these complex challenges.

**The research indicates that in addition to the approach by the state authorities to the NHRIs, issues of strategic approach and vision for their development, capacity and accountability of the NHRIs themselves persist.** There are limiting factors for raising their effectiveness, such as lack of strategic planning and communication strategy, inadequate financial control, lack of focus on information sharing and accessibility, cooperation among NHRIs and with NGOs etc.) Thus, they require further specific attention. Exploring these factors would assist in identifying the directions and options for the further strategic development of the NHRIs in the region.

**While the level of socialisation in the international human rights community at least at the formal level is relatively high (except Kosovo), it is important to further focus on the qualitative side of this process.** The slow speed of integration in the EU might impede the substantial socialisation; therefore, it is necessary to encourage structured cooperation and participation in the European organisations and networks.

**The rather diverse achievements and shortcomings of different institutions in different domains/indicators can be an opportunity for learning from each other within the region.** This research can be a basis for identifying best practices and lessons learned and mutual support in endeavours, such as international cooperation.

**The research has confirmed the need for structured and comparable measuring of the effectiveness of NHRIs in the Western Balkans.** This ensures the need for an NHRI research at regular intervals for all the countries in the Western Balkans.

Consequently, the following recommendations should be considered:

**The EU institutions should consider and support the maximum possible level of participation of NHRIs in European networks.** The EC should also support concrete projects on the transfer of best practices from MS, stimulating dialogue with the NHRIs in the WB and networking, as well as the regional transfer of best practices, to support socialisation in the international framework.

**International/bilateral donors should support regional co-operation and sharing of experiences on a regional basis with EU and CoE member states,** with a view to enhancing the role of NHRIs and their capacities, as well as their representation in various mechanisms and reporting to such mechanisms.

**The RCC should consider the inclusion of the other NHRIs, in addition to the ombudspersons, in the Balkan Barometer survey,** thus ensuring consistent measuring of the legitimacy of the NHRIs in the WB and raising awareness on human rights issues in the region.

**The RCC could also consider initiating programs/activities on structured cooperation of all NHRIs in the WB,** focused on a strategic approach to raising the effectiveness of NHRIs in the WB.

**The national authorities should promote a strategic approach towards the further increase of effectiveness of the NHRIs, taking into account the best regional, European and global practices, with focus on the substantial rather than formal compliance with the international standards,** avoiding swift and frequent changes to the legal framework.

**The NHRIs in the region should develop structured networking and cooperation among them, including design of joint projects (considering, e.g. transfer of best practices), identifying and addressing main structural and performance issues and developing strategic approaches.** In this line, a networking hub among regional NHRIs should be considered with the aim to promote and foster closer regional cooperation

between NHRIs, as well as with other relevant human rights actors. Through this cooperation, the NHRIs in the region have a chance to act as trailblazers on cross-country and cross-thematic issues which are awarded little to no attention despite their far-reaching consequences for human rights, such as, for example, use of artificial intelligence and its potential impact on human rights.

**The NHRIs in the region should foster structured cooperation with NGOs at national, but also at the regional level,** in order to increase their individual effectiveness, improve public oversight of NHRIs, inform audiences and key stakeholders with the aim to gain citizen's trust, thus ultimately increasing their impact.

**The NHRIs in the region should support each other by endorsements for membership in regional and international organizations for NHRIs who are not members yet.**

**The NGOs should at global, European and regional level increase the networking and cooperation, including through design and implementation of joint projects for monitoring, research and advocacy related to the effectiveness of NHRIs.**

**The NHRIs should also significantly improve their approach to communication with the citizens and accessibility,** through developing and implementing consistent communication strategies, including periodic measuring of their legitimacy.

**Regional media and/or platforms should take a more proactive role to promote the work of NHRIs.** This would contribute towards public confidence in the NHRIs.

## ANNEX: LIST OF INDICATORS

### Domain 1: Independence and the ability to work without pressures

Ombudsperson	EB	SADP	FAI
Independent statutory basis	Independent statutory basis	Independent statutory basis	Independent statutory basis
Appointment process	Appointment process	Appointment process	Appointment process
Clear criteria for membership	Clear criteria for membership	Clear criteria for membership	Clear criteria for membership
Term of office	Term of office	Term of office	Term of office
Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest
Immunities	Immunities		
No instruction from the government	No instruction from the government	No instruction from the government	No instruction from the government
Removal	Removal	Removal	Removal
Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure
Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI

### Domain 2. Availability of resources and capacities

Ombudsperson	EB	SADP	FAI
A separate and independent budget	A separate and independent budget	A separate and independent budget	A separate and independent budget
Adequate financial resources	Adequate financial resources	Adequate financial resources	Adequate financial resources
Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures
Sufficient human resources	Sufficient human resources	Sufficient human resources	Sufficient human resources
Adequate human resources	Adequate human resources	Adequate human resources	Adequate human resources
Financial control	Financial control	Financial control	Financial control
Pluralism	Pluralism		
Training	Training		Training
Internal structure enables the focus on each part of the mandate	Internal structure enables the focus on each part of the mandate		
Regional offices/outreach	Regional outreach/offices		
Learning and change	Learning and change	Learning and change	Learning and change

### Domain 3. Information, accessibility and cooperation with other relevant actors

Ombudsperson	EB	SADP	FAI
Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny
Providing information to the NHRI	Providing information to the NHRI		
Cooperation with government	Cooperation with government	Cooperation with government	Cooperation with government
Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRI	Cooperation with other NHRI
Cooperation with NGOs	Cooperation with relevant bodies and NGOs	Trans-national cooperation with other SAs	Cooperation with NGOs
Providing information on rights	Providing information on rights	Providing information on rights	Providing information on rights
		Information on rights and assistance to data subjects	
Accessibility	Accessibility	Accessibility	Accessibility
Accessibility to children			
Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities
Membership in international networks	Membership in international networks	Membership in international networks	
Participation in international activities	Participation in international activities	Participation in international activities	Participation in international activities
Communication strategy	Communication strategy	Communication strategy	Communication strategy
Confidentiality and protection	Confidentiality and protection	Professional secrecy	

### Domain 4: Mandate and powers

Ombudsperson	EB	SADP	FAI
		Monitoring and enforcement	Monitoring and oversight
Human rights promotion	Promotion and prevention	Promotion	Promotion
Promotion of harmonisation with international HR instruments and implementation			Promotion of pro-active dissemination
Mandate - coverage of sectors	Coverage of grounds of discrimination		
	Coverage - area		
	Equal treatment of all persons without discrimination on the grounds of sex		
Human rights protection- powers - investigation	Independent assistance - mandate	Investigations	
Human rights protection- powers - access	Independent assistance - strategic litigation		
Human rights protection- powers - complaints	Independent assistance - issuing recommendations and legally binding decisions		
Human rights protection- powers - courts			
Follow-up of recommendations	Follow-up on recommendations		
Initiatives to national authorities	Initiatives to national authorities	Advisory Role	Advisory Role
	Complaints submission	Complaints handling	Complaints handling
	Complaints submission - language		Complaints submission
	Complaints submission - free of charge		Complaints submission - free of charge
	Independent surveys	Regulatory functions/ authorisations	
Reports	Independent reports		
Submission of contributions to international bodies	Submission of contributions to international bodies		
National prevention mechanism			
Rights of the child			
Public opinion on public trust in NHRI institution	Public opinion on public trust in NHRI institution	Public opinion on public trust in SA institution	Public opinion on public trust in SA institution
Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report



# WHAT IS BEHIND AND BEYOND THE AVERAGE?

Country Report  
Albania



**Effectiveness of NHRIs in Western Balkan countries**  
Albania, Bosnia and Herzegovina, Kosovo,  
Montenegro, North Macedonia, Serbia

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## Country Report **Albania**

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

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## List of Acronyms and Abbreviations

ALB	Albania
BIH	Bosnia and Herzegovina
CoE	Council of Europe
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CPD	Commissioner for Protection against Discrimination
CJEU.	Court of Justice of the European Union
CRD	Convention on the Rights of the Child
CRD	Civil Rights Defenders
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisation
ECRI	European Commission against Racism and Intolerance
FRA	European Union Agency for Fundamental Rights
GANHRI	Global Alliance for National Human Rights Institutions
GDPR	General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)
EPI	European Policy Institute - Skopje
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
IDP	Commissioner for the Right to Information and Data Protection
IDP- FA	Commissioner for the Right to Information and Data Protection - Freedom of Access mandate
IDP- DP	Commissioner for the Right to Information and Data Protection - Data Protection mandate
KOS	Kosovo
MS	Member States
MTBP	Medium-Term Budget Plan
NHRI	National Human Rights Institutions
NE	National Expert
OHCHR	The UN Office of the Commissioner for Human Rights
OP-CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
RE	Regional expert
SA	Supervisory Authority
UN	United Nations
UNHRC	UN Human Rights Committee
WB	Western Balkans

## INTRODUCTION

National Human Rights Institutions (NHRI)s are essential mechanisms in ensuring that citizens' rights are protected and upheld. They have also become increasingly crucial in narrowing the implementation gap of national legislation by monitoring how international human rights treaties are being implemented. In addition, they provide an irreplaceable contribution to a country's efforts to promote fundamental rights and ensure that domestic legislation complies with international human rights instruments. NHRIs are important state-building actors, which play a significant role in strengthening the rule of law in a democratic system.<sup>1</sup>

The Republic of Albania is a party to all fundamental human rights treaties and instruments and abides by the monism principle. Accordingly, these instruments are considered to be part of domestic law. Furthermore, they supersede national laws that are not compatible with them.<sup>2</sup> Their implementation is monitored by a system of institutions, including independent national human rights institutions comprising the Ombudsperson, the Commissioner for Protection against Discrimination (CPD) and the Commissioner for the Right to Information and Data Protection (IDP).<sup>3</sup> Like many Western Balkans (WB) countries, Albania's experience with such institutions is relatively new. They have risen both as a necessity for a more resilient democracy through respect for human rights and a technical requirement for Albania's accession to the European Union. This research measures the effectiveness of NHRIs in four domains. In the following sections, the areas in which each NHRI performs the best, as well as those that require improvement, have been explained and highlighted.

This monitoring of the NHRIs in Albania is not comprehensive. However, the assessment found that although these institutions have come a long way since their inception, further progress is needed to comply with the international standards they aspire towards. Even though there is an overall adequate legal basis for the functioning of NHRIs in Albania, these institutions must continuously aim to update the legislation and improve regulations that enable greater oversight capacities over citizens' rights. NHRI institutions should also aim to increase their capacities, follow up on their recommendations, and become a more active voice in support of these rights. To ensure this, NHRIs must expand their strategic communication platforms to become more visible to the public and strengthen their overall credibility.

NHRIs are essential instruments of checks and balances in society; hence, strengthening them is directly connected to the level of democracy in a country. For that reason, NHRIs, the parliament and the government must all work towards consolidating their authority and mandate.

This report is produced as part of a regional research effort. The effectiveness of NHRIs was measured against a pre-defined set of indicators developed by Civil Rights Defenders and the European Policy Institute – Skopje. Following the first part of the research on Montenegro, North Macedonia and Serbia conducted in 2019, the research this year covers the three remaining countries from the Western Balkans region – Albania, Bosnia and Herzegovina and Kosovo. It is the first comparative research of this kind in the region. Independent experts from all Western Balkan countries carried out the country research, based on the specific Methodology for this project.

The research specifically focused on the selected institutions' effectiveness using the methodology outlined in the next section. After a brief overview of these institutions, we will present the research findings on the systemic challenges and shortcomings that hinder the work of the NHRIs for each of the effectiveness domains: independence and ability to work without pressure; availability of resources and capacities; information, accessibility and cooperation with other relevant actors; and mandate and powers. Finally, a set of recommendations targeted at various stakeholders are proposed.

## APPROACH AND METHODOLOGY

Within the scope of this research, effectiveness was defined as “the capability of the NHRI to independently perform its mandate and powers, with the aim to make a significant impact on the achievement of human rights.”

The report focuses on the findings from the research on the effectiveness of three NHRIs in Albania: the Ombudsperson, the Commissioner for Protection against Discrimination (CPD) and the Commissioner for the Right to Information and Data Protection (IDP). The mandate on information and data protection mandate of the IDP were evaluated separately and the scores are the average of the two.

<sup>1</sup> National Human Rights Institutions in the EU Member States. FRA. European Union Agency for Fundamental Rights, 2010

<sup>2</sup> Albanian Constitution, Article 122/2, p. 56, [http://www.pp.gov.al/web/kushtetuta\\_2016\\_1082.pdf](http://www.pp.gov.al/web/kushtetuta_2016_1082.pdf).

<sup>3</sup> [http://www.ambasadat.gov.al/japan/sites/default/files/Brochure\\_MPJ-M\\_OKB-\\_20\\_5\\_2014\\_%5BR%5D.pdf](http://www.ambasadat.gov.al/japan/sites/default/files/Brochure_MPJ-M_OKB-_20_5_2014_%5BR%5D.pdf)

In the given context and current state of development of research on NHRIs in the Western Balkans, an approach to measuring effectiveness that combines the structural and the mandate-based approach was applied. The structural approach focuses on the compliance of NHRI with the main legal norms or institutional safeguards. The mandate-based approaches are performance-based and focus on the success in performing the mandate of the NHRI.

A matrix of indicators was developed,<sup>4</sup> structured per four domains:

- (1) Independence and ability to work without pressure,
- (2) Availability of resources and capacities,
- (3) Information, accessibility and cooperation with other relevant actors, and
- (4) Mandate and powers.

The values of indicators were weighed, depending on the number of indicators per domain (which ranged from 7-12). In addition, some indicators have been broken down to sub-indicators to capture the specifics of a particular issue, which depends on the level of detail of the relevant international standard. The indicator per domain is estimated as a sum of the measured values of indicators in the domain. The overall score of effectiveness for each NHRI in each country is estimated as a sum of the indicators per domain. Each domain participates equally in the final score – 25%. Consequently, the scale of the score per country per body is 0-8. If an NHRI body is a multi-mandate body, it is scored in terms of each mandate, while its score as an institution is estimated as an average of the sum of its scores for each mandate.

An overview of the matrix is presented in Attachment 1.

The basis for developing the indicators were the relevant international standards and their interpretations. The Paris Principles<sup>5</sup>, or, more precisely, the GAHNRI General Observations<sup>6</sup>, are taken as a basis for the indicators for human right institutions with the general mandate. The basis for specific indicators were the UN relevant standards related to the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>7</sup>, the Convention on the Rights of the Child (CRC)<sup>8</sup>, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>9</sup>, and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)<sup>10</sup> and especially their interpretations.

The European Commission Recommendation of 22 June 2018 on standards for equality bodies<sup>11</sup>, the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the CoE, as well as the Revised General Policy Recommendation No. 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE<sup>12</sup> were the European standards taken as a basis for indicators for equality bodies.

The EU General Data Protection Regulation (GDPR)<sup>13</sup> and the CoE Convention 108+<sup>14</sup> are taken as main standards for setting the indicators for data protection supervisory authorities. Provided the lack of specific international standards for an independent body on free access to information, the general standards for NHRIs were accordingly applied, while specific international standards on content of the right of information<sup>15</sup>, as well as documents developed by special rapporteurs for freedom of expression from the UN, CoE, and OSCE, were the basis for the indicators on powers and mandate.

The year 2018 is taken as a baseline for the research – the same year that was used in the research done for the three countries in the region in 2019 in order to ensure comparability.

<sup>4</sup> A detailed explanation of the Methodology is available in the Comparative Analysis, published alongside the reports.

<sup>5</sup> UN General Assembly, Resolution A/RES/48/134 (1993).

<sup>6</sup> Global Alliance for National Human Rights Institutions, General observations of the Sub-Committee on Accreditation, adopted by GAHNRI Bureau, 21 February 2018 (2018). Available at: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf); accessed on 7 August 2019.

<sup>7</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (1996).

<sup>8</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (1989).

<sup>9</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I (2006).

<sup>10</sup> UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, A/RES/57/199 (2002).

<sup>11</sup> Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, C/2018/3850, OJ L 167 Ch I, (2) (2018).

<sup>12</sup> Council of Europe, ECRI, General policy recommendation No. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CRI(2018)06 (2017).

<sup>13</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), (2016) OJ L 119.

<sup>14</sup> CoE, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), 10.10.2018 (2018).

<sup>15</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (1966); CoE, Convention on Access to Official Documents, CETS 205, 11 June 2008 (2008).

## OVERVIEW OF NHRIs IN ALBANIA

In this section, we briefly present a short history of the NHRIs, their primary mandate and composition, and any significant developments of relevance for effectiveness. This overview shows that NHRIs should have the necessary independence in order to exercise their monitoring roles effectively. The capacity of the institutions in charge of the protection of human rights remains weak, and there is a particular need for better-trained or technical staff to cover their extended mandates.

**The Ombudsperson (People's Advocate)** is a national constitutional body that acts as a national human rights institution. The establishment of the Ombudsperson is based on the provisions set up in the Constitution of the Republic of Albania and its organic law.

The Albanian Parliament adopted the Organic Law on the Ombudsperson in 1999. The Ombudsperson's institution was thus affirmed as a constitutional guarantee for protecting the rights, freedoms, and lawful interests of the Albanian citizens, foreigners, regular or non-regular residents in Albania, refugees, as well as stateless people who are located in the territory of the Republic of Albania against the actions or inactions of the public administration only, as well as third parties acting on behalf of it.<sup>16</sup> The law has been amended in 2014 (Law No.155 of 27 November 2014) where, among other changes, there has also been an amendment to clearly define the Ombudsperson institution as a promoter of the highest standards of human rights and freedoms in the country. In addition to its remit on human rights promotion, the new amendments provided for a more transparent and inclusive selection of candidate commissioners.<sup>17</sup> The Ombudsperson has offices both at the central and local level. The Ombudsperson enjoys the immunity of a judge of the High Court and is not liable to criminal proceedings for his/her actions when exercising powers.<sup>18</sup> Although the Ombudsperson does not enjoy any jurisdiction over the President, the Prime Minister, and the military,<sup>19</sup> he/she has the right to obtain official documents classified as "secret"<sup>20</sup> Albania's ongoing political conflicts and the lack of the functioning Constitutional Court and the Supreme Court have further hampered the work of the Ombudsperson.<sup>21</sup> EU reports on Albania indicate that government institutions insufficiently uphold the Ombudsperson's recommendations.<sup>22</sup> For example, out of a total of 171 recommendations addressed to the public administration bodies for 2018, only 54% have been accepted.<sup>23</sup> Thus, the enforcement of its recommendations remains weak. In addition, the Ombudsperson is faced with inadequate financial and human resources to fulfil its mandate and, more specifically, with insufficient staffing in the section on Children's Rights. This obstacle makes it more difficult for the institution to follow up on complaints in a timely manner and monitor its final resolution. However, the Ombudsperson's proposals to the Government and the Parliament to increase its human and financial resources have not been appropriately addressed.<sup>24</sup>

The Ombudsperson has a broad mandate covering all the human rights and freedoms enshrined in the Constitution, laws and international legal instruments on human rights and freedoms ratified by the Republic of Albania. The Ombudsperson is a member of the Global Alliance of National Human Rights Institutions (GANHRI), where it is accredited with A-status for its compliance with the UN Paris Principles since 2014.<sup>25</sup> In accordance with the Paris Principles, the Ombudsperson has been provided with a broad mandate based on the international human rights standards for the promotion and protection of human rights and the prevention of their violations.<sup>26</sup> It covers the following functions, such as:

- The national human rights institution (NHRI) according to the UN Paris Principles;
- The "classic" Ombudsperson role of being charged with the task of monitoring the public authorities in terms of the application of the rule of law and the principles of good governance and the avoidance of maladministration in the delivery of public goods and services;
- The National Preventive Mechanism against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in accordance with the Optional Protocol of the UN Convention against Torture (NPM);

16 Article 16 section 1 of the 1998 Constitution of the Republic of Albania; Article 2 of the Law on the Ombudsperson.

17 The Law No.8454 of 04.02.1999 on the People's Advocate amended, supplemented by the law No. 8600 of 10.04.2000, amended by the Law No. 9398 of 12.05.2005, added to and as amended by the Law 155/2014 of 27.11.2014, on the People's Advocate; <https://www.avokatipopullit.gov.al/en/article/legislation>

18 <https://www.u4.no/publications/albania-overview-of-corruption-and-anti-corruption.pdf>

19 Article 25, Law No. 8454 of 04.02.1999 on the People's Advocate, amended.

20 [http://idmalbania.org/wp-content/uploads/2014/11/MONITORING-AND-EVALUATION-OF-of-SSG-in-Albania\\_2012.pdf](http://idmalbania.org/wp-content/uploads/2014/11/MONITORING-AND-EVALUATION-OF-of-SSG-in-Albania_2012.pdf)

21 ENNHRI, People's Advocate of Albania.2020. Retrieved from <http://ennhri.org/wp-content/uploads/2020/06/State-of-the-Rule-of-Law-in-Europe-2020-Albania.pdf>

22 EU progress report 2019

23 Ombudsman. Annual report 2018. p. 8

24 ENNHRI, People's Advocate of Albania.2020. Retrieved from <http://ennhri.org/wp-content/uploads/2020/06/State-of-the-Rule-of-Law-in-Europe-2020-Albania.pdf>

25 GANHRI, Chart of the status of national institutions, Accreditation status as of 20 January 2021, Retrieved from <https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20as%20of%2020%2001%202021.pdf>; ENNHRI, People's Advocate of Albania.2020. Retrieved from <http://ennhri.org/wp-content/uploads/2020/06/State-of-the-Rule-of-Law-in-Europe-2020-Albania.pdf>

26 People's Advocate. Strategic Plan of the People's Advocate of the Republic of Albania 2019-2022. Tirana, 2018.

– The Children's Ombudsperson: The creation of such institutions has been promoted by the United Nations Committee on the Rights of the Child, and, from 1990 onwards, by the Council of Europe.

Thus, the Ombudsperson is vested with a dual mandate: to both protect and promote human rights. This provision ensures that the Ombudsperson must act as the national focal point and centre of expertise for everyone's human rights and freedoms, with close connections to and cooperation with all state structures, business structures and civil society structures. In addition, the Ombudsperson's strategic ambition is to become the key human rights actor of a well-functioning national human rights system in Albania as described in the role of the Ombudsperson.<sup>27</sup> The direct authority to which the Ombudsperson reports is the Parliament. The Assembly has a Committee on Legal Affairs, Public Administration, and Human Rights, which reviews the annual report of the Ombudsperson.

The independence of the institution is influenced by the fact that a direct appointment procedure is applied. What should be deemed an appointment to an independent institution, has frequently taken on political significance. For example, in 2010, an ongoing political stalemate directly impacted the election of the new Ombudsperson.<sup>28</sup> In May 2017, a new Ombudsperson was nominated by the Parliament, based on a political agreement between the two main parties and without fully completing all the steps foreseen in the consultation process.<sup>29</sup>

**The Information and Data Protection Commissioner (IDP)** is an independent national institution in charge of supervising and monitoring the protection of personal data both in the public and private sectors and guaranteeing the right to access public information. The Commissioner's Office was first established in 2008 with Law No. 9887, of 10 March 2008 on the Protection of Personal Data, as amended by Law No. 48/2012. IDP was established as an independent state supervisory body acting as a public legal person for the supervision of the legality of activities of personal data processing on the territory of the Republic of Albania. In September 2014, as a result of a "bottom-up" initiative, which was advocated entirely by local civil society<sup>30</sup>, the Assembly adopted Law No. 119/2014 on the right to information, thereby expanding the powers of this Authority. The IDP was vested with extensive competences and disciplinary powers and was later renamed Commissioner for the Right to Information and Protection of Personal Data.<sup>31</sup> The Assembly determines the remuneration of the Commissioner, the organisational structure, and remuneration for the employees of the Commissioner for the Protection of Personal Data. The rules and procedures for the election of the members of the bodies established by law, such as the Commissioner, are specified in the Assembly's regulation.<sup>32</sup> The Assembly appoints the Commissioner upon a proposal of the Council of Ministers for a 5-year term eligible for re-election.<sup>33</sup> Yet, this procedure could not be considered transparent as it could, among other things, as a prerequisite for members' nomination, favour political bias toward the Commissioner's election.

In its mandate for personal data protection, IDP has the power to conduct administrative investigations, to order for the blocking, erasure, destruction, or suspension of the unlawful processing of personal data and to impose administrative sanctions. The Commissioner has access to personal data processing and collects all necessary information with the view of fulfilling his oversight obligations. The Commissioner's powers regarding the right to information are to ensure the practical realisation of the freedom of information and to monitor and guarantee the citizens' right to access public information, serving as an administrative appeal and as the administrative body that monitors checks and facilitates the implementation of the law. IDP is to increase the public understanding regarding their right to access public information and help them during the process. For this reason, the law has granted him/her broad authority, even to impose administrative sanctions to the managers of public institutions.<sup>34</sup> While the decisions of the Commissioner are binding (executive titles)<sup>35</sup> as for the mandate on the protection of personal data, they are non-binding for public administration officials regarding the mandate on the right to information.<sup>36</sup>

**The Commissioner for Protection from Discrimination (CPD)** is the equality body in Albania, and it is established and operates in compliance with Law No. 10221/2010 "For Protection from Discrimination".

27 Ibid.

28 [https://www.parlament.al/Files/Integrimi/al\\_analytical\\_report\\_2010\\_en\\_23390\\_1.pdf](https://www.parlament.al/Files/Integrimi/al_analytical_report_2010_en_23390_1.pdf)

29 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf>

30 Civil society actors in Albania took an active role in lobbying for legal changes for improving the Law 8503. The Centre for Public Information Issues (Albanian: INFOCIP) was one of the partners which offered to the drafting team its extended expertise on developing the new approach materialised into this new law. Gerti Shella, Right to information in Albania, from creation to evolution. Science of law.

31 Indeed, these competences fell under the mandate of People's Advocate with the previous Law No. 8503 of 30.06.1999. on the right to information over the official documents.

32 The candidates for the constitutional organs or the organs established by law can be proposed by a group of no less than 28 Members of Parliament. Assembly's regulation, Article 111. [https://www.legislationline.org/download/id/8100/file/Albania\\_Rules\\_of\\_procedure\\_assembly\\_as\\_of\\_2011\\_en.pdf](https://www.legislationline.org/download/id/8100/file/Albania_Rules_of_procedure_assembly_as_of_2011_en.pdf).

33 Article 33, Law No. 9887 of 10.03.2008 on Protection of Personal Data

34 Ibid, Article 18.

35 Ibid, Article 41.

36 The European Commission. Albania 2019 Report, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-albania-report.pdf>

The Commissioner is an important institution for the protection of human rights in Albania, which assures effective protection from discrimination and from every other form of conduct that incites discrimination. The establishment of this institution was an initiative of the civil society, that prepared the draft law as a result of EU requests regarding the steps to be taken by Albania towards the progress and European integration process and reflected the engagement of the Albanian authorities regarding the respect for human rights, equality and non-discrimination.<sup>37</sup>

The CPD is a quasi-judicial body with some litigation powers, such as representation in courts. It can examine complaints from persons or groups of persons who claim that they have been discriminated against, perform and impose administrative investigations and take part in judicial proceedings in the capacity of the defendant. The CPD is entitled to publish reports, make suggestions, and conduct independent surveys about any issue related to discrimination. In addition, CPD has the competence to address public opinion, organise various awareness-raising and educational activities and hold regular dialogue with civil society actors about any kind of issue related to discrimination. The Commissioner has the authority to receive complaints both from the public and private sectors alike, as well as from individuals, and has the power to impose fines for breaching the law.<sup>38</sup>

The Commissioner is elected for a mandate of five years, with the right to be re-elected only once.<sup>39</sup> A majority of all Assembly members elect the Commissioner after a group of deputies makes a proposal to the Assembly.<sup>40</sup> The Assembly decides on the organisational structure and the classification of salaries for the employees of the Office of the Commissioner and that of the Commissioner. The employees of this office enjoy the status of a civil servant. The Commissioner has an independent budget, which is financed from the State Budget and various donations.<sup>41</sup>

So far, the procedure for the election of the Commissioner has not been very efficient. The decision for the election of the Commissioner has been pending for three years.<sup>42</sup> The Assembly finalised a second round for electing the Commissioner for Protection against Discrimination in 2018<sup>43</sup> after failing to elect one in March 2017.<sup>44</sup>

According to the EU progress report 2019 for Albania, the Commissioner for Protection against Discrimination still faces weak implementation of its recommendations by the Albanian administration, and it needs to strengthen its capacities through a comprehensive targeted approach in handling cases of human rights violations. The EU progress report 2020 for Albania raised the same issues.<sup>45</sup>

This overview highlighted that even though there is an overall adequate constitutional or legal basis for the functioning of NHRI institutions in Albania, they still face structural obstacles that impede their overall performance. Through years these institutions have experienced an expansion of the mandate, which is not always reflected with adequate and sufficient human resources to carry out their mission.

## STATE OF RESEARCH ON NHRIS

Several CSOs, such as INFOCIP, monitor the right to information, nevertheless the others, such as Res Publica, go further to scrutinise the work of the Commissioner. Res Publica has produced several monitoring reports on the right to information and the performance of the Commissioner in monitoring this right.<sup>46</sup> In its annual monitoring report for 2018, it encouraged more transparent procedures for the appointment of the Commissioner to ensure its independence from political pressure.<sup>47</sup> Independent reports by CSOs have criticised Commissioner's soft approach to sanctions.<sup>48</sup> The EU Progress Reports for 2019 and 2020 recommend the need to increase the capacity of the Commissioner for the Right to Information and Protection of Personal Data to oversee the disclosure of information by public institutions.<sup>49</sup>

37 OSCE, 2011. Law on protection from discrimination.

38 Article 32, Law No. 10 221 of 04.02.2010 on Protection from Discrimination

39 Ibid, Article 25.

40 Ibid, Article 23.

41 Ibid, Article 21.

42 <http://www.parlament.al/Files/Procesverbale/20190418120858Proc.%20dt%2011.04.2019.pdf>

43 <https://www.parlament.al/Files/Kerkese/20190315144121RAPORTI%20VJETOR%202018%20%20KMD.pdf>

44 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf>

45 [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/albania\\_report\\_2020.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/albania_report_2020.pdf)

46 <http://www.respublica.org.al/>

47 Law on the right to information in 2018, Res Publica, 2018, p. 47.

48 Ibid., Res Publica, 2018.

49 Ibid., EU 2019; Ibid., EU 2020.

## RESEARCH FINDINGS

Next, we will discuss the research findings. We have presented them per domain in order to facilitate the reaching of comparative remarks for each of them. In addition, this enables us to point out to systemic challenges faced by all institutions. Each section starts with a figure presenting the ranking of NHRIs per domain, starting from the institution with the highest and ending with the one with the lowest score.

### General score

NHRI	General score ↓ <i>min: 0; max:8</i>
Commissioner for Protection against Discrimination	5.08
Ombudsperson	4.68
Information and Data Protection Commissioner	4.60

According to the general ranking, the Commissioner for Protection against Discrimination (5.08) is the most effective NHRI, with very consistent scores in all four domains. The Ombudsperson holds the second position (4.68), closely followed by the Information and Data Protection Commissioner (4.60). IDP received the highest score in its freedom of access mandate (4.66), compared to its data protection mandate (4.54). ). The CPD has the highest score (1.30) in Domain 1. Independence and ability to work without pressure, while in Domain 4. Mandate and powers – the IDP (FA) received the highest score (1.50).

IDP (FA) has the lowest score (0.94) in Domain 3. Information, accessibility and cooperation with other relevant actors, while the Ombudsperson received the lowest overall score (1.04) in Domain 4. Mandate and powers.

### Domain 1: Independence and the ability to work without pressure

NHRI	General score ↓ <i>min: 0; max:2</i>
Commissioner for Protection against Discrimination (CPD)	1.30
Information and Data Protection Commissioner (FA)	1.22
Ombudsperson	1.20
Information and Data Protection Commissioner (DP)	1.00

The CPD ranks highest of all NHRIs in Albania on independence and ability to work without pressure with a score of 1.30, followed by IDP scoring 1.22 on its mandate for freedom of access. The Ombudsperson received a score of 1.20, and finally, the IDP received a score of 1.00 on its mandate for data protection.

All institutions across the board present a strong **independent statutory basis**.<sup>50</sup> All the NHRIs are established under a law passed by the legislature, whereas the Ombudsperson is also a constitutional institution. A fall-back can be seen, however, in the **appointment process** of the NHRIs<sup>51</sup> but the procedure is not fully transparent and devoid of political influence. However, the IDP appears to score the lowest in this category, with a score of 0 (zero) as the appointment and finances of the Commissioner involve the executive (Council of Ministers).<sup>52</sup> The CPD and the Ombudsperson have **more precise criteria for membership**,<sup>53</sup> scoring 2 points in this category, unlike for the IDP, for which the requirements are generic and do not focus on the unique expertise required,<sup>54</sup> hence receiving only 1 point. All these institutions have set up favourable **terms of office** to allow the appointed members to hold positions longer than the duration of a term of office for a particular mandate.<sup>55</sup>

50 The independence of NHRI in Albania is clearly defined in laws and even in the Constitution.

51 Law No. 8454 of 04.02.1999 on People's Advocate, Article 4, Article 9; Law No. 10221, of 04.02.2010 on Protection from Discrimination, Article 23

52 Law No. 9887 of 10.03.2008 on Protection of Personal Data, Articles 36 and 37, respectively.

53 Law No. 8454 of 04.02.1999 on People's Advocate, Article 3; Law No. 10221, of 04.02.2010 on Protection from Discrimination, Article 24

54 Law No. 9887 of 10.03.2008 on Protection of Personal Data, Article 33, Article 35

55 Law No. 8454 of 04.02.1999 on People's Advocate, Article 7; Law No. 10221, of 04.02.2010 on Protection from Discrimination, Article 27; Law No. 9887 of 10.03.2008 on Protection of Personal Data, Article 33

All NHRIs score 1 on provisions that would prevent **conflict of interest**. Different from CPD and IDP, the Ombudsperson enjoys the **immunity** of a High Court judge, thus receiving maximum score.<sup>56</sup> Although all NHRIs in Albania are independent of the executive, it is important to note that the laws pertaining to all these institutions do not *directly* and *explicitly* prohibit **instruction from the government**, creating potential loopholes for interference. Thus, all of them scored 1 point. **Removal** from office is outlined in all respective laws of the NHRIs in Albania. However, removal is not supported by another independent body's decision in all the grounds, creating conditions that make it easier to dismiss NHRIs (all institutions score 1 point). Perhaps it would be beneficial that such a mechanism is prescribed in law to ensure more significant checks and balances over the authority and rights of the NHRIs.

Overall, there are no records of the NHRIs in Albania **submitting to pressure** by the government or any other entities in the period covered with this report. Reports over the last years indicate that there have been no significant cases of NHRIs changing decisions or being pressured to act in any particular way.<sup>57</sup> Perhaps the fact that the executive or other institutions do not feel pressure from these independent institutions might also be an indicator that more efforts need to be done to enforce their recommendations and engage more effectively with the Parliament. This may also explain the citizen's perception that these institutions are not truly **independent** and act as an extension of other government branches instead; as in recent years, less than 50% of citizens perceive NHRIs (across the board) to be independent, causing them to receive 0 (zero) points.<sup>58</sup>

## Domain 2: Availability of resources and capacities

NHRI	General score ↓ <i>min: 0; max:2</i>
Commissioner for Protection against Discrimination (CPD)	1.25
Ombudsperson	1.10
Information and Data Protection Commissioner (DP)	1.00
Information and Data Protection Commissioner (FA)	1.00

Regarding the availability of resources and capacities, the CPD received the highest score (1.25), the Ombudsperson - 1.10 while the two other other NHRIs scored equally (1.00).

NHRIs are not entirely **independent financially**. They rely on the Parliament to provide their core operational budgets and various financial donations. All three institutions have a say on the drafting of budget requests, even though their requests could be dismissed or pending for years. For example, the Ombudsperson's request to enhance human resources of the institution for 2018 was dismissed by the Parliament. It does not have a sufficient budget to handle all the cases of human rights violations appropriately.<sup>59</sup> The CPD still lacks **available resources** to fulfil some basic functions, such as website maintenance and the translation of essential documents in all languages as required by law. Hence, they receive a score of 1.00. The annual budget allocation for the Ombudsperson for 2018 was 116.000.000 ALL (EUR 937,523.44) of which 66% had been spent on salaries, 9% on social and health insurances, 18% on operative expenses, 3 % on the investment, 2% for foreign transfers and 2% for transfers for the family budget<sup>60</sup>. The Ombudsman 2018 budget makes up 0.023% of Albania's 2018 state budget.<sup>61</sup> For 2018, IDP has spent 67.029 ALL (EUR 541,148.00) of the budgetary value, by using up to 97% of the annual plan<sup>62</sup> and CPD used up the total amount of 43.878,02 ALL (354,626.49 EUR), using 91,61 % of the total allocated budget.<sup>63</sup>

In terms of the **sufficiency of human resources**, the capacity of the CPD for 2018 has been strengthened with additional staff – from 23 to 34 in 2018 and an increased budget as well. In addition, the local offices of the PD, opened in three main cities, are now fully operational.<sup>64</sup> Hence the assigned score is 2.00. Nevertheless, the Office of the IDP falls short on human resources. For 2018 the IDP was approved the total number of 37

employees.<sup>65</sup> Given the enhancement of the IDP activity and competences, an increase in capacities was requested for 2018, reasoned in the MTBP by adding at least nine more employees.

The Parliament determines the remuneration of the Commissioner, the organisational structure, and the remuneration for the employees of the IDP and CPD. Unlike many independent constitutional institutions and other independent institutions established by law, Ombudsperson himself determines the structure and organisation.<sup>66</sup> **Recruitment** procedures are not fully independent, as the employees of these institutions enjoy the status of a civil servant. Vacancies are filled pursuant to Law No. 152/2013, "On Civil Servants". This law provides for independent institutions to organize recruitment procedures by themselves, having as responsible unit their own human resources unit.

On the other hand, the Ombudsperson can hire 20% of the staff directly, from out of the system. Differently from 2 other commissioners, the Ombudsperson can make the structure of the institution independently.

Although this procedure seems *de jure* transparent, there is the possibility of the technical staff to be appointed based on political affinity.<sup>67</sup> In addition, the lengthy procedures in hiring technical staff due to civil service recruitment procedures/practices can negatively affect the quality and efficiency of NHRIs. Therefore, the total score is 1.00.

The composition of members and staff of Ombudsperson and CPD reflects the diversity in society to some extent, so they receive a score of 1. The issues of finances, recruitment and pluralism are also related to the overall human resources in these institutions. Neither of them has established **internal financial control**, but they are subject to regular independent external financial audit by SAI (State Audit Institution).<sup>68</sup> Hence, the score they get is 1.00.

In all the areas of discrimination stipulated by law, the functions of the CPD mandate appear to be covered. However, a few staff has to deal with several issues, leading to overlap and insufficient dedicated personnel for each of the areas that the CPD covers.<sup>69</sup> Therefore, the total score is 1.00. In contrast, the **internal structure and distribution of the responsibilities** of the Ombudsperson cover all parts of the mandate and enable appropriate focus on each part of the mandate.<sup>70</sup>

The Ombudsperson and CPD have established regional offices/sections that allow for **regional outreach**, but do not cover the entire territory of the country. The Local Offices of Ombudsperson have been set up and operate in 7 municipalities of the country, which has enabled an ever-increasing recognition of the role of the Ombudsperson's Institution as a promoter of human rights.<sup>71</sup>

The annual report indicates that the CPD staff has undergone **training** and other professional development activities,<sup>72</sup> however, no training plan has been presented. Training appears to happen *ad hoc*. The internal regulation of the Ombudsperson specifies the obligation for the training programme, but it only has some basic elements of the training module that do not satisfy the criteria.<sup>73</sup> IDP received the maximum score of 2 since it has a working plan for 2018 that foresees a training curriculum including the NHRI members and staff as well as key target groups.<sup>74</sup>

The Ombudsperson and the IDP have their own 2018-2020 strategies with target indicators, working plans for 2018 and a training programme.<sup>75</sup> Although the strategy mentions the importance of the evaluation system, no structured evaluation is in place. The CPD annual report of 2018 states that the Strategic Plan 2018 – 2021 of the institution foresees several objectives, but the strategy is not publicly available.

In sum, we can conclude that this domain is very important for the work performance and independence of the institutions. Ensuring that the NHRIs have adequate and stable funding may have a great impact on their financial independence, which could prevent any unpredictable retaliatory reductions or reallocations in their funds by the state. Sufficient human resources that can enable national outreach would be indispensable for

56 Law No. 8454 of 04.02.1999 on People's Advocate Article 6; Law No. 10221, of 04.02.2010 on Protection from Discrimination, Article 27-28; Law No. 96/2016, on the status of Judges and Prosecutors

57 Note: Arguably the fact that appointment procedures were prolonged was a form of pressure over the institutions, since the institutions exist and operate even without the members that are appointed to head these institutions. Not appointing these members can be a form of exerting pressure over the institution.

58 Regional Cooperation Council, Balkan Barometer (2019), p. 97, Available at: [https://www.rcc.int/download/docs/Balkan-Barometer\\_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf](https://www.rcc.int/download/docs/Balkan-Barometer_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf).

59 Ombudsman. Annual report. 2018, p. 73

60 Ibid.

61 The state budget for 2018 is 496.000.000.000 ALL (EUR 3,958,342,416.37). See [http://www.financa.gov.al/wp-content/uploads/2018/06/Buxheti\\_2018.pdf](http://www.financa.gov.al/wp-content/uploads/2018/06/Buxheti_2018.pdf)

62 IDP. Annual report. 2018, p.38

63 CPD. Annual report. 2018, p.85

64 EU Progress report. p. 28; <http://www.parlament.al/Files/Procesverbale/20190418120858Proc.%20dt%2011.04.2019.pdf>

65 IDP. Annual report. 2018. p. 38

66 Ombudsman. Annual report. 2018. p. 73

67 People's Advocate. Strategic Plan of the People's Advocate of the Republic of Albania 2019-2022. Tirana, 2018

68 See SAI report for Ombudsperson. [http://www.klsh.org.al/web/Rezultatet\\_e\\_kerkimit\\_109\\_1.php?search=avokati+popullit; CPD annual report to the Parliament, p. 25, Retrieved from https://www.parlament.al/Files/Kerkese/20190315144121RAPORTI%20VJETOR%202018%20%20KMD.pdf](http://www.klsh.org.al/web/Rezultatet_e_kerkimit_109_1.php?search=avokati+popullit; CPD annual report to the Parliament, p. 25, Retrieved from https://www.parlament.al/Files/Kerkese/20190315144121RAPORTI%20VJETOR%202018%20%20KMD.pdf); IDP Annual Report for 2018, p. 41

69 [https://equineteurope.org/author/albania\\_cpd/](https://equineteurope.org/author/albania_cpd/)

70 People's Advocate. Strategic Plan of the People's Advocate of the Republic of Albania 2019-2022. pp.13-14, Tirana, 2018

71 Ombudsman. Annual report. 2018, p. 81

72 CPD. Annual report. 2018. p. 83

73 Article 72, <http://www.publeaks.al/wp-content/uploads/2016/12/RREGULLORE-AVP-1.1-7.1.pdf>

74 IDP Working Plan January-December 2018

75 People's Advocate. Strategic Plan of the People's Advocate of the Republic of Albania 2019-2022. Tirana, 2018; IDP Strategy for the right to information and data protection 2018-2020. Retrieved from [https://www.idp.al/wp-content/uploads/2018/02/Strategjia\\_per\\_te\\_Drejten\\_e\\_Informimit\\_dhe\\_Mbrojtjen\\_e\\_te\\_Dhenave\\_Personale.pdf](https://www.idp.al/wp-content/uploads/2018/02/Strategjia_per_te_Drejten_e_Informimit_dhe_Mbrojtjen_e_te_Dhenave_Personale.pdf)

NHRIs to execute their powers and mandate, ensuring full protection of human rights protection.

### Domain 3: Information, access and cooperation with other relevant actors

NHRI	General score ↓ <i>min: 0; max:2</i>
Ombudsperson	1.33
Commissioner for Protection against Discrimination (CPD)	1.20
Information and Data Protection Commissioner (DP)	1.17
Information and Data Protection Commissioner (FA)	0.94

The Ombudsperson ranks highest of all NHRIs in the domain on information, access and cooperation with other relevant actors with a score of 1.33, followed by the CPD with a score of 1.20 and finally the IDP scoring somewhat less (1.17) on its DP mandate and 0.94 on its FA mandate.

Reports of the NHRIs are subject to **parliamentary scrutiny**. They are either on the agenda of the Parliament's plenary sessions or the Committee on Legal Issues, Public Administration and Human Rights.<sup>76</sup> NHRIs as independent institutions are subject to mandatory reporting to the Albanian Parliament.<sup>77</sup> However, the delivery of reports tends to take the form of a presentation of an institution's annual activities, rather than a thorough examination by the parliament. As such, more efforts are needed from the parliamentary committee in terms of scrutinising the work of the NHRIs and providing detailed recommendations in their resolutions for the institutions. When evaluating NHRIs' work, the relevant CSOs should also be consulted. This would enhance the checks and balances system and would allow for greater oversight over independent institutions by the parliament.

There is no explicit obligation of institutions to **consult the NHRIs**, although they can offer recommendations to state institutions on several issues related to their mandate.<sup>78</sup> They can make even legislative recommendations, but they are not mandatory. Therefore, all institutions scored the same - 1.00. For example, according to the Law on the People's Advocate, one of the most important tools that the Ombudsperson has at its disposal is the Special Report to the Parliament. Despite the fact that the Ombudsperson has drafted several special reports, only one has been discussed during a parliamentary plenary session, the Special Report on the rights of LGBTI in Albania deposited on 5 September 2012. Moreover, although the Ombudsperson has access to influence governmental policy through its recommendations and publications, it has no mandate to initiate the law-making process. Therefore, it depends on the willingness of the Assembly and the government to follow up on the recommendations of the Ombudsperson.

In terms of **cooperation with the government**, there were cases of approved legal draft acts and bylaws for which the IDP's opinions were not obtained. Such verification, as stated in other previous reports, is made for the institutions to reflect on the approximation of the legislation they seek to approve with the Law on personal data protection. Following the Official Journals' monitoring, it is noted that five laws, 5 DCMs and 1 Instruction of the Ministry of Education related to personal data have been approved without obtaining the IDP's prior opinion.<sup>79</sup> The executive and other branches/bodies have the general obligation to provide relevant data to the Ombudsperson and CPD.

The three NHRIs evaluated in this report signed a cooperation memorandum drafted under the coordination and with the assistance of the OSCE Presence in Albania. This memorandum aims at strengthening **inter-institutional cooperation** according to the applicable legislation relevant to their specific activities in order to boost effectiveness in upholding human rights and fundamental freedoms by public administration bodies and beyond.<sup>80</sup> The CPD Annual Report 2018 indicates that there have been mutual exchanges with various counterpart institutions, but no other details are provided on the modes of cooperation. In addition, this memorandum was signed in December 2018, thus any developments regarding its implementation would fall outside of the period covered with this report. Therefore, the score is 1.00.

<sup>76</sup><https://www.avokatipopullit.gov.al/sq/articles-layout-1/media/news/institucioni-i-avokatit-te-popullit-prezanton-ne-kuvend-raportin-e-punes-per-vitin-2018-192/>; Ombudsperson Annual report, 2018, p. 14.

<sup>77</sup> Decision No. 49/2017 on Monitoring Independent Constitutional Institutions and Institutions Established by Special Law,

<sup>78</sup> Law No. 10 221 of 04.02.2010 on Protection from Discrimination, Article 3; IDP Annual Report, 2018, p. 28;

<sup>79</sup> IDP. Annual report. 2018, p. 28

<sup>80</sup> Council of Europe. Information on the recent developments in the data protection field. Strasbourg, 11 June 2019, p. 6. Retrieved from <https://rm.coe.int/compilation-final-version/168094ea73>

The NHRIs' annual reports indicate that there have been several **collaborations with CSOs** in the country and abroad. Currently, joint projects are being implemented by the Ombudsperson, IDP, CPD and CSOs, particularly in raising awareness on human rights. All the NHRIs cooperated with CSOs and relevant bodies but not in a well-structured and systematic manner, therefore scoring a 1.00.

The **information** provided in the publications of the Ombudsperson on rights and remedies is limited due to the fact these are not translated into all languages commonly used in the country.<sup>81</sup> Some CPD documents are translated to minority languages such as Roma, Armenian, Montenegrin, Macedonian and Greek.<sup>82</sup> However, several documents are not uploaded to the websites as some links were not **accessible**, and the websites are not updated regularly, so the final score is 1.00. IDP has published information on rights and remedies for its DP and FA in an easy-to-read language.<sup>83</sup> Therefore, it received a score of 2.00. Moreover, IDP(DP), has publicised the **rights of data protection subjects** contained in the Modernised Convention 108,<sup>84</sup> but not the manner of providing assistance to non-residents, so it gained a score of 1.00. Processing of personal data for foreigners is stipulated in more details in the Law for Aliens.<sup>85</sup>

The NHRIs have **easily accessible premises**; online, email and telephone services, but the Ombudsperson and CPD have no flexibility in meeting the time constraints of those seeking access to the services of the body, while the IDP is flexible,<sup>86</sup> thus receiving the highest score (2.00). People with vision impairment cannot access the online portal of the NHRIs not-easy-to-use accessibility tools. The buildings for the CPD are not fully set up to welcome people of all disabilities. Some NHRI information, communications, and other services are accessible to persons with some/any type of disability. Therefore, the score for accessibility to persons with disabilities is 1.00.

The Ombudsperson in the Republic of Albania has a broad mandate, which includes Children' Ombudsperson. Article 54 of the Constitution of Albania give special protection to children and young persons, and therefore the rights of minors and youth represent a particular category for protection, which constitute part of the mandate of the Ombudsperson. The Ombudsperson is a member of The National Council for the Rights and Protection of the Child. The Ombudsperson is entitled to monitor the enforcement of the law for the protection of children.<sup>87</sup> It also stipulates that the Ombudsperson has the right to access facilities where children are living.<sup>88</sup> In that respect, the Ombudsperson received the highest score.

On **membership in relevant international organisations/networks**, all NHRIs received a high score of 2. The CPD is a member of EQUINET. IDP is member of the Executive Committee of the ICPDPC, as well as of the Consultative Committee of the Convention 108 (T-PD Committee), the observer in the European Personal Data Protection Board.<sup>89</sup> The Ombudsperson is a member of GANHRI, AOM ENNHRI, ENOC, and CRONSEE. Therefore, they all received the highest score.<sup>90</sup> The Ombudsperson and CPD received the highest score of 2 for participating in more than seven relevant **international events**. Whereas, IDP received a medium score of 1 for participating in five international activities concerning data protection and 0 for the right to information.

None of the NHRIs has a customised **communication strategy**, scoring 0 in this indicator. Some elements of the communication are present in the strategic plans of the NHRIs, but they do not have the key elements of a communication strategy, such as context, target groups, key messages, or channels.

The IDP has a code of ethics specifying **professional secrecy** rules that are obligatory for members and staff during and after the term of office/service. The principles of confidentiality for the Ombudsperson are set in the Law No. 8454, of 4 February 1999 on People's Advocate, Article, 2/12 and also are part of the institution Internal regulation,<sup>91</sup> while CPD relies on the law on whistle-blower protection.<sup>92</sup> Yet, it should be noted that the implementation of Law on whistle-blower protection lags far behind, due to lack of safeguard to protect whistle-blowers against arbitrary removal or retaliation from the state authorities.<sup>93</sup> Therefore, the Ombudsperson and

<sup>81</sup> <https://www.avokatipopullit.gov.al/sq/complaint/create>; <https://www.kmd.al/?lang=en>

<sup>82</sup> <https://kmd.al/wp-content/uploads/2019/06/law-leaflet-romani.pdf>

<sup>83</sup> <https://www.idp.al/broshura-mbrojtja-e-te-dhenave-personale/>;

<sup>84</sup> <https://www.idp.al/broshura-mbrojtja-e-te-dhenave-personale/>; <https://www.idp.al/per-subjektin-e-te-dhenave-te-dhenave-tuaja/>; [https://www.idp.al/wp-content/uploads/2016/11/fletpalosje\\_kdimdp.pdf](https://www.idp.al/wp-content/uploads/2016/11/fletpalosje_kdimdp.pdf)

<sup>85</sup> [https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA\\_Law%20No%20108%20on%20Aliens.pdf](https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Law%20No%20108%20on%20Aliens.pdf)

<sup>86</sup> IDP has a green number and an android application where people can file a complaint.

<sup>87</sup> <http://femijet.gov.al/wp-content/uploads/2017/06/Law-No-18-2017-On-the-rights-and-protection-of-the-child.pdf>; IDP Strategy 2019

<sup>88</sup> Law No. 8454, of 4 February 1999 on People's Advocate, Articles 19 and 31

<sup>89</sup> IDP. Annual Report. 2018. p. 35

<sup>90</sup> Ombudsman. Annual report 2018, pp. 163-169

<sup>91</sup> Article 65, p. 38. <http://www.publeaks.al/wp-content/uploads/2016/12/RREGULLORE-AVP-1.1-7.1.pdf>

<sup>92</sup> Law No 60/2016 on the protection of whistle-blowers, Article 17, states that all institutions must ensure that whistle-blowers identity is preserved.

<sup>93</sup> <https://see-whistleblowing.org/2017-annual-report-shows-scanty-results-on-implementation-of-the-law-on-whistleblowing-in-albania/>



the IDP received a higher score (2.00) other than the CPD which received 1.00.

#### Domain 4: Mandate and powers

NHRI	General score ↓ <i>min: 0; max:2</i>
Information and Data Protection Commissioner (FA)	1.50
Information and Data Protection Commissioner (DP)	1.38
Commissioner for Protection against Discrimination (CPD)	1.33
Ombudsperson	1.04

The IDP ranks highest of all NHRI institutions on aspects pertaining to its mandate and powers, with a score of 1.50 for its FA mandate and 1.38 for its DP mandate, followed by the CPD with a score of 1.33 and finally the Ombudsperson, scoring the lowest 1.04.

This domain is rather unique, because the mandate and powers of each NHRI are different as they are established to serve citizens under distinct characteristics ranging from *discrimination, human rights, transparency and accountability, and privacy*. This is the reason why scores regarding certain aspects of the mandates are unique to some NHRIs.

Overall, the IDP receives a score of 1 point on its ability to monitor and oversee the application of its mandate.<sup>94</sup> It has a *partial mandate* and powers to **monitor and oversee** issues related to *freedom of information*, but a full legal mandate to **monitor and enforce** issues related to privacy (data protection) – the difference being that decisions made under the capacity of the latter, are legally binding. On issues pertaining to access to information, the IDP can only provide recommendations.<sup>95</sup> **Promotion** of human rights and their ‘areas of responsibility’ is also presented under different standards for each of the NHRIs. The IDP and CPD have the authority to promote and conduct training on the issues they cover, but they are not legally mandated to do so, thus scoring 1 point; while the Ombudsperson does not have a legal mandate to promote legislation with international standards (receiving 0 points), although in practice it does.<sup>96</sup> Furthermore, the CPD and IPD are the only two NHRI institutions which attempt to **harmonise** practices with international instruments; however, it must be noted that these institutions are not legally obliged to do so. The IDP scores 2 points for its extensive use of publications and promotional events while the CPD received only 1 point.

Both the CPD and Ombudsperson **cover** the public sectors, albeit with some limitations for the Ombudsperson (supervision of the President, Prime Minister and military orders of an operational nature).<sup>97</sup> Nonetheless, both institutions receive 2 points on this criterion. The Ombudsperson has the power to conduct **investigations**, evaluate **complaints**, and have free **access to courts** and other public institutions when it is in the interest of protecting human rights – 2 points in all areas.<sup>98</sup> The CPD however, as per its mandate, can offer independent assistance on **strategic litigations**, **represent** individuals in courts and offer **recommendations** which are not legally binding.<sup>99</sup> However, for both of these institutions, less than 90% of their recommendations have been **followed up**, receiving a score of 1 point. With regards to the NHRI’s **advisory** role to the national governments, all of them have been active in submitting various initiatives. The Ombudsperson has submitted only 3 initiatives recently, whereas all CPD have submitted more than five recommendations to national authorities.<sup>100</sup> On the other hand, IDP has submitted two initiatives for its mandate on data protection and three for its mandate on free access.<sup>101</sup>

**Complaints** handled by the CPD are free of charge and can be submitted in all the languages commonly used in the country, either orally, online or in written form, for which the institution receives 2 points.<sup>102</sup> The same thing applies to the Commissioner on the Right to Information, however, its decisions are not binding in this case. IDP has recently announced an Android app for complaints handling, which is quite an innovative strategy to reach **larger audiences**. When acting under the capacity of the Commissioner for Personal Data Protection, decisions

94 Law No. 9887 of 10.03.2008 on Personal Data Protection, Article 30 (stipulating full powers on data protection)

95 Law 119/2014, on the Right to Information, Article 24

96 People’s Advocate Strategy of 2018-2020, CPD Annual Report, p. 73, <https://kmd.al/wp-content/uploads/2019/03/RAPORTI-VJETOR-2018.pdf>; IDP Annual Report p. 32/38

97 Law No. 8454, of 04.02.1999 on People’s Advocate, Article 25

98 Ibid., Article 14, Article 24

99 Law No. 10221, of 04.02.2010 on Protection from Discrimination, Article 32 (competences)

100 People’s advocate, <https://www.avokatipopullit.gov.al/sq/list/publications/rraporte-speciale-1/>; CPD Annual Report, <https://kmd.al/wp-content/uploads/2019/03/RAPORTI-VJETOR-2018.pdf>, p. 73

101 FOIA request to the IDP

102 Law No. 10221 of 04.02.2010 on Protection from Discrimination, Article 32 and Article 33

made on complaints are binding.<sup>103</sup>

The Ombudsperson has done a good job in delivering at least the annual report, and three special **reports** in the past year (2 points),<sup>104</sup> however, it has not submitted any contributions to **international bodies** (0 points). On the other hand, although the CPD can deliver **independent surveys**, it has neither done so in the past year (1 point), nor does it include **independent research** for its reports (0 points); but the CPD has several **submissions to international bodies** (2 points).<sup>105</sup>

The **national prevention mechanism** and the **rights of children** which are unique to the Ombudsperson are two well-regulated instruments in law. However, the law is a bit vague on whether the Ombudsperson can take cases to court on issues pertaining to the rights of children (2 points and 1 point, respectively).<sup>106</sup>

Perhaps the area in which all NHRIs scored the poorest is **public trust**, where recent surveys indicate that less than 50% of citizens trust NHRIs in general. All institutions scored 0 points in this domain, which should be a concerning outcome as it indicates both a lack of understanding of these institutions by citizens and disregard for the importance of their work.<sup>107</sup> The most recent **assessment** of the European Commission “the Ombudsman, the Commissioner for Protection against Discrimination and other independent institutions still face the poor implementation of their recommendations by the Albanian administration”.<sup>108</sup>

## RECOMMENDATIONS

On the basis of the ranking, the main findings and the main challenges established, we developed a set of recommendations. These refer to the national authorities (the Parliament and the Government, and the NHRIs), international actors (European Unions and others) and CSOs.

### NATIONAL AUTHORITIES

- **Parliament**

**Increase the human capacities and financial resources of the independent institutions** that play the role of protecting people who are in charge of the protection of human rights. Adequate funding and human resources of the offices are essential to strengthen their capacities to examine complaints and to undertake awareness-raising activities to ensure the prevention of any discrimination and thus implement the principle of equal treatment.

**Financial resources capacities: NHRIs should be provided with adequate and sustainable funding to carry out their extended mandate.**

**Human resources capacities: Enhance human resource capacities by adding technical staff** to fulfil their activities. In particular, on the protection of personal data, the capacities of the IDP need to be adequate to perform its tasks effectively. The capacities of local offices for the Ombudsperson and CPD need to be increased to ensure that they can function satisfactorily and expand their outreach.

**Strengthen the collaboration with NHRIs**, particularly with Parliamentary Committee.

Increase IT Capacities in order to increase the effectiveness and efficiency of the NHRIs especially pertaining to increasing the access for the public in these institution.

**More elaborated safeguarding measures are necessary to be set in the law** to avoid any arbitrary dismissals of the SA. Provisions should make clear that SA could be dismissed only under certain specific circumstances stipulated by law.

**Set up specific regulations to ensure merit-based recruitment, code of ethics for the appointment of the NHRIs’ technical staff.** The amendments should provide for the more transparent and inclusive selection of candidate commissioners. Stability of the staff could be further guaranteed through the right of the SAs to appoint their own staff.

The parliament should **engage more efficiently with NHRIs by employing more expertise in assessing the**

103 Law No. 9887 of 10.03.2008 on Protection of Personal Data, Article 14

104 People’s Advocate, Official website <https://www.avokatipopullit.gov.al/sq/list/publications/rraporte-vjetore-2/>

105 Law No. 10221, of 04.02.2010 on Protection from Discrimination, Article 32; CPD Annual Report, <https://kmd.al/wp-content/uploads/2019/03/RAPORTI-VJETOR-2018.pdf>

106 Law No. 8454, of 04.02.1999 on People’s Advocate, Article 31 and Article 19, respectively

107 Regional Cooperation Council, Balkan Barometer 2018: Public Opinion Survey, <https://www.rcc.int/download/docs/PUBLIC%20OPINION%20-%20RCC%20Balkan%20Barometer%202018.pdf/b56d30eb1af53ab00d6eb30cfbad304.pdf>

108 European Commission, Albania 2019 report. <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-albania-report.pdf>

**annual reports of NHRIs.** The relevant expert CSOs and watchdogs and their reports on the work of NHRIs should be effectively consulted.

**Vest NHRIs with the power to enforce their decisions.** The Commissioner for the Right to Information should refrain from its “soft reaction” in charging sanctions to violators and apply stronger measures in cases of freedom of information breaches.

The **NHRIs should be appointed following a transparent recruitment process by setting clear rules and procedures (open nominations).** The responsibility for conducting the nomination and selection process can be delegated to a representative committee of experts, which can prepare a shortlist of possible candidates or the Government can at least consult with an external pool/committee of independent experts to obtain their input for the candidates. The Parliament makes a final decision, based on specific merit-based criteria. This procedure should be made in time to ensure that pending decisions do not hamper NHRIs’ work for the election of the Commissioners.

Amend the law on the freedom of information to **make the IDP’s decisions enforceable.**

**Continuously work with NHRIs to improve the legal basis in accordance with the changing social and political dynamics.** Further, include NHRIs in the decision-making on laws pertaining to human rights issues.

**Improve the level of implementation of the recommendations of NHRIs** and diligently monitor their implementation by institutions.

- **Government**

**Enhance the authority of NHRIs in proposing strategies and action plans.** Invite them more frequently and effectively to comment on governmental legislative initiatives, draft legislation and reforms affecting their areas of competence before these are submitted to the Parliament. They should always be informed or notified to give their opinions on draft laws and bylaws concerning the issues they cover in their mandate.

The public bodies should **proactively involve interested parties and stakeholders not only in the notification of the draft-acts** but also systematically during the initial process of drafting the relevant acts.

Consider an increase in NHRI’s budget before proposing it to the Parliament for approval.

The Government should **establish a harmonised and comprehensive policy system that would somehow introduce more participatory approaches to involve NHRIs in the policy-making process,** monitoring and partnership with the government.

**Increase the capacities of all NHRI across the board to make them more accessible to the public and more present in monitoring public decision-making.**

Improve the level of implementation of the recommendations of NHRIs and diligently monitor their implementation by institutions supervised by the Council of Ministers.

- **National Human Rights Institution**

NHRIs should **strengthen their efforts to ensure more systematic follow-up and implementation of their recommendations, especially by public institutions.** The fact that there is a high number of recommendations that remain unimplemented or partially implemented creates distrust in the work of these institutions. NHRIs should establish tailor-made mechanisms and indicators to measure the impact of their recommendations or the extent to which the administration authorities consider their recommendations. In addition to these, in cases when they believe that certain legal provisions are unconstitutional, they should make more efforts to appeal to the Constitutional Court (despite its pending decisions in the last few years).

NHRIs should **establish internal audit structures** to strengthen their internal accountability.

**More efficient coordination mechanisms should be established to ensure more meaningful and consistent engagement between CSOs, the government and NHRIs.** NHRIs should try to put in place more concrete initiatives that aim to engage stakeholders through establishing partnerships with external actors (NGOs and other) to receive complaints without compromising the institution’s independence.

NHRIs should **establish a more comprehensive and tailor-made communication strategy** with key indicators

to better promote their active role. The strategy should promote their human rights activities through coverage in the media. IDP publishes a briefing/newsletter on developments in the field of data protection and information. Ombudsperson and CPD should follow similar models to reach a larger audience and raise public awareness.

The NHRIs are encouraged to **issue more thematic periodic reports and opinion papers on specific human rights issues** or prepare policy briefs and other policy documents on the observations on legislation or policies. In addition, more efforts are needed so they would provide advice and reactions on their initiative (*ex officio*) regarding legislative acts and other measures to protect human rights, irrelevant of the request from both private citizens, the executive and the legislature.

**More efforts need to be invested by the NHRIs to ensure that mechanisms for complaints handling are easily accessible and reachable to all persons, including those with disabilities.** IDP application for the complaint handling mechanism is an innovative initiative that could be used more efficiently. More joint efforts should be made to include complaints received by Ombudsperson and CPD. The application could reach a larger audience and be more effective if all the complaints are registered in the system and then delivered to the respective institution in accordance with its mandate.

They must **expand their research capabilities to deliver higher quality and more frequent reports on their work.** The NHRIs should rise to their role of being champions of HR in Albania by consistently advocating for enhanced HR for Albanian citizens. NHRIs must become a credible voice for citizens.

There should be more cases of mutual assistance with other SA by exchanging relevant and useful information and cooperating.

NHRIs should **promote and contribute more to the socialisation of international human rights norms and standards into domestic practices.** For example, more efforts need to be done from IDP to align the personal data protection legislation with the General Data Protection Regulation 2016/679 25 and the Police Directive 2016/680.

NHRIs should **be more active in the media and reach larger audiences when promoting preventive approaches to human rights violations.** Restoring public trust in these institutions implies that public entities seriously consider their recommendations.

## INTERNATIONAL ACTORS

- **European Union**

**To continue to support technically and financially the NHRIs in order to enhance their independence and effectiveness.** The EU is encouraged to support the expansion of NHRI mandate through training, exchanges and improved research capabilities as well as by developing projects and offering funding opportunities for CSOs that conduct work in cooperation with independent institutions such as the NHRIs in Albania. Technical and financial assistance should be focussed particularly on issues related to capacity building of the human resources, improving NHRIs infrastructure, such as upgrading the complaints and case management system and related IT systems, with a view to ensure timely monitoring of cases and to enable disaggregation of information as well as aligning domestic laws with international standards.

**To be more explicit, when assessing the effectiveness and enforcement capacity of NHRIs recommendations** on public officials by indicating measurable indicators of the NHRI performance in annual progress reports.

**Include in its progress report reference of public opinion trust** in the independence and efficiency of these institutions.

**Strengthen the conditionality in relation to the issue of human and financial resources** as a crucial issue regarding the independence of the NHRIs.

More efforts are needed to **enhance the role of Parliament in monitoring the implementation of NHRIs recommendations.** This should be done through activities and projects that aim to strengthen parliamentary oversight capacities.

International actors are encouraged to **promote a more comprehensive approach to strengthen the capacities of NHRIs,** particularly that of Ombudsperson and of the Commissioner for Protection from Discrimination in handling cases of human rights violations. This approach should be tailored to meet the needs of these

institutions.

**Actively contribute to experience sharing on relevant human rights issues, or cooperation** through study visits and expert training within the country and abroad.

**Offer financial assistance to help NHRIs conduct independent administrative inspections** in cases of alleged violations and increase local offices outreach.

**Set up an advisory mechanism or body composed of representatives from NHRIs and various human rights institutions, main stakeholders from academia, media, civil society and international partners** in order to discuss and promote relevant human rights topics.

- **NGO**

CSOs are encouraged to **enhance their watchdog role by monitoring the effectiveness of NHRIs**, especially that of Ombudsperson and of the Commissioner for Protection from Discrimination since that is lacking. They should be more proactive to scrutinise their effectiveness by writing more periodic and systematic monitoring reports. Recommendations from the reports could be shared with relevant NHRIs in order to improve their performance

**Conduct public opinion surveys in order to measure public trust** in these institutions as well as their independence and accountability. Annual public opinion surveys provide a path to assess the public’s opinion about NHRIs efficiency.

**Include NHRIs in their strategic plans, mutual collaboration and sustainable partnerships** on various human rights issues they are advocating. These partnerships should be developed through more structured and systematic approaches. NGOs should consider NHRIs as partners in policy interventions when lobbying and advocating for legislative reform, which can be done through roundtables, public hearings, media announcement, policy documents and other. Therefore, NGOs should engage NHRIs not only by inviting them as guest speakers for the welcoming note of public events but also through more concrete initiatives, joint projects and experience sharing.

## Annex: List of indicators

### Domain 1: Independence and the ability to work without pressure

Ombudsperson	EB	SADP	FAI
Independent statutory basis	Independent statutory basis	Independent statutory basis	Independent statutory basis
Appointment process	Appointment process	Appointment process	Appointment process
Clear criteria for membership	Clear criteria for membership	Clear criteria for membership	Clear criteria for membership
Term of office	Term of office	Term of office	Term of office
Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest
Immunities	Immunities		
No instruction from the government	No instruction from the government	No instruction from the government	No instruction from the government
Removal	Removal	Removal	Removal
Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure
Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI

### Domain 2. Availability of resources and capacities

Ombudsperson	EB	SADP	FAI
A separate and independent budget	A separate and independent budget	A separate and independent budget	A separate and independent budget
Adequate financial resources	Adequate financial resources	Adequate financial resources	Adequate financial resources
Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures
Sufficient human resources	Sufficient human resources	Sufficient human resources	Sufficient human resources
Adequate human resources	Adequate human resources	Adequate human resources	Adequate human resources
Financial control	Financial control	Financial control	Financial control
Pluralism	Pluralism		
Training	Training		Training
Internal structure will enable focus on each part of the mandate	Internal structure will enable focus on each part of the mandate		
Regional offices/outreach	Regional outreach/offices		
Learning and change	Learning and change	Learning and change	Learning and change

### Domain 3. Information, accessibility and cooperation with other relevant actors

Ombudsperson	EB	SADP	FAI
Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny
Providing information to the NHRI	Providing information to the NHRI		
Cooperation with government	Cooperation with government	Cooperation with government	Cooperation with government
Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRI	Cooperation with other NHRI
Cooperation with NGOs	Cooperation with relevant bodies and NGOs	Trans-national cooperation with other SAs	Cooperation with NGOs
Providing information on rights	Providing information on rights	Providing information on rights	Providing information on rights
		Information on rights and assistance to data subjects	
Accessibility	Accessibility	Accessibility	Accessibility
Accessibility to children			
Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities
Membership in international networks	Membership in international networks	Membership in international networks	
Participation in international activities	Participation in international activities	Participation in international activities	Participation in international activities
Communication strategy	Communication strategy	Communication strategy	Communication strategy
Confidentiality and protection	Confidentiality and protection	Professional secrecy	

### Domain 4: Mandate and powers

Ombudsperson	EB	SADP	FAI
		Monitoring and enforcement	Monitoring and oversight
Human rights promotion	Promotion and prevention	Promotion	Promotion
Promotion of harmonisation with international HR instruments and implementation			Promotion of pro-active dissemination
Mandate - coverage of sectors	Coverage of grounds of discrimination		
	Coverage - area		
	Equal treatment of all persons without discrimination on the grounds of sex		
Human rights protection-powers - investigation	Independent assistance - mandate	Investigations	
Human rights protection-powers - access	Independent assistance - strategic litigation		
Human rights protection-powers - complaints	Independent assistance - issuing recommendations and legally binding decisions		
Human rights protection-powers - courts			
Follow-up of recommendations	Follow up on recommendations		
Initiatives to national authorities	Initiatives to national authorities	Advisory Role	Advisory Role
	Complaints submission	Complaints handling	Complaints handling
	Complaints submission - language		Complaints submission
	Complaints submission - free of charge		Complaints submission - free of charge
	Independent surveys	Regulatory functions/ authorisations	
Reports	Independent reports		
Submission of contributions to international bodies	Submission of contributions to international bodies		
National prevention mechanism			
Rights of the child			
Public opinion on public trust in NHRI institution	Public opinion on public trust in NHRI institution	Public opinion on public trust in SA institution	Public opinion on public trust in SA institution
Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

Country Report  
Bosnia and Herzegovina

WHAT IS BEHIND AND  
BEYOND THE  
AVERAGE?

Country Report  
Albania



**Effectiveness of NHRIs in Western Balkan countries**  
Albania, Bosnia and Herzegovina, Kosovo,  
Montenegro, North Macedonia, Serbia

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## Country Report **Bosnia and Herzegovina**

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

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Aida Malkić

November 2020

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## List of Acronyms and Abbreviations

<b>ALB</b>	Albania
<b>BIH</b>	Bosnia and Herzegovina
<b>CoE</b>	Council of Europe
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CJEU.</b>	Court of Justice of the European Union
<b>CRD</b>	Convention on the Rights of the Child
<b>CRD</b>	Civil Rights Defenders
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GANHRI</b>	Global Alliance for National Human Rights Institutions
<b>GDPR</b>	General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)
<b>EPI</b>	European Policy Institute - Skopje
<b>EU</b>	European Union
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>MS</b>	Member States
<b>NGO</b>	Non-governmental Organisation
<b>NHRI</b>	National Human Rights Institutions
<b>NE</b>	National Expert
<b>OHCHR</b>	The UN Office of the Commissioner for Human Rights
<b>OP-CAT</b>	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>OSCE</b>	Organisation for Security and Co-operation in Europe
<b>PDPA</b>	Personal Data Protection Agency (the Agency)
<b>SA</b>	Supervisory Authority
<b>UN</b>	United Nations
<b>UNHRC</b>	UN Human Rights Committee
<b>WB</b>	Western Balkans

## INTRODUCTION

The post-Dayton Bosnia and Herzegovina faced the challenges of introducing the concepts of democracy and human rights protection within the war-torn and deeply divided society. The burning issues regarding human rights, and the newly established democratic processes that led to the increase in the number of NGOs working on human rights and marginalised groups seeking their rights, called for the establishment of the independent structures for the protection of human rights.

In such a climate, the establishment of the national human rights institutions posed several challenges to their mandate and power. The first national human rights institutions were established as entity-level institutions, and only later, by merging them, the Institution of Ombudsman was formed at the level of the state. To cater to the political and social division, the institution established offices in Banja Luka (head office), and several field offices. The merger of the separate entity-level ombudsman institutions into one state-level centralised institution led merging of their mandates and the loss of a clear division of mandates between the departments and heads of the institution. This resulted in a certain prioritisation of human rights issues they tackle.

Despite this integration and the confirmed human rights mandate of the Ombudsman Institution, the politics still play a major role within the institution. It is reflected in, for example, the appointment of the ombudspersons from each of the constituent people, but also in the decision-making process that requires all three ombudsmen to agree on a decision which translates into the inability to reach a decision regarding human rights in the more political cases.

Despite the broad mandate of the Ombudsman Institution, the developments in the work of the institution, democratic tendencies and human rights standards indicated the necessity to introduce other institutions with a mandate to protect and safeguard human rights in different aspects of public and personal life. One of the areas identified was the protection of personal data. Even though the state level the Personal Data Protection Agency was envisaged under the Law on Data Protection the same year the Law was adopted, the Agency started its work a year later as the central institution for monitoring of personal data protection.

The research on the national human rights institutions in Bosnia and Herzegovina is relatively scarce. It is mostly done either by the international organisations/bodies who engage in NHRIs' capacities raising, in a rather limited scope to meet their needs or by local NGOs and think-tanks that would assess the political and institutional position of the NHRIs, their capacities and dedication to human rights protection work. Thus, more effort needs are needed to evaluate the efficiency of the human rights institutions and look into the level of compliance with international standards to identify systemic challenges and ways forward in addressing them.

This report is produced as part of a regional research effort to assess the effectiveness of human rights. The effectiveness of NHRIs was measured against a predefined set of indicators developed by Civil Rights Defenders and the European Policy Institute – Skopje. Following the first part of the research on Montenegro, North Macedonia and Serbia conducted in 2019, the research this year covers the three remaining countries from the Western Balkans region – Albania, Bosnia and Herzegovina and Kosovo. It is the first comparative research of this kind in the region. Independent experts from all Western Balkans countries carried out the country research, based on the specific Methodology, elaborated for this project.

The report focuses on the findings from the research on the effectiveness of the NHRIs in Bosnia and Herzegovina. The research specifically focused on the effectiveness of the selected institutions, using the Methodology outlined in the next section. After a brief overview of these institutions, we will present the research findings on the systemic challenges and shortcomings that hinder the work of the NHRIs for each of the effectiveness domains: independence and ability to work without pressure; availability of resources and capacities; information, accessibility and cooperation with other relevant actors; and mandate and powers. The final section includes a set of recommendations targeted at various stakeholders.

## APPROACH AND METHODOLOGY

Within the scope of this research, effectiveness was defined as “the capability of the NHRI to independently perform its mandate and powers, with the aim to make a significant impact on the achievement of human rights”.

In the given context and current state of development of research on NHRIs in the Western Balkans, an approach to measuring effectiveness that combines the structural and the mandate-based approach was applied. The structural approach focuses on the compliance of NHRI with the main legal norms, or the institutional safeguards. The mandate-based approaches are performance-based and focus on the success in performing the mandate of the NHRI.

A matrix of indicators was developed,<sup>1</sup> structured per four domains:

- (1) Independence and ability to work without pressure,
- (2) Availability of resources and capacities,
- (3) Information, accessibility and cooperation with other relevant actors, and
- (4) Mandate and powers.

The values of indicators were weighed, depending on the number of indicators per domain (which ranged from 7-12). In addition, some indicators have been broken down to sub-indicators, to capture the specifics of a particular issue, which depended on the level of detail of the relevant international standard. The indicator per domain is estimated as a sum of the measured values of indicators in the domain. The overall score of effectiveness for each NHRI in each country is estimated as a sum of the indicators per domain. Each domain participates equally in the final score – 25%. Consequently, the scale of the score per country per body is 0-8. If an NHRI body is a multi-mandate body, it is scored in terms of each mandate, while its score as an institution is estimated as an average of the sum of its scores for each mandate.

An overview of the matrix is presented in Attachment 1.

The basis for developing the indicators were the relevant international standards and their interpretations. The Paris Principles<sup>2</sup>, or more precisely the GAHNRI General Observations<sup>3</sup>, are taken as a basis for the indicators for human right institutions with the general mandate. The basis for specific indicators were the UN relevant standards related to the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>4</sup>, the Convention on the Rights of the Child (CRC)<sup>5</sup>, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>6</sup>, and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)<sup>7</sup> and especially their interpretations.

The EU Commission Recommendation of 22 June 2018<sup>8</sup>, the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the CoE, as well as the Revised General Policy Recommendation No. 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE<sup>9</sup> were the European standards taken as a basis for indicators for equality bodies.

The EU General Data Protection Regulation (GDPR)<sup>10</sup> and the CoE Convention 108+<sup>11</sup> are taken as main standards for setting the indicators for data protection supervisory authorities. In the absence of specific international standards for an independent body on free access to information, the general standards for NHRI were accordingly applied, while specific international standards on content of the right to information<sup>12</sup>, as well as documents developed by special rapporteurs for freedom of expression in the UN, CoE and OSCE, were the basis for the indicators on powers and mandate.

The year 2018 is taken as a baseline for the research – the same as in the research done for the other three countries in the region in 2019, in order to ensure comparability.

<sup>1</sup> A detailed explanation of the Methodology is available in the Comparative Analysis, published alongside the reports.

<sup>2</sup> UN General Assembly, Resolution A/RES/48/134 (1993).

<sup>3</sup> Global Alliance for National Human Rights Institutions, General observations of the Sub-Committee on Accreditation, adopted by GAHNRI Bureau, 21 February 2018 (2018). Available at: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf); accessed on 7 August 2019.

<sup>4</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (1996).

<sup>5</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (1989).

<sup>6</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I (2006).

<sup>7</sup> UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, A/RES/57/199 (2002).

<sup>8</sup> Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, C/2018/3850, OJ L 167 Ch I, (2) (2018).

<sup>9</sup> Council of Europe, ECRI, General policy recommendation no. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CRI(2018)06 (2017).

<sup>10</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), (2016) OJ L 119.

<sup>11</sup> CoE, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), 10.10.2018 (2018).

<sup>12</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (1966); CoE, Convention on Access to Official Documents, CETS 205, 11 June 2008 (2008).



## OVERVIEW OF NHRIS IN BOSNIA AND HERZEGOVINA

In this section, we briefly present a short history of the NHRIs, their basic mandate and composition, and any significant developments of relevance for their effectiveness. This overview shows that both the Institution of Human Rights Ombudsman/Ombudsmen of BiH and Personal Data Protection Agency in Bosnia and Herzegovina face similar problems hindering their ability to implement their mandates fully. Their independence and ability to work without pressure are endangered due to legal obstacles related to their financial independence and immunity in their work, and the fact they do not have enough financial and human resources to respond to institutional needs adequately which affects their work with their beneficiaries. Shortage in available resources also influences their outreach towards different local and international actors and tailoring the information to fit their needs. Accessibility remains an issue for both institutions.

The **Institution of Human Rights Ombudsperson(s) of BiH** is an independent institution with a broad mandate related to protection and promotion of human rights - serving as the national human rights institution, equality body and supervisory body on the freedom of access to information. The institution started to operate in 1996, as defined by Annexes IV and VI of the General Framework Agreement on Peace for Bosnia and Herzegovina (concluded in 1995), constituting the BiH Human Rights Commission, together with the Human Rights Chamber. The Ombudsman Institution known today was formed by uniting the three ombudsman institutions. The legal basis for its work is found in the BiH Constitution and the Law on Ombudsman - which was first adopted in 2000, with amendments in 2002, 2004 and 2006. The Ombudsman institution is in charge of both reviewing the individual complaints and the ex officio review of HR violations in Bosnia and Herzegovina. It issues recommendations in cases where the violations are obvious. The institution monitors the work of public institutions and the state institutions in breach of human rights at all levels in BiH. It prepares annual and special thematic reports on the state of human rights in BiH.

The institution is run by three ombudspersons, each from one of the constituent people, and they are elected by the Parliamentary Assembly of BiH (for the term of 6 years). Although it is not stipulated under the Law on the BiH Ombudsman that the ombudspersons must be from the constituent people, so far, all of the ombudspersons were elected in such manner, and no person belonging to the category of others was proposed to this office. This structure affects the independence and conditions the Institution to shy away from political issues, but it also influences its efficiency. The consensus from all three ombudspersons is needed to adopt every complaint, proposition, report and decision, and there is no mechanism to resolve the issue when consensus cannot be made. The issues of capacities, both the HR and the financial ones, continuously hinder the work and the independence of the Institution. The multiyear practice has shown that the Ombudsman Institution does not have any influence over the drafting of the annual BiH state-level budget. The draft Budget is entirely developed and proposed to the Parliamentary Assembly by the Ministry of Finances which has on several occasions cut down the budget for the Ombudsperson Institution. The budget cut rendered this institution incapable of fulfilling its legal responsibilities - in terms of conducting research, proposing legal solutions and enhancing the existing standards of protection of human rights. The failure to amend the Law on Ombudsman has also prevented the Institution to be accredited as the National Preventive Mechanism in line with the UN Convention Against Torture. There have been attempts to push for the new legislative proposals to secure financial independence of the Institution and recognise it as the National Preventive Mechanism, but without much success. In order to resolve the issue of financial independence, several legislative proposals have been considered by the Parliamentary Assembly and the Council of Ministers of BiH, however, none of them were adopted.

The **Personal Data Protection Agency in Bosnia and Herzegovina** is an independent administrative organisation with authority and scope of powers stipulated under the Law on Protection of Personal Data. The Agency was established in 2006 after the adoption of the Law on Personal Data Protection (amended in 2011). Generally, the legislative framework regulating personal data protection includes the Constitution of Bosnia and Herzegovina, the Law on Personal Data Protection and adopted international documents. The Director of Agency is elected by the Parliament, with the five-year term of office. The Agency has the responsibility of reporting to the Parliament in the form of annual reports.

Over the years of work, the Agency was pointing out the problems regarding financial and human resources. The severe lack of capacities in this respect affects its efficiency in performing its mandate. The insufficient capacities, especially the lack of specialised staff, lead to the obstruction of its essential activities such as inspection controls, complaints procedures, opinions, issuing misdemeanour orders, participation in court proceedings, maintenance of the Central Registry, etc. Also, the lack of funds affects the outreach towards different audiences and influences cooperation with international counterparts and other actors. The Agency, as the central institution for the monitoring of personal data protection, has the mandate to react to proposals,

initiatives, and opinions of other institutions in this regard. Unfortunately, the institutions proposing these initiatives usually fail to engage the Agency in this process and submit their proposals for the expert opinion, which is a systemic flaw that needs to be adequately addressed.

A general overview of the national human rights institutions in Bosnia and Herzegovina shows that their work is burdened with multiple problems which hinder their independence and efficiency. In the section below - State of research on NHRIs, several reports questioning the efficiency of the NHRIs were reviewed and presented to support the overview mentioned above.

## STATE OF RESEARCH ON NHRIS

The research on the national human rights institutions in Bosnia and Herzegovina and their effectiveness is relatively scarce.<sup>13</sup> The majority is done by the international bodies present in Bosnia and Herzegovina with an interest of strengthening these institutions to fulfil their mandates effectively. In addition, there are also several valuable sources provided by the local think-tanks and civil society organisations working in the area of human rights.

In 2018, The Council of Europe published an “Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina”.<sup>14</sup> The authors of the report point out to the fact that the Institution has insufficient resources to fully carry its mandate, particularly in terms of the retention of the existing members and the outdated structure and complex decision-making process. Additional funds should be secured for the staff educational activities. Even though the Institution processes numerous complaints and issues a significant number of recommendations, it is necessary to improve the process to prevent the case backlog and increase the visibility of the recommendations. However, it needs to be presented in a more user-friendly manner. In this regard, the communication strategy should also be drafted. The report also emphasised the need to designate the role of being the National Preventive Mechanism against Torture under the OPCAT. In the mandate of an equality body, the Institution should take a more proactive approach in combating discrimination, revive the practice of publishing annual reports on discrimination in the society and implement more awareness-raising activities. Similar findings related to advocacy and promotional activities were found in the study on advocacy and activities of the Ombudsperson.<sup>15</sup>

The OSCE mission to Bosnia and Herzegovina has conducted assessment on the work of Bosnia and Herzegovina institutions in combating discrimination<sup>16</sup>. This Assessment includes an extensive chapter on the capacities of the Ombudsman institution in fulfilling the equality body mandate. The findings are similar to those found in the CoE report. The Institution needs financial support to operate fully under its mandate. The amendments to the Law on Ombudsman should include the provision of the funds but also its role as the National Preventive Mechanism. The budget increase would also solve the current understaffing issue. Staff capacity building - particularly the Department for the elimination of all forms of discrimination, improvement of the organisational structure and decision-making processes, are emphasised. An outreach to multiple audiences needs improvement, particularly in providing the information and publishing decisions and recommendations, as well as in reporting to the international human rights bodies. The outreach towards the general audience is of particular importance given that OSCE research/public poll on the discrimination in Bosnia and Herzegovina<sup>17</sup> has shown that the general public (9.7%) is mostly uninformed about the work of Ombudsman institution in handling discrimination cases.

The same conclusions on the efficiency of the Ombudsman institutions were found in the research reports published by the Centre for Social Research Analitika. The report on the role of Ombudsman in the system of protection against discrimination<sup>18</sup> points out to the structural issues, lack of financial independence, insufficient funds, non-implementation of the recommendations, the role before the courts, and similar. Analitika's recommendations follow the same logic as the research mentioned above. This overview of the Institution efficiency is also found in the publications “Squaring the Anti-discrimination triangle in BiH: legal framework,

<sup>13</sup> This refers to the research published until 2018, which is in line with the methodological framework.

<sup>14</sup> CoE, Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, May 2018 (2018). Available at: <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>

<sup>15</sup> CoE, Comparative Study and Report on Advocacy Capacities and Activities of the Ombudsperson of Bosnia and Herzegovina, 2018. Available at: <https://rm.coe.int/comparative-study-on-advocacy-capacities-of-the-ombudsperson/16808f13c0>

<sup>16</sup> OSCE Mission to BiH, Assessment of the Work of Bosnia and Herzegovina Institutions in Combating Discrimination. Available at: <https://www.osce.org/files/f/ documents/3/a/414671.pdf>

<sup>17</sup> OSCE Mission to BiH, Discrimination in Bosnia and Herzegovina - Public Perceptions, Attitudes, and Experiences, (2019), p. 19. Available at: <https://www.osce.org/files/f/documents/d/c/448855.pdf>

<sup>18</sup> Hanusic, A., The Ombudsman in the System of Protection against Discrimination in B&H: Situation Analysis and Characteristic Problems, Analitika, Centre for Social Research, 2012. Available at: [https://www.analitika.ba/sites/default/files/publikacije/analitika\\_-\\_report\\_-\\_ombudsman\\_10may2013\\_eng.pdf](https://www.analitika.ba/sites/default/files/publikacije/analitika_-_report_-_ombudsman_10may2013_eng.pdf); [http://www.analitika.ba/sites/default/files/publikacije/analitika\\_-\\_policy\\_brief\\_-\\_ombudsman\\_24april2013\\_eng.pdf](http://www.analitika.ba/sites/default/files/publikacije/analitika_-_policy_brief_-_ombudsman_24april2013_eng.pdf)

policies and practices”, covering the work of the Institution for the periods 2012-2016<sup>19</sup> and 2016-2018<sup>20</sup>.

Not much has been published concerning the mandate of the Ombudsman as the supervisory body for the FAI. Analitika has published the brief “The right of access to information in BiH: towards effective institutional design”<sup>21</sup>, pointing out that the Ombudsman institution does not have the authority to pass binding decisions in cases referring to the right of access to information as it can only issue recommendations. It should have an overview of the number of requests received by public institutions. However, the real-time situation is quite the opposite, since the Ombudsman does not receive this information (through reports), which prevents it from monitoring the implementation of the Law. The promotional activities are also evaluated as insufficient. The brief conclusion says that the Ombudsman institution, with the broad mandate and insufficient capacities, cannot adequately fulfil the mandate of the supervisory body for the FAI.

On the other hand, in the same report, the Personal Data Protection Agency is seen as the one who should take over the role of Information Commissioner. The Agency as an independent institution definitely meets all the requirements necessary for unimpeded oversight of the implementation of the Law on free access to information. The Agency reports directly to the Parliament, which is seen as an additional advantage, its decisions are binding, and it has been active in advocating for the improvement of the implementation of the legal framework regulating the FAI.

Besides the above-mentioned report, substantive analysis on the effectiveness of the Personal Data Protection Agency in Bosnia and Herzegovina is generally missing.

This research is a way forward in filling this research gap. In order to evaluate the national human rights institutions in Bosnia and Herzegovina, we used the effectiveness evaluation matrix by checking the level of compliance with international standards to identify systemic challenges for the effectiveness of NHRIs in Bosnia and Herzegovina. The results are presented in the following section, Research Findings.

## RESEARCH FINDINGS

The research findings are presented per domain, in order to facilitate the reaching of comparative remarks which can encourage mutual learning between the NHRIs. In addition, this enables us to point out the systemic challenges faced by all institutions. Each section starts with a figure presenting the ranking of NHRIs per domain, starting from the institution with the highest and ending with the one with the lowest score.

### General score

NHRI	General score ↓ <i>min: 0; max: 2</i>
The Institution of Human Rights Ombudsman/Ombudsmen of BiH (NHRI, Equality, FAI)	4.29
Personal Data Protection Agency in Bosnia and Herzegovina (PDP)	4.18

By looking into the general ranking, it can be stated that both NHRIs are somewhat similar, with the Ombudsman institution scoring slightly higher (4.29).

Considering that the Ombudsman institution has multiple mandates as a national human rights institution, equality body and supervisory body on FAI, it comes as no surprise that the general score is generally low, due to the lack of financial and human resources. This is particularly visible in work related to free access to information (3.49), where the institution got the lowest scores in the Domain 3. Information, accessibility and cooperation with other relevant stakeholders (0.31) and Domain 4. Mandate and powers (0.63). The PDP is the only institution which scored below 1.5 in Domain 1. Independence and the ability to work without pressure (1.11), since this is what effectively brought its score down. The Ombudsman institution scored the highest as an equality body since its mandate and powers are more indisputable in this regard. The

19 Reljanovic M. et al. Squaring the Anti-discrimination triangle in BiH: legal framework, policies and practices 2012-2016, Analitika, Centre for Social Research, 2016. Available at: [http://www.analitika.ba/sites/default/files/publikacije/kvadratura\\_antidiskriminacijskog\\_trougla\\_a4\\_web.pdf](http://www.analitika.ba/sites/default/files/publikacije/kvadratura_antidiskriminacijskog_trougla_a4_web.pdf)  
20 Radonicic, Dz., Hodzic, E., Izmirlija, M., Squaring the Anti-discrimination triangle in BiH: legal framework, policies and practices 2016-2018., Analitika, Centre for Social Research, 2018. Available at: <https://www.analitika.ba/sites/default/files/publikacije/kvadratura%20antidiskriminacijskog%20trougla%20-%20WEB.pdf>  
21 Voloder, N., Right to information in BiH: Towards effective institutional design, Analitika, Centre for Social Research, 2015. Available at: [https://www.analitika.ba/sites/default/files/publikacije/right\\_to\\_information\\_eng\\_brief\\_-\\_web.pdf](https://www.analitika.ba/sites/default/files/publikacije/right_to_information_eng_brief_-_web.pdf)

position of the Ombudsman concerning the competences and ability to act effectively and independently in its work should be thus reconsidered.

Generally, both institutions scored lower when it comes to the availability of resources to work without obstacles as well as information sharing, accessibility and cooperation with other relevant local and international actors. These two areas call for an intervention.

All these domains are explained in detail in the next four sections.

### Domain 1: Independence and ability to work without pressures

NHRI	General score ↓ <i>min: 0; max: 2</i>
Ombudsman institution (FAI)	1.56
Ombudsman institution (Equality)	1.50
Ombudsman institution (NHRI)	1.50
PDPA (PDP)	1.11

The first domain was intended to capture the institutions’ independence and ability to work without pressures. The Ombudsman Institution (FAI) has the highest score in this domain (1.56) and the Personal Data Protection Agency has the lowest score (1.11).

Having its foundation in the Constitution, the Ombudsman institution has the highest score (2.00) regarding its **independent statutory basis**<sup>22</sup> since its independence is guaranteed under the Constitution and the Law on BiH Ombudsman. The PDPA has achieved a lower score of 1.00, despite its independence being secured by the Law, it does not include all required GDPR provisions. There are no specific rules and procedures for the appointment of the authority regulated within the Law. The provisions of the Law on Personal Data Protection which regulate the appointment of the Director and its deputy fail to regulate the number of terms of office they can serve; the prohibitions on actions, occupations and benefits incompatible with their duty during and after the term of office.<sup>23</sup> Some procedures applied to the PDPA are regulated under the Law on Ministerial and Government Appointments of Bosnia and Herzegovina.

As for the **appointment process**, the Agency received the highest score.<sup>24</sup> An ad-hoc commission is in charge of the whole process, developing a ranking list and delivering it to the Parliament. Although the transparency is not clearly stated in the LPPD, the ad-hoc commission needs to work in line with the Law on Ministerial and Government Appointments of Bosnia and Herzegovina with the transparency clearly stated in Article 3. The Ombudsman Institution is composed of three persons selected by an ad-hoc committee and appointed by the Parliament, but not in a participatory and transparent procedure.<sup>25</sup> The procedure for their appointment is closed for the public, and there is no public debate organised for either citizens or civil society (the exception was made only in 2017 when some NGOs got the opportunity to participate<sup>26</sup>). The ad-hoc group is composed of the parliamentarians who later vote on the three ombudsmen, making this process more of a political than a human rights issue.<sup>27</sup>

Concerning **membership criteria**, the Ombudsman Institution has met the highest standards, and the human rights expertise is clearly specified in the provision defining the membership criteria.<sup>28</sup> As for the PDPA, criteria specify general legal qualification, but not actual data protection expertise.<sup>29</sup>

In regard to **term of office**, both institutions have mandates that are satisfying the highest standards. The Ombudsman has a six-year mandate<sup>30</sup>, whereas the Director of the Agency has a five-year mandate.<sup>31</sup>

22 Article 1, Law on BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.; Annexes IV and VI of the General Framework Agreement on Peace for Bosnia and Herzegovina; BiH Constitution  
23 Articles 1 and 35, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.  
24 Articles 3, 42 and 45, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11; <http://www.parlament.ba/data/dokumenti/ad-hoc-komisije/59815%20Izvestaj%20AZLP%202015.-B.pdf> <http://www.propisi.ba/page/akt/4TQwsAjAohz4nh78h77to=>; <http://www.parlament.ba/Content/Read/84?title=Zajedni%C4%8Dkeprivremene/adhockomisije>  
25 Articles 8 and 9, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.; ANALITIKA – Commentary on the Draft of Human Rights Ombudsman Law)  
26 COMMISSION STAFF WORKING DOCUMENT Analytical Report Accompanying the document Communication from the Commission to the European Parliament and the Council Commission Opinion on Bosnia and Herzegovina’s application for membership of the European Union (COM(2019) 261 final  
27 Commentary on the Draft of Human Rights Ombudsman Law, Analitika – Centre for Social Research, 2016. Available at: <https://www.analitika.ba/publications/commentary-draft-human-rights-ombudsman-law>  
28 Article 11, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.  
29 Article 44, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.  
30 Article 10, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.  
31 Article 43, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

The most considerable difference in the scores among the institutions is noticeable when looking into the **avoidance of conflict of interest** indicator. The Ombudsman Institution has the highest score considering that the Law has a specific provision on avoidance of conflict of interest<sup>32</sup>, whereas the PDPA has no such provision specified in law.

Both the Ombudsman Institution and the Personal Data Protection Agency need to have **immunity and protection against threats and coercion** ensured in their work. Within the Ombudsman Institution, the three ombudsmen are guaranteed immunity, yet the full protection from coercion is not guaranteed.<sup>33</sup>

The work of the Ombudsman Institution is additionally secured through an explicit legal prohibition of interference in their work<sup>34</sup>. At the same time, the law only made a general provision of independence of the PDPA. Thus, the Ombudsman Institution achieved the highest score regarding the criteria of **no instruction from the government**, while the Agency received a medium score.<sup>35</sup>

In regard to the criterion **removal from office**, the general provisions of the laws do not provide enough guarantees either to the Ombudsman<sup>36</sup> or to the PDPA<sup>37</sup> to protect them from arbitrary removal, dismissal and non-renewal of office. Thus, both of the institutions have achieved medium scores. As for the Ombudsman institution, there is room for the manipulation in the removal mechanism, as the Law states that the Ombudsman can be voted out from the position by a simple majority in case of any potential conflict. The provisions regulating the removal from office of the PDPA Director, though seemingly offering protection to the position, still leave enough room for the Parliamentary Assembly to interpret serious misconduct in such way fitting to the interests of the current parliamentary majority and use it to affect the independence of the Agency.

Despite some previous accounts of disruption of work within the PDPA, which were detailed in the 2016 official institutional report, with supporting statements in the media from the Agency representatives following the dispute<sup>38</sup>, however, no similar disruptions were reported in 2018.<sup>39</sup> The Institution of Ombudsman also reported no disruption or pressure in its work in its 2018 report, and nothing could be found in other reports and sources.<sup>40</sup> Therefore, both institutions scored the highest standard under the criteria **submission or agreement to pressure**.

For the **public opinion on the independence of the institutions**, the Institution of Ombudsman scored rather low. We used available public opinion polls for this criterion,<sup>41</sup> which only covered the Ombudsman. The public view on its independence was below 50%, hence a minimal score.

In the area of independence and ability to work without pressure, the key challenges identified refer to tackling the issues of depoliticisation of the appointment of the Ombudsman, as well as making the process more transparent and open to the public debate.

Ensuring the independence of these institutions and their unobstructed work in the field of protection of human rights and personal data, through adequate and clear legal provisions, remains a challenge for both of the institutions. Legal provisions should therefore explicitly cover the conflict of interest within the PDPA, clearly prohibit instructions from the government for the PDPA, ensure protection from arbitrary removal from office, support the institutions in promoting their independence to the citizens to maintain a relationship of trust and improve their public image. The legal provisions should also specify particular data protection experience for the PDP members.

## Domain 2: Availability of resources and capacities

NHRI	General score ↓ <i>min: 0; max: 2</i>
PDPA (PDP)	1.17
Ombudsman institution (Equality)	1.10
Ombudsman institution (NHRI)	1.00
Ombudsman institution (FAI)	1.00

In the availability of resources and capacities domain, the Agency has the highest score of 1.17. The Ombudsman Institution has scored 1.00. However, the Institution as EB, with its Department for the elimination of all forms of discrimination, scored 1.10.

Both institutions have their **separate budget line, and the Parliament decides on the budget**.<sup>42</sup> As for the Ombudsman Institution, its financial independence is hindered by the fact that it is not fully involved in **budgetary preparations**.<sup>43</sup> The Institution has to submit a proposal to the Ministry of Finance of BiH, allowed to modify the proposal, depending on what it considers as realistic and achievable in that budget year. Only the modified budget is sent to the Parliamentary Assembly of BiH for adoption. Such a procedure is not in the best interest of this institution and it is not in line with best practice when it comes to its independence and effectiveness. The problem is that the institution itself cannot influence significant modifications of their budget proposals, which are usually made by the Ministry of Finance of BiH.<sup>44</sup> A separate budget line intended for combating discrimination is stipulated under the LPD,<sup>45</sup> but this was never implemented in practice. As for the Agency, its financial independence as a unique budget user is ensured by Article 36 of the Law on Personal Data Protection, which regulates that the funds required to finance the work of the Agency are provided from the Budget of BiH institutions and international obligations of BiH. However, the very process of adopting the Budget Law is opening the possibility of influencing the Agency. In that part, it would be necessary to ensure the more significant influence of the Parliamentary Assembly of BiH.<sup>46</sup>

In 2018, the budget of the Ombudsman was EUR 1,369,239.66 (or BAM 2,678,000.00), which amounted to 0,137% % of the annual budget for 2018. In the same year, the budget of the PDPA was EUR 697,913.42 (or BAM 1,365,000.00, amounting to 0,07% of the annual budget for 2018). On multiple occasions, through their work, these institutions underlined they have **insufficient financial resources** to carry out their full mandates.<sup>47</sup> This situation was also recognised by different international and national stakeholders who have included in their recommendations the need to allocate more funds to these institutions so they would fulfil the mandates.<sup>48</sup>

Both institutions received medium scores on employing **transparent and meritocratic recruitment procedures**. The laws define general procedures on the employment of the personnel and oblige the NHRIs to adopt rules, procedures and regulations related to employment and recruitment procedures, however, these are not available online.<sup>49</sup>

Due to state-wide politically imposed and legally supported ethnicization, the procedures of appointing the heads of the institutions, as well as the employment of staff are known to follow the national structure, and some candidates have a clear advantage due to their nationality. The laws do provide an opportunity to disregard such criteria, but it is seldom applied in practice.

32 Article 17, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

33 Article 16, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

34 Article 15, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

35 Articles 35 and 41, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

36 Article 12, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006; ANALITIKA - Commentary on the Draft of Human Rights Ombudsman Law.

37 Article 45, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

38 There has been an issue with the Prosecution office BiH in the previous years - they claimed that disruption of work has occurred. (<https://hayat.ba/direktor-agencije-za-zastitu-licnih-podataka-zbogo-ovaga-cime-se-bavimo-smo-imali-problema/100227/>)

39 Personal Data Protection Agency BiH, Report on Personal Data Protection Agency for 2018, 14 May 2019.

40 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, 2018 Annual Report on the results of the activities of The Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, March 2019.

41 Regional Cooperation Council, BALKAN BAROMETER 2018: Public Opinion Survey, 2018. Available at: [file:///C:/Users/Aida/Downloads/Balkan-Barometer\\_Public-Opinion-2019-07-03%20\(1\).pdf](file:///C:/Users/Aida/Downloads/Balkan-Barometer_Public-Opinion-2019-07-03%20(1).pdf)

42 Article 39, Law on BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.; Articles 36 and 46, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

43 Hanusic, A., The Ombudsman in the System of Protection against Discrimination in B&H: Situation Analysis and Characteristic Problems, Analitika, Centre for Social Research, 2012.

44 Commentary on the Draft of Human Rights Ombudsman Law, Analitika - Centre for Social Research, 2016. Available at: <https://www.analitika.ba/publications/commentary-draft-human-rights-ombudsman-law>

45 Article 7, Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09 and 66/16.

46 Personal Data Protection Agency BiH, Report on Personal Data Protection Agency for 2018, 14 May 2019.

47 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, The Operational Strategy of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina for the Period of 2016 - 2021, February 2016. Available at: [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2016041509303547eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2016041509303547eng.pdf);

Personal Data Protection Agency BiH, Report on Personal Data Protection Agency for 2018, 14 May 2019.

48 ANNEX to the COMMISSION IMPLEMENTING DECISION amending Commission Decision C(2014) 9495 of 15.12.2014 adopting the Indicative Strategy Paper for Bosnia and Herzegovina for the period 2014-2020; Hanusic, A., The Ombudsman in the System of Protection against Discrimination in B&H: Situation Analysis and Characteristic Problems, Analitika, Centre for Social Research, 2012.; NHRI contributions: Albania, Bosnia and Herzegovina, Serbia, Kosovo\*, North Macedonia, Montenegro - European Commission Enlargement package 2020.

49 Articles 36, 37 and 38 of Law on BiH Ombudsman; website of the Institution ([www.ombudsmen.gov.ba](http://www.ombudsmen.gov.ba)); Articles 38 and 46, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

Both institutions are facing difficulties in carrying out all parts of their mandate due to the insufficient staff, thus receiving the medium score (1.00) for this criterion. As stated by the Agency, in 2018, they have been working with 60% of the total staff planned by the job classification.<sup>50</sup> As a result, the Agency had to reduce inspections, suspend cooperation with civil service agencies, reduce the issuance of misdemeanour warrants and limit their work in any other way. The Ombudsman institution has also faced understaffing, which hinders its ability to fulfil its mandates fully.<sup>51</sup>

This is also reflected in the score for the **adequate human resources** criterion, where both institutions have medium scores - the current staff has the expertise for carrying out the basic mandate, but both institutions lack more specialised staff. For example, in 2018, two positions for complaint proceedings were unfilled due to a lack of qualified persons.<sup>52</sup> The description of workplace duties for the deputies and lawyers in all departments in the Ombudsman Institution is not appropriate, paired with the unfavourable ratio between specialised staff and administrative workers.<sup>53</sup> The Institution handles poorly the assignment division, burdening the employees in one department to address the complaints/cases outside of their work scope. This is particularly visible in the Department for the elimination of all forms of discrimination. This dispersion of mandate between the units prevents the departments from focusing directly on their work scope. It also affects the **internal structure and distribution of responsibilities** which is why the Ombudsman does not satisfy the standards set for these criteria.<sup>54</sup> As for the **pluralism** criterion, the employee structure of the Ombudsman institution follows the “national key” logic, as it can be seen from the organisational structure – where gender, assumed nationality and education are presented - but no other information as to other diversity is available.<sup>55</sup>

The Ombudsman Institution scored the lowest in the criteria regarding the **training** of the staff through continuous and comprehensive programmes. The Institution has recognised this as an area that needs to be tackled in the future period. The Strategy for 2016-2021 was planned to include this.<sup>56</sup> However, additional information on the progress was not available.

Another criterion set for the Ombudsman institution is the local **outreach through regional offices** in the country. As for the BiH Ombudsman, the institution has established regional offices/sections, which do not cover the whole territory of the country. The Head Office of the Institution is located in Banja Luka, while three regional offices operate in Sarajevo, Brcko, and Mostar, with one field office in Livno. Aside from these, it was also planned to have regional offices in Foca, Travnik and Zenica, but these were never established.<sup>57</sup> To overcome this issue, and fulfil the promotional role of the Institution, is to an extent exercised through the organisation of office days. During these office days, two lawyers of the Institution travel to locations where the Institution has no field presence, offering to receive complaints and being at the disposal of citizens for advice and referral. With the support of the OSCE Mission, office days have been organised in six locations: Glamoc, Drvar, Grahovo, Bihac, Doboje and Bijeljina.<sup>58</sup>

If put in a perspective of **learning and change**, the Agency (which scored 2.00) has recognised the importance of having a strategic plan and evaluation to monitor the success of work, which is additionally defined in Article 10 of the Rulebook on professional education, training and education of employees in the Personal Data Protection Agency in BiH and reflected in its Medium-term work plan for the period 2017-2019 that was in place during the reporting period.<sup>59</sup> From the publicly available information, it cannot be established whether the Ombudsman has such a document. However, it had a strategy covering the period 2016 – 2021, which addressed this issue, but without a concrete monitoring plan or impact indicators – thus scoring 1.00 for this criterion.<sup>60</sup>

50 Response from the Personal Data Protection Agency in Bosnia and Herzegovina, received on 16 of September 2020.

51 Hanusic, A., The Ombudsman in the System of Protection against Discrimination in B&H: Situation Analysis and Characteristic Problems, Analitika, Centre for Social Research, 2012.; CoE, Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, May 2018 (2018); The Institution of Human Rights Ombudsman/Ombudsmen of BiH, Medium-term work plan of the Institution of Human Rights Ombudsmen of Bosnia and Herzegovina 2021-2023. Available at: [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2016062211120091eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2016062211120091eng.pdf).

52 Personal Data Protection Agency BiH, Report on Personal Data Protection Agency for 2018, 14 May 2019.

53 CoE, Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, May 2018 (2018). Available at: <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>

54 CoE, Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, May 2018 (2018). Available at: <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>

55 [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2017072112405145eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2017072112405145eng.pdf)

56 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, The Operational Strategy of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina for the Period of 2016 – 2021, February 2016. Available at: [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2016041509303547eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2016041509303547eng.pdf);

57 [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2013041106175843eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2013041106175843eng.pdf), [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2016041509303547eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2016041509303547eng.pdf)

58 OSCE Mission to BiH, Assessment of the Work of Bosnia and Herzegovina Institutions in Combating Discrimination. Available at: <https://www.osce.org/files/f/ documents/3/a/414671.pdf>

59 Available on their website: [http://www.azlp.ba/propisi/Default.aspx?id=5&langTag=bs-BA&template\\_id=149&pageIndex=1](http://www.azlp.ba/propisi/Default.aspx?id=5&langTag=bs-BA&template_id=149&pageIndex=1)

60 CoE, Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, May 2018.; Available at: <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>; [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2019030109434379bos.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2019030109434379bos.pdf), p. 116

In relation to **financial control**, both institutions got the highest scores (2.00) for having internal financial control and being subjected to regular independent external financial control.<sup>61</sup> Managements of both institutions are responsible for the preparation and fair presentation of financial statements in accordance with the accepted financial reporting framework, i.e. the Law on Financing of BiH Institutions, the Rulebook on Financial Reporting of the Institution of BiH and the Rulebook on Accounting with accounting policies and procedures. This responsibility includes the implementation of internal controls that are relevant to the preparation and presentation of financial statements. The internal audit is carried out by the Assembly’s internal audit department and is reflected in the financial reports published by the NHRIs each year. The external audit control is also being conducted each year.

Concerning the availability of resources and capacities, it is clear that both the Ombudsman and the Agency face challenges in the organisation of their work due to external and internal factors. The external factors are visible in inadequate funds and capacities and the shortage of both specialised and administrative staff. The internal factors pertain to the systematisation of their work, the specialised staff and inadequate training and capacity building opportunities. There appears to be very little willingness among the legislators to improve the financial position and independence of these institutions in order to allow them to tackle these shortcomings properly, as these issues in their work never seem to change.

Another rather worrying challenge is the role of the constituency or the “national key” in appointing the heads and the staff of the institutions. The application of this principle adds to the politicisation of the institution and disrupts their public image. Given the political reality of Bosnia and Herzegovina, it is important to uphold it to a certain degree (with respect to all the nationalities in BiH, not just the constituent ones), but its application needs to be assessed in every individual case, and it should not be applied to non-political positions.

### Domain 3: Information, access and cooperation with other relevant actors

NHRI	General score ↓
	<i>min: 0; max: 2</i>
Ombudsman institution (Equality)	0.95
PDPA(PDP)	0.78
Ombudsman institution (NHRI)	0.77
Ombudsman institution (FAI)	0.31

In the domain of information, accessibility and cooperation with other relevant actors, the Ombudsman institution (Equality body) has scored higher (0.95) than the PDPA (0.78). The general score for the Ombudsman would be much higher, however, the drop in the score is related to their supervisory role in freedom of access to information, where the institutional role is not clearly defined within the laws, so their activities in this regard are limited.<sup>62</sup>

Regarding **parliamentary scrutiny**, both institutions received the lowest score (0.00) considering that both institutions annual reports for 2018 were not debated either in working bodies or at plenary sessions in 2018<sup>63</sup>. No other documents related to these institutions were reviewed in this reporting period, aside from the amendments to the Law on Ombudsman.

**Cooperation with the government** is another essential component. Most of the legislation provides the opportunity to the legislators and relevant institutions to consult other actors when developing laws and policies, and seek their cooperation. Still, the situation is different when the NHRIs are to initiate such discussions. There are usually no obligations or guarantees to ensure their actual engagement. In this regard, the Ombudsman institution scored the lowest (0.00) as the law does not envisage the obligation to consult the Institution on policy proposals related to human rights.<sup>64</sup> The situation is somewhat better for the Agency (1.00), as there is no legal obligation for consultations, but, in its rules of procedure, the Parliament has introduced an obligation to consult the Agency on legislative proposals - no such requirements exist at the entity or cantonal level.<sup>65</sup>

61 <http://www.revizija.gov.ba>; [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2019100510361344bos.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2019100510361344bos.pdf); [https://www.mft.gov.ba/hrv/images/stories/chj/izvjestaji/2017/IR%20god%C5%A1nj%20konsolidovani%20za%202018%20\(hrv\).pdf](https://www.mft.gov.ba/hrv/images/stories/chj/izvjestaji/2017/IR%20god%C5%A1nj%20konsolidovani%20za%202018%20(hrv).pdf); Articles 3 and 34, Rulebook on financial management and control in the Personal Data Protection Agency of BiH

62 Voloder, N., Right to information in BiH: Towards effective institutional design, Analitika, Centre for Social Research, 2015. Available at: [https://www.analitika.ba/sites/default/files/publikacije/right\\_to\\_information\\_eng\\_brief\\_-\\_web.pdf](https://www.analitika.ba/sites/default/files/publikacije/right_to_information_eng_brief_-_web.pdf)

63 Only in 2020 the 2017 and 2018 Annual reports for both institutions were discussed before the working body (Joint Committee for Human Rights of both Houses of the Parliamentary Assembly) and subsequently at the plenary session within the Parliamentary Assembly. See: <https://www.parlament.ba/session/OSessionDetails?id=2016&ConverterId=2>; <https://www.ombudsmen.gov.ba/Novost.aspx?newsid=1506&lang=BS>; <https://www.parlament.ba/session/OSessionDetails?id=1982>

64 Law on BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

65 EU report: 529-bosnia-and-herzegovina-opinion.pdf, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-analytical-report.pdf>

As for the **mutual cooperation** between the bodies in the country, there is no record of cooperation between the NHRIs in their annual reports. Thus, both institutions did not cooperate sufficiently with other NHRIs and scored 0.00.

When it comes to **cooperation with the NGOs**, the situation is somewhat better. Based on the annual report, the Ombudsman institution participated in multiple events organised by NGOs (conferences, meetings, round tables, etc.). However, although the institution describes this cooperation as “continuous”<sup>66</sup>, it is not yet structural, thus warranting a score of 1.00.

Under the relevant international standards, national human rights institutions are also obliged to **provide information on rights**. Both institutions fall within a medium score (1.00) as their publications on rights and remedies are made available and translated into all languages commonly used in the country, however they are not presented in easy-to-read language.<sup>67</sup> For the Ombudsman institution, the quality of the information depends on the type of the format. For example, the quality and simplicity of the recommendations that are published mostly depend on the person preparing the report.<sup>68</sup>

The Agency has followed the reform in the field of personal data protection at the level of the Council of Europe and the level of the European Union. On its website, it has **publicised the rights of data subjects** contained in the Modernised Convention 108.<sup>69</sup>

In terms of **accessibility**, both institutions have easily accessible premises located in the city centre as well as online, email and telephone services available on their website. This also applies to the regional offices of the Ombudsman institutions. However, the Ombudsman institution has limited its availability to its clients/beneficiaries to the hours between 08:30 to 14:30, which poses a time constraint in their openness to those seeking their services and support.<sup>70</sup> There is no indication of similar working hours restrictions with the Agency.

Also, in terms of **accessibility for persons with disabilities**, the premises of the Ombudsman are not all physically accessible (ramps), and the availability of elevators in the Institution in the regional offices is uncertain. As for the Agency, even though they have secured the access to the building, they have a problem maintaining it, as the motor ramp is not accessible in its full capacity, so physical strength or another person is required to enter the building. The information on the accessibility of the institutions is also not made available at their websites, and interested parties must seek this information directly from the institution through formal channels, which additionally impedes the access to their services.

For the Ombudsman institution, the content on the website is not adjusted to the needs of people with different disabilities. All publications (recommendations, reports, etc.) are published in the PDF format, which hinders the possibility of using the reading software. The website of the Institution does not have the accessibility features, for example, to change website font size and enable text contrast. However, such accessibility features are available on the website of the PDPA. Thus, the Agency received a better score on this criterion.

Another criterion the Ombudsman institution should satisfy is **accessibility to children**. Even though the Law does prescribe the establishment of the Department for children’s rights<sup>71</sup> and although multiple special reports on their rights and position have been published, the law itself does not include provisions on accessibility or outreach of NHRIs to children specifically.

When looking into the **participation in international activities** and **memberships in international networks**, both institutions received the highest scores (2.00). They were present at relevant international events<sup>72</sup> and are members of multiple international networks relevant to their area of work. However, according to the publicly available information for 2018, the PDPA does not seem to have cooperated with other supervisory bodies, and this is the area where the Agency needs to invest additional efforts to improve its work, especially in the context of human rights protection. Without proper cooperation with other supervisory bodies, the Agency cannot employ a comprehensive approach to this field and lacks information on important regional and international standards and developments.

66 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, 2018 Annual Report on the results of the activities of The Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, March 2019.; Personal Data Protection Agency BiH, Report on Personal Data Protection Agency for 2018, 14 May 2019.

67 Websites of the bodies and documents produced.

68 CoE, Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, May 2018 (2018). Available at: <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>

69 Available on the website of the Agency: [http://www.azlp.ba/prava\\_nosioca\\_podataka/Default.aspx?id=161&langTag=bs-BA&template\\_id=149&pageIndex=1](http://www.azlp.ba/prava_nosioca_podataka/Default.aspx?id=161&langTag=bs-BA&template_id=149&pageIndex=1)

70 Website of the Institution

71 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, The Operational Strategy of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina for the Period of 2016 – 2021, February 2016. Available at: [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2016041509303547eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2016041509303547eng.pdf); Article 1, Law on Ombudsman Official Gazette No. 19/2002, 35/2004 and 32/2006; <https://www.ombudsmen.gov.ba/Default.aspx?id=3&lang=EN>

72 Personal Data Protection Agency BiH, Report on Personal Data Protection Agency for 2018, 14 May 2019; The Institution of Human Rights Ombudsman/Ombudsmen of BiH, 2018 Annual Report on the results of the activities of The Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, March 2019.; The Institution of Human Rights Ombudsman/Ombudsmen of BiH, Medium-term work plan of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina 2021-2023. Available at: [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2016062211120091eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2016062211120091eng.pdf).

**Confidentiality and protection** are another important part of the work of the Ombudsman institution, its reliability and credibility. However, in the reporting period, there were no strong legal and procedural guarantees that offered confidentiality and protection to witnesses and whistle-blowers, so the Institution scored 1.00 in this criterion.<sup>73</sup> PDPA scored the highest for this criterion (2.00) due to the clear legal obligations for the members and staff to maintain professional secrecy during and after the terms of office.<sup>74</sup>

The crucial part of ensuring the credibility and visibility of these institutions in their respective fields is a continuous and strategic **communication plan**. The Agency does not have a Communication Strategy as a separate document. Some version is incorporated in the Work Plan of the Agency for 2018 and the Medium-Term Work Plan of the Agency for Personal Data Protection in BiH for the period 2018-2020. Yet, not all elements needed for a proper communication strategy are included in these documents. The Ombudsman Institution does not have a communication strategy, even though such a document was foreseen in its Strategy for the period 2016/2021.<sup>75</sup>

In conclusion, in the domain of information, access and cooperation with other relevant actors, both the Ombudsman Institution and the PDPA need to make significant improvements. The legislative shortcomings are constraining the work and the efficiency of these institutions. In this regard, both the Ombudsman and the PDPA have to be obligatory partners to the legislators and other relevant institutions in their work on policy and legislative development. The cooperation between NHRIs and their cooperation with the NGOs need to be structured and reflected as such in the laws and policies regulating the work of these institutions. Also, the issue of inadequate parliamentary scrutiny and supervision has a negative impact on the work of these institutions.

#### Domain 4: Mandate and powers

NHRI	General score ↓ <i>min: 0; max: 2</i>
Ombudsman institution (Equality)	1.49
PDPA (PDP)	1.13
Ombudsman institution (NHRI)	1.06
Ombudsman institution (FAI)	0.63

Regarding mandate and powers, we evaluated the institutions against very specific mandate criteria applicable to their type of institution. The Ombudsman institution (Equality Body) scored higher (1.49) than the Personal Data Protection Agency (1.13).

The Agency has an almost full **mandate and powers** for monitoring and enforcement of the data protection law and other relevant developments in data protection as required under the GDPR, except to withdraw a certification or to order the certification body to withdraw a certification issued pursuant to Articles 42 and 43 or to order the certification body not to issue certification if the requirements for the certification are not met or are no longer met.<sup>76</sup>

As for the **monitoring and oversight** criterion, the Ombudsman institution has partial mandate and powers for monitoring and oversight of the Law on Free Access to Public Information and all relevant developments for free access to public information.<sup>77</sup> According to the law, the Institution does have a full mandate, but in practice, this cannot be realised because public institutions do not fulfil their obligation to deliver data to the Ombudsman, and are not sanctioned for that.<sup>78</sup>

73 Article 20, Law on BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

74 Articles 11 and 16, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

75 CoE, Assessment of the Efficiency of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, May 2018 (2018). Available at: <https://rm.coe.int/assessment-of-the-efficiency-of-the-institution-of-ombudsman/16808f13be>

76 Articles 18, 23, 30, 41, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

77 Articles 21 and 22, Law on Free Access to Public Information, Official Gazette BiH No. 28/00, 45/06, 102/09 and 62/11.

78 Voloder, N., Right to information in BiH: Towards effective institutional design, Analitika, Centre for Social Research, 2015. Available at: [https://www.analitika.ba/sites/default/files/publikacije/right\\_to\\_information\\_eng\\_brief\\_-\\_web.pdf](https://www.analitika.ba/sites/default/files/publikacije/right_to_information_eng_brief_-_web.pdf)

When it comes to **promotion**, both institutions received the highest scores (2.0). The Ombudsman institution has the competence to address public opinion freely, raise public awareness on human rights issues, carry out education and training programs and make use of the press.<sup>79</sup> Also, in addition to the full mandate on promotion and prevention, the NHRI has an obligation to promote equality through training, raising awareness and developing standards. In addition, even though the Ombudsman institution does not have an explicit **mandate to promote and ensure ratification and harmonisation of national legislation**, regulations and practices with the international human rights instruments and to promote and ensure their effective implementation, the Institution does recognise it as one of its responsibilities.<sup>80</sup>

However, the Institution does not have an explicit mandate to **promote pro-active dissemination** of data by public authorities when it comes to free access to information. The Law does state that the Ombudsman should produce information, guidelines and recommendations for the implementation of the Law and instructions on how to implement it, but it does not precisely state the role of proactive dissemination. Consequently, the Institution failed to reach the highest score in this regard as it has carried out limited promotional activities, mostly through round tables, recommendations published on the website, etc.<sup>81</sup>

Quite the opposite, the PDPA has been exceptionally active in 2018 and has carried out promotional activities for both the general public and data controllers and processors.<sup>82</sup>

As envisaged by the laws, the mandate of the Ombudsman institution **covers the whole public sector and the private sector** performing public functions.<sup>83</sup> The list of the **grounds of discrimination**<sup>84</sup> included in the law is open and includes multiple and intersectional discrimination in all **areas** noted in the ECRJ GPR.<sup>85</sup> As the equality body, the Ombudsman institution has the competences to provide independent assistance to victims of discrimination in pursuing their discrimination complaints, to conduct independent surveys concerning discrimination, to publish **independent reports** and make recommendations on any issue relating to such discrimination and at the appropriate level exchange available information with European counterpart bodies.

The Ombudsman institution has reached the highest score when it comes to **human rights protection powers (investigation, access, and courts)**.<sup>86</sup> This NHRI has the power to obtain statements to assess situations raising human rights issues and the authority to compel witnesses. Also, it can inspect and examine any public premises, documents, equipment and assets, without prior written notice. It has the unlimited authority to join or initiate action in court. However, when it comes to complaints, the Ombudsman institution has no ability to settle complaints through a binding determination.<sup>87</sup>

In addition, when it comes to **strategic litigation** and acting as **amicus curiae**, even though the Law itself does not pose any obstacles for it to take on this role, it has avoided doing so as this was perceived as distracting from the primary role of being the preventive mechanism.<sup>88</sup>

As for the Personal Data Protection Agency, it has **full mandate and powers for investigations**.<sup>89</sup> When it comes to **regulatory functions/authorisations**, the Agency has mandate and powers for authorisations of codes of conduct, certifications, standards, authorisation of contractual clauses and administrative arrangements and the approval of binding corporate rules.

There have been multiple failed attempts for amendments to the Law on Ombudsman so that the Institution is recognised as a **national prevention mechanism**, a function it already performs. Also, the role of Ombudsman concerning the **rights of the children** is vaguely defined by the law. It does not include prevention, promotion and protection of children's rights, albeit there is the prescription for establishing a Department for protection of children's rights.<sup>90</sup>

Both institutions have the mandate to **handle complaints and issue binding decisions**. The Ombudsman institution has the right to issue recommendations and legally binding decisions on specific cases, subject

to judicial review as an equality body (in discrimination cases)<sup>91</sup>, yet it cannot issue binding decisions in FAI cases. In contrast, the PDPA has full mandate and powers to handle complaints by data subjects, issue binding decisions, and the obligation to inform the data subjects on the progress and outcome of the complaint.<sup>92</sup>

As for the **complaints' submission**, the Ombudsman institution has received the highest score given that the complaints can be submitted orally, in written form or online.<sup>93</sup> In addition, complaints can be submitted in a language of the complainant's choosing commonly used in the country where the equality body is located (in local languages and English). Proceedings before the Ombudsman Institution are free of charge for the complainants<sup>94</sup>.

The **follow-up on recommendations** remains an issue for the Ombudsman institution. Keeping a record of the status of the issued recommendations is hindered by the lack of capacity of the Institution. It can only demand the response from the party the complaint was filed against on the status of the implementation of the recommendation received.<sup>95</sup>

The Ombudsman Institution has been active in submitting **initiatives to the national authorities**. However, none of the eight submitted initiatives in 2018 is relevant to free access to information.<sup>96</sup> In this field, most of the work detailed in their Annual Report concerns responses to the individual complaints. The PDPA failed to receive a higher score for this criterion – it has mentioned only one initiative related to the Law on Personal Data Protection.<sup>97</sup>

The Ombudsman institution received the highest score concerning the number of issued **reports**. In 2018, the Institution published their annual report, one thematic and four special reports covering the human rights situation of different social groups. Even though the Institution is obliged (within the LPD), as the equality body, to publish **independent reports** on discrimination<sup>98</sup> in BiH, they have stopped producing separate reports on this matter. Yet, such data became an integral part of their annual reports, thus losing the strength in showing the discrimination trends, its indicators and recommendations for combating it.<sup>99</sup> The current report depicts discrimination cases either by the ground of discrimination or by the area it occurred, failing to cross-reference the data and showcase the trends in each area, for example, the most common ground of discrimination was to be found in access to employment, healthcare, etc. In addition, the Institution does annually collect data on discrimination, but only through the cases reported to them and their ex officio cases, without actually doing proper surveys, even though the LPD does foresee the possibility of conducting **independent surveys**<sup>100</sup>.

**Submissions or contributions to international bodies** was a criterion for the Ombudsman. During 2018, the Ombudsman responded to numerous questionnaires of international organisations regarding the degree of realisation of human rights and freedoms of certain social categories and groups in Bosnia and Herzegovina<sup>101</sup>, thus securing the highest score for this indicator.

As for the criterion of **public trust in NHRIs**, both institutions received the lowest score (0.00). An available public opinion poll<sup>102</sup> has shown that less than 50% of respondents trust the Ombudsman institution. In contrast, there is no publicly available data on the trust of the public in the Personal Data Protection Agency.

The European Commission had also engaged in **monitoring the progress of NHRIs** and noted that there are still shortcomings and challenges these institutions face in their work, especially in terms of financial resources and human resources limiting their role in the protection of human rights.<sup>103</sup> Therefore both institutions scored 1.00 for this criterion. Additional remarks have been made to the Ombudsman institution concerning the delays in issuing recommendations and internal organisation (a thematic division of labour).

79 Article 1, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006; Articles 1 and 7 of Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09 and 66/16.

80 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, The Operational Strategy of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina for the Period of 2016 – 2021, February 2016. Available at: [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2016041509303547eng.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2016041509303547eng.pdf);

81 Information available on their website.

82 Personal Data Protection Agency BiH, Report on Personal Data Protection Agency for 2018, 14 May 2019.

83 Articles 1 and 3, Law on BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

84 Articles 2 and 4, Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09 and 66/16.

85 Articles 2 and 6, Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09 and 66/16.

86 Articles 2, 4, 20, 23, 24, Law on BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

87 Articles 2, 18, 19, 23, 32 Law on BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

88 Causevic, Mirza. The role of the Ombudsmen institution and courts in judicial proceedings for discrimination cases in Bosnia and Herzegovina, (2018), Faculty of Law Split Annual Review, god. 56, 3/2019, pp. 667-683.

89 Article 41, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

90 Article 1, Law of BiH Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

91 Articles 7 and 15, Law on Ombudsman, Official Gazette No. 19/2002, 35/2004 and 32/2006.

92 Article 30, Law on Personal Data Protection, Official Gazette of BiH, No. 49/06, 76/11 and 89/11.

93 Website of the Institution. Information available at: <https://www.ombudsmen.gov.ba/Default.aspx?id=13&lang=EN>,

94 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, Complaint form. Available at: [https://www.ombudsmen.gov.ba/documents/obudsmen\\_doc2018031212420940bos.pdf](https://www.ombudsmen.gov.ba/documents/obudsmen_doc2018031212420940bos.pdf)

95 OSCE Mission to BiH, Assessment of the Work of Bosnia and Herzegovina Institutions in Combating Discrimination, p. 149. Available at: <https://www.osce.org/files/f/documents/3/a/414671.pdf>

96 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, 2018 Annual Report on the results of the activities of The Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, March 2019.

97 Response from the Personal Data Protection Agency in Bosnia and Herzegovina, received on 16 September 2020.

98 Article 7, Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09 and 66/16.

99 OSCE Mission to BiH, Assessment of the Work of Bosnia and Herzegovina Institutions in Combating Discrimination.

100 Article 7, Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09 and 66/16.

101 The Institution of Human Rights Ombudsman/Ombudsmen of BiH, 2018 Annual Report on the results of the activities of The Institution of the Human Rights Ombudsman of Bosnia and Herzegovina, March 2019.

102 Regional Cooperation Council, BALKAN BAROMETER 2018: Public Opinion Survey, 2018. Available at: file:///C:/Users/Aida/Downloads/Balkan-Barometer\_Public-Opinion-2019-07-03%20(1).pdf

103 See Chapter 23, Fundamental Rights, p. 26, 529-bosnia-and-herzegovina-opinion.pdf, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-analytical-report.pdf>

Shortcomings identified above are reflected in the failure of the institutions to fulfil their role, predominately the Ombudsman institution, particularly initiating judicial proceedings in cases of discrimination, issuing independent reports and following up on their recommendations, and submitting initiatives to national authorities. In this aspect as well, there is a need to establish more explicit legal mandates of these institutions, especially the role of Ombudsman as the National Prevention Mechanism.

The most common challenge identified within all of the domains this research has covered, comes down to inadequate financial independence and stability, as well as human resources within both of these institutions. It has come up as well regarding their mandate and powers as a limiting factor of their activities and effectiveness.

## RECOMMENDATIONS

Based on the ranking, the main findings and main challenges established, we have developed a set of recommendations. These refer to the national authorities (the Parliament and the Government, and the NHRIs), international actors (European Unions and others) and NGOs.

### NATIONAL AUTHORITIES

- **Parliament**

In order to enhance the work of the NHRIs and remove the obstacles that hinder them from using exercising their mandate and powers fully, the Parliamentary Assembly of BiH should

**Approach its role and exercise scrutiny over the work of these institutions in a timely and structured manner**, and in a timely manner provide concrete conclusions and recommendations for the future detecting any issues that need to be addressed or removed and thus provide adequate institutional support to their work.

**Engage in annual parliamentary scrutiny of the work and the results of the NHRIs through publicly open parliamentary debates**, in order to make their work visible to the public, provide timely support, and make the entire monitoring process more transparent, to get the public more involved into the work of the NHRIs.

**Collaborate with the government on the amendments to the laws necessary to strengthen and clearly define the mandates of the NHRIs** to ensure that all of the legal preconditions for their unobstructed and efficient functioning are in place.

**Ensure that the NHRIs are directly consulted during the adoption of the budget for their institutions and activities.** Such an approach will ensure a larger degree of the financial independence of the institutions and therefore contribute to their depoliticisation.

**Directly consult NHRIs when amending/adopting new legislation, as well as obtain all the relevant information regarding human rights standards and protection that need to be met.** This approach will enable the institutions to voice out their needs and ensure that they can exercise their mandate.

**Enhance the visibility and public outreach of the NHRIs by organising joint thematic events/sessions on the issues of importance for human rights** to cultivate the potential of the public to engage in meaningful discussions which would result in concrete joint initiatives towards relevant authorities.

- **Government**

In order to address the issues that hinder the independence and the efficiency of the NHRIs, it is necessary to

**Amend the laws necessary to ensure the greater independence of the NHRIs and to reinforce their institutional financial independence** by giving them a crucial role in the process of drafting the annual Budget of BiH Institutions to ensure that the finances awarded to them meet the activities and needs the NHRIs envisaged by themselves.

**Enhance the position and broaden the mandate of the Institution of Ombudsman in the domain of freedom of assembly**, as the central institution in safeguarding this right, also reinforcing its role as the supervisory body in this regard.

**Amend the Law on Ombudsman to define and divide the responsibilities of each of the ombudspersons by the thematic issues the Institution covers** (such as FAI, FOA, freedom of expression, anti-discrimination, etc.) to avoid decision-making by consensus and de-block the decision-making processes within this Institution to ensure it carries out its mandate of protection of human rights.

**Amend the Law on Ombudsman to finally regulate the issue of the National Preventive Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**, taking into consideration experiences from others countries (such as for example, the Ombudsman Plus model) and enable the Institution to be accredited for this work, as the Institution already engages in the work envisioned for the National Preventive Mechanism such as the overview of the human rights of the prisoners and asylum seekers.

**Amend the Law on Ombudsman or the Rules of Procedure on electing the ombudsperson** to provide the opportunity for an ombudsperson belonging to the category of others to be elected as one of the heads of the Institution and ensure the appointed persons are elected based on merits and are not affiliated with the ruling parties.

### NATIONAL HUMAN RIGHTS INSTITUTIONS

In order to enhance their own efficiency and work through the obstacles to the fulfilment of their mandate and power, NHRIs should

**Develop and implement strategic and continuous education programmes designed to meet the needs of the staff and targeting the development of the capacities** necessary for the work of the Institution to achieve its full professional potential and enhance the results.

**Apply a strategic and systematic approach to cooperation with the civil society, other NHRIs and the academia**, through regular, structured or semi-structured forms/mechanisms consultations that can enrich and enhance their work on human rights and advance human rights protection in BiH. This should also apply to cooperation with organisations working in specific fields not currently covered by different mandates of the Institution, such as FoPA, FoE, etc.

**Advance the presence of the NHRIs in the media, among the citizens and their cooperation with each other, other public institutions/bodies, the civil society, academia and the professionals** in order to enhance their image and increase the trust in its work.

**Assess and evaluate their availability to citizens' in terms of the openness and transparency of their work**, as well as the physical availability of their premises, their working hours and different channels of communication with their clients/beneficiaries in order to enhance the public trust and their credibility.

**Evaluate their accessibility to marginalised communities**, especially persons with disabilities, and adjust their premises and services to be more inclusive in order to be accessible to potential beneficiaries with disabilities and to lead by example in respect of human rights.

**Develop, design and implement a strategic communication plan and activities aimed to provide information to the public on their rights, the work of NHRIs and the protection/safeguarding they provide**, in order to fulfil their promotional role, establish themselves as the protectors of the citizens and enhance the public trust.

**Adopt and apply a more proactive approach to protection and safeguarding of human rights, especially in terms of issuing recommendations, handling complaints, investigating human rights violations and using all the mechanisms at their disposal for protection of human rights.** It should be done mostly in terms of the Ombudsman institution, especially the initiation of judicial proceedings and exercise of possible sanctions because such an approach would strengthen the role of the protectors of citizens and their human rights.

**The PDPA should invest additional efforts in establishing cooperation with other supervisory bodies in other countries to provide mutual assistance, exchange of information/experience or work on joint investigations, interventions or actions.** Without proper cooperation with other supervisory bodies, the Agency cannot employ a comprehensive approach to this field and lacks information on important regional and international standards and developments.

**Advance the internal structure and human resources of the Institution through the improvement of the internal rules of procedure**, to ensure full confidentiality and protection to their clients/beneficiaries, and divide and define the responsibilities of the staff to prevent the workload burden and secure the excellence in handling the complaints and issuing recommendations.

**The Ombudsman and PDPA need to assess their communication and approach it strategically**, since the large part of their mandate concerns informing the public, providing information on rights and being transparent about their work. Also, the aspect of confidentiality within the Ombudsman Institution needs to be enhanced **to meet the highest standards of protection of beneficiaries'/clients' safety, information and privacy.**

### INTERNATIONAL ACTORS

- **European Union, other international actors and local/international NGOs**

In order to support the work and independence of the NHRIs, these actors should

**Engage in direct dialogue and cooperation with the NHRIs** to enhance their openness to NGOs, the application of the highest human rights standards in their work, and providing them with the support concerning the local institutions and advocacy for their independence and broader mandate

**Support the development and implementation of capacity building programmes and training for the NHRIs and their staff** to advance their capacities and knowledge in human rights and therefore, their professional approach to their duties and responsibilities

**Support the NHRIs in their public awareness activities through involvement in public campaigns and similar formats**, invite and involve them in activities regarding legislative/policy/human rights tendencies in the country, to support their timely and adequate reactions to the human rights violation, enhance their role as human rights protection mechanisms and create connections between them and other relevant stakeholders in this field.

**Advocate before the Parliament and the government to enact necessary legislative, policy and practical changes to** strengthen the position, independence and depoliticisation of these institutions.



## Annex: List of indicators

### Domain 1: Independence and the ability to work without pressures

Ombudsperson	EB	SADP	FAI
Independent statutory basis	Independent statutory basis	Independent statutory basis	Independent statutory basis
Appointment process	Appointment process	Appointment process	Appointment process
Clear criteria for membership	Clear criteria for membership	Clear criteria for membership	Clear criteria for membership
Term of office	Term of office	Term of office	Term of office
Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest
Immunities	Immunities		
No instruction from the government	No instruction from the government	No instruction from the government	No instruction from the government
Removal	Removal	Removal	Removal
Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure
Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI

### Domain 2. Availability of resources and capacities

Ombudsperson	EB	SADP	FAI
A separate and independent budget	A separate and independent budget	A separate and independent budget	A separate and independent budget
Adequate financial resources	Adequate financial resources	Adequate financial resources	Adequate financial resources
Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures
Sufficient human resources	Sufficient human resources	Sufficient human resources	Sufficient human resources
Adequate human resources	Adequate human resources	Adequate human resources	Adequate human resources
Financial control	Financial control	Financial control	Financial control
Pluralism	Pluralism		
Training	Training		Training
Internal structure enables focus on each part of mandate	Internal structure enables focus on each part of mandate		
Regional offices/outreach	Regional outreach/offices		
Learning and change	Learning and change	Learning and change	Learning and change

### Domain 3. Information, accessibility and cooperation with other relevant actors

Ombudsperson	EB	SADP	FAI
Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny
Providing information to the NHRI	Providing information to the NHRI		
Cooperation with government	Cooperation with government	Cooperation with government	Cooperation with government
Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRI	Cooperation with other NHRI
Cooperation with NGOs	Cooperation with relevant bodies and NGOs	Trans-national cooperation with other SAs	Cooperation with NGOs
Providing information on rights	Providing information on rights	Providing information on rights	Providing information on rights
		Information on rights and assistance to data subjects	
Accessibility	Accessibility	Accessibility	Accessibility
Accessibility to children			
Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities
Membership in international networks	Membership in international networks	Membership in international networks	
Participation in international activities	Participation in international activities	Participation in international activities	Participation in international activities
Communication strategy	Communication strategy	Communication strategy	Communication strategy
Confidentiality and protection	Confidentiality and protection	Professional secrecy	

## Domain 4: Mandate and powers

Ombudsperson	EB	SADP	FAI
		Monitoring and enforcement	Monitoring and oversight
Human rights promotion	Promotion and prevention	Promotion	Promotion
Promotion of harmonisation with international HR instruments and implementation			Promotion of pro-active dissemination
Mandate - coverage of sectors	Coverage of grounds of discrimination		
	Coverage - area		
	Equal treatment of all persons without discrimination on the grounds of sex		
Human rights protection-powers - investigation	Independent assistance - mandate	Investigations	
Human rights protection-powers - access	Independent assistance - strategic litigation		
Human rights protection-powers - complaints	Independent assistance - issuing recommendations and legally binding decisions		
Human rights protection-powers - courts			
Follow-up of recommendations	Follow up on recommendations		
Initiatives to national authorities	Initiatives to national authorities	Advisory Role	Advisory Role
	Complaints submission	Complaints handling	Complaints handling
	Complaints submission - language		Complaints submission
	Complaints submission - free of charge		Complaints submission - free of charge
	Independent surveys	Regulatory functions/ authorisations	
Reports	Independent reports		
Submission of contributions to international bodies	Submission of contributions to international bodies		
National prevention mechanism			
Rights of the child			
Public opinion on public trust in NHRI institution	Public opinion on public trust in NHRI institution	Public opinion on public trust in SA institution	Public opinion on public trust in SA institution
Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

Country Report  
Kosovo

WHAT IS BEHIND AND  
BEYOND THE  
AVERAGE?

Country Report  
Bosnia and Herzegovina



**Effectiveness of NHRIs in Western Balkan countries**  
Albania, Bosnia and Herzegovina, Kosovo,  
Montenegro, North Macedonia, Serbia

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## Country Report **Kosovo**

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

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## List of Acronyms and Abbreviations

<b>CoE</b>	Council of Europe
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CJEU.</b>	Court of Justice of the European Union
<b>CRD</b>	Convention on the Rights of the Child
<b>CRD</b>	Civil Rights Defenders
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CSO</b>	Civil Society Organisation
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GANHRI</b>	Global Alliance for National Human Rights Institutions
<b>GDPR</b>	General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)
<b>EU</b>	European Union
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>LPPD</b>	Law on Protection of Personal Data
<b>KOS</b>	Kosovo
<b>MS</b>	Member States
<b>NAPPD</b>	National Agency for the Protection of Personal Data
<b>NHRI</b>	National Human Rights Institutions
<b>NE</b>	National Expert
<b>OHCHR</b>	The UN Office of the Commissioner for Human Rights
<b>OIK</b>	Ombudsperson Institution in Kosovo
<b>OP-CAT</b>	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>OSCE</b>	Organisation for Security and Co-operation in Europe
<b>RE</b>	Regional expert
<b>SA</b>	Supervisory Authority
<b>SRSR</b>	Special Representative of the Secretary-General of the United Nations
<b>UN</b>	United Nations
<b>UNHRC</b>	UN Human Rights Committee
<b>UNMIK</b>	United Nations Mission in Kosovo
<b>WB</b>	Western Balkans

## INTRODUCTION

Being a part of the Western Balkans (WB) and similar to the rest of the countries within WB, Kosovo was affected by the break-up of Yugoslavia and the necessary transition that was required to establish democracy, the rule of law, and protection of human rights including through the establishment of NHRIs. To a certain extent, Kosovo faced a context that was particular to its circumstances, which other nations within the WB did not experience. Prior to independence and proper state-building (where fundamental principles such as democracy, the rule of law and protection of human rights would be an integral part), Kosovo had to engage in establishing an interim mission set up by the United Nations. Nevertheless, the principles mentioned above were very much part of the interim mission so further progress could be achieved by building on those already established building blocks.

The Ombudsperson Institution in Kosovo (OIK) was established by the United Nations Mission in Kosovo (UNMIK) in June 2000<sup>1</sup>, with the Ombudsperson and three deputies being appointed by the Special Representative of the Secretary-General of the United Nations (SRSG)<sup>2</sup>. The OIK was inaugurated on 21 November 2000.<sup>3</sup>

The mandate of the institution as established was “to promote and protect rights and freedoms of individuals and entities ... and help to ensure that all persons in Kosovo are able to exercise the rights and freedoms safeguarded by international human rights instruments”.<sup>4</sup> The institution’s mandate was to review and redress “any act, omission or decision constituting an abuse of authority or violation of human rights by UNMIK or by any emerging central or local institution”.<sup>5</sup> In addition, the Ombudsperson was entitled to initiate *ex officio* cases, make recommendations on the compatibility of domestic law with recognised international standards, where its authority extended to the entire territory of Kosovo including Kosovans outside of its territory. Up to 2008, the OIK continued to operate as part of the UNMIK framework with Kosovans employees and deputies being part of the institution.

In addition, during the UNMIK era and pre-independence, the Law on Access to Official Documents was enacted.<sup>6</sup> Whereas data protection was addressed through the Law on the Information Services,<sup>7</sup> it did not exclusively deal with data protection. Legislation dealing only with this subject matter was addressed much later by the Assembly of Kosovo by enacting the Law on Protection of Personal Data in 2010.<sup>8</sup>

This report is produced as part of a regional research effort to assess the effectiveness of the human rights institutions. The effectiveness of NHRIs was measured against a pre-defined set of indicators developed by Civil Rights Defenders and the European Policy Institute – Skopje. Following the first part of the research on Montenegro, North Macedonia and Serbia conducted in 2019, this year the research covers the three remaining countries from the Western Balkans region – Albania, Bosnia and Herzegovina and Kosovo. It is the first comparative research of this kind in the region. Independent experts from all Western Balkan countries carried out the country research, based on the specific Methodology, elaborated for this project.

The report focuses on the findings from the research on the effectiveness of the NHRIs in Kosovo. The research specifically focused on the effectiveness of the selected institutions, using the methodology outlined in the next section. After a brief overview of these institutions, we will present the research findings on the systemic challenges and shortcomings that hinder the work of the NHRIs for each of the effectiveness domains: independence and ability to work without pressure; availability of resources and capacities; information, accessibility and cooperation with other relevant actors; and mandate and powers. Finally, a set of recommendations targeted at various stakeholders, are proposed.

1 United Nations Mission in Kosovo, Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, 30 June 2000.

2 Ombudsperson Institution of Kosovo, First Annual Report 2000 -2001, 18 July 2001, p.1 available at <https://www.oik-rks.org/en/2001/07/18/1-st-annual-report-2000-2001-2/>

3 Ibid

4 Ibid

5 Ibid

6 Law No. 2003/12

7 Law No. 02/L-23

8 Law No. 03/L - 172

## APPROACH AND METHODOLOGY

Within the scope of this research, effectiveness was defined as “the capability of the NHRI to independently perform its mandate and powers, with the aim to make a significant impact on the achievement of human rights”.

In the given context and current state of development of research on NHRIs in the Western Balkans, an approach to measuring effectiveness that combines the structural and the mandate-based approach was applied. The structural approach focuses on the compliance of NHRI with the main legal norms, or the institutional safeguards. The mandate-based approaches are performance-based and focus on the success in performing the mandate of the NHRI.

A matrix of indicators was developed,<sup>9</sup> structured per four domains:

- (1) Independence and ability to work without pressure,
- (2) Availability of resources and capacities,
- (3) Information, accessibility and cooperation with other relevant actors, and
- (4) Mandate and powers.

The values of indicators were weighed, depending on the number of indicators per domain (which ranged from 7-12). In addition, some indicators have been broken down to sub-indicators, to capture the specifics of a particular issue, which depended on the level of detail of the relevant international standard. The indicator per domain is estimated as a sum of the determined values of indicators in the domain. The overall score of effectiveness for each NHRI in each country is estimated as a sum of the indicators per domain. Each domain participates equally in the final score – 25%. Consequently, the scale of the score per country per body is 0-8. If an NHRI body is a multi-mandate body, it is measured for each of its mandates, while its score as an institution is estimated as an average of the sum of its scores for each mandate.

An overview of the matrix is presented in Attachment 1.

The basis for developing the indicators were the relevant international standards and their interpretations. The Paris Principles<sup>10</sup>, or more precisely the GAHNRI General Observations<sup>11</sup>, are taken as a basis for the indicators for human right institutions with a general mandate. The basis for specific indicators were the UN relevant standards related to the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>12</sup>, the Convention on the Rights of the Child (CRC)<sup>13</sup>, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>14</sup>, and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)<sup>15</sup> and especially their interpretations.

The EU Commission Recommendation of 22 June 2018<sup>16</sup>, the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the CoE, as well as the Revised General Policy Recommendation No. 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE<sup>17</sup> were the European standards taken as a basis for indicators for equality bodies.

The EU General Data Protection Regulation (GDPR)<sup>18</sup> and the CoE Convention 108<sup>19</sup> are taken as main standards for setting the indicators for data protection supervisory authorities. Although they lack specific international standards for an independent body on free access to information, the general standards for NHRI were accordingly applied, while specific international standards on content of the right to information<sup>20</sup>, as well as documents developed by special rapporteurs for freedom of expression in UN, CoE and OSCE, were the basis for the indicators on powers and mandate.

The year 2018 is taken as a baseline for the research – the same as in the research done for the three countries in the region in 2019, in order to ensure comparability.

9 A detailed explanation of the Methodology is available in the Comparative Analysis, published alongside the reports.

10 UN General Assembly, Resolution A/RES/48/134 (1993).

11 Global Alliance for National Human Rights Institutions, General observations of the Sub-Committee on Accreditation, adopted by GAHNRI Bureau, 21 February 2018 (2018). Available at: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf); accessed on 7 August 2019.

12 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (1996).

13 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (1989).

14 UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I (2006).

15 UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, A/RES/57/199 (2002).

16 Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, C/2018/3850, OJ L 167 Ch I, (2) (2018).

17 Council of Europe, ECRI, General policy recommendation no. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CRI(2018)06 (2017).

18 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), (2016) OJ L 119.

19 CoE, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), 10.10.2018 (2018).

20 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (1966); CoE, Convention on Access to Official Documents, CETS 205, 11 June 2008 (2008).

## OVERVIEW OF NHRIs IN KOSOVO

In this section, we briefly present a short history of the NHRIs, their basic mandate and composition, and any relevant developments for effectiveness. This overview shows that the Ombudsperson was the first institution to be established in Kosovo as an NHRI. On that basis, it had enough time to be consolidated as an institution and take on new functions including as an equality body. This is also reflected in the scores, which are discussed in detail in the following sections. In contrast, the Agency for the Protection of Personal Data has been created a decade later and has encountered a range of challenges in becoming functional. Because of that, its score is significantly lower than any score achieved by the Ombudsperson Institution. At the same time, both institutions depend on the Assembly of Kosovo to appoint its senior management team, i.e. the Ombudsperson and Deputies and the Chief National Supervisor and National Supervisors. In general, one could expect the legislature to be influenced by the daily politics as Members of the Assembly, after all, are members of political parties. However, in Kosovo's context, these processes tend to be repeated a number of times because candidates do not reach the required majorities and political parties seek to significantly influence the process, unwilling to compromise and without focusing on the professionals who can successfully discharge the relevant functions.

The **Ombudsperson Institution in Kosovo (OIK)** has been functional since 2000.<sup>21</sup> In 2008, with Kosovo's declaration of independence, the Constitution reaffirmed the OIK's mandate. In particular, it provides for the following: to monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts, or failures to act by public authorities.<sup>22</sup> In addition, it also specifies that:

- the Ombudsperson is to independently exercise his or her functions and does not accept any instructions or instructions from bodies, institutions or other authorities exercising state authority;<sup>23</sup>
- each body, institution or other institution exercising public functions must respond to requests of the Ombudsperson and submit all requested documentation and information.<sup>24</sup>

Other important provisions within the Constitution address the following:

- the office of the Ombudsperson should propose and administer its budget;<sup>25</sup>
- qualification, election and dismissal of the Ombudsperson;<sup>26</sup>
- reporting obligations;<sup>27</sup> and
- standing to initiate cases before the Constitutional Court.<sup>28</sup>

The Law on Ombudsperson<sup>29</sup> consolidates the OIK's powers and responsibilities.

The current Law on the Ombudsperson (whilst it was drafted) benefited from a review by two European Ombudspersons.<sup>30</sup> That review noted various discrepancies with the draft law and made recommendations on how those should be addressed. Although some changes were made, not all recommendations were implemented. For example, regarding immunity, it was suggested that it should extend to the Ombudsperson, deputies and staff,<sup>31</sup> which was not the initial starting point, however, the draft law was amended to provide for this.<sup>32</sup> Nonetheless, other recommendations such as the excessive number of deputies (5) who are to be appointed by the Ombudsperson rather than the Assembly were not implemented, among others.<sup>33</sup>

Its powers include: dealing with complaints; initiating *ex officio* cases; providing general recommendations on the functioning of the justice system and appearing as *amicus curiae* but not otherwise intervene in regular courts except when there are delays; initiate matters before the Constitutional Court; exercise his or her mandate through mediation and reconciliation; perform other tasks specified in other legislation such as an equality body; collect statistical data regarding discrimination; publish the report and make recommendations on policies and practices

21 See the Introduction of this report for background relating to establishment of the OIK by UNMIK

22 Constitution of the Republic of Kosovo, Article 132 (1), adopted 15 June 2008

23 Constitution of the Republic of Kosovo, Article 132 (2)

24 Ibid, Article 132 (3)

25 Ibid, Article 133

26 Ibid, Article 134

27 Ibid, Article 135

28 Ibid, Article 113

29 Law No. 05/L-019

30 Joint Project between the European Union and the Council of Europe - "Enhancing Human Rights Institutions in Kosovo", Reform Proposals to Energise Non-Judicial Human Rights Institutions in Kosovo, December 2013, Annex 1

31 Ibid, p. 67

32 Law on Ombudsperson, Article 12 (1)

33 Joint Project between the European Union and the Council of Europe, Reform Proposals to Energise Non-Judicial Human Rights Institutions in Kosovo, p. 66

on combating discrimination and cooperate with non-governmental organisations and other ombudsperson institutions.<sup>34</sup>

Whereas its responsibilities include to: investigate alleged violations of human rights and acts of discrimination; draw attention to cases where human rights are violated and make recommendations; raise awareness; adopt specific procedures for dealing with complaints from children; make recommendations to the Government, Assembly and other institutions on promotion and protection of human rights and non-discrimination; publish opinions and recommendations; recommend new legislation or amendments; prepare periodical and other reports on the human rights situation; recommend to the Assembly harmonisation of legislation with international human rights standards; cooperate with all institutions and organisations; and keep all information confidentially.<sup>35</sup>

Based on the Law on Ombudsperson, the OIK's mandate stretches to three pillars: (i) deal with all allegations of human rights violations as a result of actions or omissions by public institutions or those organisations exercising public functions; (ii) act as the national preventive mechanism against torture and other cruel, inhuman and degrading treatments and punishments; (iii) act as the equality body for promoting, monitoring and supporting equal treatment as set out in the Gender Equality Law and the Anti-Discrimination Law<sup>36</sup> and (iv) deal with complaints in respect of access to documents.<sup>37</sup>

Since its establishment and to date, in addition to the state granted resources, the OIK has received support to build its internal capacities as an independent institution. Such support has been provided in various forms from different bodies including the European Commission, the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE), UNICEF, UNMIK, UNDP and other organisations.<sup>38</sup>

The OIK's efforts to strengthen its capacities have been noted in the European Commission's Report for Kosovo, as well as the perceptions of citizens, which view the OIK as the most trusted institution in Kosovo.<sup>39</sup>

The **National Agency for the Protection of Personal Data (NAPPD)** was created in 2011<sup>40</sup> after the Law on Protection of Personal Data (**LPPD**) was passed by the Assembly of Kosovo in 2010. The LPPD provides a framework in respect of the processing of personal data in particular: specifying the principles of data processing;<sup>41</sup> the application of the law which covers the public and private sectors;<sup>42</sup> grounds for processing personal data;<sup>43</sup> the processing of sensitive personal data;<sup>44</sup> rights of data subjects;<sup>45</sup> obligations of data controllers and data processors;<sup>46</sup> as well as specifying the institutional framework<sup>47</sup> among others.

A year after the law was enacted, the Assembly appointed the Chief National Supervisor and four National Supervisors. At the same time, knowledge of data protection remained very low, as well as the capacities of all institutions to comply with data protection legislation continued to be limited.<sup>48</sup>

Over time the NAPPD became operational, precisely in 2014 it adopted a strategy on data protection 2014 - 2017 and became more visible pertaining to its work. Whilst some progress was made, it remained at an early stage in implementing the legislation with additional human resources and financial resources being required.<sup>49</sup> Despite being established as an independent institution, over the years, the NAPPD has continued to suffer from a lack of human resources and financial resources, preventing it from fulfilling its role.<sup>50</sup> The NAPPD was further restricted in fulfilling its role when the mandate of the Chief National Supervisor and the National Supervisors expired in 2016 and were not replaced. This meant that the NAPPD could only provisionally function.<sup>51</sup> In addition, the legislative framework needs to be aligned with the European data protection framework, in particular, the General Data Protection Regulation, which has been addressed through a new piece of legislation that has been adopted in 2019 (outside of the reporting period for this report).

34 Law on Ombudsperson, Article 16

35 Law on Ombudsperson, Article 17

36 Law on Ombudsperson, Article 1 and Article 16

37 Law on Access to Public Documents, Law No. 03/L-215

38 OIK, Annual Report 2018, No 18, Pristina 2019, p. 375.

39 European Commission, Report for Kosovo, 2018, p. 7 available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>.

40 European Commission, Report for Kosovo 2011, p. 59 available at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2011/package/ks\\_rapport\\_2011\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2011/package/ks_rapport_2011_en.pdf).

41 Law on Protection of Personal Data, Article 3.

42 Ibid, Article 4.

43 Ibid, Article 5.

44 Ibid, Article 6.

45 Ibid, Article 10 and Articles 22 – 27.

46 Ibid, Subchapter B.

47 Ibid, Subchapter D.

48 Report for Kosovo 2011, p. 59.

49 European Commission, Report for Kosovo 2014, p. 53 available at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2014/20141008-kosovo-progress-report\\_en.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf).

50 European Commission, Report for Kosovo 2015, p. 21 available at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key\\_documents/2015/20151110\\_report\\_kosovo.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_kosovo.pdf).

51 European Commission, Report for Kosovo 2018, p. 22 available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>.

## STATE OF RESEARCH ON NHRIS

Much of the research focusing on the effectiveness of the OIK is carried out by civil society in Kosovo. The focus on the effectiveness of the OIK ushered changes to human rights legislation by the Government of Kosovo - the so-called human rights package. For example, in 2013, through a Memorandum of Understanding with the OIK, the Youth Initiative for Human Rights was able to carry out in-depth desk-based and field research. This provided an insight into the workings of the OIK and made many recommendations.<sup>52</sup> Similarly, the European Union and the Council produced a comprehensive report on Reform Proposals to Energise Non-Judicial Human Rights Institutions in Kosovo in December 2013.<sup>53</sup> The latter not only provides a number of recommendations on structures but also on the draft legislation that led to the Law on Ombudsperson.

For the reporting period of this report (2018), there is limited research that has been carried out in respect of the OIK. The Advocacy Centre for Democratic Culture policy brief in September 2018 focused on the OIK's role as an equality body that makes recommendations on the strengthening of staff capacities to deal with complaints, research, development and statistical analysis. In addition, it recommends which types of cases should be allocated based on experience and knowledge of employees. Increasing presence in field offices, as well as promoting its role among the population, are viewed as methods to enhance its effectiveness. It also recommended that the OIK should focus on innovation and results and in particular on the private sector to enhance compliance with the Law on Protection from Discrimination.<sup>54</sup> As for the NAPPD, we have not been able to locate any independent research that has been carried out in respect of this institution.

## RESEARCH FINDINGS

Next, we will discuss the research findings. We have presented them per domain, in order to facilitate the reaching of comparative remarks which can encourage mutual learning of the NHRIs. In addition, this enables us to point out the systemic challenges faced by all institutions. Each section starts with a figure presenting the ranking of NHRIs per domain, starting from the institution with the highest and ending with the one with the lowest score.

### General score

NHRI	General score ↓ <i>min: 0; max: 8</i>
Ombudsperson	5.90
OIK (Equality Body)	5.69
OIK (FAI)	4.59
NAPPD	3.32

It is evident why Ombudsperson as NHRI and OIK as Equality Body scored the highest taking into consideration the recent reforms in legislation with the adoption of the so-called "Human Rights Package of laws"<sup>55</sup>. At the same time, the OIK FAI and NAPPD scored the lowest since during the reporting period both have only been provisionally run, because the Data Protection Law and Access to Information Law were being amended to address shortcomings in the system and to align the former with the GDPR<sup>56</sup>.

### Domain 1: Independence and ability to work without pressures

NHRI	General score ↓ <i>min: 0; max: 2</i>
Ombudsperson	1.70
OIK EB	1.70
OIK FAI	1.67
NAPPD	0.89

The Ombudsperson scored the highest in this domain with 1.70, compared to NAPPD, which scored 0.89. The assessment for this domain is conducted mostly based on indicators that measure compliance of legal provisions with relevant international standards. To some extent, it looks more into the effective implementation of such legal provisions. It is evident that the Ombudsperson as NHRI and OIK as Equality Body scored the highest taking into consideration the recent reforms in legislation with the adoption of the so-called "Human Rights Package of laws"<sup>57</sup>. At the same time, since during the reporting period it has only been provisionally run, the NAPPD scored the lowest, because the data protection law was being amended to address shortcomings in the system and to further align it with the GDPR.<sup>58</sup>

It is noteworthy that Ombudsperson scored slightly lower in its role as a body for free access with 1.67. However, the difference is insignificantly low to the scoring of Ombudsperson as NHRI and Equality Body, and the overall scoring of the Ombudsperson remains much higher than the scores for the NAPPD under this domain. Additionally, the free access mandate of the Ombudsperson was under reform during the reporting year (2018) together with the data protection law and as such, it was also provisionally operational.

The Ombudsperson has an **independent statutory basis**, which granted it the highest score on this indicator 2.00. While the Ombudsperson is established by the Constitution<sup>59</sup>, the NAPPD is established by law. Article 29 of the Law on the Protection of Personal Data provides that the NAPPD is an independent agency. The Constitution does not say anything about the agency, other than that personal data is to be protected and regulated by law<sup>60</sup>. It should be noted that this law was amended in 2019 to comply with GDPR as when it was enacted in 2010, the GDPR was not in force. Therefore, in reporting for 2018, throughout this assessment, the scoring has been set to 1.00 because it does not meet all of the GDPR requirements.

The situation is somewhat different concerning **the appointment process**. Only the appointment of the Ombudsperson to some extent satisfies the international standards – appointment by the legislature after public nomination, in a participatory and transparent procedure. The Constitution of Kosovo<sup>61</sup> and the Law on Ombudsperson<sup>62</sup> have specified the general framework for the public nomination, participation and transparency of the appointment process. However, there is no specific regulation adopted by the Assembly as required by the Law on Ombudsperson<sup>63</sup>. In the absence of a particular regulation, currently, the appointment process is done based on a general practice that the Assembly uses to appoint higher state officials. Even though 2018 was not an appointment year, the previous experience was not wholly satisfactory – the involvement of NGOs and publication of certain information regarding the candidates was made possible only after pressure from NGOs and media. For these reasons, the scoring of Ombudsperson for this indicator is 1.00.

The Law on the Protection of Personal Data<sup>64</sup> sets out the process for appointing the Chief State Supervisor, National Supervisor and Deputy Supervisors. After nomination from the Government, the Assembly shall appoint the Chief State Supervisor and National Supervisors. However, the Chief State Supervisor is to choose one of the National Supervisors to be his or her deputy. There is no transparency or public consultation with this process as the Government decides who they would nominate. The Assembly has a role in scrutinising, but they can only go so far based on what the Government puts forward. For these reasons, the NAPPD scored 0.00 on this indicator.

<sup>52</sup> Youth Initiative for Human Rights, An Insight into the Work of the Ombudsperson Institution, June 2013.

<sup>53</sup> European Union and Council of Europe, Reform Proposals to Energise Non-Judicial Human Rights Institutions in Kosovo, December 2013.

<sup>54</sup> Advocacy Centre for Democratic Culture, Policy Brief - The Ombudsman in the system of protection against discrimination, September 2018, Chapter 7 - Recommendations.

<sup>55</sup> As of 2015, Kosovo adopted the so-called "Human Rights Package of laws," to protect and promote the rights of individuals, including anti-discrimination and gender equality provisions.

<sup>56</sup> European Commission, Report for Kosovo 2018 page 22, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>.

<sup>57</sup> As of 2015, Kosovo adopted the so-called "Human Rights Package of laws," to protect and promote the rights of individuals, including anti-discrimination and gender equality provisions.

<sup>58</sup> European Commission, Report for Kosovo 2018 page 22, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>.

<sup>59</sup> Articles 132, 133 and 134 of the Constitution of the Republic of Kosovo.

<sup>60</sup> Constitution of the Republic of Kosovo, Article 36 (4).

<sup>61</sup> Constitution of the Republic of Kosovo, Article 134 (1).

<sup>62</sup> Law No. 05/L -019 on Ombudsperson, Article 8 and 9.

<sup>63</sup> Law on Ombudsperson, Article 8 (12).

<sup>64</sup> Law No.03/L – 172 on the Protection of Personal Data, Articles 30, 31, 32 and 33.



On **clear criteria for membership**, the Ombudsperson scored highest 2.00, since both the Constitution<sup>65</sup> of Kosovo and the law require “distinguished experience and knowledge in the area of human rights and freedoms”. The NAPPD received the lowest score of 0.00. The law requires that at least one of the Council members must have a university law degree<sup>66</sup>. However, the person appointed as the Chief National Supervisor only requires a university degree without specifying the subject<sup>67</sup>. Similarly, persons appointed as the National Supervisors only require university education without specifying the subject<sup>68</sup>.

The **term of office** for the Ombudsperson is five years<sup>69</sup> without renewal which is within the range recommended by GANHRI (5-7 years) and gets the highest score on this indicator 2.00. Similarly, the NAPPD got the highest score 2.00 since the LPPD provides that appointments of the Chief National Supervisor and National Supervisors are for five years where all of them have a right to be reappointed once<sup>70</sup>.

On **avoidance of conflict of interest**, due to vague language of legal provisions both the Ombudsperson and the NAPPD received a medium score of 1.00. The applicable legislation requires for the Ombudsperson and the NAPPD to act in complete independence, to refrain from any action incompatible with duties and not to exercise any other occupation<sup>71</sup>. However, no legal provision specifically refers to the conflict of interest but prohibits another job.

In relation to **immunities**, the Ombudsperson (for which the international standard for immunity has been established) scored a 2.00. The Constitution grants the general functional immunity<sup>72</sup>. Additionally, the law provides that the Ombudsperson, his/her deputies as well as staff of the Ombudsperson Institution enjoy immunity from prosecution, civil lawsuit and dismissal due to oral or written statements, for activities or decisions that are within the scope of responsibilities of the Ombudsperson Institution. Their functional immunity continues even after the end of the office. Furthermore, the Offices of the Ombudsperson Institution are inviolable. Archives, files, communications, property, funds and assets of the Ombudsperson Institution, wherever they are or by whomsoever holds them, shall be inviolable and enjoy immunity from control, acquisition, official search, confiscation, expropriation or from any other intervention or through the bailiff, administrative, judicial or legislative action.

Regarding the criterion ‘**no instruction from government**’, the Ombudsperson has the highest attainable score of 2.00 because of explicit Constitutional and legal provisions on the prohibition of interference. Even though the prohibition does not explicitly say that “the Government shall not interfere”, it states that it “does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo”<sup>73</sup>. At the same time, the NAPPD has received a medium score of 1.00. The LPPD specifies that the Agency is independent. However, it does not explicitly refer to the prohibitions of interference from government or any other authority<sup>74</sup>.

The Ombudsperson received the highest score 2.00 on **removal from office** since the grounds for dismissal are clearly defined and limited to actions that adversely impact the capacity of a member to fulfil the mandate, and are carried out in a transparent procedure, supported by a decision of the 2/3 of the Kosovo Parliament. At the same time, the NAPPD has received medium score 1.00 since the law provides some grounds for dismissal<sup>75</sup> but does not provide for a transparent procedure for removal.

Both the Ombudsperson and NAPPD were assessed with highest scores 2.00 on the criteria of **submission/agreement to pressure**. The annual reports for both institutions did not make any reference to any instance when they were prevented from acting. Furthermore, the European Commission Report and NGO reports do not state that there was such interference.

Finally, on the indicator of **public opinion on independence**, both institutions had the lowest scores 0.00. None of the institutions has carried out any surveys of their own. The European Commission Report for Kosovo for 2018 says that the Ombudsperson Institution has become the most trusted institution in Kosovo. However, it is not clear on what was the basis for that, and there is no percentage provided. Whereas, the Balkan Barometer Public Opinion 2018 provides that 61% of people in Kosovo trust the Ombudsperson Institution<sup>76</sup>.

65 Constitution of Kosovo, Article 134 (2), adopted 15 June 2008.

66 Article 30 of the Law on Protection of the Personal Data.

67 Ibid, Article 31.

68 Ibid, Article 32.

69 Constitution of Kosovo, Article 134 (1) and Law on Ombudsperson Article 9(1).

70 Law on Protection of the Personal Data, Article 31 and Article 32.

71 For Ombudsperson see: Constitution of Kosovo, Article 134 (3) and Law on Ombudsperson Article 6 (1.1.5) and Article 7 of the. For the NAPPD see: Law on Protection of the Personal Data, Article 35.

72 Constitution of the Republic of Kosovo, Article 134 (4)(5).

73 Constitution of the Republic of Kosovo, Article 132 (3) and of the law on Ombudsperson, Article 3 (1).

74 Law on the Protection of Personal Data, Article 29 and 35.

75 Law on the Protection of the Personal Data, Article 43.

76 Public opinion survey, Balkan Barometer 2018, Regional Cooperation Council, p. 118.

## Domain 2: Availability of resources and capacities

NHRI	General score ↓ <i>min: 0; max: 2</i>
Ombudsperson	1.35
EB OIK	1.25
FA OIK	1.36
NAPPD	0.67

The average score per institution in this domain is 1.16, which is 0.13 points lower than for Domain 1.

Similar to Domain 1, there is a major gap in scores between the Ombudsperson, OIK Equality Body and OIK FAI and the NAPPD. This scoring is a result of two factors: (a) During the reporting period (2018) the NAPPD was exercising its mandate only provisionally due to undergoing legislative reform and (b) the low budget and lack of resources the NAPPD has.

The scores for OIK Equality Body authorities and institutions for OIK FAI are 1.25 and 1.35, respectively. These institutions scored similarly as the Ombudspersons in this domain.

Regarding the indicator **separate and independent budget**, three aspects were taken into account: (i) whether the NHRI has a separate budget line; (ii) whether the budget is decided by the Parliament (not Government); and (iii) whether the NHRI is involved in budgetary preparations. The Budget for all NHRIs in Kosovo have a separate budget line and the Parliament decides the budget. However, the Government did cut NHRIs budget<sup>77</sup> in certain areas, which means that the Government does have a decisive role in the overall budget allocation. Therefore, all NHRIs received a medium score of 1.00 in this assessment. The Law on Ombudsperson provides that the Ombudsperson prepares its budget and presents it to the Assembly for approval. It also provides that it cannot be smaller than the previous year and it may be only less if approved by the Ombudsperson<sup>78</sup>. The Law on Ombudsperson also provides that if the Ombudsperson’s responsibilities increase, then its budget should increase<sup>79</sup>.

However, their involvement in budgetary preparations is mainly assessed as inadequate and as only the Ombudsperson is to some extent involved in budgetary preparations.

The Ombudsperson received the highest score of 2.00 on the indicator of **adequate financial resources**. The Ombudsperson’s budget approved by the Parliament was 1,373,167.00 Euro. Ombudsperson was able to make some savings, and the Government reduced its budget to 1,137,358.58<sup>80</sup>. Since there was underspending of approximately 20% (272,135.45 Euro) it did have enough money for its mandate. However, the National Audit Office auditing report of the Ombudsperson’s Institution for 2018 provides that the Ombudsperson spent 95% of the allocated budget. It means that only the budget after the Government deductions (with Ombudsperson’s consents) was calculated, where only 36,327.13 Euro was underspent. The National Audit Office Report shows that there was an increase in the Ombudsperson’s budget year after year. A medium score of 1.00, meaning that the institution “had enough financial resources for some parts of its mandate, but not for all”, was given to the NAPPD whose budget is four times lower than the Ombudsperson’s – the former being an institution with a similar nature to the latter. According to the National Audit Report for 2018 for the Data Protection Agency, the initial budget was 364,067 Euro, but the final budget was 253,785 Euro. A reduction of 110,282 Euro was due to the Government’s decision to reduce the budget. The majority of the reduction (107,030 Euro) was against salaries. The National Audit Report found that the NAPPD used 87% of its final budget for 2018, which was an improvement from previous years<sup>81</sup>. The Annual Report also states that the current budget is not adequate, and certain sectors cannot be functional<sup>82</sup>.

The total percentage of the national budget spent by the Ombudsperson is 0.055% and 0.012% by the NAPPD.

On the indicator of **transparent and meritocratic recruitment procedures**, the Ombudsperson is ranked medium (1.00). The Law on Ombudsperson provides that personnel is to be recruited by open and transparent criteria<sup>83</sup>. However, the provisions applicable to civil servants should apply. The medium value of the indicator

77 OIK, Annual Report 2018, No 18, Pristina 2019, p. 384- 386 and NAPPD Annual Report, Pristina 2019, p 31-42.

78 Law on Ombudsperson, Article 35 (1).

79 Ibid, Article 35 (2).

80 OIK, Annual Report 2018, No 18, Pristina 2019, p 384-6.

81 Audit Report for the NAPPD for 2018, Office of National Audit, p 10.

82 NAPPD Annual Report, Pristina 2019, p. 32.

83 Law on Ombudsperson, Article 32.

means that the Ombudsperson recruits its staff. Still, there are possibilities for transfer of staff by the Government or other forms of influence on staff recruitment exerted by the Government. The Law on Ombudsperson also provides that the Ombudsperson can appoint external advisors to serve for a certain period<sup>84</sup>. For this purpose, the Ombudsperson has adopted Rules of Procedure and other regulations regarding systematisation of jobs and the Regulation 02/2017 on the procedure for recruitment, appointment and probationary work of employees in the Ombudsperson.

The NAPPD received a minimum score of 0.00 since there was no available data on the recruitment procedures of their staff in addition to those applicable to all civil servants.

The Ombudsperson had a medium score of 1.00 on the sub-indicator **sufficient human resources**. The Ombudsperson's Annual Report and the National Audit Report for 2018 say that four legal advisors were planned to be hired. However, this did not take place, and 99% of the budget for salaries was used. Since the Ombudsperson Institution exercised the powers of the OIK Equality Body and OIK FAI, the scoring applies equally to those.

The NAPPD has received the minimum score of 0.00. In its Annual Report for 2018, it notes that the NAPPD had 17 members of staff although according to the organogram it should have had 37<sup>85</sup>. Therefore, not only that NE assessed this, but also the NAPPD view is that this is insufficient and NAPPD is not able to fulfil its mandate.

Similarly, for the sub-indicator **adequate human resources**, it was assessed that the Ombudsperson should receive the medium score for the following factors. The Ombudsperson's Rules on Procedure set out the organisational structure to cover the different sectors that the Ombudsperson is responsible<sup>86</sup>. Additionally, the Regulation 01/2016 provides the job titles of each section<sup>87</sup>. However, through external donors' support, Ombudsperson has engaged many external experts to draft *ex officio* reports. These reports indicated that while the existing staff can carry out basic mandates, the institution lacks specialised staff.

The NAPPD has received a minimum score of 0.00 for this sub-indicator, considering that in its Annual Report for 2018 it states that staff are having to complete up to 5 functions and so it is unlikely they will have all the skills for those functions<sup>88</sup>.

On the issue of **pluralism**, the Ombudsperson has been assessed with the medium score of 1.00. The only available data from 2016 provide that there were only four staff members from a non-majority ethnic community. Even though there are no data for 2018, we can assume that the pluralism of staff could not be drastically increased in such a short time.

As for **training**, the Ombudsperson does not have a structured specialist training programme either for their employees or for their target groups, resulting in a medium score of 1.00. However, it is indicated in the Annual Report for 2018 that the Ombudsperson employees attended many trainings, study visits and had an exchange of experience over the year<sup>89</sup>.

On the **internal structures**, the Ombudsperson received a medium score of 1.00. While the Ombudsperson's Rules on Procedure set out the organisational structure to cover the different sectors for which the Ombudsperson has responsibilities<sup>90</sup>, there is no job position dedicated to cover the free access part of the mandate.

The Ombudsperson has established eight **regional offices** in addition to the central office in Pristina. This covers each of the regions, as well as an office in North Mitrovica and Gračanica where the majority of the population is of Serbian ethnicity. The Ombudsperson and deputies hold open days in all of the offices - this is publicised through the website and the offices. The OIK makes field offices and receives communications online.

According to the National Audit Office Report –completed on an annual basis, the Ombudsperson has proper **internal controls** in place and complies with its obligations. The Law on Ombudsperson states that Ombudsperson should have regular internal and external audit controls<sup>91</sup>. Therefore, Ombudsperson received a maximum score of 2.00. The same maximum scoring of 2.00 is received by the NAPPD since the National Audit Office report notes that the NAPPD has good controls in place in relation to its legal obligations<sup>92</sup>. The NAPPD does not meet the criteria for establishing an internal audit unit and so relies on other public institutions to fulfil this function on its behalf.

84 Ibid, Article 33.

85 Data Protection Agency Annual Report, Pristina 2019, p. 12.

86 Regulation No 02/2016 on the Rules of Procedure of Ombudsperson Institution, 2016, Article 11.

87 Ibid, Article 40.

88 Data Protection Agency Annual Report, Pristina 2019, p. 12.

89 OIK, Annual Report 2018, No 18, Pristina 2019, p. 146.

90 Regulation No 02/2016 on the Rules of Procedure of Ombudsperson Institution, 2016, Article 11.

91 Law on Ombudsperson, Article 35 (4).

92 National Audit Report for 2018, p. 14.

### Domain 3: Information, access and cooperation with other relevant actors

NHRI	General score ↓ <i>min: 0; max: 2</i>
Ombudsperson	1.33
OIK (Equality Body)	1.30
OIK (FAI)	0.88
NAPPD	0.89

The Ombudsperson as a NHRI achieved the highest score for this Domain. The reasons for this include achieving a maximum score relating to the following: the parliamentary scrutiny of its work, other institutions having obligations to provide information to the OIK, being accessible and being accessible specifically to children, membership in international networks and participation in international activities, as well as having a communication strategy and offering confidentiality to witnesses.

On the sub-indicator of **parliamentary scrutiny**, the Ombudsperson received a high score of 2.00 as the OIK's report was deliberated by the Parliamentary Committee for Human Rights, Equality, Missing Persons, and Petitions.<sup>93</sup> In addition, it was debated in the plenary session, although it was not voted due to lack of quorum, which indicates that both deputies and political parties are not sufficiently interested in discharging their functions within the Assembly. Ombudsperson submits an annual comprehensive report for all its mandates (OIK equality body, OIK as NHRI and OIK FAI). Therefore, Ombudsperson received a high score (2.00) for all its mandates. Similarly, NAPPD received a high score of 2.00, as its report was debated both by the Parliamentary Committee and in plenary session.

Under the sub-indicator **providing information to the NHRI**, the Ombudsperson Institution received a high score of 2.00 for all its mandates (OIK as NHRI, OIK equality body and OIK FAI) due to the strong constitutional and legal provisions that oblige Kosovo institutions to provide information to the Ombudsperson. Both the Constitution and the Law on Ombudsperson provide that "authorities are obliged to respond to the Ombudsperson on his requests on conducting investigations, as well as provide adequate support according to his/her request"<sup>94</sup>. Furthermore, the Law on Ombudsperson provides that "refusal to cooperate with the Ombudsperson by a civil officer, a functionary or public authority is a reason that the Ombudsperson requires from the competent body initiation of administrative proceedings, including disciplinary measures, up to dismissal from work or civil service"<sup>95</sup>.

In **cooperation with the government**, the Ombudsperson received a minimum score of 0.00 in all its mandates (OIK as NHRI, OIK Equality Body and OIK FAI) since there is no obligation to be consulted by the government. However, according to the Law on Ombudsperson, the Ombudsperson can advise and recommend to the institutions of the Republic of Kosovo regarding their programs and policies to ensure the protection and advancement of human rights and freedoms<sup>96</sup>. Whereas the government is obliged to consult the NAPPD and NAPPD is obliged to respond<sup>97</sup>. The NAPPD's Annual Report refers to the Agency being consulted on and responding in respect of 27 draft laws, 13 draft regulations, 47 administrative instructions and 19 other acts<sup>98</sup>. Therefore, NAPPD has received a high score of 2.00 on this sub-indicator.

On the **cooperation with other NHRIs**, both OIK in all its mandates and NAPPD received medium scores of (1.00). From Annual Reports of both institutions, it is evident that some degree of cooperation exists. However, not in a structured manner. There are certain areas where the two NHRIs can intensify cooperation, in particular in joint advocacy regarding the budget increase and membership in international organisations and networks. The NAPPD cooperated with international experts in making changes to data protection legislation to align with GDPR.<sup>99</sup> In addition, the NAPPD attended other events, including a meeting of the International Working Group on Data Processing in Telecommunications<sup>100</sup> and the International Conference of Data Protection and Privacy Commissioners.<sup>101</sup>

On the component **cooperation with NGOs**, only the OIK has been assessed in all its mandates and received a medium score of 1.00. The OIK has established an online platform for publication of NGO reports, at the same time commemorating the International Human Rights Week. However, the cooperation is not well-structured,

93 This meeting took place on 25 April 2018

94 Constitution of the Republic of Kosovo, Article 132 (3) and Law on Ombudsperson, Article 25 (1).

95 Law on Ombudsperson, Article 25 (2).

96 Ibid, Article 18 (3).

97 Law on Protection of Personal Data, Article 39.

98 NAPPD Annual Report for 2018, p. 15.

99 NAPPD Annual Report for 2018, p. 26.

100 Ibid, p.27.

101 Ibid, p.28.

and cooperation with different NGOs is regulated by MoUs<sup>102</sup>.

On the sub-indicator **information on rights**, both NAPPD and OIK (OIK Equality Body, OIK FAI and OIK as NHRI) received a minimum score of 0. Whilst the Ombudsperson's Annual Report for the reporting period is comprehensive, it is not the easiest to read, and citizens may not necessarily use it to inform themselves about their rights. On the specific sub-indicator **rights of data subject** or information on rights and remedies, other than the annual reports, *ex officio* reports and other thematic reports, there are no additional resources that are readily available and easy-to-read and inform citizens on their rights and remedies.

Ombudsperson Institution in all its mandates (OIK equality body, OIK as NHRI and OIK FAI) has received a high score of 2.00 on the **accessibility** component because the OIK has a central office, as well as regional offices. It also provides a free phone number, receives complaints via email, and it is presented on specific social media platforms. Its website informs the citizens of its work and how complaints can be submitted. Whereas for **accessibility for children**, it is notable that the OIK has been working with NGOs to address this issue in its internal processes specifically.<sup>103</sup> The NAPPD received a medium score of 1.00 in this assessment. Even though the NAPPD has a central office, as well as email and telephone access, during the reporting period, the NAPPD has experienced the institutional challenges as there had been no sufficient focus on accessibility or outreach. Whereas, on the **access of persons with disabilities**, both NHRIs have received minimum scores of 0.00. Whilst the use of technology may assist, there could be other measures that the OIK and NAPPD could put in place to advance accessibility further.

In respect of **membership in international networks**, the Ombudsperson received the highest score of 2.00 since it is a member of a range of networks including the International Ombudsman Institute, the European Ombudsman Institute, the European Network National Human Rights Institution, the South East Europe Children's Rights Ombudsperson's Network (CRONSEE), the Association of Ombudsmen & Mediators of Francophonie, the Association of Mediterranean Ombudsman, the Global Alliance of National Human Rights Institutions, the European Network of Ombudspersons for Children and South-East Europe Network of National Mechanisms for the Prevention of Torture.<sup>104</sup> At the same time, the NAPPD received a minimum score of 0 due to its lack of membership in international networks.

The OIK as NHRI and OIK Equality Body received the maximum score of 2.00, while OIK FAI received the minimum score of 0 for **participation in international activities**. The OIK Annual Report provides information on the participation of OIK staff in numerous study visits, conferences and training. However, there was no sufficient focus on freedom of expression and/or information. The NAPPD was scored with a medium score of 1.00 since the Annual Report refers to a number of regional and international events (up to 7 activities) attended by NAPPD staff<sup>105</sup>.

The OIK received a high score of 2.00 in all its mandates for having a **communication strategy** covering three years<sup>106</sup>. The NAPPD has been scored with a minimum score of 0.00 for not having one.

On **confidentiality/protection** regarding NHRIs, the research considered whether and to what extent confidentiality is provided to witnesses and whistle-blowers. All NHRIs scored highly with a score of 2.00, as they ensure confidentiality, mainly referring to the general legal framework. The Ombudsperson, his deputies and staff must safekeep the confidentiality of all information and data they receive<sup>107</sup>. Similarly, at NAPPD, the supervisors and all staff are required to protect confidentiality during and after their mandate ends<sup>108</sup>. Additionally, the Law on Protection of Whistle-blowers provides additional layers of confidentiality/protection for the staff of NHRIs.<sup>109</sup>

#### Domain 4: Mandate and powers

NHRI	General score ↓ <i>min: 0; max: 2</i>
Ombudsperson	1.52
OIK (Equality Body)	1.44
OIK (FAI)	0.69
NAPPD	0.88

The Ombudsperson as an NHRI once again received the highest score for this domain of 1.52. The OIK Equality Body scored slightly lower at 1.44. Whereas the OIK FAI scored much lower at 0.69. In this section, we set out how the OIK scored in respect of the individual indicators for this domain as NHRI, Equality Body and FAI.

The OIK as a NHRI scored the highest score of 2.00 in respect of **human rights promotion**. This is attributed to it having a broad mandate including the promotion of human rights<sup>110</sup> and being able to address the public or institutions through *ex officio* cases, which it has done during the reporting period with 72 cases initiated and 14 reports issued.<sup>111</sup> Similarly, as OIK Equality Body on **promotion and prevention**, it has scored the highest score of 2.00. Its mandate includes the promotion of equality and non-discrimination and prevention through informing the public about these principles and providing guidance and advising on best practices to the public and private sector.<sup>112</sup>

On the indicator of **promoting harmonisation with internal human rights instruments and implementation**, the OIK as a NHRI scored a medium score of 1.00. Whilst the OIK does have a role in harmonisation,<sup>113</sup> it does not have an obligation to report to international bodies. Although in practice, it has done so voluntarily.<sup>114</sup> Similarly, on submission on contributions to international bodies, the OIK scored 2.00. It merits such a score as it has submitted reports to international organisations including to the Office of the High Commissioner for Human Rights, the Global Alliance of National Human Rights Institutions and European Network National Human Rights Institution, among others.<sup>115</sup>

Concerning **mandate and powers**, as an NHRI, the OIK has achieved high scores. Firstly, it scored 2.00 on coverage of sectors as its mandate includes both the public sector and the private sector exercising public functions.<sup>116</sup> Secondly, the OIK has substantial **powers of investigation** within public institutions being under an obligation to cooperate with the OIK.<sup>117</sup> The OIK has the right to compel witnesses when they are civil servants.<sup>118</sup> Whereas, in its capacity as a national prevention mechanism, the OIK has the requisite powers, including unannounced visits, access to all information and not being obliged to disclose any information it has received during interviews.<sup>119</sup> Thirdly, the OIK enjoys **broad powers of access**. In particular, the Constitution requires all institutions to respond to requests and provide all information requested by the OIK. The Law on Ombudsperson provides the OIK with broad powers to investigate complaints. Nevertheless, for its role as the national preventative mechanism against torture, it is entitled to undertake unannounced visits in any place where violations of human rights are suspected.<sup>120</sup>

In respect of the OIK's mandate as an Equality Body, the Law on Protection from Discrimination<sup>121</sup> provides a comprehensive list of protected grounds, as well as multiple and intersectional discrimination.<sup>122</sup> On these grounds, it has achieved a high score of 2.00, but for coverage – areas it got only 1.00 as its mandate does not cover hate speech.<sup>123</sup>

<sup>110</sup> Law on Ombudsperson, Article 1 and Article 16.

<sup>111</sup> Ombudsperson Annual Report 2018, pages 388 and 291.

<sup>112</sup> Law on Protection from Discrimination, Article 9.

<sup>113</sup> Law on Ombudsperson, Article 18.

<sup>114</sup> Ombudsperson Annual Report 2018, p. 380.

<sup>115</sup> Ibid, p. 379.

<sup>116</sup> Law on Ombudsperson, Article 1.

<sup>117</sup> Law on Ombudsperson, Article 25.

<sup>118</sup> Ibid, Article 26.

<sup>119</sup> Law on Ombudsperson, Article 16.

<sup>120</sup> Ibid, Article 17.

<sup>121</sup> Law No. 05/L-021.

<sup>122</sup> Law on Protection from Discrimination, Article 1 and 2.

<sup>123</sup> Ibid, Article 2.

<sup>102</sup> OIK Annual Report for 2018, p. 20-25.

<sup>103</sup> Law on Ombudsperson (Article 18 (3)) requires specific procedures for children to be adopted. The OIK engaged in outreach activities and collaborated with NGOs as set out in the Ombudsperson Annual Report for 2018, page 25.

<sup>104</sup> Ombudsperson Annual Report for 2018, pages 378 - 379.

<sup>105</sup> NAPPD Annual Report for 2018, p. 26 - 28.

<sup>106</sup> Strategy of the Office for Public and Media Relations 2016-2018, OIK, available at: <https://www.oik-rks.org/en/2018/10/19/strategy-of-the-office-for-public-and-media-relations-2016-2018/>.

<sup>107</sup> Law on Ombudsperson, Article 18 (1.11).

<sup>108</sup> Law on the Protection of Personal Data, Article 50.

<sup>109</sup> Law on Protection of Whistle-blowers, Article 11, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18303>.

Similarly, on the sub-indicator of equal treatment of all persons without discrimination on the grounds of sex, the OIK Equality Body scored 2.00. The OIK has a range of competencies including assisting victims, conducting independent surveys and making independent public reports and recommendations, among others.<sup>124</sup>

Despite having a wide mandate and a range of powers, in respect of **complaints**, the OIK as a NHRI scored 1.00. The scope of its powers includes dealing with all complaints that come before it or initiating complaints *ex officio*, as well as being able to use mediation or conciliation.<sup>125</sup> However, in this respect, there is a limitation as the OIK can only make recommendations and those recommendations are not binding. Similarly, the OIK as an NHRI does not have the right to represent victims in regular courts. It can only intervene in the capacity of *amicus curiae* or take matters before the Constitutional Court.<sup>126</sup> Such a limitation means that the OIK scored 0.00 regarding its ability to protect human rights through the courts. With regards to children's rights, the OIK scored 1.00. Although it is required to adopt specific procedures to receive and handle complaints from children, as well as create a specialised team for this purpose, it is not entitled to take cases to the regular courts other than as *amicus curiae*. Still, it does have standing before the Constitutional Court on constitutionality issues.<sup>127</sup> Therefore, the limitation regarding courts affects its mandate overall.

The limitation regarding the inability to represent victims in court also impacted the scoring of the OIK Equality Body. Although the OIK Equality Body has a broad mandate, it is not able to represent clients in regular courts other than to intervene as *amicus curiae*.<sup>128</sup> Similarly, on independent assistance and strategic litigation, whilst the Ombudsperson can appear before the Constitutional Court, it does not enjoy the same rights before regular courts.<sup>129</sup> Therefore, in respect of the sub-indicators for courts and strategic litigation, it received a score of 1.00, respectively. Whereas on independent assistance - issuing recommendations and legally binding decision, it received a score of 1.00 because the OIK Equality Body can issue recommendations but not legally binding decisions.<sup>130</sup>

During the reporting period, it is reported that only 38% of OIK's recommendations were implemented.<sup>131</sup> It has resulted in a medium score of 1.00 for **follow up of recommendations**. It also scored the same in its capacity as OIK Equality Body. However, on the sub-indicator of **initiatives to national authorities**, the OIK did much better with a score of 2.00, based on its engagement in a number of initiatives to national authorities including initiating 72 *ex officio* cases and 14 reports.<sup>132</sup> Similarly, on **reports**, the OIK scored 2.00. Through *ex officio* cases, the OIK has focused on issues that have persisted and affected a number of victims. The OIK Equality Body also engaged in many **initiatives to national authorities** to draw attention to discriminatory practices during the reporting period.<sup>133</sup>

On the **manner of complaints submission**, the OIK Equality Body scored 2.00. As noted above in respect of the OIK NHRI, it uses various channels to receive complaints including over the phone, in person at the central and regional offices, and it has a presence on social media. Whereas on the sub-indicator of the **language used to submit complaints**, the OIK Equality Body scored 1.00. While complaints can be submitted in the two official languages of Albanian and Serbian<sup>134</sup>, there are other minority languages in some local regions such as Turkish or Romani which do not appear to be available. As part of its mandate, the OIK as a NHRI, Equality Body and as FAI is to deal with all complaints free of charge for which it scored 2.00.<sup>135</sup> The OIK has the mandate to carry out independent surveys<sup>136</sup>, but none were carried out during the reporting period. Therefore, for independent surveys, it scored 1.00. It also has a mandate to publish independent reports, and many reports were published through the Annual Report for which it scored 2.00.<sup>137</sup> Whereas on the sub-indicator of making **submission or contributions to international bodies**, the OIK Equality Body scored 2.00 as during the reporting period it made five submissions.<sup>138</sup>

The OIK FAI scored 2.00 on **monitoring and oversight**. During the reporting period, the OIK had a full mandate and powers to monitor the Law on Access to Public Documents.<sup>139</sup> On **promotion**, the OIK FAI scored 1.00, because there were limited activities such as public service announcements on the right of access to

124 Law on Protection from Discrimination, Article 9.

125 Ibid, Article 16.

126 Ibid.

127 Ibid, Article 18 and 16.

128 Ibid

129 Law on Ombudsperson, Article 18.

130 Ibid, Article 27 and 28.

131 Ombudsperson Annual Report, p. 398.

132 Ibid, pages 381 and 388.

133 Ibid, page 202 onwards.

134 Ibid, Article 4.

135 Ibid, Article 16.

136 Law on Protection from Discrimination, Article 9.

137 Ombudsperson Annual Report, pages 47 and 82.

138 Ibid, p. 379.

139 Law No. 03/L-215, Article 10 and 17.

public documents and a roundtable with civil society and public institutions on the right of access to public documents.<sup>140</sup> However, on the **promotion of proactive dissemination**, the OIK FAI scored 0.00 since the legal framework does not explicitly provide for the OIK to promote proactive dissemination of public authority data<sup>141</sup> and the legal framework can be a limiting factor in this regard. On **complaints submission**, the OIK FAI scored 1.00, because the legislation provides that complaints must be signed and contain the personal data of the requester.<sup>142</sup> However, through its Annual Report, the OIK FAI states that it does provide assistance over the phone.<sup>143</sup>

At the same time, the NAPPD scored a relatively low score of 0.88 for this domain. This is mainly attributed to the legislation not being aligned with the GDPR during the reporting period. That has been corrected but falls outside of this reporting period. In the paragraphs that follow, we consider the specific scores allocated for each indicator.

On **monitoring and enforcement**, the NAPPD scored 1.00. Although the NAPPD does have a mandate to carry out inspections and audits and to carry out investigations and impose fines, which can only be challenged in court, its mandate is not fully aligned with GDPR.<sup>144</sup> On **promotion**, the NAPPD scored 1.00. The LAPPD has a duty to provide advice, as well as promote the right to data protection.<sup>145</sup> The LAPPD also sets out obligations on publicising the NAPPD's work.<sup>146</sup> Whilst there were some promotional activities organised such as training for teachers, a campaign published in newspapers and portals, as well as events for international privacy day and television and media appearances, these appear to be limited.<sup>147</sup>

On its **advisory role**, the NAPPD scored 0.00. Whilst the LAPPD provides the NAPPD with a mandate to give such advice<sup>148</sup> and during the reporting period, it reported that it did so on a number of occasions. A breakdown is not provided for those instances where it did so, and it is not clear whether it took the initiative itself.<sup>149</sup> On **investigations**, the NAPPD scored 2.00 because the LAPPD provides it with a mandate to carry out investigations, audits and deal with complaints.<sup>150</sup> Similarly, on **complaint handling**, the NAPPD scored 2.00, as it has a clear mandate on complaint handling<sup>151</sup> and during the reporting period it has received and dealt with complaints.<sup>152</sup>

On **regulatory functions/authorisations**, the NAPPD received a score of 1.00. The NAPPD does have a mandate to establish and maintain a register of filing systems,<sup>153</sup> as well as generate a list of countries and international organisations that provide adequate protections/authorise international transfers.<sup>154</sup> However, as the NAPPD has not been aligned with the GDPR during the reporting period, it could not have received a maximum score. On **public opinion on public trust** in the NAPPD, it scored a 0.00 since no public opinion survey on public trust has been performed. At the same time, in an assessment by the European Commission, the NAPPD scored a 0.00. In the EC Report for Kosovo, it is noted that no progress was made during the reporting period. In particular, the NAPPD continues to be provisionally run as the mandate of all five supervisors expired, and the activities of the NAPPD were limited. Further, the legislative framework required alignment with the European Union data protection framework.<sup>155</sup>

On public opinion on public trust in NHRI institutions, the OIK scored 0.00. Whilst the OIK itself has not carried out any surveys, a report by Balkan Barometer Public Opinion 2017 provides that 59% of people in Kosovo trust the Ombudsperson Institution.<sup>156</sup> The OIK Equality Body achieved the same score of 0.00 as it has not carried out its survey. Other than the Balkan Barometer, no additional specific results exist. The latter also applies to OIK FAI as it achieved a score of 0.00 for the same reasons.

The European Commission assessment for the reporting period is positive as it recognises that the Ombudsperson has continued to strengthen its capacities and has become the most trusted institution in Kosovo.<sup>157</sup> The same applies to the OIK in its capacity as the Equality Body. For OIK FAI, it is noted that implementation remains

140 Ombudsperson Annual Report, pages 20 and 22.

141 The Constitution of Kosovo, Article 41 and Law on Access to Public Documents, Article 17.

142 Law on Access to Public Documents, Article 20.

143 Ombudsperson Annual Report, p. 26.

144 LAPPD, Article 46 - 48.

145 Ibid, Article 29.

146 Ibid, Article 45.

147 NAPPD Annual Report, pages 24 - 26.

148 LAPPD, Article 38 and 29.

149 NAPPD Annual Report, pages 14 - 15.

150 LAPPD, Article 29.

151 Ibid, Article 29, 41 and 42.

152 NAPPD Annual Report, page 21.

153 LAPPD, Article 20.

154 LAPPD, Articles 53 - 55 and 57.

155 European Commission Report for Kosovo, 2018, p. 22.

156 Public Opinion Survey, Balkan Barometer 2017, Regional Cooperation Council, p. 125.

157 Report for Kosovo 2018, p. 7.

uneven, and the law itself needs revision.<sup>158</sup> This has in fact taken place outside of the reporting period, and the legislative framework provides for this role to be fulfilled by the NAPPD from 2019. As for the NAPPD, no progress is reported as the NAPPD continues to be provisionally run.<sup>159</sup>

## RECOMMENDATIONS

Based on the ranking, the main findings and the challenges established, we have developed a set of recommendations. These refer to the national authorities (the Parliament and the Government, and the NHRIs), international actors (European Union and others) and NGOs.

### NATIONAL AUTHORITIES

- **Assembly**

**Adopt the necessary internal regulations to deal with independent appointments as a matter of priority, such as required by the Law on Ombudsperson.** This would enable the Assembly to fulfil its role effectively in nominating independent appointees. Having necessary regulations in place can assist with other independent appointments, i.e. pertaining to the NAPPD.

**Review internal processes regarding appointments to ensure robust processes are initiated each time the appointments are to be made.** The Assembly has continuously failed to make independent appointments, and processes were either repeated on many occasions or positions remained unfulfilled. It affects not only such institutions to function and their ability to secure citizens' rights but also the Assembly's position to hold those institutions to account through annual reporting procedures.

**Carry out appointment processes for all NHRIs through participatory methods, with the highest transparency, by involving NGOs and briefing media thoroughly and quickly.** This is necessary to ensure a participatory, transparent and de-politicised process that will result in a successful conclusion of the relevant appointment processes.

**All deputies and political parties should work together and be willing to compromise when making appointments for NHRIs to discharge their legal obligations but also focusing on professional criteria rather than political objectives.** Such situation is critical because appointment processes for independent appointees seem to continuously fail and/or attract criticism because of politicisation and the failure of the Assembly and deputies to implement the very legislation that they have enacted. It affects not only the Assembly but also the independent institutions and ultimately citizens and the constituents who voted deputies to represent their interests.

**Regularly engage with NHRIs through parliamentary committees and plenary sessions to understand issues faced by citizens and NHRIs.** The Assembly and deputies' essential role are to serve citizens. They can only hold the independent institutions to account over their work if they fully understand what they have been doing. Similarly, this sort of engagement will also enable them to hold the government to account, including those institutions who, for example, are not implementing Ombudsperson recommendations.

**Hold the government to account regarding recommendations made by NHRIs by following up on these and debating these in plenary sessions.** This is important because this is the crucial role of the Assembly and by engaging with NHRIs, the Assembly will not only highlight their work and profile but also fulfil its role and represent citizens.

**Ensure that the NHRIs have sufficient financial resources to complete their mandate.** This is important because, without sufficient resources, NHRIs cannot perform their functions. By engaging in this way, the Assembly can also hold the government to account and ensure that citizens' rights are protected and promoted by sufficient resources being allocated.

- **Government**

**Seek opinions from NHRIs on new legislation and policies as allowed by the applicable legislation.** This will enable the government to comply with its legal obligations, as well as improve the legislation and its reputation nationally and internationally.

<sup>158</sup> European Commission, Report for Kosovo 2018, p. 12.  
<sup>159</sup> Report for Kosovo for 2018, p.22.

**Where seeking opinions is not a legislative requirement, to consider seeking such an opinion voluntarily to ensure compliance with legislation and policymaking.** This will enhance the quality of the drafted legislation.

**Continuously monitor compliance with recommendations of independent institutions and work with government departments and agencies to improve compliance with recommendations of NHRIs.** This is critical to ensuring the protection of human rights of citizens, and that the changes in public policy or practice are made in line with recommendations of NHRIs.

**Continue to refrain and, in particular, ensure from interfering with the work of NHRIs.** This is very important because the status of the most NHRIs' as independent institutions is specified in the Constitution of Kosovo. Therefore, the government should take all measures necessary to ensure it does not interfere.

**NHRIs have leverage in designing their budget based on their needs to fulfil their mandate completely.** Budgets are to be allocated from the national budget so the government should be guided by the principle of refraining from interfering but allowing them to participate in budget design in line with their mandate.

**Provide sufficient financial resources in accordance with NHRIs' needs.** This is very important since, without sufficient financial resources, NHRIs cannot fulfil their mandate.

- **National Human Rights Institutions**

**Prepare budget requests based on needs and improve budget justification.** This is important because NHRIs will be competing for public funds with a vast range of other agencies and government departments. If the case put forward is not convincing and is not aligned with the needs, then it is unlikely to be approved.

**Increase budget advocacy efforts to be able to have sufficient financial resources to complete their mandate.** In particular, NAPPD should undertake extensive budget advocacy actions to increase its budget. It could be an effective approach to consider performing joint budget advocacy with other NHRIs. As mentioned above, this is important because if what is requested is not justified, then it is not likely to be allocated in entirety.

**Hold regular strategic planning processes with an evaluation system. Ensure that activities and donors give support to the institution's strategic priorities.** It is vital to ensure the relevant mandate fulfilment, by institution responding to the most pressing issues so they could be promoted and the strategic priorities could be utilised in various other processes, including budgetary advocacy.

**Enhance accessibility, especially by focusing on citizens with disabilities and how they can gain access.** This is important not only for the citizens concerned who can then realise their rights but also the wider impact it can have in persuading other institutions to do the same, and the private sector entities too. It could be done in many ways, including the use of technology.

**Adopt a communication strategy which includes explicitly focusing on citizen outreach and informing citizens of their rights, the institution's mandate and how citizens can realise their rights.** A comprehensive communication strategy is important to target "hard-to-reach" communities, or complainants who are not well represented, as well as to use easy-to-read language to convey mandate, manner of complaining, etc. It is important to increase the number of complaints and fulfil the institution's mandate.

**Review internal programs and plans to ensure appropriate budgeting, recruitment and sourcing of other resources.** This is critical for any organisation, although if an NHRI is dealing with more than one mandate, it becomes essential to ensure that the entire mandate can be fulfilled.

**Identify marginalised groups and target them in respect of making complaints** – for example, if the majority of complaints come from men and women are marginally represented, then the focus should be on reaching out to women so they can realise their rights. This can be further used for various processes such as an institution's communication strategy, internal programs and plans, as well as budgetary advocacy.

**Ensure the pluralism of staff, which should also be representative of local communities.** Such thing is important for an organisation, so they lead by example, and it is likely to have an impact on an institution's ability to serve citizens by reaching out to those who are marginalised or hard-to-reach.

**Continuously review capacities to deal with complaints and efficient allocation of resources.** Since the nature of complaints is likely to change and for the purpose of efficiency, it is important to use resources to ensure that more citizens can be assisted and thus fulfil an institution's mandate.

**Continuously provide learning and development for staff including by assessing capacities, putting in place a training programme for learning and development, reviewing it and monitoring its effectiveness.** This is important because an institution's mandate can only be fulfilled if its staff are well prepared, motivated and have the skills and tools to deal with complaints effectively.

**Conduct perception-based surveys and other surveys to identify citizen's needs. Translate the findings into policies that aim to improve NHRI's outreach, awareness and quality of services.** This is an essential tool that does not appear to be utilised at all. Utilising it will not only tell the institution how well it is performing, but also how to use it to make improvements, and it can be used in different processes such as budgetary advocacy.

**Ensure that regular coordination and cooperation is taking place between NHRIs on shared objectives such as budget advocacy and membership in international organisations.** This is important because it could result in saving both time and financial resources through knowledge and experience sharing, as well as making a greater impact.

**Develop a stable and sustainable platform for cooperation with NGOs.** This is important because NGOs can provide a vast amount of support to reach hard-to-reach groups and improve access.

#### INTERNATIONAL ACTORS

**Coordination between donors is critical to ensure linkages and avoid wasting resources.** There are vast areas where support can be provided, but one particular donor should not take an "ownership" of an issue should there be others who had also done the work, and also consider what has been planned.

**Be visible on the support provided and initiate discussions with the Assembly and the Government to draw attention to the support provided.** Since many resources have not been specifically noted, or it is not sure where donors have stepped in to fill the gap, it cannot be established with certainty where the Assembly or the Government have failed to address an issue. Even if this cannot be publicly done, other ways should be considered so that there is some form of acknowledgement.

**Before making interventions, one should seek views on them to be able to respond to the needs by requesting opinions from a range of representatives such as NGOs, the NHRIs, other donors etc.** Thus, it would be ensured there is no duplication and buy-in from those who are already operating in the field and may have experience and knowledge on interventions that can have a broader impact.

**Seek innovative proposals on the support that is provided, including through the use of technology and how impact can be measured in the longer term.** It is important to ensure that investments are not short-lived and unsustainable.

**Consider supporting NGOs for them to scrutinise the actions of the Assembly and the Government in respect of NHRIs, as well as NHRIs themselves.** A number of objectives can be thus assisted, including driving local ownership, raising capacities and sustainability.

**Support cooperation and coalition-building between NHRIs on shared objectives.** This is important because as it has been noted in this report, different NHRIs are at different levels in their operation. It is partly due to experience, but other issues such as the unwillingness of the Assembly and Government to fulfil their role also has an impact. Knowledge and experience sharing can be essential, especially to navigate operational challenges, as well as to identify the areas of cooperation to achieve long term objectives.

**Support advocacy efforts of NHRIs on the budget increase and membership in international organisations.** This is important because a well-funded NHRI will have the ability to fulfil its mandate and doing so could generate other benefits including greater accountability for public institutions or a stronger data protection regime which may persuade investors to operate in Kosovo.

#### • NGOs

**Monitor the work of NHRIs, as well as the work of the Assembly and Government in respect of NHRIs.** This is incredibly important because failures by these two institutions have had and continue to have a significant impact on the operation of NHRIs. Civil society can play an essential role in bringing deficiencies to the forefront of public debate and demanding accountability for inaction.

**Participate in the Assembly appointment process of any official to NHRIs** – this can be a fundamental way to scrutinise the actions of those involved in the appointment process, as well as draw the public's attention to the failure of deputies and political parties to fulfil their legal obligations during an appointment process. Failure to do so means processes are continuously repeated without any responsibility by those involved and, in the meantime, the respective NHRI is not functional.

**Engage in research on the work of NHRIs, updating on the latest developments affecting their mandate, including legislative changes or case law.** Such weakness is visible since there is limited research on the NHRIs by NGOs, and that could improve their ability to have a positive impact.

**Work collaboratively with other NGOs, international actors/donors and NHRIs where possible.** It is important to ensure a stronger voice when drawing attention to a particular issue, such as failures in appointment processes.

**Actively submit shadow reports to international bodies where possible.** It is especially important to independently report on the cases when the government is seeking to influence an NHRI or where the NHRI does not have the capacities or is not obliged by the law to make submissions to these bodies.

**Support advocacy effort of NHRIs on the budget increase and membership in international organisations.** This would help and contribute to national processes on budgetary allocation and international processes of memberships in organisations.

## Annex: List of indicators

### Domain 1: Independence and the ability to work without pressures

Ombudsperson	EB	SADP	FAI
Independent statutory basis	Independent statutory basis	Independent statutory basis	Independent statutory basis
Appointment process	Appointment process	Appointment process	Appointment process
Clear criteria for membership	Clear criteria for membership	Clear criteria for membership	Clear criteria for membership
Term of office	Term of office	Term of office	Term of office
Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest
Immunities	Immunities		
No instruction from the government	No instruction from the government	No instruction from the government	No instruction from the government
Removal	Removal	Removal	Removal
Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure
Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI

### Domain 2. Availability of resources and capacities

Ombudsperson	EB	SADP	FAI
A separate and independent budget	A separate and independent budget	A separate and independent budget	A separate and independent budget
Adequate financial resources	Adequate financial resources	Adequate financial resources	Adequate financial resources
Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures
Sufficient human resources	Sufficient human resources	Sufficient human resources	Sufficient human resources
Adequate human resources	Adequate human resources	Adequate human resources	Adequate human resources
Financial control	Financial control	Financial control	Financial control
Pluralism	Pluralism		
Training	Training		Training
Internal structure will enable focus on each part of the mandate	Internal structure will enable focus on each part of the mandate		
Regional offices/outreach	Regional outreach/offices		
Learning and change	Learning and change	Learning and change	Learning and change

### Domain 3. Information, accessibility and cooperation with other relevant actors

Ombudsperson	EB	SADP	FAI
Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny	Parliament's scrutiny
Providing information to the NHRI	Providing information to the NHRI		
Cooperation with government	Cooperation with government	Cooperation with government	Cooperation with government
Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRI	Cooperation with other NHRI
Cooperation with NGOs	Cooperation with relevant bodies and NGOs	Trans-national cooperation with other SAs	Cooperation with NGOs
Providing information on rights	Providing information on rights	Providing information on rights	Providing information on rights
		Information on rights and assistance to data subjects	
Accessibility	Accessibility	Accessibility	Accessibility
Accessibility to children			
Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities
Membership in international networks	Membership in international networks	Membership in international networks	
Participation in international activities	Participation in international activities	Participation in international activities	Participation in international activities
Communication strategy	Communication strategy	Communication strategy	Communication strategy
Confidentiality and protection	Confidentiality and protection	Professional secrecy	

## Domain 4: Mandate and powers

Ombudsperson	EB	SADP	FAI
		Monitoring and enforcement	Monitoring and oversight
Human rights promotion	Promotion and prevention	Promotion	Promotion
Promotion of harmonisation with international HR instruments and implementation			Promotion of pro-active dissemination
Mandate - coverage of sectors	Coverage of grounds of discrimination		
	Coverage - area		
	Equal treatment of all persons without discrimination on grounds of sex		
Human rights protection-powers - investigation	Independent assistance - mandate	Investigations	
Human rights protection-powers - access	Independent assistance - strategic litigation		
Human rights protection-powers - complaints	Independent assistance - issuing recommendations and legally binding decisions		
Human rights protection-powers - courts			
Follow-up of recommendations	Follow up on recommendations		
Initiatives to national authorities	Initiatives to national authorities	Advisory Role	Advisory Role
	Complaints submission	Complaints handling	Complaints handling
	Complaints submission - language		Complaints submission
	Complaints submission - free of charge		Complaints submission - free of charge
	Independent surveys	Regulatory functions/ authorisations	
Reports	Independent reports		
Submission of contributions to international bodies	Submission of contributions to international bodies		
National prevention mechanism			
Rights of the child			
Public opinion on public trust in NHRI institution	Public opinion on public trust in NHRI institution	Public opinion on public trust in SA institution	Public opinion on public trust in SA institution
Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report



# WHAT IS BEHIND AND BEYOND THE AVERAGE?

Country Report  
Montenegro

WHAT IS BEHIND AND  
BEYOND THE  
AVERAGE?

Country Report  
Kosovo



**Effectiveness of NHRIs in Western Balkan countries**  
Albania, Bosnia and Herzegovina, Kosovo,  
Montenegro, North Macedonia, Serbia

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## Country Report **Montenegro**

# WHAT IS BEHIND AND **BEYOND THE AVERAGE?**

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November 2020

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## List of Acronyms and Abbreviations

<b>APDP-FAI</b>	Agency for Personal Data Protection and Free Access to Information
<b>CoE</b>	Council of Europe
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CJEU</b>	Court of Justice of the European Union
<b>CRD</b>	Convention on the Rights of the Child
<b>CRD</b>	Civil Rights Defenders
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GANHRI</b>	Global Alliance of National Human Rights Institutions
<b>GDPR</b>	General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)
<b>EC</b>	European Commission
<b>EPI</b>	European Policy Institute – Skopje
<b>EU</b>	European Union
<b>HRA</b>	Human Rights Action
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>MANS</b>	<i>Mreža za afirmaciju nevladinog sektora</i> (Network for Affirmation of the NGO Sector)
<b>MNE</b>	Montenegro
<b>MS</b>	Member States
<b>NHRI</b>	National Human Rights Institutions
<b>NE</b>	National Expert
<b>NGO</b>	Non-governmental organisation
<b>NPM</b>	National Preventive Mechanism
<b>OHCHR</b>	UN Office of the High Commissioner for Human Rights
<b>OPCAT</b>	Optional Protocol to Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>RCC</b>	Regional Cooperation Council
<b>SA</b>	Supervisory Authority
<b>UN</b>	United Nations
<b>UNHRC</b>	UN Human Rights Committee
<b>WB</b>	Western Balkans

## INTRODUCTION

The process of transition to democracy has brought about a change in the state-citizen relations across the former socialist countries. The political aspects of this process included the establishment of democratic political institutions, the rule of law, and above all, guarantees that fundamental human rights and freedoms shall be exercised.<sup>1</sup> The latter bore particular significance in the post-communist countries, faced with scarce experience in providing adequate institutional guarantees that the state would safeguard human rights in line with international standards. States have thus established national human rights institutions (NHRIs) precisely with the mandate of upholding and promoting human rights.<sup>2</sup> In this research, the national human rights institution (NHRI) is defined as “a body established by the state with the mandate to protect and promote human rights”.

The Western Balkan (WB) states lagged behind in this process when compared to their East European counterparts. The latter have created mechanisms for the protection of human rights in the framework of their aspiration to comply with the conditions for the European Union (EU) membership. In the decade immediately following the breakup of Yugoslavia, the ethno-religious conflict and general state weakness made the establishment of the NHRIs virtually impossible. While the early 2000s brought the WB countries towards a moment of democratic change,<sup>3</sup> political institutions remained weak and susceptible to clientelism, patronage and corruption.<sup>4</sup> In the absence of a functioning rule of law, the existence of the NHRI has become increasingly significant not only for safeguarding human rights and freedoms within the states, but also for measuring and monitoring their implementation by external actors, and the EU above all in the context of accession.

Montenegro is specific in this context. While the first guarantees of human rights and freedoms were introduced as a part of the ‘creeping independence’ process,<sup>5</sup> the establishment of the NHRIs was put on the back burner while dealing with the issue of statehood. Only after that have the two NHRIs been constitutionalised and established. These are (1) Ombudsperson and the (2) Agency for Personal Data Protection and Free Access to Information (APDP-FAI), respectively. Monitoring of the work of these two institutions in Montenegro remains unsystematic and there have been scarcely any local NGO reports or academic analyses in this regard.<sup>6</sup> Even so, several problems have been highlighted in these reports, especially as regards political interference, the lack of institutional independence, human resources and budget. While each of these issues represents a serious obstacle for the NHRIs to perform their function, their intersection points to a dire need for assessing their effectiveness. For the purposes of this research, on the basis of the pre-set indicators, the Report evaluates the performance of the NHRIs in the WB defining their effectiveness as ‘the capability of the NHRI to independently perform its mandate and powers, with the aim to make a significant impact on the achievement of human rights’.<sup>7</sup>

This Report focuses on assessing the two NHRIs in Montenegro in line with the methodology sketched out in the subsequent section. The following overview of these institutions is then used as the backdrop for presenting research results in the four domains used for evaluating how effective the NHRIs are: independence and ability to work without pressures, availability of resources and capacities, information, accessibility and cooperation with other relevant actors and mandate and powers. After highlighting the challenges, the Report concludes with a set of recommendations for various stakeholders.

1 Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds. *The power of human rights: International norms and domestic change* (Cambridge University Press, 1999).

2 Richard Carver, “One NHRI or Many? How Many Institutions Does It Take to Protect Human Rights? – Lessons from the European Experience.” *Journal of Human Rights Practice* 3, No 1 (2011): 1-24.

3 Geoffrey Pridham and Tom Gallagher. *Experimenting with Democracy: Regime Change in the Balkans* (Routledge, 2000).

4 Soeren Keil, “The business of state capture and the rise of authoritarianism in Kosovo, Macedonia, Montenegro and Serbia.” *Southeastern Europe* 42, No 1 (2018): 59-82; Gergana Noutcheva and Senem Aydın-Düzgit. “Lost in Europeanisation: The Western Balkans and Turkey.” *West European Politics* 35, No 1 (2012): 59-78.

5 Jelena Džankić, “Montenegro’s Minorities in the Tangles of Citizenship, Participation and Access to Rights.” *JEMIE* 11 (2012): 40.

6 Marijana Laković Drašković, Daliborka Uljarević, Boris Marić, Wanda Tiefenbacher and Maja Stojanović, *Kratki vodič kroz zakonodavni i institucionalni okvir zaštite ljudskih prava u Crnoj Gori* (Centar za građansko obrazovanje, 2015); Snežana Bajčeta and Vuk Janković, *Analiza kapaciteta Agencije za zaštitu ličnih podataka i slobodan pristup informacijama* (MANS, 2019)

7 Malinka Risteska, *Effectiveness of NHRIs: Methodology* (EPI, 2019)

## APPROACH AND METHODOLOGY

Since there is no systematic research for empirically assessing the effectiveness of the NHRIs in the WB, this research deploys an approach that combines the structural and the mandate-based indicators. The structural approach focuses on the compliance of NHRIs with the main legal norms, or the institutional measures for safeguarding human rights. The mandate-based approach is used as complementary to the structural one, as it allows the assessment of the extent to which the NHRIs are successful in performing their institutional assignments.

Combining these two approaches enabled us to develop a matrix of indicators structured in four domains:

- (1) Independence and ability to work without pressures,
- (2) Availability of resources and capacities,
- (3) Information, accessibility and cooperation with other relevant actors, and
- (4) Mandate and powers.

The overview of indicators is presented in the Annex, whereas a detailed outline of methodology is available in the Comparative Analysis.<sup>8</sup>

The relevant international standards and the interpretations thereof have been the starting point for developing the indicators in the matrix.

The Paris Principles<sup>9</sup>, or more precisely the GANHRI General Observations<sup>10</sup>, are taken as the grounds for the indicators assessing the effectiveness of human rights institutions with a general mandate. The bases for specific indicators were the UN relevant standards related to the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>11</sup>, the Convention on the Rights of the Child (CRC)<sup>12</sup>, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>13</sup> and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>14</sup> and especially their interpretations.

The EU Commission Recommendation of 22 June 2018<sup>15</sup>, the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the CoE as well as the Revised General Policy Recommendation No 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE<sup>16</sup> were the European standards taken as the basis for indicators that assess the effectiveness of equality bodies.

The EU General Data Protection Regulation (GDPR)<sup>17</sup> and the CoE Convention 108<sup>18</sup> are used as main standards for setting the indicators related to the performance of data protection supervisory authorities. Since there are no specific international standards for an independent body on free access to information, the general standards for NHRIs were applied accordingly, while specific international standards on content of the right to information<sup>19</sup>, as well as documents developed by special rapporteurs for freedom of expression in the UN, CoE and OSCE were used for the indicators on powers and mandate.

The values of indicators have been weighed depending on the number of indicators per domain (which ranged from 6-12). In addition, some indicators have been broken down to sub-indicators, to capture the specifics of a particular issue, which depended on the level of detail of the relevant international standard. The indicator per domain is estimated as a sum of the weighed values of indicators in the domain. The overall score of effectiveness for each NHRI in each country is estimated as a sum of the indicators per domain. Each domain equally participates in the final score with 25%. Consequently, the scale of the score per country per body is 0-8. If an NHRI body is a multi-mandate body, which is the case with both the Ombudsperson and APDP-FAI in Montenegro, each mandate is scored separately. The overall institutional score is then estimated as a simple average of the sum of its scores for each mandate.

8 Malinka Risteska, *Effectiveness of NHRIs: Comparative Analysis* (EPI, 2019)

9 UN General Assembly, Resolution A/RES/48/134 (1993)

10 Global Alliance of National Human Rights Institutions, *General observations of the Sub-Committee on Accreditation*, adopted by GANHRI Bureau, 21 February 2018 (2018) Available at: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN\\_GeneralObservations\\_Revisions\\_adopted\\_21.02.2018\\_vf.pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf); accessed on 7 August 2019

11 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (1996)

12 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (1989)

13 UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I (2006)

14 UN General Assembly, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199 (2002)

15 Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, C/2018/3850, OJ L 167 Ch I, (2) (2018)

16 Council of Europe, ECRI, *General policy recommendation No 2: Equality bodies to combat racism and intolerance at national level*, adopted on 7 December 2017, CRI (2018) 06 (2017).

17 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), (2016) OJ L 119

18 CoE, *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No 223), 10 October 2018 (2018)

19 *International Covenant on Civil and Political Rights* (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR) (1966); CoE, *Convention on Access to Official Documents*, CETS 205, 11 June 2008 (2008);

## OVERVIEW OF NHRIS IN MONTENEGRO

This section of the Report provides an overview of the roots of the NHRIs in Montenegro, their mandate, composition and the developments that may have an impact on their functioning. Both the Ombudsperson and the APDP-FAI in Montenegro have multiple mandates, which in the context of resources raises the questions of their effectiveness and competence. Further issues that may affect the implementation of these institutions' mandates in practice include the lack of political independence, insufficient specialisation and general lack of human resources, poorly targeted capacity-building, and the approach to human rights protection and promotion which is formal rather than substantive.

**Ombudsperson** [*Zaštitnik/ca ljudskih prava i sloboda Crne Gore*]<sup>20</sup> is the state's institutional pillar for the protection and promotion of human rights and freedoms in Montenegro. It was first established by the Law on Ombudsperson on 10 July 2003.<sup>21</sup> In practice, the Ombudsperson was inaugurated on 10 December the same year. While operating in accordance with the Law in the first years of its existence, the institution of the Ombudsperson as an independent body with the mandate of protecting human rights and freedoms was established by Article 81 of the 2007 Constitution of Montenegro.<sup>22</sup> The constitutional provisions at the same time warranted for legislative change, as the 2003 Law on Ombudsperson was not fully compatible with the highest legal act of the state. As highlighted in the report of the Human Rights Action (HRA) NGO, legislative amendments were delayed for several years, thus postponing the establishment of the national preventive mechanism (NPM) for the prevention of torture and the protection from discrimination.<sup>23</sup> The incompatibility of legislation was resolved with the adoption of the second Law on Ombudsperson in Montenegro on 15 August 2011, which provided for adequate legal guarantees for the institution to perform its NPM functions, but the 'capacity of the Ombudsperson's Office to effectively address cases of anti-discrimination' remained limited.<sup>24</sup> The 2014 Amendments to the Law on Ombudsperson in Montenegro have consolidated the role of this institution as both the institution for NPM and the equality body. The latter has been further engrained in the 2014 Law on Protection from Discrimination, giving a broad mandate to this institution to safeguard citizens from the potentially discriminatory actions of state organs and private entities.<sup>25</sup> In May 2016, the Ombudsperson has obtained a B-status accreditation by the Global Alliance of National Human Rights Institutions (GANHRI), meaning that it is only partly in compliance with the Paris Principles.<sup>26</sup>

Hence in Montenegro, the Ombudsperson's mandate entails four pillars, including: 1) national mechanism for guaranteeing human rights and fundamental freedoms vis-a-vis public administration; 2) rights of the child, rights of youth and social protection; 3) national prevention mechanism – prevention from torture and due process; and 4) anti-discrimination, gender equality, and protection of minority rights.<sup>27</sup> With two general mandates on the protection of human rights and freedoms and anti-discrimination, and the specific mandates on the protection of the rights of the child and the NPM, questions of resources and training have frequently been raised in the European Commission's (EC) Progress Reports and shadow reports of local NGOs.<sup>28</sup> This research covers the two general mandates of the Ombudsperson.

Two further issues that have been identified include the fact that the recommendations the Ombudsperson issues are not implemented in practice, as they are not binding; and that the Ombudsperson is frequently appointed as a result of political bargaining and not of a transparent and participatory process.<sup>29</sup> Both issues influence the Ombudsperson's effectiveness. Namely, the first one implies its institutional weakness in comparison to public and private bodies against whose abuse it is mandated to protect citizens. The second one may indicate potential political influence, even though international and local assessments of impartiality in the course of

his or her work have been positive.<sup>30</sup> The Ombudsperson's term of office is six years, pursuant to Article 81 of the Constitution of Montenegro. Between 2003 and 2019, there have been two appointed Ombudspersons – Šefko Crnovršanin 2003 – 2009, who was re-elected for the period 2009-2015 and Šučko Baković 2015-2019. The appointment procedure is performed by the Parliament of Montenegro on the proposal of the President. As of 16 November 2019, a public call for the next Ombudsperson is ongoing, and the list containing four male and four female candidates has been published on the President's website on 1 October. A lengthy appointment procedure, as in 2013 and 2014,<sup>31</sup> may hamper the institution's effectiveness in developing a multi-annual strategy.

**The Agency for Personal Data Protection and Free Access to Information (APDP-FAI)** [*Agencija za zaštitu ličnih podataka i slobodan pristup informacijama*] was first established in 2008 as the Agency for Personal Data Protection, mandated as a supervisory body in view of the requirements for visa liberalisation in Montenegro.<sup>32</sup> The double-mandate of this institution was introduced by the 2012 Amendments to the Law on Free Access to Information, when the Agency was charged with implementing the constitutional guarantee of free access to information held by the public bodies.<sup>33</sup> The Agency is headed by a Director and led by a Council. The Council of the APDP-FAI is appointed by the Parliament of Montenegro. The Council appoints the Director of the Agency, whose term of office is four years, with the possibility of re-election. Internal activities of the Agency are regulated through a series of 26 subsidiary legal acts, which has indicated its institutional complexity and reflected on its capacity to perform its supervisory role.<sup>34</sup> The capacity of the Agency to take a double-mandate, especially as regards data protection, is insufficiently clearly regulated, which calls into question its efficiency as an NHRI.

Both the shadow report of the Montenegrin NGO MANS and the EC Annual Report have highlighted the weakness of the legal framework in terms of the protection of personal data, as well as the institutional capacity of the Agency to perform its tasks. The latter has especially been mirrored in the most recent criticism of the EC that while 'the number of complaints lodged with the Agency has increased ... the number of data protection cases brought to court remains limited'.<sup>35</sup> In the domain of the protection of whistle-blowers, the capacities of the Agency remain scarce. Equally, as regards the Agency's mandate in terms of free access to information, the institution's recommendations are not followed by public administration, raising questions of accountability and transparency 'especially in the areas prone to corruption and in the sectors dealing with the allocation of large portions of state budget or property'.<sup>36</sup> Further problems, similar to the ones related to the Ombudsperson include inadequate resources, the insufficiently defined professional qualifications and potential political influence especially in the appointment procedures. The Agency lacks a communication strategy and a clear, simple and transparent citizen-oriented approach.<sup>37</sup>

<sup>20</sup> The Law in the local language(s) uses gender sensitive language, while in English the name of the institution is translated as "Ombudsman". This report reverts back to gender sensitive language and refers to the institution as Ombudsperson.

<sup>21</sup> Zakon o zaštiti ljudskih prava i sloboda Crne Gore [Law on Ombudsperson] (Official Gazette of the Republic of Montenegro, No 41/03)

<sup>22</sup> Ustav Crne Gore [Constitution of Montenegro] (Official Gazette of the Republic of Montenegro 01/07), Article 81

<sup>23</sup> Tea Gorjanc Prelević, Ljudska prava u Crnoj Gori 2010-2011 (Akcija za ljudska prava, 2012). Available at: [http://www.hracion.org/wp-content/uploads/Ljudska\\_prava\\_u\\_Crnoj\\_Gori\\_2010-2011.pdf](http://www.hracion.org/wp-content/uploads/Ljudska_prava_u_Crnoj_Gori_2010-2011.pdf)

<sup>24</sup> Tea Gorjanc Prelević, Ljudska prava u Crnoj Gori 2010-2011 (Akcija za ljudska prava, 2012); Marijana Laković Drašković, Daliborka Uljarević, Boris Marić, Wanda Tiefenbacher, and Maja Stojanović, *Kratki vodič kroz zakonodavni i institucionalni okvir zaštite ljudskih prava u Crnoj Gori* (Centar za građansko obrazovanje, 2015);

<sup>25</sup> Zakon o zabrani diskriminacije [Law on Prohibition of Discrimination] (Official Gazette No 46/2010, 40/2011 – other law, 18/2014, 42/2017), Article 21

<sup>26</sup> Global Alliance of National Human Rights Institutions (GANHRI), Chart of the Status of National Institutions. Available at: [https://www.ohchr.org/Documents/Countries/NHRI/Chart\\_Status\\_NIs.pdf](https://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf)

<sup>27</sup> European Commission, 2011 Progress Report on Montenegro, p. 19. Available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2011/package/mn\\_rapport\\_2011\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/mn_rapport_2011_en.pdf)

<sup>28</sup> European Commission, 2012 Progress Report on Montenegro. Available at: [https://eeas.europa.eu/sites/eeas/files/mn\\_rapport\\_2012\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/mn_rapport_2012_en.pdf); Vanja Čalović, Vuk Maraš, Aleksandar Mašković, Veselin Radulović, Procjena nacionalnog integriteta Crne Gore (MANS 2016). Available at: <http://www.mans.co.me/wp-content/uploads/2016/08/NISizvjestajCG.pdf>

<sup>29</sup> Vanja Čalović, Vuk Maraš, Aleksandar Mašković, Veselin Radulović, Procjena nacionalnog integriteta Crne Gore (MANS 2016). Available at: <http://www.mans.co.me/wp-content/uploads/2016/08/NISizvjestajCG.pdf>

<sup>30</sup> European Commission, 2012 Progress Report on Montenegro. Available at: [https://eeas.europa.eu/sites/eeas/files/mn\\_rapport\\_2012\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/mn_rapport_2012_en.pdf); Vanja Čalović, Vuk Maraš, Aleksandar Mašković, Veselin Radulović, Procjena nacionalnog integriteta Crne Gore (MANS 2016). Available at: <http://www.mans.co.me/wp-content/uploads/2016/08/NISizvjestajCG.pdf>

<sup>31</sup> Marijana Laković Drašković, Daliborka Uljarević, Boris Marić, Wanda Tiefenbacher, and Maja Stojanović, *Kratki vodič kroz zakonodavni i institucionalni okvir zaštite ljudskih prava u Crnoj Gori* (Centar za građansko obrazovanje, 2015)

<sup>32</sup> Zakon o zaštiti podataka o ličnosti [Law on Personal Data Protection] (Official Gazette of the Republic of Montenegro 79/08, 70/09, 44/12)

<sup>33</sup> Ustav Crne Gore [Constitution of Montenegro] (Official Gazette of the Republic of Montenegro 01/07), Article 51

<sup>34</sup> Vanja Čalović, Vuk Maraš, Aleksandar Mašković, Veselin Radulović, Procjena nacionalnog integriteta Crne Gore (MANS 2016). Available at: <http://www.mans.co.me/wp-content/uploads/2016/08/NISizvjestajCG.pdf>

<sup>35</sup> European Commission, 2019 Report on Montenegro, p.26. Available at:

<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-montenegro-report.pdf>

<sup>36</sup> European Commission, 2019 Report on Montenegro. Available at:

<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-montenegro-report.pdf>

<sup>37</sup> Assessment made on the basis of the APDP-FAI website, which does not provide clear information in a language accessible to citizens, but rather refers to lengthy legislative provisions in an unsystematic manner.

## RESEARCH FINDINGS

The following section discusses the research findings per domain, so as to render the comparative findings in a better way, as well as to highlight the challenges that are common across the NHRIs in Montenegro. Such an approach also enables us to foster applicable recommendations and encourage inter-institutional exchange of good-practices. Subsections first present domain-specific ranking of each NHRI, and follow up in a descending order, per mandate.

### General score

NHRI (mandate)	General score ↓
	<i>min: 0; max: 8</i>
Ombudsperson (Equality)	5.28
Ombudsperson (NHRI)	5.20
Ombudsperson (total)	5.24
APDP-FAI (FAI)	4.28
APDP-FAI (PDP)	4.22
APDP-FAI (total)	4.25

The general ranking reveals that the Ombudsperson (5.24) is somewhat more effective NHRI than the APDP-FAI (4.25). The former institution also scored higher than the APDP-FAI in all domains. Domain 1 ‘Independence and Ability to Work without Pressures, where the Ombudsperson (1.50) received a somewhat higher score than the APDP-FAI (1.22). The close scores are related to the fact that legislative provisions related to the establishment and functioning of the two institutions are stipulated in a similar way. In practice, there have been concerns over the appointment procedure and possible political interference, especially as regards APDP-FAI.

In Domain 2 ‘Availability of Resources and Capacities’, the Ombudsperson (1.15) has a slightly higher score than the APDP-FAI (1.0). Both institutions reportedly lack financial resources, adequate training and strategic planning. While legislative provisions require general specialism from staff in both institutions, the structure and expertise of employees in the institution of Ombudsperson better reflects the four pillars of this institution. This will be explained in more detail in the section below.

In Domain 3 ‘Information, Accessibility and Cooperation with Other Relevant Actors’, the Ombudsperson (1.37, 1.30) scored higher than the APDP-FAI (1.00, 0.88). While both institutions would benefit from a streamlined communication strategy and better accessibility, the Ombudsperson’s higher score reflects the international outreach of this organisation in the relevant networks, greater degree of local initiatives and collaboration with local NGOs.

Finally, in Domain 4 ‘Mandate and powers’, the Ombudsperson (1.19, 1.33) has demonstrated to be a more effective institution than the APDP-FAI (1.00, 1.1). The Ombudsperson’s score is highest in relation to its mandate as an equality body (1.33), where the 2014 Law on Protection from Discrimination has given the prerogative to this institution to take to court private entities with a public function, along with public bodies. The low level of institutional responsiveness due to the non-binding character of recommendations and opinions remains the greatest concern for both NHRIs.

### Domain 1: Independence and Ability to Work without Pressures

NHRI	Domain 1 score ↓
	<i>min: 0; max: 2</i>
Ombudsperson (Equality)	1.50
Ombudsperson (NHRI)	1.50
APDP-FAI (PDP)	1.22
APDP-FAI (FAI)	1.22

The first domain in the matrix assesses the independence of the NHRI and its ability to work without pressure. While the scores only slightly differ, the Ombudsperson (1.50 on both mandates) is ostensibly more effective than the APDP-FAI (1.22 on both mandates).

Both institutions scored high (2.0) as regards their **independent statutory basis**. While originally the Ombudsperson was established by law, since 2007 this NHRI also has a constitutional basis.<sup>38</sup> APDP-FAI has been instituted through a separate law. The APDP-FAI met the highest appointment standard of a transparent procedure by legislature or specific independent body.<sup>39</sup> Since 2014 the legislation foresees participation of civil society, requires parliamentary approval and a public nomination by the President.<sup>40</sup> The 2015 selection of the Ombudsperson (in office until 2019) entailed participation of three academic institutions, a public call to NGOs, and a meeting with those that objected the **appointment**.<sup>41</sup> Including different societal actors in the appointment procedure is a step forward in ensuring legitimacy of the Ombudsperson as the central NHRI. Consultations regarding all candidates rather than the one put forward by the President and the publication of dissenting views would further enhance the transparency of the process. The appointment procedure for the next Ombudsperson is currently ongoing. While the names of the candidates are published on the President’s website, hence a part of the procedure is transparent, the selection takes place without mandatory public debate. There is no information on the consultations the President has undertaken in this regard.

On the **membership criteria**, the Ombudsperson satisfied the highest standard (human rights expertise). Article 8 of the Law on Ombudsman requires the appointees to have ‘at least 15 years of work experience, of which at least 7 in the domain of human rights and freedoms’, as well as a post-graduate degree, and other integrity-related qualifications.<sup>42</sup> The legally required educational qualification and experience correspond to the institutional structure and mandates of the Ombudsperson. By contrast, membership requirements for the APDP-FAI Council and Director include higher education and “5 years of work experience in the domain of human rights and freedoms”, but there are no further conditions as regards specialisation or integrity.<sup>43</sup> As a result, APDP-FAI has received the score of 1.00. The present composition of the Agency’s Council as well as the appointed Director only have a broad specialism in human rights, which may hamper the effectiveness of this institution in performing its mandates.

As regards the **term of office**, the term of the office of the Ombudsperson is six years, which is one year below the recommended maximum for the NHRI and the equality body, resulting in the score of 2.<sup>44</sup> Equally, the Director of APDP-FAI meets the highest standards in this domain with a term of office of four years, but the Council is elected for a five-year term.<sup>45</sup>

The Ombudsperson and the APDP-FAI scored 1.00 on the **avoidance of conflict of interest** as the law contains a general clause.<sup>46</sup> The Ombudsperson does not have adequate protection mechanisms against threat and coercion and there are no constitutional guarantees of immunity from prosecution.<sup>47</sup> A general functional **immunity** is laid down in the Law on Ombudsman. The lack of constitutionally guaranteed immunity makes this institution susceptible to political pressure and less effective in performing its function as an NHRI. APDP-FAI Council members, Director and staff are bound by professional secrecy during and after the office term.<sup>48</sup> As a result, this institution fully meets international standards in this domain, which require the extension of secrecy beyond office term.

The conditions on the **absence of instruction from government** are only partly safeguarded for both institutions in the two mandates through general provisions on independence in performing their function. The Ombudsperson and APDP-FAI both scored 1.00. Regarding **removal from office**, the Ombudsperson scored 2.00 as there are specific safeguards from arbitrary dismissal, while the APDP-FAI only scored 1.00 because it only provides for general safeguards.

38 Ustav Crne Gore [Constitution of Montenegro] (Official Gazette of the Republic of Montenegro 01/07), Article 81

39 Zakon o zaštiti podataka o ličnosti [Law on Personal Data Protection] (Official Gazette of the Republic of Montenegro No 79/08, 70/09, 44/12), Article 52

40 Zakon o zaštitniku/ci ljudskih prava i sloboda Crne Gore [Law on Ombudsman] (Official Gazette of the Republic of Montenegro No 42/2011, 32/2014), Article 7

41 Baković ombudsman još 6 godina, RTCG (29 December 2015). Available at: <http://www.rtcg.me/vijesti/drustvo/114542/bakovic-ombudsman-jos-6-godina.html>

42 Zakon o zaštitniku/ci ljudskih prava i sloboda Crne Gore [Law on Ombudsman] (Official Gazette of the Republic of Montenegro No 42/2011, 32/2014)

43 Zakon o zaštiti podataka o ličnosti [Law on Personal Data Protection] (Official Gazette of the Republic of Montenegro No 79/08, 70/09, 44/12), Article 52

44 Zakon o zaštitniku/ci ljudskih prava i sloboda Crne Gore [Law on Ombudsman] (Official Gazette of the Republic of Montenegro No 42/2011, 32/2014), Article 8

45 Ustav Crne Gore [Constitution of Montenegro] (Official Gazette of the Republic of Montenegro No 01/07), Article 81

46 Zakon o zaštiti podataka o ličnosti [Law on Personal Data Protection] (Official Gazette of the Republic of Montenegro No 79/08, 70/09, 44/12), Article 54

47 Ustav Crne Gore [Constitution of Montenegro] (Official Gazette of the Republic of Montenegro No 01/07), Articles 86, 122, 137, 144; Amendment XII, Amendment XV

48 Zakon o zaštiti podataka o ličnosti [Law on Personal Data Protection] (Official Gazette of the Republic of Montenegro No 79/08, 70/09, 44/12), Article 64

There have been no recorded cases of Ombudsperson's **submission to pressure** in 2018, and hence this institution received the highest score in that regard. Local NGOs have reported at least one case of submission to political pressure of the APDP-FAI, raising concerns among the international community, above all Transparency International.<sup>49</sup> Shortly after the presidential elections in April 2018, APDP-FAI rejected 90 requests for free access to information on finances of political parties submitted by the NGO MANS. The refusal of requests occurred two days after the Special Prosecutor for anti-corruption initiated an investigation on donations to the ruling Democratic Party of Socialists (DPS). The NGO maintained that free access to information has been politicised, in view of the upcoming local elections (May 2018).<sup>50</sup>

Finally, the Ombudsperson received the score of 1.00 on public trust and 0.00 on independence. According to the Balkan Barometer of the Regional Cooperation Council survey, the public trust in this institution of 58 per cent is among the highest in the region; **public opinion of its independence** is at 49 per cent.<sup>51</sup> There have been no public polls measuring public trust in or independence of APDP-FAI.

Therefore, the analysis points out that while the statutory framework is solid, there are several challenges in the domain of independence. First, there need to be specific safeguards for institutional independence, especially as regards protection mechanisms for the Ombudsperson. Second, institutional independence and capacity building would be further advanced by more specific conditions for appointment (e.g., specialism related to the mandate of the NHRI).

## Domain 2: Availability of Resources and Capacities

NHRI	Domain 2 score ↓ <i>min: 0; max: 2</i>
Ombudsperson (Equality)	1.15
Ombudsperson (NHRI)	1.15
APDP-FAI (PDP)	1.00
APDP-FAI (FAI)	1.00

Regarding the **availability of resources and capacities**, the Ombudsperson received a score of 1.15 both as the NHRI and the equality body. As such, it scored higher than the APDP-FAI, which has a score of 1.00 under both mandates.

The institutions are financed through the state's budget, but are not directly involved in budgetary preparations. Hence they receive the score of 1.00. In their annual reports, both the Ombudsperson and the APDP-FAI have highlighted that they have **insufficient resources** to carry out their tasks. The annual budget for the Ombudsperson amounted to EUR 672,175.68 (0.0369 per cent of the Budget of Montenegro for 2018), of which EUR 619,075.21 have been executed. A total of EUR 503,042.83 has been allocated for the employees' salaries.<sup>52</sup> The reported budget contains no information on allocations for professional training, activities or specific budget items that the institution would require in performing its tasks. A report of a local NGO, Center for Civic Education, covering the period between 2010 and 2014 indicated an underspending by the Ombudsperson, which stands in stark contrast for the calls for additional financial resources.<sup>53</sup> The annual allocation for the APDP-FAI for 2018 was EUR 617,323.69 euros (0.03387 per cent of the Budget of Montenegro for 2018), of which 511,222.69 had been spent on salaries, 15,200 on administrative material, 5,000 on fuel, 26,000 on communication services, 19,500 on travel and representation costs and merely 2,000 on professional training.<sup>54</sup>

**Internal financial control** is established. Only scarce information is available on external financial control, which depends on the State Audit Office (SAO). In 2018, the SAO performed an audit of the APDP-FAI but not of the Ombudsperson (last audited in 2016). In its report, the SAO gave a "positive opinion, but highlighted the financial audit and a conditional opinion subject to revision of irregularities".<sup>55</sup> The lack of regular external control highlights the need for stronger internal financial audit mechanisms.

**Recruitment procedures** are not fully independent, and there have been indirect modes for transfer of staff by the Government or other forms of influence exerted by the Government.<sup>56</sup> The employees at the institution of Ombudsperson have sufficient qualification under the four pillars of the institution, and both in the NHRI and the equality body mandates the allocated score is 2.00. The composition of the staff at this institution has a good gender balance internally, even though no woman has been elected Ombudsperson to date. Pluralism is good (1.00), but not all communities are represented in the institution. Conversely, the current staff at the APDP-FAI (1.00) only have general specialism in human rights, which questions their expertise in the growing requirements in the field of data protection. While there is representation of different national communities at the APDP-FAI, there is no gender balance and no female representation at the high institutional level (Council, Director). Hence the allocated score is 1.00.

The issues of **finances, recruitment and pluralism** are also related to the overall human resources in these institutions. Neither of them has a structured specialist training programme either for their employees or for their target groups. As indicated above, very scarce amounts of the budget allocations for both the Ombudsperson and APDP-FAI are spent on training and professional advancement. This issue is probably related to the lack of strategic planning and regular assessment on the basis of output and impact indicators. Both institutions do publish annual reports, which represent a broad overview of the mandate and activities, with scarce evaluation of the institution's impact or an indication of its future direction.

Regarding the **regional offices** criterion, it is worth noting that the score for the Ombudsperson (1.00) does not fully reflect the reality on the ground, possibly due to the fact that Montenegro is a small country. Even though the institution does not have offices outside of the capital city, it has "postal boxes" and has organised the "Days of the Ombudsperson" in several Montenegrin municipalities.<sup>57</sup>

In sum, Domain 2 '**Availability of Resources and Capacities**' presents some of the key challenges for the effectiveness of the NHRI. The core difficulty is not only the lack of financial resources, reported both by these institutions and the EC in its Progress Report, but also structural underspending and internal allocation of funds. A further issue is the professionalism and capacity building of staff, which is crucial for building human resources that would foster the work of the NHRI in Montenegro.

## Domain 3: Information, Accessibility and Cooperation with Other Relevant Actors

NHRI	Domain 3 score ↓ <i>min: 0; max: 2</i>
Ombudsperson (Equality)	1.37
Ombudsperson (NHRI)	1.30
APDP-FAI (PDP)	1.00
APDP-FAI (FAI)	0.88

The Ombudsperson scored significantly higher than the APDP-FAI in Domain 3 'Information, Accessibility and Cooperation with Other Relevant Actors'. Overall, the institutions scored higher as regards the formal conditions within this domain (parliamentary scrutiny), but have not been as effective in those aspects of their mandate where an active approach or initiative is required.

49 MANS, Transparency International: Odbijanje zahtjeva za pristup informacijama izaziva zabrinutost (2018). Available at: <https://www.mans.co.me/odbijanje-zah-tjeva-za-pristup-informacijama-izaziva-zabrinutost/>

50 MANS, Transparency International: Odbijanje zahtjeva za pristup informacijama izaziva zabrinutost (2018). Available at: <https://www.mans.co.me/odbijanje-zah-tjeva-za-pristup-informacijama-izaziva-zabrinutost/>

51 Regional Cooperation Council, 'Balkan Barometer' (2018), p. 118 [https://www.rcc.int/seeds/files/RCC\\_BalkanBarometer\\_PublicOpinion\\_2018.pdf](https://www.rcc.int/seeds/files/RCC_BalkanBarometer_PublicOpinion_2018.pdf)

52 Zaštitnik ljudskih prava i sloboda Crne Gore, Godišnji izvještaj (2018), p. 214. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf)

53 Marijana Laković Drašković, Daliborka Uljarević, Boris Marić, Wanda Tiefenbacher, and Maja Stojanović, Kratki vodič kroz zakonodavni i institucionalni okvir zaštite ljudskih prava u Crnoj Gori (Centar za građansko obrazovanje, 2015)

54 Izvještaj o stanju zaštite ličnih podataka i stanju u oblasti pristupa informacijama za 2018. godinu. Available at: [http://www.azlp.me/docs/zajednicka/izvjestaj\\_o\\_stanju/IZVJESTAJ%202018.doc](http://www.azlp.me/docs/zajednicka/izvjestaj_o_stanju/IZVJESTAJ%202018.doc)

55 Godišnji izvještaj o izvršenim revizijama i aktivnostima Državne revizorske institucije Crne Gore za period oktobar 2018 – oktobar 2019. godine. Available at: <http://www.dri.co.me/1/doc/Godisl%20izvje%20izvr%20o%20izvr%20o%20enim%20revizijama%20i%20aktivnostima%20DRI%20za%20period%20oktobar%202018%20-%20oktobar%202019.%20godine.pdf>

56 Marijana Laković Drašković, Daliborka Uljarević, Boris Marić, Wanda Tiefenbacher, and Maja Stojanović, Kratki vodič kroz zakonodavni i institucionalni okvir zaštite ljudskih prava u Crnoj Gori (Centar za građansko obrazovanje, 2015)

57 Zaštitnik ljudskih prava i sloboda Crne Gore, Godišnji izvještaj (2018), p. 23. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf)

Reports of the NHRIs are commonly on the agenda of the plenary sessions of the national Parliament.<sup>58</sup> In most cases such plenary debates are tantamount to presentation of the institution's activities, rather than true **scrutiny** of its activities. Hence while both institutions have high score (2.0), it may reflect the adequate legislative framework rather than a substantial mechanism of checks and balances. Moreover, **cooperation with the government and other NHRIs** is also an important indicator of the institution's effectiveness. While the statutes of these institutions provide them with the possibility to initiate or contribute to laws and policy proposals falling within their domains, there is no mechanism in Montenegro that obliges the government to consult NHRIs on the respective issues. However, the score for the Ombudsperson in this domain is 0.00 because "there is no obligation to consult the NHRI on policy proposals" and 1.00 for the APDP-FAI because the government "may, but is not obliged to consult the SA on legislative proposals related to data protection" (0.00 in the matrix implies the absence of the provision). The value of the indicator differs because the relevant standards for the NHRI and equality body are different from those for data protection and free access to information.

No formal **cooperation channels** exist between the Ombudsperson and APDP-FAI, although the two institutions have engaged in collaboration through activities, e.g. the workshop "Protocol on the behaviour of entities, bodies and organisations with homeless children and children who work on the street" co-organised by Save the Children, and the international Human Rights Day conference organised by the Parliament of Montenegro.<sup>59</sup> The Ombudsperson has actively and frequently teamed up with NGOs and the media, thus promoting its activities, especially as regards the rights of the child.<sup>60</sup> The Annual Report of the APDP-FAI lists 3 collaborative initiatives, including the signing of a memorandum with the NGO Blind Alliance, the above-mentioned Human Rights Day conference and a meeting with a presidential candidate. Hence this institution's collaboration and outreach have been limited.

As regards the **international activities**, the Ombudsperson received the highest score for being a member of nine relevant international networks.<sup>61</sup> This NHRI's report also lists a number of international events, mostly in the Western Balkan region, in which the Ombudsperson participated actively.<sup>62</sup> In 2018, the APDP-FAI became an observer in the European Data Protection Board (EDPB), and its members attended several international conferences. The Annual Report does not indicate whether APDP-FAI members actively participated in these events.<sup>63</sup>

NHRIs in Montenegro have the obligation to **provide information on rights and remedies**. Moreover, in line with the international standards, such information needs to be provided in an **accessible language**. While such information is published on the Ombudsperson and APDP-FAI websites, it is not always in an easily accessible language. Information on the Ombudsperson's website is principally simplified. However, it is not available in all the languages of the country, hence the score is 1.00. By contrast, information available on the APDP-FAI website is based on verbatim extracts from laws which most citizens find difficult to understand. Even so, this institution scored 1.00 because the standard for NHRI with mandate in free access to information and data protection is different from the one applied for the Ombudsperson.

Websites are not easy to navigate, especially for **persons with disabilities**. Equally, while the institutions' premises are accessible for most individuals with physical disabilities, no special hosting arrangements have been made in either of the institutions. The Ombudsperson can be reached online, via email, telephone/fax, through designated postal boxes in prisons and orphanages. Office hours for meeting citizens are between 11 am and 2 pm Monday to Friday. The APDP-FAI can be reached online, by email, telephone/fax. Neither of the two NHRIs has a publicly available **communication strategy**.

As regards professionalism, it has been highlighted in Domain 1 that the key shortcoming of the Ombudsperson's mandates as a NHRI and equality body is the absence of mechanisms for the protection against threat. As a result, adequate standards for offering **confidentiality** to witnesses or protection to whistle-blowers in either of the two institutions still do not exist, except from the general obligation in line with Law on Prevention of Corruption.<sup>64</sup>

58 Skupština Crne Gore, Dnevni Red: Izvještaj o radu Zaštitnika ljudskih prava i sloboda Crne Gore za 2018. godinu. Available at: <http://www.skupstina.me/index.php/me/kalendar/deseta-sjednica-prvog-redovnog-zasjedanja-u-2019-godini>; Skupština Crne Gore, Dnevni Red: Izvještaj o stanju zaštite ličnih podataka i stanju u oblasti pristupa informacijama za 2018. godinu. Available at: <http://www.skupstina.me/index.php/me/saradnja-sa-iseljenicima-aktuelnosti/item/3312-nastavak-seste-sjednice-prvog-redovnog-zasjedanja-u-2019-godini>

59 Izvještaj o stanju zaštite ličnih podataka i stanju u oblasti pristupa informacijama za 2018. godinu. Available at: [http://www.azlp.me/docs/zajednicka/izvjestaj\\_o\\_stanju/IZVJESTAJ%202018.doc](http://www.azlp.me/docs/zajednicka/izvjestaj_o_stanju/IZVJESTAJ%202018.doc)

60 Zaštitnik ljudskih prava i sloboda Crne Gore, Godišnji izvještaj (2018), p. 23. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf)

61 The Ombudsperson: AOM, EOI, CRONSEE, ENOC, EQUINET, ECRI, NPM former Yugoslavia, GAHHNRI (B status).

62 Zaštitnik ljudskih prava i sloboda Crne Gore, Godišnji izvještaj (2018), p. 32. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf). The annual report also lists the topics of the Ombudsperson's contributions/speeches.

63 Izvještaj o stanju zaštite ličnih podataka i stanju u oblasti pristupa informacijama za 2018. godinu. Available at: [http://www.azlp.me/docs/zajednicka/izvjestaj\\_o\\_stanju/IZVJESTAJ%202018.doc](http://www.azlp.me/docs/zajednicka/izvjestaj_o_stanju/IZVJESTAJ%202018.doc). The Annual Report mostly lists the topic of the conference/event.

64 Zakon o sprječavanju korupcije [Law on Prevention of Corruption] (Official Gazette No 53/2014, 42/2017)

Finally, in Domain 3 'Information, Accessibility and Cooperation with Other Relevant Actors', the key challenges include active collaboration with national NGOs and international networks; accessibility of premises and communication tools for individuals with disability; and most importantly substantial protection to whistle-blowers.

#### Domain 4: Mandate and Powers

NHRI	Domain 4 score ↓
	<i>min: 0; max: 2</i>
Ombudsperson (Equality)	1.33
Ombudsperson (NHRI)	1.19
APDP-FAI (FAI)	1.19
APDP-FAI (PDP)	1.00

In Domain 4 'Mandate and Powers' the, research analyses specific conditions related to the assessment of each institution's mandate. The focus is on cross-sectoral mandates and on the follow-up on the areas which need improvement as regards the applicable international standards.

In the NHRI domain, the Ombudsperson has a **mandate limited to the public sector** apart from courts, which fall under the institution's mandate only in cases of failure to ensure due process), and its decisions and opinions are not legally binding. Hence the institution received the score of 1.00 in this regard. The Law on Prevention of Discrimination extends the **mandate of the Ombudsperson to the private sector** (private companies performing a public function), in the domain of discrimination, and therefore as the equality body the Ombudsperson receives the score of 2.00.<sup>65</sup> The Ombudsperson's decisions remain of a non-binding character, and Article 22 of the Law on Ombudsperson explicitly prohibits this institution from 'changing, terminating, or annulling' any legal act in force.<sup>66</sup>

APDP-FAI also has a dual mandate, being the supervisory mechanism for data protection and a safeguard for free access to information. Formally, it has **full mandate and powers for monitoring and enforcement** of the Law on Personal Data Protection and the Law on Free Access to Information, as well as all relevant developments in these two areas. It therefore scored 2.00 on monitoring and enforcement. APDP-FAI also has a full mandate for investigations, where it also reaches the highest standard. However, this institution does not have the full mandate required under the GDPR for 'authorisations of codes of conduct, certifications, standard, authorisation of contractual clauses and administrative arrangements, approval of binding corporate rules'.<sup>67</sup> In this regard, it scored 0.00. Its decisions and opinions are not legally binding.

The fact that a number of **NHRI recommendations** have not been implemented poses a persistent problem, as well as the fact that there has been no follow-up on them. While there are no public data on the exact percentages, the 2018 Annual Report of the Ombudsperson highlights that one of the key challenges the institution faces is the 'attitude towards the recommendations of the Ombudsperson that have not been implemented'.<sup>68</sup> The Ombudsperson has received the score of 1.00 in this domain. APDP-FAI adopted 35 decisions, 24 opinions, and 2 stances related to data protection, as well as 2,989 decisions on requests to free access to information.<sup>69</sup> There is no information as to how many such decisions have been implemented in the domain of data protection, but the APDP-FAI annual report notes that the institutions followed 91.38% of the decisions on requests for free access to information.<sup>70</sup>

65 Zakon o zabrani diskriminacije [Law on Prohibition of Discrimination] (Official Gazette No 46/2010, 40/2011 – other law, 18/2014 and 42/2017)

66 Zakon o zaštitniku/ci ljudskih prava i sloboda Crne Gore [Law on Ombudsperson] (Official Gazette of Montenegro No 42/2011, 32/2014), Article 22

67 GDPR, Article 46

68 Zaštitnik ljudskih prava i sloboda Crne Gore, Godišnji izvještaj (2018), p. 203. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf).

69 Izvještaj o stanju zaštite ličnih podataka i stanju u oblasti pristupa informacijama za 2018. godinu, p. 16. Available at: [http://www.azlp.me/docs/zajednicka/izvjestaj\\_o\\_stanju/IZVJESTAJ%202018.doc](http://www.azlp.me/docs/zajednicka/izvjestaj_o_stanju/IZVJESTAJ%202018.doc)

70 Izvještaj o stanju zaštite ličnih podataka i stanju u oblasti pristupa informacijama za 2018. godinu, p. 101. Available at: [http://www.azlp.me/docs/zajednicka/izvjestaj\\_o\\_stanju/IZVJESTAJ%202018.doc](http://www.azlp.me/docs/zajednicka/izvjestaj_o_stanju/IZVJESTAJ%202018.doc)



At the national level, the Ombudsperson submitted three initiatives<sup>71</sup> related to its general NHRI mandate (hence the score of 1.00 for NHRI), but none in the domain of equality (hence the score of 0.00 for equality body): 1) Law on Protection from Family Violence (to increase the payable charge); 2) Initiative for a training for police forces so that they avoid “arbitrariness” in executing their functions; 3) Opinion on the Guidelines for Noise Levels.<sup>72</sup> There were no **international initiatives** by the Ombudsperson. APDP-FAI was inactive in this regard at both national and international levels, receiving the score of 0.00.

The **public trust** in the Ombudsperson is 58 per cent, according to the Balkan Barometer of the Regional Cooperation Council survey,<sup>73</sup> resulting in the score of 1.00. However, there are no local or international public opinion polls that measure the public trust in APDP-FAI, and therefore this institution scored 0.00.

Finally, the indicator for assessing the NHRI was the **evaluation of the European Commission** in its last Report. Since both institutions have made progress, but shortcomings and limitations still exist, their score is 1.00.<sup>74</sup> The EC’s assessment of the Ombudsperson is indeed better than that of the APDP-FAI, but both institutions have been facing significant challenges in terms of financial and human resources and in terms of their position to guarantee that citizens’ human rights are protected.

## RECOMMENDATIONS

The ensuing recommendations to the national authorities (the Parliament and the Government and the NHRIs), international actors (the European Union and others) and the NGOs are based on the ranking of the Montenegrin NHRIs across the four domains. Rather than opting for general recommendations, in line with the findings and the main challenges outlined in the Report, the following are tailored per different stakeholders.

### NATIONAL AUTHORITIES

- **Parliament**

**Ensure that appointments are genuinely transparent and participatory.** While formal transparency is indeed guaranteed, there is scarcely any public debate on the appointments to NHRIs. A proactive approach is required to involve different stakeholders in the public debate, especially as regards appointments to APDP-FAI.

**Stipulate clear conditions for appointment in view of the mandate of the NHRI.** Such an approach would require members to have specific expertise related to the mandate of the institution (e.g. rights of the child, data protection, etc.) rather than a broad specialism in human rights. In turn, expertise within the institution would enhance its performance.

**Ensure that members of the NHRI reflect the composition of Montenegrin society.** This implies not only formal anti-discrimination safeguards, but also special attention that the composition of the institution truly reflects the demographic map of the country. In turn, this would contribute to the NHRIs becoming institutions that can address the needs and protect the rights and freedoms of all citizens, without prejudice to gender, ethnic and religious belonging as well as persons with disabilities.

**Institute the obligation to consult NHRIs on issues clearly within their mandate.** As such a consultation is not obligatory, it is scarce at present. This would result in legislation and policies that take into account the expertise of NHRIs, and that tackle issues important for all citizens and, in particular, vulnerable groups.

**Introduce constitutional guarantees for immunity and protection against threat for NHRIs.** This would ensure independence in the performance of NHRI mandates.

**Discuss the needs of NHRIs regarding the mandate and their work plan as to ensure sufficient budgetary allocation.** Sufficient and adequately distributed resources would guarantee institutional independence and effectiveness of the NHRIs.

**Establish mechanisms for regular external financial control of NHRIs.** This would ensure compliance, but also help to identify the real financial needs of institutions.

- **National Human Rights Institutions**

**Adopt strategic (multi-annual) work plans specifying activities within their mandate.** Mid-term strategic planning would ensure that the NHRI activities reflect the needs of citizens in guaranteeing their rights. It would also enable NHRIs to tailor their activities in a way that would enhance their performance in the context of EU accession.

**Enhance pluralism of staff, at all levels of seniority.** It is essential that NHRIs reflect societal diversity. Women, people of different ethnic backgrounds, and persons with disabilities must have equal opportunities within the institutions, particularly as regards senior positions.

**Enhance human resources by regular training programmes.** These would result in capacity-building of NHRIs and would also enable collaboration and knowledge transfer with other stakeholders (NGOs, other NHRIs, IGOs).

**Enhance accessibility of NHRIs.** Individuals with physical, sensory and intellectual disabilities should be able to approach NHRIs and premises need to be equipped to accommodate such individuals. Individuals from the entire territory of Montenegro should have access to NHRIs, and arrangements should be made to ensure open office hours for those who reside outside the capital. This would guarantee that all citizens have equal opportunity to have their human rights protected.

<sup>71</sup> Only those proposals that have been reported in the annual reports and submitted on the NHRI’s own initiative were accounted for.

<sup>72</sup> Zaštitnik ljudskih prava i sloboda Crne Gore, Godišnji izvještaj (2018), pp. 71-75 203. Available at: [http://www.ombudsman.co.me/docs/1554124685\\_final-godisnji-izvjestaj-2018.pdf](http://www.ombudsman.co.me/docs/1554124685_final-godisnji-izvjestaj-2018.pdf).

<sup>73</sup> Regional Cooperation Council, ‘Balkan Barometer’ (2019) 96 <[https://www.rcc.int/download/docs/Balkan-Barometer\\_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf](https://www.rcc.int/download/docs/Balkan-Barometer_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf)>.

<sup>74</sup> European Commission, 2019 Progress Report on Montenegro. Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-montenegro-report.pdf>

**Enhance communication efforts and accessibility of information.** NHRIs would benefit from annual or bi-annual communication strategies, including outreach to the general public through most commonly used media (including social media). All information regarding the rights within the NHRIs' mandate should be made available in all the languages commonly used in the country. Such information needs to be in an easy-to-read format, written in a manner understandable to citizens. The outcome of this would be equal access to rights for all citizens.

**Establish structured collaboration with NGOs, IGOs, and with other NHRIs.** Inter-institutional cooperation at different levels needs a structured approach so that joint initiatives can best meet the needs of NHRIs. Such collaboration would entail periodic meetings for discussing key challenges; a multi-actor approach to legislative initiatives; co-financing outreach activities with citizens. It would result in a participatory approach to key challenges that the Montenegrin society faces in view of human rights and freedoms.

**Enhance international activity.** This would entail not only formal membership in international networks, but also submission of initiatives therein and *active* participation in their work (e.g. by initiating projects, commenting on draft documents, presenting the NHRIs' activities). This would result in an effective implementation of international standards through cross-fertilization of knowledge, learning and emulation.

**Enhance national activity.** NHRIs must take a more proactive approach in submitting independent initiatives to national authorities. According to international standards, within each mandate, multi-mandate NHRIs are advised to submit three such initiatives. Mechanisms for monitoring of compliance with NHRIs' recommendations need to be established. This would reinforce the institutional position of the NHRI, thus offering a better protection of citizens' rights.

### INTERNATIONAL ACTORS

- **European Union**

**Clearly highlight both the elements of progress of NHRIs and the areas where improvement is needed in the Annual Report.** Such an approach will ensure smoother harmonization with the conditions for EU membership, and at the same time allow a quality comparison of an institution's progress or backsliding.

- **Other international actors**

**The international organizations in Montenegro should establish structured collaboration with NHRIs in the relevant domain, particularly as regards training activities, technical and financial support.** Such an approach would help the domestic NHRIs build up human resources necessary for performing their tasks.

- **NGOs**

**Actively collaborate with NHRIs, seeking both project-based and structured co-operation.** Initiatives for long term collaboration should be established. Active and substantive collaboration that goes beyond signing memoranda of understanding between the NHRI and the NGOs is crucial for guaranteeing the institution's effectiveness.

**Enhance monitoring of the NHRI along their mandates.** NGO reports on the performance of institutions help to assess their credibility and effectiveness. Such reports would need to include recommendations, which in turn would help highlight the key issues these institutions are facing and propose feasible solutions to them.

**Conduct public opinion polls on independence and public trust in NHRIs.** NGOs that conduct regular surveys of public opinion should include questions regarding specific NHRIs. This would enable future assessment of the perceptions of the institution's effectiveness.

## ANNEX: LIST OF INDICATORS

### Domain 1: Independence and ability to work without pressures

Ombudsperson	EB	SADP	FAI
Independent statutory basis	Independent statutory basis	Independent statutory basis	Independent statutory basis
Appointment process	Appointment process	Appointment process	Appointment process
Clear criteria for membership	Clear criteria for membership	Clear criteria for membership	Clear criteria for membership
Term of office	Term of office	Term of office	Term of office
Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest
Immunities	Immunities		
No instruction from government	No instruction from government	No instruction from government	No instruction from government
Removal	Removal	Removal	Removal
Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure
Public opinion on independence of NHRIs	Public opinion on independence of NHRIs	Public opinion on independence of NHRIs	Public opinion on independence of NHRIs

### Domain 2: Availability of resources and capacities

Ombudsperson	EB	SADP	FAI
Separate and independent budget	Separate and independent budget	Separate and independent budget	Separate and independent budget
Adequate financial resources	Adequate financial resources	Adequate financial resources	Adequate financial resources
Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures
Sufficient human resources	Sufficient human resources	Sufficient human resources	Sufficient human resources
Adequate human resources	Adequate human resources	Adequate human resources	Adequate human resources
Financial control	Financial control	Financial control	Financial control
Pluralism	Pluralism		
Training	Training		Training
Internal structure enables focus on each part of mandate	Internal structure enables focus on each part of mandate		
Regional offices/outreach	Regional outreach/offices		
Learning and change	Learning and change	Learning and change	Learning and change

### Domain 3. Information, accessibility and cooperation with other relevant actors

Ombudsperson	EB	SADP	FAI
Parliamentary scrutiny	Parliamentary scrutiny	Parliamentary scrutiny	Parliamentary scrutiny
Providing information to NHRIs	Providing information to NHRIs		
Cooperation with government	Cooperation with government	Cooperation with government	Cooperation with government
Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRIs
Cooperation with NGOs	Cooperation with relevant bodies and NGOs	Trans-national cooperation with other SAs	Cooperation with NGOs
Providing information on rights	Providing information on rights	Providing information on rights	Providing information on rights
		Information on rights and assistance to data subjects	
Accessibility	Accessibility	Accessibility	Accessibility
Accessibility to children			
Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities
Membership in international networks	Membership in international networks	Membership in international networks	
Participation in international activities	Participation in international activities	Participation in international activities	Participation in international activities
Communication strategy	Communication strategy	Communication strategy	Communication strategy
Confidentiality and protection	Confidentiality and protection	Professional secrecy	

### Domain 4: Mandate and powers

Ombudsperson	EB	SADP	FAI
		Monitoring and enforcement	Monitoring and oversight
Human rights promotion	Promotion and prevention	Promotion	Promotion
Promotion of harmonisation with international HR instruments and implementation			Promotion of pro-active dissemination
Mandate – coverage of sectors	Coverage of grounds of discrimination		
	Coverage – area		
	Equal treatment of all persons without discrimination on grounds of sex		
Human rights protection – powers – investigation	Independent assistance – mandate	Investigations	
Human rights protection – powers – access	Independent assistance – strategic litigation		
Human rights protection – powers – complaints	Independent assistance – issuing recommendations and legally binding decisions		
Human rights protection – powers – courts			
Follow-up on recommendations	Follow up on recommendations		
Initiatives to national authorities	Initiatives to national authorities	Advisory role	Advisory role
	Complaints submission	Handling complaints	Handling complaints
	Complaints submission – language		Complaints submission
	Complaints submission – free of charge		Complaints submission – free of charge
	Independent surveys	Regulatory functions / authorisations	
Reports	Independent reports		
Submission of contributions to international bodies	Submission of contributions to international bodies		
National prevention mechanism			
Rights of the child			
Public opinion on public trust in NHRIs	Public opinion on public trust in NHRIs	Public opinion on public trust in SA institution	Public opinion on public trust in SA institution
Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

Country Report  
North Macedonia

WHAT IS BEHIND AND  
BEYOND THE  
AVERAGE?

Country Report  
Montenegro



**Effectiveness of NHRIs in Western Balkan countries**  
Albania, Bosnia and Herzegovina, Kosovo,  
Montenegro, North Macedonia, Serbia

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## Country Report **North Macedonia**

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

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November 2020

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## List of Acronyms and Abbreviations

<b>ADL</b>	Law on Prevention and Protection against Discrimination (2010)
<b>CoE</b>	Council of Europe
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CPAD, the Equality body</b>	Commission for Protection against Discrimination
<b>CRD</b>	Convention on the Rights of the Child
<b>CRD</b>	Civil Rights Defenders
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>DPD, the Directorate</b>	Data Protection Directorate
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GANHRI</b>	Global Alliance of National Human Rights Institutions
<b>GDPR</b>	General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)
<b>EU</b>	European Union
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>KOMSPI, the Commission</b>	Commission for the Protection of the Right to Access to Public Information
<b>LFAPI</b>	Law on Free Access to Public Information (2006)
<b>LO</b>	Law on the Ombudsperson (2003)
<b>LPPD</b>	Law on Protection of Private Data (2005)
<b>MKD</b>	North Macedonia
<b>MLSP</b>	Ministry of Labour and Social Policy
<b>MNE</b>	Montenegro
<b>NGO</b>	Non-governmental organisation
<b>NHRI</b>	National Human Rights Institutions
<b>Ombudsperson</b>	Ombudsperson of the Republic of Macedonia <sup>1</sup>
<b>OHCHR</b>	UN Office of the High Commissioner for Human Rights
<b>OP-CAT</b>	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>Priebe Report</b>	Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015
<b>SA</b>	Supervisory Authority
<b>SRB</b>	Serbia
<b>UN</b>	United Nations
<b>UNHRC</b>	UN Human Rights Committee

<sup>1</sup> As of February 2019, the Ombudsperson of the Republic of North Macedonia.

## INTRODUCTION

Following 1991 and the start of the transition, the ‘ombudsmania’ took over the former state socialist countries, including North Macedonia.<sup>2</sup> These processes overlapped with the enhanced efforts at the international level to promote the concept of national human rights institutions. A national human rights institution (NHRI) is a body established by the state with the mandate to protect and promote human rights.<sup>3</sup> These international efforts aimed to close the gap between international law and national practices.<sup>4</sup>

The 1990s were a period when NHRIs were on the rise in Europe in general, and in the former Yugoslav republics they were, and still are, particularly important. The main reason for this is that, while in lieu of NHRIs the other western European countries can rely on another protection option (their strong judiciaries), this is not the case in our part of the world. The dissolution of Yugoslavia brought turbulent changes and an overhaul of the judiciary, disturbing it completely. In a context of ‘weak, politicized, slow or otherwise incapacitated’<sup>5</sup> judiciary and a tendency for ‘power concentration’<sup>6</sup> among political elites, NHRIs become even more important. The prominence of NHRIs has grown since, and they have become an integral benchmark of international monitoring of human rights practices at the national level, including for the purposes of EU accession.

Under the pressure of international actors – first the UN and later the EU – the NHRIs in North Macedonia have been developing and diversifying. Four institutions satisfied the NHRI definition criteria selected for this research: the Ombudsperson, the Commission for Protection against Discrimination, the Data Protection Directorate, and the Commission for Protection of the Right to Free Access to Public Information. However, the monitoring of the NHRIs in North Macedonia consistently points out to several issues which these institutions face – ranging from lack of human and financial resources, to severe political pressure and undermining of their independence. This raises the issue of the ability of NHRIs to perform their work effectively, which leads us to the aim of this research – ‘to assess the effectiveness (performance) of the human rights institutions in North Macedonia, Montenegro and Serbia, based on a pre-defined set of indicators.’<sup>7</sup> In this research, the effectiveness of an NHRI is defined as ‘the capability of the NHRI to independently perform its mandate and powers, with the aim to make a significant impact on the achievement of human rights’.<sup>8</sup>

The starting ground was the current state of research on NHRIs. Several important sources have been published in North Macedonia for 2018 as an outcome of regular monitoring of NHRIs. The European Policy Institute in Skopje publishes regular annual monitoring reports of the Network 23 on Chapter 23 Judiciary and Fundamental Rights, including the NHRIs’ role in fundamental rights protection.<sup>9</sup> A specific monitoring report on the Ombudsperson by the NGO Info Centre from 2018 covered several aspects relevant for the institution’s effectiveness – legal framework, regional offices, as well as communication and cooperation with NGOs and media.<sup>10</sup> The Non-discrimination Network has been monitoring the implementation of the Anti-discrimination Law since 2011, including the operation of the Commission for Prevention and Protection of Discrimination,<sup>11</sup> while the Helsinki Committee for Human Rights published an annual information bulletin on discrimination.<sup>12</sup> The think tank Analytica has set out a framework for monitoring the Commission on Free Access to Public Information and the Data Protection Directorate.<sup>13</sup> The European Network of Legal Experts in the Non-Discrimination Field annual reports on non-discrimination deal with the compliance of equality bodies with EU directives standards.<sup>14</sup>

This report focuses on the findings from the research on the effectiveness of the four NHRIs in North Macedonia. The research specifically focused on the effectiveness of the four selected institutions, using the methodology outlined in the next section. After a brief overview of these institutions, we will present the research findings on the systemic challenges and shortcomings that hinder the work of the NHRIs for each of the effectiveness domains: independence and ability to work without pressure; availability of resources and capacities; information, accessibility and cooperation with other relevant actors; and mandate and powers. Finally, a set of recommendations, targeted at various stakeholders, are proposed.

2 Svetomir Škarić and Gordana Siljanovska, Уставно право [Constitutional Law] (Kultura 2009) 759.

3 See the research methodology in the comparative analysis.

4 ‘A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights’ (United Nations 1995).

5 Linda Reif, ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’ 13 Harvard Human Rights Journal 1, 2.

6 Jan Jarab, ‘Perspective on the Need for NHRIs in Europe and the World’ in Jan Wouters and Katrien Meuwissen (eds), National Human Rights Institutions in Europe: Comparative, European and International Perspectives (Intersentia and COST 2013) 291–292.

7 See the research methodology in the comparative analysis.

8 See the research methodology in the comparative analysis.

9 Iva Conevska and others, ‘Shadow Report on Chapter 23 for the Period from June 2018 to March 2019’ (EPI 2019) <<https://epi.org.mk/wp-content/uploads/2019/05/Shadow-Report-Eng-1.pdf>>.

10 Biljana Bejkova and Uranija Pirovska, ‘Граѓански мониторинг на Народниот правобранител [Civic Monitoring of the Ombudsperson]’ (NVO IC 2018).

11 Igor Jadrovski, Jovana Jovanovska Kapurkova and Marija Gelevska, ‘Извештај за имплементација на Законот за спречување и заштита од дискриминација [Report on the Implementation of the Law on Prevention and Protection against Discrimination]’ (Мрежа за заштита од дискриминација 2019).

12 Helsinki Committee of the Republic of Macedonia, Annual Information Bulletin on Discrimination - 2018 (Helsinki Committee of the Republic of Macedonia 2019) (in Macedonian) <https://mhc.org.mk/reports/godishen-informator-za-diskriminacija-za-2018/>

13 Magdalena Lembovska, ‘Основни документи за следење на работата на Комисијата за заштита на правото на слободен пристап до информации од јавен карактер и Дирекцијата за заштита на личните податоци [Basic Documents for Monitoring of the Work of the Commission for the Protection of the Right to Free Access to Public Information and the Data Protection Directorate]’ (Analytica – think-tank 2017).

14 Biljana Kotevska, Country Report – Non-Discrimination: Republic of North Macedonia 2018 (European Commission 2019).

## APPROACH AND METHODOLOGY

In the given context and the current state of development of research on NHRIs in the Western Balkans, an approach to measuring effectiveness that combines structural and mandate-based approaches was applied. The structural approach focuses on the compliance of an NHRI with main legal norms, i.e. institutional safeguards. The mandate-based approaches are performance based and focus on success in performing the mandate of an NHRI.

A matrix of indicators has been developed,<sup>15</sup> structured per four domains:

- (1) Independence and ability to work without pressure,
- (2) Availability of resources and capacities,
- (3) Information, access and cooperation with other relevant actors, and
- (4) Mandate and powers.

Values of the indicators have been weighed, depending on the number of indicators per domain (which ranged from 6 to 12). In addition, some indicators have been broken down to sub-indicators, to capture the specifics of a particular issue, which depended on the level of detail of a relevant international standard. The indicator per domain has been estimated as a sum of the weighed values of indicators in the domain. The overall score of effectiveness for each NHRI in each country is estimated as a sum of indicators per domain. Each domain participates equally in the final score – 25%. Consequently, the scale of the score per country per body is 0–8.

An overview of the indicators is presented in the Annex.

Relevant international standards and their interpretations have been used as the basis for developing the indicators.

The Paris Principles<sup>16</sup>, or more precisely the GANHRI General Observations<sup>17</sup>, have been taken as a basis for the indicators for general mandate human rights institutions. UN relevant standards related to the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>18</sup>, the Convention on the Rights of the Child (CRC)<sup>19</sup>, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>20</sup>, and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)<sup>21</sup> and especially their interpretations have been used as the basis for specific indicators.

The EU Commission Recommendation of 22 June 2018<sup>22</sup>, the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the CoE, as well as Revised General Policy Recommendation No 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE<sup>23</sup> are the European standards taken as a basis for indicators for equality bodies.

The EU General Data Protection Regulation (GDPR)<sup>24</sup> and the CoE Convention 108+<sup>25</sup> have been taken as main standards for setting the indicators for data protection supervisory authorities. Lacking specific international standards for independent bodies on free access to information, general standards for NHRIs have been accordingly applied, while specific international standards on content of right of information<sup>26</sup>, as well as documents developed by special rapporteurs for freedom of expression in the UN, CoE and OSCE have been used as the basis for the indicators on powers and mandate.

15 A detailed explanation of the Methodology is available in the Comparative Analysis, published alongside the reports.

16 UN General Assembly, Resolution A/RES/48/134 (1993).

17 Global Alliance of National Human Rights Institutions, General observations of the Sub-Committee on Accreditation, adopted by GANHRI Bureau, 21 February 2018 (2018).

18 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (1996).

19 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (1989).

20 UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I (2006).

21 UN General Assembly, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, A/RES/57/199 (2002).

22 Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, C/2018/3850, OJ L 167 Ch. I, (2) (2018).

23 Council of Europe, ECRI, General policy recommendation no. 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CR(2018)06 (2017).

24 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), (2016) OJ L 119.

25 CoE, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), 10.10.2018 (2018).

26 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (1966); CoE, Convention on Access to Official Documents, CETS 205, 11 June 2008 (2008);

## OVERVIEW OF NHRIS IN NORTH MACEDONIA

In this section, we briefly present a short history of the NHRIs, their basic mandate and composition, and any major developments of relevance for effectiveness. This overview shows that all of the institutions were established and started operating only following pressure from the outside, from an international actor. They are usually set up with wide enough mandates, not enough resources, and are traditionally led by persons who, at the time of their appointment, have links to or strong support from ruling party or parties. However, some specificities do arise.

The oldest NHRI in the country is the **Ombudsperson**.<sup>27</sup> The legal ground for the establishment of the institution was set in 1991, with the adoption of the Constitution.<sup>28</sup> However, due to lack of political will, there were no developments regarding the adoption of the Law on the Ombudsperson and no setting-up preparations for several years after the adoption of the Constitution. The situation changed only following the visit of Elisabeth Rehn – UN Special Rapporteur on the Situation of Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia at the time.<sup>29</sup> In her report, Elisabeth Rehn urged ‘the Government and all political forces in the country [...] to pay particular attention to the development of adequate national institutions for the protection of human rights’<sup>30</sup> while also citing the belated adoption of the law. The Law on the Ombudsperson had finally been adopted in 1997<sup>31</sup> and the institution with a mandate to deal with violations of the constitutional rights of the citizens in the public field and with maladministration started operating soon thereafter. One person heads the institution – the Ombudsperson of the Republic of North Macedonia,<sup>32</sup> appointed by the Parliament, with an eight-year mandate. It has six regional offices spread throughout the territory of the country, headed by a Deputy Ombudsperson. In addition to this, there are four other Deputy Ombudspersons tasked with specific thematic mandates. A new law under the same title – the Law on the Ombudsperson (LO) – was adopted in 2003 and has been amended and supplemented several times since, including to enlarge the mandate of the institution.<sup>33</sup> So, in time, the Ombudsperson assumed the role of the National Preventive Mechanism<sup>34</sup> and of an independent mechanism as per the Convention on the Rights of Persons with Disabilities.<sup>35</sup> It should be added, however, that the enlarged mandate was not followed by appropriate enlargement of resources. While the material scope of the Ombudsperson’s work has increased thematically, its sole focus on the public sector has been preserved. In 2011, the institution was awarded B-status by the Global Alliance of National Human Rights Institutions<sup>36</sup> (GANHRI). Since then, the Law on the Ombudsperson has been changed several times in order to address the points where the institution is not in line with the Paris Principles, namely legal grounds for conducting promotional work, lack of pluralism in the composition of the institution beyond the ethnic one, lack of transparency in staff recruitment, lack of financial independence and sufficient budget, and lack of interaction with the international human rights system and the existing networks.<sup>37</sup>

The second NHRI that we focus on is the **Commission for Protection against Discrimination (CPAD)**, the equality body.<sup>38</sup> This equality body was established under the 2010 Law on Prevention and Protection against Discrimination (ADL).<sup>39</sup> The adoption of the law was preceded by years of effort by the domestic NGOs, who pushed for such a law to be adopted, drafted full proposals, organised and coordinated a large, participatory and diverse working group,<sup>40</sup> and maintained a momentum for its adoption. However, a major political push for the adoption of this law came from the outside, by the European Union, within the frame of the visa liberalisation process, which established the adoption of a comprehensive non-discrimination law as one of the benchmarks.<sup>41</sup> **With an initially high potential for positive change in the area of anti-discrimination in the country, this process**

27 Official website of the institution: www.ombudsman.mk

28 Устав на Република Македонија [Constitution of the Republic of Macedonia] (Official Gazette of the Republic of Macedonia 1991) Чл. 77.

29 Мирјана Најчевска, ‘НИЧП во Република Македонија: Актуелна состојба, предизвици и можен развој’ (2012) 16 Списание за европски прашања ‘Евродијалог’ 25.

30 Elisabeth Rehn, Situation of Human Rights in the Territory of the Former Yugoslavia E/CN.4/1996/63 (Report submitted by Ms Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1995/89, UN Economic and Social Council 1996) <http://hrlibrary.umn.edu/commission/country52/63-yugos.htm>.

31 Закон за народниот правобранител [вон сила] (Службен весник на Република Македонија, бр. 7/97).

32 Until February 2019, this was Ombudsperson of the Republic of Macedonia.

33 LO 2003.

34 As per the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 17.

35 UN, Convention on the Rights of Persons with Disabilities (CRPD) (2006), Art. 33 (2).

36 Until March 2016, it was called ‘International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights’.

37 International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) (2011) <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20OCTOBER%202011%20-%20FINAL%20(with%20annexes).pdf>.

38 Official website of the institution: www.kzd.mk

39 Закон за спречување и заштита од дискриминација [Law on Prevention and Protection against Discrimination] 2010 (Службен весник на Република Македонија, бр. 50/10, 44/2014, 150/2015, 31/2016, 21/2018, Одлука на Уставен суд (У бр): 82/2010).

40 NGO PolioPlus led the Progress project, within the frame of which this working group was established and operated.

41 European Commission, ‘Visa Liberalisation with the Former Yugoslav Republic of Macedonia Roadmap’ (2008).

turned into a ‘missed opportunity’<sup>42</sup> when it comes to anti-discrimination since the EU decided to award the country visa free travel before the adoption of the ADL could be completed. In the meantime, the ruling coalition pushed through the Parliament a version of the law that was not the one that the working group had been working on, and which proposed that the equality body be seated in the Ministry of Labour and Social Policy. Eventually, this was amended in the brief parliamentary procedure and the end result was the CPAD. The CPAD is a composite body of seven commissioners, appointed following a public call by the Parliament, with a five-year mandate. Thus far, there have been two compositions of the CPAD appointed, both were highly contested because of their lack of experience and an abundance of suspicions about political ties with the then ruling parties of the appointed members. Both the CPAD and the Ombudsperson hold competences in relation to equality and non-discrimination in the public sector, whereas CPAD has sole competence in the private sector. This overlap in their mandates has not been properly dealt with; it was only a subject of one Memorandum for Understanding signed between the two institutions. Because of this and many other points on which the ADL was not in line with the EU *acquis* and was not, to put it simply, working in practice,<sup>43</sup> a new law under the same title was adopted in May 2019.<sup>44</sup> This law brought forth many improvements to the legal framework.<sup>45</sup> The membership criteria of the equality body are one of these improvements. However, since this research is a snapshot of the situation in 2018, we will take into consideration the 2019 developments when formulating the recommendations,<sup>46</sup> but we will not analyse them.<sup>47</sup>

The third NHRI that we focus on is the **Data Protection Directorate (DPD, the Directorate)**.<sup>48</sup> The Directorate was established in 2005, by the Law on Protection of Private Data (LPPD).<sup>49</sup> Before this, there was an older law with the same title, however it did not foresee the establishment of a competent authority tasked with the implementation of the law.<sup>50</sup> As of 2008, the body received the mandate to act as an inspectorate for the protection of personal data.<sup>51</sup> The DPD is headed by a Director appointed by the Parliament following a public call, with a five-year mandate. The Director has a Deputy Director, appointed following the same procedure and for the same number of years.

The fourth and final one is the **Commission for Protection of the Right to Free Access to Public Information (KOMSPI, the Commission)**.<sup>52</sup> The KOMSPI, established under the 2006 Law on Free Access to Public Information,<sup>53</sup> is tasked with the protection and promotion of the right to access to information. It has five members – president, deputy-president and three members, each with a five-year mandate. They are appointed by the Parliament, following a public call. A 2013 study on the implementation of the LFAPI identified a trend of closing up of the KOMSPI with its restrictive approach to the interpretation of the concept of ‘public information’, as well as serious delays in acting upon individual cases.<sup>54</sup> This and later studies pointed out to many issues with the work and the positioning of the body, including lack of competences to issue fines and, like in other NHRIs, lack of financial and human resources.<sup>55</sup> The situation with the KOMSPI became alarming in May 2018 when, following the resignation of one of its members, it was left with two members only. Thus, it was not able to adopt any decisions, and therefore not able to decide upon cases.<sup>56</sup> All of this led to the adoption of a new law, with the same title, which is to enter into force on December 01, 2019.<sup>57</sup> According to this law, the KOMSPI is to be transformed into the Agency on the Right to Free Access to Public Information. In this research, we will take the same approach to this law as to the new ADL, which means that, since this research is a snapshot of the situation in 2018, we will take into consideration the 2019 developments when formulating the recommendations, but the analysis will not focus on these.

42 Simonida Kacarska, ‘Losing the Rights along the Way: The EU–Western Balkans Visa Liberalisation’ (2015) 16 European Politics and Society 363, 368.

43 For references to many relevant studies on various aspects of the ADL until 2019, see: Vaska Leshoska and others, ‘Gender-Based Discrimination and Labour in North Macedonia’ (Reactor – Research in Action 2019) 18 (footnote 17).

44 Закон за спречување и заштита од дискриминација [Law on Prevention and Protection against Discrimination] 2019 (Службен весник на РСМ бр. 101/2019).

45 For an analysis of the novelties in one of the latest draft versions before the law was adopted, see: Kotevska (n 15).

46 This means we will not propose any recommendations if an issue present in 2018 has been addressed in the 2019 law.

47 This is especially true since the mandate of the old CPAD ended, under Article 48(1) of the 2019 law, but a new one has not been appointed yet, regardless of the fact that the vacancy announcement ended five months ago.

48 Official website of the institution: dzlp.mk

49 Закон за заштита на личните податоци [Law on Personal Data Protection] 2005 (Службен весник на Република Македонија бр. 7/2005, 103/2008, 124/2008, 124/2010, 135/2011, 43/2014, 153/2015, 99/2016, 64/2018).

50 Закон за заштита на личните податоци [Law on Personal Data Protection] – not in force 1994 (Службен весник на Република Македонија бр. 12/1994, 4/2002).

51 Lembovska (n 14) 20.

52 Official website of the institution: komspi.mk

53 Закон за слободен пристап до информации од јавен карактер [Law on Free Access to Public Information] 2006 (Службен весник на Република Македонија бр. 13/2006, 86/2008, 6/2010, 42/2014, 148/2015, 55/2016 и 64/2018, Службен весник на Република Северна Македонија“ бр. 98/2019).

54 Danche Danilovska-Bajdevska, Marija Petrovska and Nada Naumovska, ‘Шест години подоцна: распука ли ѕидот од тишина? Анализа на имплементацијата на Законот за слободен пристап до информациите Од Јавен Карактер [Six Years Later: Has the Wall of Silence Cracked? Analysis of the Implementation of the Law on Free Access to Public Information]’ (FOOM 2013) 51–52.

55 Lembovska (n 14) 17–18; Danilovska-Bajdevska, Petrovska and Naumovska (n 58).

56 European Commission, ‘North Macedonia 2019 Report’ (2019) <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf>.

57 Закон за слободен пристап до информации од јавен карактер („Службен весник на РСМ“ бр. 101/2019).



A common trait for all NHRIs throughout their history is refraining from entering into hot political issues. This was best exemplified during the wiretapping scandal, which revealed the extent of state capture which was later fully encapsulated in the 2015 Priebe Report.<sup>58</sup> This report included sections focusing on the Ombudsperson and on the DPD.

For the Ombudsperson, the Priebe Report found that it is ‘considered by many as being generally an independent institution in a difficult environment that carries out his functions delicately’,<sup>59</sup> and that its ‘genuine efforts to perform its oversight function are hampered by other institutions’<sup>60</sup>. It also found that:

*‘[The Ombudsperson] appears reluctant to use his mandate fully, probably as he is balancing between not upsetting the establishment too much in relation to concrete cases and his ability to carry out investigations into less politicised cases. Furthermore, the tense political environment seems to contribute to a lack of respect for his work and powers leading to obstruction. Yet it is precisely during such times of crisis that a strong oversight by the Ombudsman is essential to the rule of law, good governance, the protection of human rights and the restoring of public trust in the state institutions. Consequently, the Ombudsman is not systematically addressing the revealed potential violations of human rights although apart from obvious political pressure (direct or indirect) nothing, in theory, seems to prevent him from acting strongly on the revelations, like a real watchdog.’<sup>61</sup>*

As for the DPD, the Priebe Report found that it ‘appears generally to function well and with a high level of professionalism. It has received substantial international support.’ However, it expressed worry over the low activity of the DPD in the investigation of possible violations resulting from the wiretapping scandal, which fall within its mandate.<sup>62</sup> Furthermore, ‘[b]odies in charge of oversight and control in particular should not shy away from, and should by no means be prevented from, freely carrying out their mandate without inappropriate “political self-restraint”. Bodies which in a properly functioning democracy would be among the more important oversight and control bodies, such as [...] the Directorate for Personal Data Protection [...] appear unwilling to carry out their mandate.’<sup>63</sup>

As this overview shows, all institutions lack human and financial resources and are subjected to severe political pressure and undermining of their independence. We have evaluated these institutions using an effectiveness evaluation matrix. This enabled us to both identify the fine nuances in the level of compliance with international standards (explained in Approach and Methodology sections), and examine all institutions in order to identify systemic challenges for the effectiveness of NHRIs in North Macedonia. We present the results from this measuring exercise in the next section, Research Findings.

## RESEARCH FINDINGS

Next, we will discuss the research findings. We have presented them per domain, in order to facilitate the reaching of comparative remarks which can encourage mutual learning of the NHRIs. In addition, this enables us to point out to systemic challenges faced by all institutions. Each section starts with a figure presenting the ranking of NHRIs per domain, starting from the institution with the highest and ending with the one with the lowest score.

### General score

NHRI	General score ↓
DPD	5.25
Ombudsperson	4.71
KOMSPI	3.71
CPAD	2.95

58 Senior Experts’ Group, ‘The Former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts’ Group on Systemic Rule of Law Issues Relating to the Communications Interception Revealed in Spring 2015’ (2015) <[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news\\_corner/news/news-files/20150619\\_recommendations\\_of\\_the\\_senior\\_experts\\_group.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf)>.

59 *ibid* 13.

60 *ibid* 4.

61 *ibid* 14.

62 *ibid* 16.

63 *ibid* 4.

According to the general ranking, the DPD (5.25) is the most effective NHRI. The CPAD holds the lowest score (2.95). The CPAD also had the lowest score in all other domains, except Domain 4 ‘Mandate and Powers’, where the KOMSPI had the lowest score. The Ombudsperson scored very close to the DPD (4.71). The KOMSPI is third in the ranking (3.71).

The general score of the DPD is the highest because it scored better than the other three NHRIs in Domain 3 ‘Information, Accessibility and Cooperation with Other Relevant Actors’. This is also the domain that brought the score of the Ombudsperson significantly down. The general score of the KOMSPI and the CPAD is affected by the fact that one of them was not functioning for much of the researched period (KOMSPI), whereas the other had serious independence and passivity issues (CPAD). We explain all these points in more detail in the next four sections.

The lowest overall score per domain is in Domain 2 ‘Availability of Resources and Capacities’. It is also worth noting that the institution with the best general score – the DPD, has its lowest score in this domain. This reflects well the fact that all NHRIs in the country have been working for years with very low human and financial resources. Overall, together with political interference, these two are the biggest systemic challenges for the effectiveness of the NHRIs in the country.

### Domain 1: Independence and Ability to Work without Pressure

NHRI	Domain 1 score ↓
	<i>min:0; max:2</i>
DPD	1.33
Ombudsperson	1.30
KOMSPI	1.22
CPAD	1.00

In the first domain, we examined the issues of independence and ability to work without pressure. The DPD has the highest score in this domain (1.33), but only slightly higher than the Ombudsperson (1.30). They are followed by KOMSPI (1.22). The CPAD has received the lowest score (1.00).

All institutions have scored high regarding their **independent statutory basis**, since they were all founded through either a law or the Constitution.<sup>64</sup> The highest appointment standard applicable to the DPD and the KOMSPI (transparent procedure by legislature or specific independent body) has been satisfied,<sup>65</sup> whereas the highest appointment standard applicable to the Ombudsperson and the CPAD (legislature after public nomination, through participatory and transparent procedure) has not been satisfied due to the lack of a participatory and transparent procedure. This is mainly due to the fact that once the applications reach a competent parliamentary body – the Committee on Elections and Appointment Issues – the procedure becomes very much closed. There is no mandatory public debate, nor criteria for participation in the election by actors other than the Members of Parliament and, with that, beyond political parties.<sup>66</sup>

Concerning **membership criteria**, the Ombudsperson and the KOMSPI have satisfied the highest standards, whereas the CPAD and the DPD have not. The CPAD membership criteria do not demand a ‘human rights expertise which may or may not be in conjunction with legal qualification’. While the ADL has ‘human rights’ among its criteria, this is diluted by the ‘or social sciences’ part,<sup>67</sup> which makes the provision porous to unqualified persons. This was very much the case in the past.<sup>68</sup> The DPD does not have a specified ‘data protection expertise’ among its membership criteria.<sup>69</sup>

64 LO 2003; ADL 2010; LPPD 2005; LFAP 2006.

65 LPPD 2005 Art. 37; LFAP 2006 Art. 31.

66 ADL 2010 Art. 19; LO 2003 Art. 5.

67 ADL 2010 Art. 18.

68 Kotevska (n 15) 70.

69 LPPD 2005 38.

With regards to **term of office**, the Ombudsperson has a mandate that is longer than the one recommended by GANHRI (seven). On the other hand, the equality body has a four-year mandate, thus satisfying the standard.<sup>70</sup> The DPD and the KOMSPI comply with the highest standards.<sup>71</sup>

All institutions have received a medium score on the **avoidance of conflict of interest**. This is caused by the fact that neither foresees any specific criteria, only a general clause applicable for the duration of the term. For the DPD and the KOMSPI, according to the international standards for these bodies, the criteria should be extended for the period after the term as well, which is not currently the case with these two institutions.<sup>72</sup> The Ombudsperson and the CPAD should have an additional layer of protection - **immunity and protection against threat and coercion**. While immunity is well regulated for the Ombudsperson, protection against threat and coercion does not exist for the Ombudsperson and the deputies.<sup>73</sup> The ADL contains no clause that would provide both functional immunity and protection against threat and coercion.

Regarding the criterion **‘no instruction from government’**, only the Ombudsperson has the highest score attainable because it has an explicit provision on prohibition of interference.<sup>74</sup> All other institutions have received a medium score, because the laws contain only general provisions on their independence.<sup>75</sup>

All institutions have also received a medium score regarding **removal from office**. This is mainly due to the room left for arbitrariness in the general provisions of the laws.

Regarding the criterion of **submission or agreement to pressure**, the Ombudsperson and the DPD have received the highest score since no cases of submission to pressure were registered in 2018. We have defined submission as both to remain free from external influence, whether direct or indirect, and to not seek nor take instructions from anybody.<sup>76</sup> The KOMSPI and the CPAD have received the minimum score for this criterion, marking them as institutions under high submission or agreement to pressure. For the KOMSPI, the score is such more because of the external pressure that rendered the body unable to function. With the CPAD, the body itself exhibited high submission. The largest case that tilted the score for the CPAD was the Opinion the CPAD adopted in the case of the runaway former Prime Minister, Nikola Gruevski. The Opinion dated 5 November 2018, was one of the key evidence used by Gruevski in his asylum claim in Hungary.<sup>77</sup> In it, the CPAD found that Gruevski was subjected to direct discrimination on grounds of personal and social status in the area of justice and administration.<sup>78</sup>

Finally, **public opinion on the independence of institutions** has been added. We used available public opinion polls for this. Only the Ombudsperson was scored, and it received a minimal score, since the public view on its independence was below 50%.<sup>79</sup>

There are several key challenges in relation to this domain. While the very foundation for addressing independence under the law has already been established, these provisions are quite general. A stable structure that can guarantee independence has not been erected yet, making the current position of the NHRIs quite vulnerable and susceptible to pressure. This means that there is no specific mechanism that can guard the independence of these institutions and that can minimise and ultimately stop the political influence and pressure. The political influence and pressure valve open with the very appointment procedures. The main reason for this is the fact that, beyond the public vacancy announcement, the rest of the procedures remain non-transparent and non-participatory, and thus very susceptible to political influence and pressure.

## Domain 2: Availability of Resources and Capacities

NHRI	Domain 2 score ↓
	<i>min: 0; max:2</i>
Ombudsperson	1.20
KOMSPI	0.93
DPD	0.92
CPAD	0.30

In the availability of resources and capacities domain, the Ombudsperson has the highest score (1.20). The KOMSPI (0.93) and the DPD (0.92) have very close scores, whereas the CPAD has the lowest score (0.30).

The Ombudsperson is the only institution that has a **separate budget line**.<sup>80</sup> None of the institutions has **appropriate financial resources** nor suitable human resources to carry out its mandate fully. In 2018, the budget of the Ombudsperson was EUR 1,178,292.00 (or MKD 71,940,000.00 and MKD 525,000.00 for the NPM). This amounted to 0.0342% of the annual budget for 2018.<sup>81</sup> In the same year, the budget of the CPAD was EUR 90,081.00 (or MKD 5,540,000.00). This amounted to 0.0026% of the annual budget for 2018. The budget of the DPD was EUR 278,211.00 (or MKD 17,110,000.00). This amounted to 0.008% of the annual budget for 2018. The budget of the KOMSPI was EUR 267,967.00 (or MKD 16,480,000.00). This amounted to 0.0078% of the annual budget. In their annual reports, all of the institutions have been consistently asking the authorities to allocate sufficient resources for the institutions to be able to carry out their full mandates.<sup>82</sup> Due to lack of publicly available data, a more in-depth analysis of the spending per institution was not possible.<sup>83</sup>

With persons retiring or leaving the institutions, and not enough new staff being recruited, the situation is getting even more alarming, **human resources** wise. In 2018, the Ombudsperson employed 71 persons (79, including the appointed persons, out of 141, according to the job classification).<sup>84</sup> The CPAD employed 0 persons (7 with the appointed commissioners),<sup>85</sup> the DPD employed 24 persons (out of 50, according to the job classification),<sup>86</sup> and the KOMSPI employed 19 persons (out of 28, according to the job classification).<sup>87</sup> None of the NHRIs recruits staff independently, in a **transparent and meritocratic** manner. The **recruitment** is very much tied to the executive and a final approval from the Ministry of Finance, and is thus hindered by it. Therefore, the Ombudsperson, DPD and KOMSPI have received a medium score for this indicator. The CPAD has received the lowest score because it has no administrative support. In fact, under the law, the commissioners perform the administrative and technical tasks, in addition to the expert ones. Thus, it cannot recruit persons at all.<sup>88</sup> Since 2011, the CPAD has been operating with the assistance of volunteers and staff that has been taken over from the Ministry of Labour and Social Policy.<sup>89</sup> Not only does this manner of operation undermine the capacity of the body, but it also enhances its links to the executive and thus severely undermines its independence. This is also why the CPAD, as opposed to the Ombudsperson, does not satisfy the set standard according to which the **internal structure and distribution of responsibilities** of the NHRI units should cover all parts of the mandate and enable appropriate focus to each part of the mandate.

The issue of human resources is also related to the lack of structured and ongoing training programmes for

<sup>80</sup> LO 2003 Arts. 43-a, 48.

<sup>81</sup> As per the State Budget for 2018, reported in: [https://finance.gov.mk/files/u6/BUZET%202018%20-%20DOPOLNET%20PREDLOG%20\(12.12.2017\).pdf](https://finance.gov.mk/files/u6/BUZET%202018%20-%20DOPOLNET%20PREDLOG%20(12.12.2017).pdf)

<sup>82</sup> 'Годишен извештај за 2018 година – Народен правобранител [2018 Annual Report – Ombudsperson]' (Народен правобранител [Ombudsperson] 2019) <<http://ombudsman.mk/upload/Godisni%20izvestai/GI-2017/GI-2018.pdf>>; 'Годишен извештај за 2018 година – Комисија за заштита од дискриминација [Commission for Protection against Discrimination – 2018 Annual Report]' (Комисија за заштита од дискриминација [Commission for Protection against Discrimination] 2019) <<https://www.sobranie.mk/materialdetails.nsp?materialId=a554ee4c-74e0-44a2-a5bb-04b4e411c353>>; 'Годишен извештај за 2018 година Дирекција за заштита на лични податоци [Data Protection Directorate – 2018 Annual Report]' (Дирекција за заштита на лични податоци [Data Protection Directorate] 2019) <<https://www.sobranie.mk/materialdetails.nsp?materialId=089ba446-8cf3-43d6-932e-e1b76a885f22>>; 'Годишен извештај за 2018 година – Комисија за заштита на правото на слободен пристап до информации од јавен карактер [Commission for the Protection of the Right to Free Access to Public Information – 2018 Annual Report]' (Комисија за заштита на правото на слободен пристап до информации од јавен карактер [Commission for the Protection of the Right to Free Access to Public Information] 2019) <<https://www.sobranie.mk/materialdetails.nsp?materialId=7e97a548-7d2e-426f-b14a-b17476be7ad2>>.

<sup>83</sup> For the same reasons, the recommendations section does not include recommendations in this regard.

<sup>84</sup> 'Годишен извештај за 2018 година – Народен правобранител [2018 Annual Report – Ombudsperson]' (Народен правобранител [Ombudsperson] 2019) 161/162 <<http://ombudsman.mk/upload/Godisni%20izvestai/GI-2017/GI-2018.pdf>>.

<sup>85</sup> 'Годишен извештај за 2018 година – Комисија за заштита од дискриминација [Commission for Protection against Discrimination – 2018 Annual Report]' (Комисија за заштита од дискриминација [Commission for Protection against Discrimination] 2019) 6, 36–37 <<https://www.sobranie.mk/materialdetails.nsp?materialId=a554ee4c-74e0-44a2-a5bb-04b4e411c353>>.

<sup>86</sup> 'Годишен извештај за 2018 година – Дирекција за заштита на лични податоци [Data Protection Directorate – 2018 Annual Report]' (Дирекција за заштита на лични податоци [Data Protection Directorate] 2019) 7, 35 <<https://www.sobranie.mk/materialdetails.nsp?materialId=089ba446-8cf3-43d6-932e-e1b76a885f22>>.

<sup>87</sup> 'Годишен извештај за 2018 година – Дирекција за заштита на лични податоци [Data Protection Directorate – 2018 Annual Report]' (Дирекција за заштита на лични податоци [Data Protection Directorate] 2019) 7, 35 <<https://www.sobranie.mk/materialdetails.nsp?materialId=089ba446-8cf3-43d6-932e-e1b76a885f22>>.

<sup>88</sup> ADL 2010 Art. 30.

<sup>89</sup> Jatrovski, Jovanovska Kanurkova and Gelevska (n 12) 78.

<sup>70</sup> Устав на Република Македонија [Constitution of the Republic of Macedonia] (n 28) Art. 77; LO 2003 Art. 5(1).

<sup>71</sup> LPPD 2005 Art. 37; LFAP 2006 Art. 31.

<sup>72</sup> LPPD 2005 Art. 40.

<sup>73</sup> LO 2003 Art. 38.

<sup>74</sup> *ibid* Art. 3.

<sup>75</sup> ADL 2010 Art.16; LPPD 2005 Art.37; LFAP 2006 Art. 30.

<sup>76</sup> Adjusted from the GDPR, Art. 52.

<sup>77</sup> Комисија за заштита од дискриминација, 'Мислење Бр. 0801-295/1 на Комисијата за заштита од дискриминација донесено на 05.11.2018'.

<sup>78</sup> On the problematic aspects of the Commission's Opinion, see: Kotevska (n 15) 70.

<sup>79</sup> Regional Cooperation Council, 'Balkan Barometer' (2019) 96 <[https://www.rcc.int/download/docs/Balkan-Barometer\\_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf](https://www.rcc.int/download/docs/Balkan-Barometer_Public-Opinion-2019-07-03.pdf/adad30ca8a8c00a259a1803673c86928.pdf)>.

**their staff**, aside from the mandatory training programme for civil servants.<sup>90</sup> In addition, according to the international standards, all NHRIs are expected to provide training programmes for their target groups. At the moment, the DPD and the KOMSPI engage in such activities regularly. Under the standards established in the GDPR, the DPD is also to publish information on rights and remedies in an easy-to-read language. While such information is shared on its website, it is not in an easy-to-read language.

Two more criteria set out in the international standards pertain to the Ombudsperson and the CPAD specifically. It is recommended that both the Ombudsperson and the CPAD have **regional offices**. However, only the Ombudsperson has these.<sup>91</sup> It is also recommended that the composition reflect fully the diversity represented in society. This applies to both the leadership of the institutions and the staff. With the CPAD, we could evaluate only the leadership and not the staff, since there is no staff. With the Ombudsperson, there is diversity in relation to gender, although women are somewhat overrepresented. As for ethnicity, the principle of equitable and proportionate representation has not been fully respected; the Albanians are overrepresented, whereas some of the other ethnicities (such as the Turks) are underrepresented.<sup>92</sup> There is no information as to other diversity.<sup>93</sup>

In relation **financial control**, the biggest issue is building solid internal financial control. The regularity of external financial control is also questionable since it depends on the annual plans of the State Audit Office. In addition, very few information is readily available as to the financial control of these institutions.

With regards to **learning and change** criterion, the DPD has established a system of regular strategic planning, with output and impact indicators and an evaluation system.<sup>94</sup> The KOMSPI had such a strategic plan for the researched year. While this on its own could not attest to the ‘regularity’ element, since it foresaw ‘annual evaluation and revision,’ we gave it a maximum score as well.<sup>95</sup> CPAD’s strategy has expired and has not been renewed since, whereas for the Ombudsperson the data was not available.<sup>96</sup>

In sum, this is the most challenging domain and it impacts the effectiveness of the institutions in all other domains. There are systemic obstacles and lack of political will to provide the NHRIs with sufficient resources, both financial and human, for them to execute their mandate.

### Domain 3: Information, Accessibility and Cooperation with Other Relevant Actors

NHRI	Domain 3 score ↓
	<i>min: 0; max:2</i>
DPD	1.50
Ombudsperson	0.90
KOMSPI	0.69
CPAD	0.55

In the domain of **information, accessibility and cooperation with other relevant actors**, the DPD has scored higher than the other institutions (1.50). This is due to its intensive and pro-active cooperation with many stakeholders, accessibility and shared information. The Ombudsperson scored 0.90, the KOMSPI 0.69, and the CPAD 0.55.

For the **parliament’s scrutiny**, the highest score is given to an NHRI if its annual report was debated at a plenary session. Save for the CPAD’s, all other NHRIs’ reports have been debated at a plenary session.<sup>97</sup> An important element is also **cooperation with the government**. A persisting issue with all NHRIs is that there is no explicit **obligation under the law for the government to consult the NHRIs on legislative and/or policy proposals related to**

90 This was also a finding in the functional analysis of the KOMSPI. Source: ‘Извештај од спроведена функционална анализа во Комисијата за заштита на правото на слободен пристап до информации од јавен карактер [Report on the Functional Analysis of the Commission for the Protection of the Right to Free Access to Public Information]’ (Комисија за заштита на правото на слободен пристап до информации од јавен карактер [Commission for the Protection of the Right to Free Access to Public Information] 2017) 74 <<http://komspi.mk/wp-content/uploads/2014/01/Функционална-анализа.pdf>>.  
91 LO 2003 Art.44.  
92 ‘Годишен извештај за 2018 година – Народен правобранител [2018 Annual Report – Ombudsperson]’ (n 85) 161–162.  
93 For example, there is no information on disability. In addition, there is a new division on disability, but the initial unofficial information that we have been provided with are that there are no persons with disability working there. There are no openly LGBT\*IQ persons either. From the available documents, it is not possible to know the age composition of the employees.  
94 ‘Стратегија за спроведување на правото на заштита на личните податоци во Република Македонија 2017 - 2022’ (Дирекција за заштита на лични податоци [Data Protection Directorate] 2017) <[https://dzlp.mk/sites/default/files/dzlp\\_strategija\\_mk.pdf](https://dzlp.mk/sites/default/files/dzlp_strategija_mk.pdf)>.  
95 ‘Стратешки план на Комисијата за заштита на правото на слободен пристап до информации од јавен карактер 2018–2020 [Strategy of the Commission for the Protection of the Right to Free Access to Public Information 2018–2020]’ (Комисија за заштита на правото на слободен пристап до информации од јавен карактер [Commission for the Protection of the Right to Free Access to Public Information] 2017) <<http://komspi.mk/wp-content/uploads/2014/01/Стратешки-план-на-Комисијата-2018-2020.pdf>>.  
96 Request for access to public information was sent to the Ombudsperson on 28.10.2019.  
97 <https://www.sobranie.mk/materialdetails.aspx?materialId=43ccfa39-c959-4203-9955-297becb4cabf> and <https://www.sobranie.mk/sessiondetails.aspx?sessionDetailsId=32de1194-c36b-4305-88c9-685db13a0272&date=27.5.2019>

the issues that fall within their competences.<sup>98</sup> While most laws do contain the possibility of NHRIs to contribute to such discussions or to even initiate them, there is no explicit obligation for consultation from the government.

One of the weakest elements of all NHRIs in this domain is their **mutual cooperation**. At the moment, according to available information, the only sign of cooperation is the memorandum of understanding signed by the Ombudsperson and the CPAD. It is also clear from the Ombudsperson’s report that they forward cases which do not fall within their competence to the CPAD. The annual reports of all four institutions do not report any other cooperation among the NHRIs. Cooperation of the Ombudsperson, the CPAD and KOMSPI with NGOs was also assessed. Based on the information provided in their annual reports, KOMSPI are within the medium score,<sup>99</sup> whereas the Ombudsperson and CPAD scored low. The CPAD was in a better position in the previous years, especially during the first composition. Aside from speaking at NGO events, during that composition, the CPAD cooperated with NGOs on joint projects and organised joint campaigns. However, the CPAD’s annual report for 2018 shows a significant drop in these activities.<sup>100</sup> In 2018, the Ombudsperson also maintained a very superficial and sporadic **cooperation with NGOs**.<sup>101</sup>

According to international standards, in addition to the general obligation for the executive and other branches or bodies to provide relevant data to an NHRI, the executive and other branches/bodies should also be obliged to provide relevant data for evidence on specific cases. The Ombudsperson has satisfied this criterion, but not the CPAD.

All NHRIs have an **obligation to provide information on rights and remedies**. While such information is shared on the websites of all of these institutions except the CPAD,<sup>102</sup> language accessibility remains an issue. These publications are almost never in an easy-to-read language, and none of the institutions has used easy-read formats. The **accessibility** of their websites **for persons with disabilities** remains an issue. **Accessibility** overall is an issue in these institutions, particularly for sensory disabilities. But the CPAD has an even more basic issue than that, since its premises remain inaccessible for physically disabled as well. While both the Ombudsperson and the CPAD can be reached online,<sup>103</sup> via email or telephone services, only the Ombudsperson has met the criteria for flexibility in meeting the time constraints of those seeking access to services. The Ombudsperson should also be **accessible to children** and has an obligation for outreach to children. However, according to its annual report and the information available in the public domain, this is not the case.

In relation to **international activity**, the bodies showed good overall results. Regarding the NHRIs’ international activity, evaluated as participation at relevant events, the Ombudsperson and the DPD have had high international activity. The CPAD has had medium activity, whereas the KOMSPI has had low activity. **Membership in relevant international networks** was a criterion for the Ombudsperson, the CPAD and the DPD, and they have all received the highest scores.<sup>104</sup> In addition, the DPD cooperated with more than three other counterparts from other countries by providing mutual assistance, exchange of information, or joint investigations, interventions or actions.<sup>105</sup>

In addition, there are standards set for the DPD regarding **professional secrecy**. These are obligatory for members and staff during and after the term of office. The DPD has satisfied this criterion.<sup>106</sup> The Ombudsperson and the CPAD are to attain a standard for **confidentiality and protection**, within the frame of which they are supposed to be obliged to offer confidentiality to witnesses and whistle-blowers. However, at the moment, there is no such strong guarantee.<sup>107</sup>

Finally, the bodies are expected to have a **communication strategy** covering a period of at least three years. The DPD has a communication strategy for the period 2018–2023.<sup>108</sup> The KOMSPI has a communication strategy, however it was not possible to establish its period of duration.<sup>109</sup> The CPAD’s communication strategy has expired and has not been renewed. No data is available on the Ombudsperson.<sup>110</sup>

98 Furthermore, the DPD has raised this issue in its annual report. ‘Годишен извештај за 2018 година – Дирекција за заштита на лични податоци [Data Protection Directorate – 2018 Annual Report]’ (n 85).  
99 ‘Годишен извештај за 2018 година – Комисија за заштита на правото на слободен пристап до информации од јавен карактер [Commission for the Protection of the Right to Free Access to Public Information– 2018 Annual Report]’ (n 85).  
100 ‘Годишен извештај за 2018 година – Комисија за заштита од дискриминација [Commission for Protection against Discrimination – 2018 Annual Report]’ (n 85).  
101 ‘Годишен извештај за 2018 година – Народен правобранител [2018 Annual Report – Ombudsperson]’ (n 85).  
102 The CPAD’s website was offline for most of 2018. Source: ‘Годишен извештај за 2018 година – Комисија за заштита од дискриминација [Commission for Protection against Discrimination – 2018 Annual Report]’ (n 85).  
103 The CPAD’s website was not in operation for the large part of 2018, however it maintained a Facebook page, so we have marked that criteria as satisfied.  
104 The Ombudsperson: GANHRI, AOMF, ENNHRI, FRA observer.; the CPAD: EQINET; the DPD: full member with voting rights in the Consultative Committee (T-PD), European Conference for Personal Data Protection (Spring Conference), Conference of Central and Eastern European Authorities for Personal Data Protection, International Conference of Data Protection and Privacy Commissioners, International Working Group on Data Protection in Telecommunications, observer status in the European Data Protection Board (former Working Group 29) of the European Union.  
105 ‘Годишен извештај за 2018 година – Дирекција за заштита на лични податоци [Data Protection Directorate – 2018 Annual Report]’ (n 85) 16–17.  
106 LPPD 2005 Art. 43.  
107 Закон за заштита на укажувачи [Law on Whistleblowers Protection] (Службен весник на Република Македонија, бр. 196/2015, 35/18) Art. 5.  
108 ‘Communication Strategy of the Directorate for Personal Data Protection (2018–2023)’ (Directorate for Personal Data Protection 2018).  
109 We were informed by the KOMSPI in a phone inquiry (29.10.2019) that the strategy had been prepared as part of a project, where the KOMSPI had received support from the Konrad Adenauer Stiftung. However, we were told that the strategy had not been made with the intent to last for a specific period.  
110 Request for access to public information was sent to the Ombudsperson on 28.10.2019.

## Domain 4: Mandate and Powers

NHRI	Domain 4 score ↓ <i>min: 0; max:2</i>
DPD	1.50
Ombudsperson	1.31
CPAD	1.10
KOMSPI	0.88

Regarding mandate, we evaluated the institutions against very specific mandate criteria applicable for their type of institution. The DPD scored the highest (1.50), followed by the Ombudsperson (1.31). The CPAD scored 0.95 and the KOMSPI 0.88.

We single out here only those who have not attained the highest standard expected according to international standards. The CPAD has no limitations with regards to mandate, thus it is not mentioned separately here.

The **Ombudsperson's decisions** are not binding. It cannot be said to have the competence to operate 'amicable and confidential settlement of the complaints through an alternative dispute resolution process.' Even though at present there are institutions with competences regarding gender equality as per the Goods and Services Directive and the Recast Directive (primarily the CPAD, but also the Ombudsperson to an extent, both mainly in relation to their **protection mandate**), the gender equality mandate is not visible and is not given appropriate treatment at all. Thus, even though gender equality competences have been formally awarded, there is no independent institution dealing with gender equality in practice. The DPD can act only once it receives a report. Also, it does not have full mandate and power to authorise codes of conduct, certifications, standards, contractual clauses and administrative arrangements, or to approve binding corporate rules, as required under the GDPR. The KOMSPI does not have mandate to assist applicants and to ensure **proactive dissemination of information by public bodies**.<sup>111</sup>

Regarding initiatives<sup>112</sup> submitted to national authorities, the DPD has been the most active one and has had more than five initiatives submitted.<sup>113</sup> The Ombudsperson falls within the medium score, whereas the CPAD and KOMSPI have received the lowest score due to their inactivity in this regard. Submissions or contributions to international bodies was a criterion for the Ombudsperson and the CPAD. The Ombudsperson has received a medium score because of having two relevant **submissions to international bodies**,<sup>114</sup> and the CPAD has received the lowest score.

It is important also whether and to what extent there is a **follow up on the NHRIs' recommendations**. In 2018, there was no reliable public data regarding follow up.<sup>115</sup> For the CPAD, such an evaluation was conducted by CSOs, and the result was less than 90%, so the CPAD has received a medium score.<sup>116</sup>

We have also assessed the **public trust** in the institutions. In order to do this, we have used available public opinion polls. We have scored the Ombudsperson and the CPAD. Both have received the lowest score, since the public trust level for both is below 50%.<sup>117</sup>

The final criterion that we have evaluated is **assessment of progress provided by the European Commission** in its last annual report. On this point, the Ombudsperson and the DPD have received the highest score, the CPAD a medium score, whereas the KOMSPI have received the lowest score.<sup>118</sup>

<sup>111</sup> LFAPI 2006 Art. 32.

<sup>112</sup> Only the proposals that have been reported in the annual reports and submitted on the NHRI own initiative were counted in.

<sup>113</sup> 'Годишен извештај за 2018 година – Дирекција за заштита на лични податоци [Data Protection Directorate – 2018 Annual Report]' (n 85).

<sup>114</sup> These were the submissions to the CRPD and to ECRI. Source: 'Годишен извештај за 2018 година – Народен правобранител [2018 Annual Report – Ombudsperson]' (n 85) 142–143.

<sup>115</sup> Bejkova and Pirovska (n 11).

<sup>116</sup> Jadrovski, Jovanovska Kanurkova and Gelevska (n 12).

<sup>117</sup> Regional Cooperation Council (n 79) 96; Gjorgji Kimov and Fani Kimova, 'Barometer of Equal Opportunities (Unpublished)' (OSCE 2019).

<sup>118</sup> Regarding the lowest score awarded to KOMSPI, the EC wrote in the Progress Report: 'The delays in appointing of the Commission for Protection of Free Access to Public Information from May 2018 until the end of March 2019 made it non-responsive to appeals in that period. Its capacities have remained insufficient to monitor compliance with the proactive disclosure of information requirements.' Source: European Commission (n 60) 13.

## RECOMMENDATIONS

On the basis of ranking, main findings and established main challenges, we have developed a set of recommendations. These refer to national authorities (the Parliament and the Government, and the NHRIs), international actors (European Union and others), and NGOs.

### NATIONAL AUTHORITIES

- **Parliament**

**To hold consultations with representatives of the executive and of all NHRIs, and with relevant experts and relevant NGOs in order to establish a proposal for a portion of the annual state budget that would be allocated to the institutions. This proposal would also contain a strict list of criteria for evaluation of sufficiency of the budget in newly arisen circumstances (such as, for example, change in the mandate of the institutions).** This would strengthen not only the financial independence of the institutions, so that they could finally operate under their full mandates, but it would also enhance their ability to conduct multi-annual planning. This would also enable them to take more part in projects with their counterparts from the region and beyond, and with other stakeholders, as they would have a credible pool of resources on which they could.

**To free the recruitment of staff by the NHRIs from the administrative blockade of the Ministry of Finance by establishing a proposal for shifting the real decision-making power for recruitment to the NHRIs, but without impacting the status of the staff as 'public servants', in consultations with representatives from the government and from all NHRIs, and with relevant experts.** This would enable an institution to manage its own human resources independently and to not be understaffed for long periods of time, for external reasons. It would also ease its dealing with natural processes such as filling in vacancies created because of persons retiring or leaving the institution. This would also help the NHRI to plan its internal training and capacity building, but also any efforts towards enhancing its own pluralism. It would also shift the responsibility for capacities to the NHRI.

**To reform appointment procedures for all NHRIs in order to make them more transparent and participatory, in discussion with the NHRIs, NGOs and other relevant stakeholders.** This needs to be done alongside an in-depth analysis of the experience of the Parliament with previous appointments and its Rules of Procedure, as well as by drawing on comparative experiences from other countries, which are contextually fitting and have been assessed as fully compliant with this criterion of international NHRI standards. The procedure stipulated in the Law on Prevention of Corruption and Conflict of Interest<sup>119</sup> can be used a starting ground for this reform. The pluralism criteria should be taken into consideration.

**To propose, discuss (with the NHRIs, NGOs and other relevant stakeholders), and adopt specific membership provisions, which would foresee specific expertise related to the mandate of a body and would enable the appointment procedures to result in memberships that would reflect the composition of the society.** This would put an end to the porous entry points for persons that are not highly competent in the relevant area. It would also stop the consistent practices of appointment of persons who reflect only or predominantly one gender, one or two ethnic groups, and which do not reflect at all diversity regarding disabilities, age, and sexual orientation.

**To propose, discuss (with the NHRIs, NGOs and other relevant stakeholders) and adopt legislative changes which would supplement the current, very general independence provisions with strong and clear legal grounds for independence of the institutions, including by immunity and prohibition of interference clauses, specific removal criteria which would be as much free as possible from arbitrary acts, and conflict of interest provisions both during and after the term.** This would provide the institutions with a strong legal backbone on which they could more confidently implement their full mandates independently. This should be done in dialogue with the NHRIs.

**To undertake a public consultation process on possible expansion of mandates of the NHRIs.** This would be the first step towards enlarging their mandates in order to address the weak points identified in this report. This expansion of mandates must not happen without appropriate increase in resources – both human and financial. In addition, a solution for the obfuscation of the gender equality mandate has to be sought out, and an independent institution, existing or new, has to undertake fully, seriously and visibly the competences regarding gender equality, as per the EU Directives.

<sup>119</sup> Закон за спречување на корупцијата и судирот на интереси [Law on Prevention of Corruption and Conflict of Interest] 2019 (Службен весник на Република Македонија бр. 12/2019) Art. 12.

**To regularly consult the NHRIs on issues which fall within their competences,** such as, for example, the Ombudsperson on legislation impacting child rights, the CPAD about equality and non-discrimination aspects in a strategy on the elderly. Such an obligation should be added to the legislative framework as well, in order to decrease the chances of this aspect depending on the willingness of the changing governments.

**To propose, discuss (with the NHRIs, NGOs and other relevant stakeholders), and adopt legislative changes which would enhance the obligation of NHRIs to offer confidentiality to witnesses and whistle-blowers, in dialogue with the NHRIs.** The present provisions on confidentiality of witnesses and whistle-blowers do not contain the element of obligation required under international standards. The legislative framework should be amended in order to provide for this.

**To regularly hold public hearings when debating the annual reports of the NHRIs** in order to promote inclusiveness and transparency. The Members of Parliament would benefit from supplementing the findings in the reports with the findings and positions of NGOs and other relevant stakeholders.

**To hold structured debates on issues related to the effectiveness of the NHRIs,** and to oversee hearings on the implementation of recommendations of the NHRIs **and hearings on specific issues brought up by the NHRIs within the frame of the Parliament's Standing Inquiry Committee on Human Rights.** This would contribute towards upgrading the level of debate in the Parliament on issues related to NHRIs and their mission, increasing the awareness of the public, and effectively contributing towards the increase in accountability and strengthened control over the executive.

- **Government**

**To develop a practice of information sharing and debate when international standards are drafted and deliberated at the European level (e.g. CoE), including through joint consultations with the NHRIs and relevant NGOs.** This would contribute towards better sharing of information, cross-pollination of expertise among these stakeholders, and the building of trust and partner relationships.

**To participate and actively contribute to all Parliament-organised discussions on NHRIs, as proposed herein.** This would enable the executive government to have a significant say in these reforms, while giving the lead to the Parliament in this process, in order to enable it to perform its function as the home of public deliberation.

**To regularly consult the NHRIs on issues that fall within their competence.** Such an obligation should be added to the legislative framework as well, in order to decrease the chances of this aspect depending on the willingness of the changing governments.

**To delimit very strictly the situations in which reallocations can be made from the budget allocated to the NHRIs.** This would address the worrying situation mentioned in the NHRIs' annual reports, according to which the NHRIs' budgets are cut quite often in budget reallocation procedures.

**To support the NHRIs in making them all fully accessible to all persons with any type of disability, by allocating sufficient funds and performing any other required actions,.** This would create an equal starting ground for equal access to justice for all.

**To not additionally hinder the work of NHRIs, including by providing requested access and data to the NHRIs as per their relevant mandates, and to work together with them in order to remove administrative bottlenecks which may be causing the hindrance.** This would make sure that the work of the NHRIs does not suffer because of the executive and would increase the level of services provided by the executive in the medium to long run.

**To ramp up the system on follow-up on recommendations from the NHRIs and to increase the transparency of the implementation.** This would contribute towards a better response and increase in the responsibility of all state bodies, including by enabling a systematic analysis of the underlying issues for non-implementation.

- **National Human Rights Institutions**

**To enhance the readily available information on the financial control and overall financial transparency of these institutions.** This can be done by fully and regularly updating annual financial reports and records of financial control activities, which are currently lacking. These sections of the NHRIs' websites should also link to the reports which the State Audit Office publishes about their respective institutions.

**To seek a solution with the Parliament and the State Audit Office in order to establish regularity in external financial control.** This would enhance their credibility in general and when seeking additional funds through projects or grants.

**To enhance the cooperation between the NHRIs.** The research shows little to no cooperation among the NHRIs. This cooperation should be conducted in a more structured way, which would enable continuity and mutual learning and support.

**To hold a regular, structured annual dialogue on issues that affect their work as NHRIs.** This would resolve the currently very low cooperation among the institutions. It would also encourage mutual learning. It would enhance the advocacy capacity of the NHRIs, since they could act as a joint front, in order to seek improvement for the conditions in which they all work in. This joint front could work well for advocacy efforts both at home and abroad, in forums working on NHRIs. In addition, they can discuss and reach joint solutions to commonly faced issues in a manner that can save resources and time to address these issues.

**To resolve the outreach of the equality body in lieu of its lack of regional offices.** One option is to discuss the possibility of outreach with the help of the regional offices of the Ombudsperson. Another option is to organise visits at regular intervals of commissioners and/or their staff to selected places throughout the whole territory. This would establish the currently non-existing regional outreach of the equality body.

**To enhance efforts in achieving pluralism within its own human resources.** This will enable the institution to better reflect on its work and to also 'practice what it preaches'.

**To develop regular and comprehensive training programmes.** These training programmes should include both training of the internal staff and training of target groups. In order to facilitate the planning and execution of these training programmes, the NHRIs can reach out to actors that have training expertise, for example, training experts from NGOs, universities, state institutions, the courts, or professional associations.

**To enhance the accessibility of the NHRIs.** The accessibility should be enhanced for all types of disabilities, including for sensory and intellectual disabilities. Persons with disabilities must be able to autonomously approach the NHRIs and receive their support.

**To enhance the language accessibility of information about rights within their mandate, and the overall accessibility of information.** This can be done by enhancing their availability in all of the languages used in the countries. All NHRIs need to work on easy-to-read language presentations of information, but they should also start publishing easy-read publications. The Fundamental Rights Agency has such publications, which can be used as examples.<sup>120</sup>

**To establish regular cooperation with NGOs in a structured manner.** Cooperation with NGOs is very low, sporadic and related to projects and/or NHRI representatives speaking at NGOs events. This keeps a great potential for cooperation and mutual support locked. A structured approach for cooperation with CSOs is needed for all NHRIs.

**To enhance the strategic planning process, including by setting of indicators and regular revision and updating.** This would enable the NHRIs to strengthen their internal capacities for strategic planning, financial management, communication, research and/or analysis. The NHRIs should annually plan funds for such activities. In addition, it would enable the NHRIs to have a clear and targeted communication mode which would have a positive impact on transparency overall. In addition, communication can help with the visibility of the NHRIs and their work, which, in turn, could have a positive impact on public trust.

**To establish regular practice of monitoring follow-ups on its recommendations and publishing the findings in an easy-to-read format.** The present practice of no or sporadic monitoring results in the inability to identify weak points in implementation of recommendations, whatever they may be. A regular practice could also help to detect early positive or negative trends arising in relation to the follow-up on the recommendations.

<sup>120</sup> See: <https://fra.europa.eu/en/publication-type/easy-read-publication>

**To enhance their international activity, including by making relevant submissions to international bodies.**

This means that the NHRIs should work on more actively partaking in international events and cooperation. Submissions to relevant international bodies should regularly be made. While participating at events is always encouraged and stimulates learning and networking above all, the NHRIs are strongly encouraged to also make their active contribution to the lively dialogue taking place at the international level regarding protection, promotion and advancement of human rights. In addition, the public would benefit from reflection in the reports on the substance of the results from international activities.

**To enhance their national activity, with regards to initiatives submitted to national authorities.** This would show a proactive approach of the NHRIs, and would disable the making of regressive or damaging changes to the legal or institutional human rights framework. On this issue, the NHRIs could cooperate with NGOs on joint initiatives

**INTERNATIONAL ACTORS**

- **European Union**

**To apply strict conditionality in relation to the NHRIs.** This would enable the national authorities to take perpetual issues, such as lack of resources, seriously into consideration.

**To support financially the national processes for enhancing the independence and effectiveness of the NHRIs.** To continue programing funds in a way that would enable access for NHRIs, focusing on increasing their own capacities and accountability, and in a way that would also facilitate cooperation of NHRIs with other relevant stakeholders, such as NGOs.

**To integrate performance and impact of NHRIs in the planning of financial support.** This would enable both more funding for the NHRIs and larger impact.

- **Other international actors**

**IGOs present in the country – to continue to support technically and financially the national processes for enhancing the independence and effectiveness of the NHRIs.** This support has been crucial for undertaking processes that can be very costly, such as technically equipping an institution or providing support for strategic planning.

**IGOs present in the country – to support NGOs’ activities on monitoring the work and effectiveness of NHRIs.** This would provide NGOs, who are at present the most relevant, critical and regular scrutinizers of the work of NHRIs, with funds to continue doing this work. This should include support for networking activities at the European level on issues related to NHRIs.

- **NGOs**

**To continue with their very important work on monitoring the NHRIs.** This enables reliable data and maintains pressure on the NHRIs and other relevant institutions to refrain from regressing the situation in which the NHRIs are, and to work towards progressing by continuously issuing recommendations.

**To seek for a more structured way to cooperate with the NHRIs, in dialogue with the NHRIs.** This would add new quality to the current, mainly project- and activity-based cooperation.

**To include questions on the independence of and trust in the NHRIs, whenever possible and appropriate when working on public opinion polls.** If this is to be done in regular intervals, it would enable not only monitoring of current opinions and attitudes, but also identifying trends.

**To work on joint initiatives with the NHRIs, which would be addressed to national authorities.** This could help to form a joint front on issues of joint interest, which could make both the NHRIs’ and NGOs’ advocacy activities stronger.

**To participate and actively contribute to all Parliament-organised discussions on NHRIs, as proposed herein.** This would enable the experience and knowledge accumulated in the NGOs to be reflected in these reforms. It would also indirectly support the shifting back of the balance of the powers in a way that would enable the Parliament to perform its function as the home of public deliberation.

**To use the existing networks for joint advocacy at the national level.** This would improve the advocacy position of NGOs and would increase the visibility of their advocacy efforts.

**To further develop networking at regional, European and global levels.** This would work towards increasing capacities, finding ideas for new solutions on pending issues at the national level, and gaining an international standing which they could use to both voice their opinions and share their national experience in regional, European and global dialogues on NHRIs, as well as to put extra pressure for pressing issues at home.

**Annex: List of indicators**

**Domain 1: Independence and ability to work without pressure**

Ombudsperson	EB	SADP	FAI
Independent statutory basis	Independent statutory basis	Independent statutory basis	Independent statutory basis
Appointment process	Appointment process	Appointment process	Appointment process
Clear criteria for membership	Clear criteria for membership	Clear criteria for membership	Clear criteria for membership
Term of office	Term of office	Term of office	Term of office
Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest
Immunities	Immunities		
No instruction from government	No instruction from government	No instruction from government	No instruction from government
Removal	Removal	Removal	Removal
Submission / agreement to pressure	Submission / agreement to pressure	Submission / agreement to pressure	Submission / agreement to pressure
Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI	Public opinion on independence of NHRI

**Domain 2: Availability of resources and capacities**

Ombudsperson	EB	SADP	FAI
Separate and independent budget	Separate and independent budget	Separate and independent budget	Separate and independent budget
Adequate financial resources	Adequate financial resources	Adequate financial resources	Adequate financial resources
Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures
Sufficient human resources	Sufficient human resources	Sufficient human resources	Sufficient human resources
Adequate human resources	Adequate human resources	Adequate human resources	Adequate human resources
Financial control	Financial control	Financial control	Financial control
Pluralism	Pluralism		
Training	Training		Training
Internal structure enables focus on each part of mandate	Internal structure enables focus on each part of mandate		
Regional offices / outreach	Regional outreach / offices		
Learning and change	Learning and change	Learning and change	Learning and change

### Domain 3: Information, accessibility and cooperation with other relevant actors

Ombudsperson	EB	SADP	FAI
Parliamentary scrutiny	Parliamentary scrutiny	Parliamentary scrutiny	Parliamentary scrutiny
Providing information to the NHRI	Providing information to the NHRI		
Cooperation with government	Cooperation with government	Cooperation with government	Cooperation with government
Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRI	Cooperation with other NHRI
Cooperation with NGOs	Cooperation with relevant bodies and NGOs	Trans-national cooperation with other SAs	Cooperation with NGOs
Providing information on rights	Providing information on rights	Providing information on rights	Providing information on rights
		Information on rights and assistance to data subjects	
Accessibility	Accessibility	Accessibility	Accessibility
Accessibility to children			
Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities
Membership in international networks	Membership in international networks	Membership in international networks	
Participation in international activities	Participation in international activities	Participation in international activities	Participation in international activities
Communication strategy	Communication strategy	Communication strategy	Communication strategy
Confidentiality and protection	Confidentiality and protection	Professional secrecy	

### Domain 4: Mandate and powers

Ombudsperson	EB	SADP	FAI
		Monitoring and enforcement	Monitoring and oversight
Human rights promotion	Promotion and prevention	Promotion	Promotion
Promotion of harmonisation with international HR instruments and implementation			Promotion of pro-active dissemination
Mandate – coverage of sectors	Coverage of grounds of discrimination		
	Coverage - area		
	Equal treatment of all persons without discrimination on grounds of sex		
Human rights protection – powers – investigation	Independent assistance – mandate	Investigations	
Human rights protection – powers – access	Independent assistance – strategic litigation		
Human rights protection – powers – complaints	Independent assistance – issuing recommendations and legally binding decisions		
Human rights protection – powers – courts			
Follow-up on recommendations	Follow up on recommendations		
Initiatives to national authorities	Initiatives to national authorities	Advisory role	Advisory role
	Complaints submission	Handling complaints	Handling complaints
	Complaints submission – language		Complaints submission
	Complaints submission – free of charge		Complaints submission – free of charge
	Independent surveys	Regulatory functions / authorisations	
Reports	Independent reports		
Submission of contributions to international bodies	Submission of contributions to international bodies		
National prevention mechanism			
Rights of the child			
Public opinion on public trust in NHRIs	Public opinion on public trust in NHRIs	Public opinion on public trust in SA institution	Public opinion on public trust in SA institution
Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

Country Report  
Serbia

WHAT IS BEHIND AND  
BEYOND THE  
AVERAGE?

Country Report  
North Macedonia





**Effectiveness of NHRIs in Western Balkan countries**  
Albania, Bosnia and Herzegovina, Kosovo,  
Montenegro, North Macedonia, Serbia

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## Country Report **Serbia**

# WHAT IS BEHIND AND BEYOND THE AVERAGE?

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November 2020

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## List of Acronyms and Abbreviations

<b>CoE</b>	Council of Europe
<b>Commissioner</b>	Commissioner for Information of Public Importance and Personal Data Protection
<b>CPE</b>	Commissioner for Protection of Equality
<b>CRD</b>	Civil Rights Defenders
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CSO</b>	Civil Society Organisation
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>GANHRI</b>	Global Alliance of National Human Rights Institutions
<b>GDPR</b>	General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC)
<b>EQUINET</b>	European Network of Equality Bodies
<b>EU</b>	European Union
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>LFAIPI</b>	Law on Free Access of Information of Public Importance
<b>LPC</b>	Law on the Protector of Citizens
<b>LPD</b>	Law on the Protection from Discrimination
<b>MKD</b>	North Macedonia
<b>MNE</b>	Montenegro
<b>MS</b>	Member States
<b>NHRI</b>	National Human Rights Institutions
<b>NGO</b>	Non-Governmental Organisation
<b>NE</b>	National Expert
<b>OHCHR</b>	UN Office of the High Commissioner for Human Rights
<b>OPCAT</b>	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>PC</b>	Protector of Citizens (Ombudsperson)
<b>SA</b>	Supervisory Authority
<b>SRB</b>	Serbia
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>WB</b>	Western Balkans

## INTRODUCTION

After democratic changes in 2000, Serbia has embarked upon a large scale of the social, political and economic reform process. In many areas of law, new laws or major amendments to existing legislation have been adopted, in order to bring national legislation and practice into line with international and European standards. Serbia adopted a new Constitution in 2006,<sup>1</sup> which contains a broad catalogue of guaranteed human rights. It has ratified almost all relevant international human rights treaties and begun to take more notice of the practice of international bodies that oversee the fulfilment of international obligations, undertaken by the ratification of those treaties. It has also established several independent institutions due to the need for additional forms of control of administration and better human rights protection, bearing in mind that traditional forms have proven to be insufficient, and inadequate.<sup>2</sup> However, it must be underlined that NHRIs were spontaneously introduced into the Serbian legal system, which raised the issue of their position, role and function.

For the purpose of this research, the NHRI is defined as “*a National Human Rights Institution that is a body established by the state with the mandate to protect and promote human rights*”.

Three institutions which satisfied the NHRI definition<sup>3</sup> were selected for this research: Commissioner for Information of Public Importance and Personal Data Protection, Protector of Citizens (Ombudsperson) and Commissioner for Protection of Equality.

The monitoring of the NHRIs in Serbia is not comprehensive and periodical. However, few sources indicate that these institutions are faced with limited human and financial resources, non-compliance with their decisions, and are exposed to political pressures which undermine their independence. It raises the issue of the ability of NHRIs to perform their work effectively. Therefore, the aim of this research - is ‘to assess the effectiveness (performance) of the human rights institutions in North Macedonia, Montenegro and Serbia, based on a pre-defined set of indicators.’<sup>4</sup> The effectiveness of the NHRI is defined, for the purpose of this research, as ‘the capability of the NHRI to independently perform its mandate and powers, with the aim to make a significant impact on the achievement of human rights.’<sup>5</sup>

The starting point was the current state of research on NHRIs. In Serbia, for the year of 2018, a few relevant sources have been published as the outcome of monitoring of NHRIs. Belgrade Centre for Human Rights in their annual report on human rights include the assessment of work of independent bodies in Serbia.<sup>6</sup> Also, CRTA prepared a report on the role and position of two NHRIs.<sup>7</sup> Equal Rights Trust conducted comprehensive research on the application of anti-discrimination law in Serbia, including the assessment on the work of the Commissioner for Protection of Equality.<sup>8</sup> In addition, there is one comprehensive monograph on independent bodies in Serbia which assess their competence, procedure and practice.<sup>9</sup>

This report focuses on the findings from the research on the effectiveness of the three NHRIs in Serbia. The research looked specifically at the effectiveness of the three selected institutions, using the methodology briefly described in the next section of this report. Following a brief overview of these institutions, the research findings on the systemic challenges and shortcomings that hinder the work of NHRIs will be presented for each of the effectiveness domains: 1) independence and ability to work without pressures; 2) availability of resources and capacities; 3) information, accessibility and cooperation with other relevant actors; and 4) mandate and powers. In the end, a set of recommendations were given, targeted at various stakeholders.

## APPROACH AND METHODOLOGY

In the given context and current state of development of research on NHRIs in the Western Balkans, an approach to measuring effectiveness that combines the structural and the mandate-based approach was applied. The structural approach focuses on the compliance of NHRI with the main legal norms, or the institutional safeguards. The mandate-based approaches are performance-based and focus on the success in performing the mandate of the NHRI.

A matrix of indicators was developed,<sup>10</sup> structured per four domains:

- (1) Independence and ability to work without pressure,
- (2) Availability of resources and capacities,
- (3) Information, accessibility and cooperation with other relevant actors, and
- (4) Mandate and powers.

The values of indicators were weighed, depending on the number of indicators per domain (which ranged from 6-12). In addition, some indicators have been broken down to sub-indicators, to capture the specifics of a particular issue, which depended on the level of detail of the relevant international standard. The indicator per domain is estimated as a sum of the weighted values of indicators in the domain. The overall score of effectiveness for each NHRI in each country is estimated as a sum of the indicators per domain. Each domain participates equally in the final score – 25%. Consequently, the scale of the score per country per body is 0-8.

An overview of indicators is presented in the Annex.

The basis for developing the indicators were the relevant international standards and their interpretations.

The Paris Principles<sup>11</sup>, or more precisely, the GANHRI General Observations<sup>12</sup>, are taken as a basis for the indicators for human right institutions with the general mandate. The basis for specific indicators were the UN relevant standards related to the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>13</sup>, the Convention on the Rights of the Child (CRC)<sup>14</sup>, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>15</sup>, and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>16</sup> and especially their interpretations.

The EU Commission Recommendation of 22 June 2018<sup>17</sup>, the Opinion on equality bodies of 2011 of the Human Rights Commissioner of the CoE, as well as the Revised General Policy Recommendation No 2 of 2017 on equality bodies to combat racism and intolerance of ECRI of the CoE<sup>18</sup> were the European standards taken as a basis for indicators for equality bodies.

The EU General Data Protection Regulation (GDPR)<sup>19</sup> and the CoE Convention 108+<sup>20</sup> are taken as primary standards for setting the indicators for data protection supervisory authorities. Since there are no specific international standards for an independent body on free access to information, the general standards for NHRI have been applied accordingly, while the basis for the indicators on powers and mandate have been the specific international standards on content of right of information<sup>21</sup>, as well as documents developed by special rapporteurs for freedom of expression in UN, CoE and OSCE.

<sup>10</sup> A detailed explanation of the Methodology is available in the Comparative Analysis, published alongside the policy report.

<sup>11</sup> UNGA, Resolution A/RES/48/134 (1993).

<sup>12</sup> Global Alliance of National Human Rights Institutions, General observations of the Sub-Committee on Accreditation, adopted by GANHRI Bureau, 21 February 2018 (2018).

<sup>13</sup> UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (1996)

<sup>14</sup> UNGA, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (1989)

<sup>15</sup> UNGA, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I (2006).

<sup>16</sup> UNGA, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, A/RES/57/199 (2002).

<sup>17</sup> Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, C/2018/3850, OJ L 167 Ch I, (2) (2018).

<sup>18</sup> Council of Europe, ECRI, General policy recommendation No 2: Equality bodies to combat racism and intolerance at national level, adopted on 7 December 2017, CRI (2018)06 (2017).

<sup>19</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), (2016) OJ L 119

<sup>20</sup> CoE, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No 223), 10.10.2018 (2018).

<sup>21</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (1966); CoE, Convention on Access to Official Documents, CETS 205, 11 June 2008 (2008).

<sup>1</sup> Ustav Republike Srbije (Constitution of the Republic of Serbia), “The Official Gazette of the Republic of Serbia”, No 98/2006.

<sup>2</sup> Marko Davinić, “Nezavisna kontrolna tela u Republici Srbiji” (Independent Controlling Bodies in Serbia), Dosijske, Belgrade, 2018, 17.

<sup>3</sup> According to the UNCHR (Office of the High Commissioner for Human Rights), national human rights institutions are defined as “state bodies with a constitutional and/or legislative mandate to protect and promote human rights, that are part of the State apparatus and are funded by the State” Office of the United Nations High Commissioner for Human Rights, National Human Rights Institutions, History, Principles, Roles and Responsibilities, UN, 2010, p. 13.

<sup>4</sup> See the research methodology in the comparative analysis.

<sup>5</sup> See the research methodology in the comparative analysis.

<sup>6</sup> Belgrade Centre for Human Rights, Human Rights in Serbia for 2018, Belgrade, 2019, 98.

<sup>7</sup> CRTA, Uloga i položaj Zaštitnika građana i Poverenika za zaštitu ravnopravnosti (The role and the position of the Protector of Citizens and the Commissioner for Protection of Equality), Belgrade, January 2019.

<sup>8</sup> Equal Trust Rights, Ravnopravnost u praksi, primena antidiskriminacionih zakona u Srbiji (Equality in practice - application of anti-discrimination legislation in Serbia), London, January 2019.

<sup>9</sup> Marko Davinić (fn 2).

## OVERVIEW OF NHRIs IN SERBIA

In this section, a short history of the NHRIs in Serbia will be presented, as well as their basic mandate and composition, and all relevant major developments which concern their effectiveness. The differences that exist between NHRIs derives from their competences and power given by the laws under which they were established. They issue different legal acts, and there is a difference in the extent of their control of subjects. Also, it is important to note that the state's attitude towards NHRIs was characterized by mistrust and insufficient support, meaning that they were faced with limited technical and financial resources, inadequate premises and obstacles in the recruitment of their staff. However, some specificities do arise.

The oldest NHRI in the country is the Commissioner for Information of Public Importance and Personal Data Protection (Commissioner) - *Poverenik za informacije od javnog značaja*. The institution of Commissioner was introduced with the adoption of the Law on Free Access of Information of Public Importance (LFAIPI).<sup>22</sup> The first Commissioner was appointed on 22 December 2004, but the institution started to operate in July 2005. The establishment of the CIPIPD does not have a constitutional basis, it was introduced before the new Constitution was adopted in 2006. The Commissioner has a mandate under the LFAIPI. Since 1 January 2009, the Commissioner also gained authority in the field of personal data protection according to the Law on Personal Data Protection (LPDP).<sup>23</sup> The National Assembly appoints the Commissioner to a seven-year term of office, which can be renewed. Under the LFAIPI, the Commissioner has a very broad mandate, yet the most important task is to consider complaints against the decision of public authorities that violate the right to access information of public importance. The procedure before the Commissioner is administrative and a complaint against his decision may be lodged to the Administrative Court. Therefore, his decisions are binding and subject to judicial review. Under the Law on Personal Data Protection, the Commissioner is allowed to decide on appeals in cases set out in the law. In the last several years, the Commissioner repeatedly come into conflict with the Government, performing his public duties. In 2018 the situation deteriorated, and the Commissioner frequently faced difficulties in his work, primarily as a consequence of lack of political will to enforce his rulings regarding access to information.<sup>24</sup> The mandate of the Commissioner expired in December 2018, while the new Commissioner was appointed in July 2019. The CIPIPD has seven divisions: 1) Harmonisation Division, 2) Enforcement Complaints Division on Access to Information, 3) Complaints Division on Data Protection, 4) Information Technology Division, 5) Supervision Division, 6) Joint Affairs Division and 7) Co-operation and Reporting Division.

The second NHRI that the report focuses on is the Protector of Citizens (Ombudsperson) - *Zaštitnik građana*. The legal ground for the establishment of the institution was set in 2006, with the adoption of the Constitution.<sup>25</sup> The highest legal act guarantees its independence, while the basis for the establishment of the institution was introduced with the Law on the Protector of Citizens.<sup>26</sup> However, back in 2001 the first draft was prepared by the Ministry of Justice and in 2002 submitted to the National Assembly, but the assassination of the Prime Minister in 2003 and new elections interrupted the process of its adoption. The new draft was prepared in 2004 and adopted it in 2005. The first PC was appointed by the National Assembly in 2007 (two years after the adoption of the law) on five-year term of office, which can be renewed. It has four deputies: 1) Deputy for child rights and gender equality, 2) Deputy for the rights of persons with disabilities, 3) Deputy for national minority rights, and 4) Deputy for the protection of persons deprived of liberty and coordination of the National Prevention Mechanism (NPM).<sup>27</sup> The PC is responsible for two complex and interconnected tasks: to protect and promote human rights, as well as to control public administration bodies. The main duty of the PC is to act upon complaints of citizens or at its own initiative in order to check if there are or have been omissions in the work of public administration bodies. If it finds any inadequacies in the work of public administration bodies, the PC issues recommendations and requires these bodies to rectify them. Although it issues recommendations, the administrative body must act upon them, but if it fails to do so, it must provide explanations for not fulfilling the recommendation. However, the responsibility of the PC is limited to control of public officials and only if other legal remedies have been exhausted. In addition, the PC is allowed to mediate, provide advice and opinions and urge administrative bodies to improve their work and protect human rights. It has the following sectors: 1) Sector for human rights protection and the rights of persons deprived of liberty, 2) Sector for child rights protection, gender equality and

rights of persons with disabilities, 3) Sector for national minority rights and rights of other minorities, 4) Media and Project Sector, 5) General Affairs Sector, 6) Sector for the Reception of Citizens, 7) Sector for Material and financial affairs, and 8) Normative Affairs Sector. The PC has an A status accreditation of the GANHRI as one of 79 NHRIs being in full compliance with the Paris Principles.

In 2017, the PC was exposed to political pressure, concerning the manner and results of his work as well as the level of his income by representatives of the most important state institutions. The negative atmosphere was noted in the Annual Report for 2016.<sup>28</sup> The culmination of this situation was his announcement of the presidential bid in the elections and his resignation on 7 February 2017. The new PC was appointed in July 2017, although some found that the process was non-transparent and that the he is ineligible to perform this duty.<sup>29</sup>

The third NHRI presented in this report is the Commissioner for the Protection of Equality (CPE) - *Poverenik za zaštitu ravnopravnosti*.<sup>30</sup> This equality body had been established under the Law on Prohibition of Discrimination (LPD),<sup>31</sup> and has the mandate to prevent and combat all forms and types of discrimination. The LPD very broadly defines discrimination and explicitly covers 19 grounds for discrimination. However, some grounds not explicitly mentioned such as residence could also be considered as prohibited grounds and within the mandate of the CPE, as it is an open-ended clause.<sup>32</sup> The civil society has been making an initiative for enacting this law since 2004. The draft was finalized in 2008 in a joint effort by several NGOs, and it was also a precondition for Serbia's inclusion in the "White Schengen List". Its adoption was heavily debated in the National Assembly, and the text was even withdrawn from the procedure, due to resistance of certain religious communities, followed by intense media and public debate.<sup>33</sup> The LPD is broadly in line with European standards, but some further alignment with EU *acquis* is needed.<sup>34</sup> The National Assembly appointed the first CPE in 2010 for five-year term of office, which can be renewed. The CPE is authorized to receive and review complaints, provide opinions and recommendations and publicly announce the existence of violation in a case her recommendation was not respected. It is also authorized to initiate strategic litigation of public interest, as well as to submit misdemeanour and criminal charges and proposals for assessing constitutionality and legality. The CPE provides legal aid to the person submitting a complaint and is also authorized to recommend mediation if assessed that the case is such. It has three sectors: 1) Sector for Acting upon Complaints, 2) Sector for Improvement of Protection of Equality, International Collaboration and Projects and 3) Sector for General Affairs. The CPE's work is regulated by the Rules of Procedure, adopted in 2011.<sup>35</sup>

The above-mentioned institutions have been analysed through the lens of an effectiveness evaluation matrix. The matrix made it possible both to identify the fine nuances in the level of compliance with the international standards (explained in the Approach and Methodology section) and to look across all institutions, in order to identify systemic challenges for the effectiveness of the NHRI in Serbia. The results from this measuring exercise will be presented in the next section, Research Findings.

<sup>28</sup> The PC notes that the trend of endangering independence and diminishing the importance of the institution continued during the entire 2016. European Commission, Serbia 2016 Report, 2016 Communication on EU Enlargement Policy, Brussels, 9 November 2016, 4.

<sup>29</sup> Danas, Rasprava u skupštini o nezavisnim institucijama (2017) [www.danas.rs/politika/rasprava-u-skupstini-o-nezavisnim-institucijama/](http://www.danas.rs/politika/rasprava-u-skupstini-o-nezavisnim-institucijama/)

<sup>30</sup> Official website of the institution: <https://www.poverenik.rs>.

<sup>31</sup> Zakon o zabrani diskriminacije (Law on prohibition of Discrimination), The Official Gazette of the Republic of Serbia, No 22/2009.

<sup>32</sup> LPD Art. 2, para. 1.

<sup>33</sup> Equal Trust, Serbia, National Anti-Discrimination Law, 2, [https://www.equalrightstrust.org/ertdocumentbank/395178321\\_5\\_\\_PILl%20Project%20-%20Serbia%20Summary%20Template%20for%20National%20Law.pdf](https://www.equalrightstrust.org/ertdocumentbank/395178321_5__PILl%20Project%20-%20Serbia%20Summary%20Template%20for%20National%20Law.pdf)

<sup>34</sup> European Commission, Serbia 2018 Report, 24. The law need to be further aligned with the *acquis*, especially in relation to the following: the definition of direct discrimination to cover also detriment; the definition of indirect discrimination to contain the conditional wording ('would') and not to be limited to the actual occurrence of disadvantage; to include the instruction to discriminate; to mention also access to goods, and not only to services; and to include provision on reasonable accommodation for people with disabilities. Non-paper on the state of play regarding chapters 23 and 24 for Serbia, May 2017.

<sup>35</sup> Rules of Procedure, the Official Gazette of the Republic of Serbia, No 34/2011. Text available at <http://www.ravnopravnost.gov.rs/rs/o-нама/акти-повереника>.

<sup>22</sup> Zakon o pristupu informacija od javnog značaja (Law on Free Access to Information of Public Importance), The Official Gazette of the Republic of Serbia, No 120/04 and 54/07.

<sup>23</sup> Zakon o zaštiti podataka o ličnosti (Law on Personal Data Protection), The Official Gazette of the Republic of Serbia, 97/2008. In a meantime, a new law was adopted, Zakon o zaštiti podataka o ličnosti (Law on Personal Data Protection), The Official Gazette of the Republic of Serbia, No 87/2018.

<sup>24</sup> Belgrade Centre for Human Rights (fn 5), 98.

<sup>25</sup> Constitution Art. 138, para. 1.

<sup>26</sup> Zakon o zaštitniku građana (Law on Protector of Citizens), The Official Gazette of the Republic of Serbia, No 79/2005, 54/2007.

<sup>27</sup> The mandate of all deputies expired in December 2018 and the new deputies have not been appointed yet.

## RESEARCH FINDINGS

Research findings are presented per domain, in order to facilitate the reaching of comparative remarks which can encourage learning between the NHRIs. In addition, this enables pointing out to systemic challenges faced by all three institutions. Each section starts with a figure presenting the ranking of NHRIs per domain, from the institution with the highest, to the one with the lowest score.

### General score

NHRI	General score ↓ <i>min: 0; max: 8</i>
CPE	5.49
PC	4.99
Comm. (PDP)	4.34
Comm. (FAI)	4.42
Comm. (total)	4.38

According to the general ranking, the CPE (5.49) is the most effective NHRI, with very consistent scores in all four domains. The PC holds the second position (4.99), while the Commissioner scored the lowest (4.38). The CPE has the highest score in the second and the third domain, while in Domain 1 – Independence and ability to work without pressures, the PC has the highest score (1.40). In Domain 4 – Mandate and Powers the Commissioner has the best score (1.49), while in all other domains it has the lowest score, especially in Domain 3 – Information, Accessibility and Cooperation with Other Relevant Actors (0.79).

The lowest overall score per domain is in Domain 3 – Information, accessibility and cooperation with other relevant actors and in Domain 2 – Availability of Resources and Capacities, with the CPE has demonstrated much higher score (1.35) compared to the PC (1.10) and the Commissioner (0.84). This reflects the fact that all NHRIs in Serbia have been working for years with very low human and financial resources,<sup>36</sup> while the CPE moved to other premises in 2017, and this change just recently has reflected in the higher score. Overall, together with political interference, these two are the biggest systemic challenges for the effectiveness of the NHRIs in Serbia.

### Domain 1: Independence and Ability to Work without Pressures

NHRI	Domain 1 score ↓ <i>min: 0; max: 2</i>
PC	1.40
CPE	1.30
Comm. (FAI)	1.22
Comm.(PDP)	1.22
Comm. (total)	1.22

In the first domain, we looked at issues of independence and ability to work without pressures. The PC has the highest score (1.40), followed by the CPE (1.30). The Commissioner has the lowest score in this domain (1.22).

All institutions scored high when it comes to the **independent statutory basis** since they are all established either by law or by the constitution. The PC is the only institution which has constitutional basis,<sup>37</sup> while other two NHRIs are referred to by the law.<sup>38</sup> When it comes to the appointment procedure, all NHRIs follow the same process. The National Assembly appoints NHRIs with majority votes, under the proposal of the competent Committee. Each parliamentary group can propose a candidate.<sup>39</sup> The LPC is the only law prescribing that before formal proposal submitted to the National Assembly, the Committee can decide to hold a session and to allow all candidates to present their views on the role and the manner of exercising the powers of the NHRI.<sup>40</sup>

36 More on this issue see CRTA (fn 6), 4-8.

37 Constitution Art. 138, para. 1; LPC Art 2, para. 1.

38 LPD Art. 1, para. 2; LFAIPI Art. 1, para. 2, Art. 32, paras. 1 and 2.

39 LPC Art. 4 of the LPC; LPD Art. 28 of the LPD; LFAIPI Art. 30.

40 LPC Art. 4; LPD Art. 28; LFAIPI Art. 30.

This is just a possibility and not the rule, although it should be a compulsory phase before the formal proposal. Despite the fact that the appointment process seems to be by the legislature after public nomination, in the participatory procedure, it has not been transparent, as the last two elections candidates were not announced on time, the NGOs were not consulted and there was no wider public debate. Also, once the applications get to the competent Committee, the procedure is closed and goes very quickly, and there is no mandatory debate. It is also important to highlight that there is always a delay in electing the new NHRI. NGOs submitted an initiative to the competent Committee to introduce a competitive election process, especially in relation to the election of the new Commissioner. The proposal was supported by five Committee members, while the remaining eight did not vote on it.<sup>41</sup>

On the **criteria for membership**, the LPD clearly requires at least 10 years of human rights expertise for the CPE,<sup>42</sup> (it got the highest score) as well as for the Commissioner,<sup>43</sup> but the latter does not expressly require specific knowledge on freedom of expression or information or data protection expertise (it got the medium score). The PC also got the medium score as the LPC contains a very broad provision requiring at least 10 years of experience on legal affairs within the competence of the PC,<sup>44</sup> which implicitly means human rights requirement. The positive trend is that in all three cases, legal qualifications are necessary. Concerning the terms of office, all NHRIs satisfy the highest criteria, as the PC is appointed on five-year term,<sup>45</sup> as well as the CPE,<sup>46</sup> while the Commissioner is appointed on seven-year term.<sup>47</sup> All mandates can be once renewed.

Two institutions had the middle score on the question of **immunities**, as none foresees more specific criteria then a general clause on functional immunity applicable for the term. It does not cover the period after the term, as well as immunity and protection against threat and coercion. However, the LFAIPI is the only law which explicitly prescribes that the Commissioner cannot be held liable for the opinion given or the proposal made in the exercise of his/her jurisdiction.<sup>48</sup>

Concerning the **avoidance of conflict of interest**, the PC got the highest score as the LPC is the only law which refers to the provisions of a special law regulating the conflict of interest.<sup>49</sup>

Regarding the criterion '**no instruction from government**', the LFAIPI has an explicit provision which says that the Commissioner will neither seek nor receive orders or instructions from state authorities or other persons.<sup>50</sup> However, the independence of the PC is protected by the provision that he/she is independent and autonomous in carrying out the tasks set out by the law, and no one has the right to influence his/her work and conduct, but it does not explicitly say the Government or state authorities.<sup>51</sup> The CPE got a medium score because the law only contains a general provision on independence.<sup>52</sup>

All NHRIs got the medium score regarding the **removal from office**. Although the position of the PC is guaranteed by the Constitution, in case of all NHRIs, the laws prescribe as one of the reasons for removal the 'unprofessional performing' of duties can be very broadly defined in practice.<sup>53</sup> Nevertheless, it is worth mentioning that the procedure for the removal from office was not initiated in practice, although in 2017 the situation with the previous PC culminated, due to which he resigned from the office.

Regarding **submission or agreement to pressure**, the PC and the CPE received the highest score since no cases of submission to pressure were registered. In 2018, the CPE issued several opinions against ministers, politicians and influential persons.<sup>54</sup> However, the new PC was appointed in 2017 and his work might be suffering indirect pressure, since the previous PC resigned in February 2017 due to negative atmosphere and constant pressure. It seems that pressure was a result of the need to discredit his personality as a potential political opponent at the elections.<sup>55</sup> The Commissioner, on the other hand, received the minimum score for this criterion, due to external pressure which left the body unable to function. The Commissioner stated that 2017 was the most difficult year

41 Belgrade Centre for Human Rights (fn 5) 224.

42 LPD Art. 28, para. 4 (2).

43 LFAIPI Art. 30, para 2.

44 LPC Art. 5, para. 2.

45 Ibid Art. 4, para. 6.

46 LPD Art. 29, para. 1.

47 LFAIPI Art. 30, para. 5.

48 Ibid Art. 32, para. 4.

49 LPC Art. 9, para. 3.

50 Ibid Art. 32, para. 2.

51 Ibid Art. 2, para. 1.

52 LPD Art. 1, para. 2. Despite the fact that some reasons for removal are ambiguous and are subject to arbitrary treatment, no NHRI was removed from its office yet.

53 LPC Art. 12, para. 3 (1); LPD Art. 30, para. 3 (1); LFAIPI Art. 31, para. 3. Despite the fact that some reasons for removal are ambiguous and are subject to arbitrary treatment, no NHRI was removed from its office yet.

54 For example, see CPE, Opinion No 07-00-368/2018-02, 2 August 2018, issued against the minister Nenad Popović; CPE, Opinion No 07-00-9/2018-2, 5 April 2018, issued against the Red Star Football Club Director.

55 Marko Davinić (fn 2) , 117.

for the institution's work. Nevertheless, as for the situation and events in 2018, this year was the most challenging for the work of the Commissioner since its foundation. By refusing to cooperate, the competent or controlled authorities often made it difficult or even impossible for the Commissioner to take legal action, or the measures taken had no effect.<sup>56</sup> Despite numerous challenges, the NHRI preserved its attribute of independence.<sup>57</sup>

Finally, except for the RCC survey, including the ombudspersons, there is no available survey of public opinion on public trust in the other NHRI institutions in 2018.<sup>58</sup>

There are several **key challenges** in relation to this domain: non-transparent procedure of appointing NHRIs, quite general provisions addressing independence, removal of office subject to arbitrariness, no specific criteria other than a general clause on functional immunity applicable for the duration of the term, non-existence of mechanism against pressure and influence, and no regular public opinion survey to measure the independence of institutions.

## Domain 2: Availability of Resources and Capacities

NHRI	Domain 2 score ↓
	<i>min: 0; max: 2</i>
CPE	1.35
PC	1.10
Comm. (FAI)	0.93
Comm. (PDP)	0.75
Comm. (total)	0.84

In the domain availability of resources and capacities, the CPE has the highest score (1.35). The PC has much lower score (1.10), whereas the Commissioner has the lowest score (0.84).

All institutions have a **separate budget**. However, the process of adopting the budget is problematic. The institution proposes the budget plan, which is sent to the Ministry of Finances to their approval and is submitted to the National Assembly. Funds are provided by the 2018 Law on the Budget, which was in total RSD 1,206,848,355,000.00.<sup>59</sup> In 2018, the PC received RSD 195,294,000.00 (0,016% of the total Budget), the CPE was allocated RSD 91,264,000.00 (0.0076% of the total Budget) and the Commissioner received 199,039,000.00 RSD (0.017% of the total Budget).

Each year all NHRIs receive a significantly smaller amount of money and some of their activities are additionally funded from donations. Therefore, none of the institutions has **adequate financial resources** nor adequate human resources to carry out its mandate fully. All NHRIs face the problem of the insufficient number of staff to fulfil its legal mandate. The worst situation and the lowest score received the Commissioner, who claimed that the funds in the Budget for 2018 were not sufficient even for the salaries of the existing number of employees, despite the fact that in all the programming documents of the Government and the National Assembly, as well as in the Action Plan for the Chapter 23, it has been stipulated that one of the goals is to strengthen the institution's staff resources. Funds were secured from last-minute budgetary reserves before payments were due.<sup>60</sup>

None of the NHRIs recruits staff independently, in a **transparent and meritocratic** manner as this process relies on the final approval from the Ministry of Finance.<sup>61</sup> Therefore, all NHRIs got a middle score on this indicator. However, it is worth mentioning that the Commissioner's Office didn't receive approval of its draft staffing plan, which was approved to other NHRIs. In addition, the PC's draft staffing plan was approved even for the envisaged staff, despite warnings that allocated funds for the Commissioner's Office are not sufficient to cover the salaries of the staff already working.<sup>62</sup>

<sup>56</sup> Commissioner, Annual report 2018, 4.

<sup>57</sup> Belgrade Centre for Human Rights (fn 5), 222.

<sup>58</sup> There is only RCC Balkan Barometer Public Opinion 2018 finding that 31% of respondents trust the institution of the Protector of Citizens, which is also the highest score with the trust in courts and the supreme audit institution. RCC, Public Opinion Survey, Balkan Barometer 2018, <https://www.rcc.int/pubs/66/balkan-barometer-2018-public-opinion-survey>. Also, the report Attitude of Citizens towards Discrimination reveals that in 2016, 50,8% of citizens knew that special institution dealing with discrimination existed (41,4% know the exact name of the institution). Also, 18% of responded said that they will address the CPE in a case of discrimination (in 2013 only 2% had the same answer).

<sup>59</sup> Zakon o budžetu Republike Srbije (Law on the Budget of the Republic of Serbia), The Official Gazette of the Republic of Serbia, No 113/2017.

<sup>60</sup> Commissioner, Annual report 2018, 1.

<sup>61</sup> CRTA (fn 6), 6

<sup>62</sup> Belgrade Centre for Human Rights (fn 5), 222.

Despite **limited human resources**, all NHRIs provide an ongoing training program for their staff, as well as training programs for their target groups, which is well documented in their annual reports.<sup>63</sup>

Another indicator is the **establishment of regional offices or regional outreach**. Both the PC and the CPE have a few regional offices, but they do not cover the whole territory of the Republic of Serbia. Thus, the PC has opened Offices in Bujanovac, Preševo and Medveđa. It has also established practice of receiving complaints in Roma settlements in Bujanovac, Kragujevac, Kraljevo and Kruševac. Additionally, in 15 libraries throughout Serbia citizens can communicate with the staff through video link and there they can submit complaints.<sup>64</sup> The CPE has opened only one regional office in Novi Pazar.<sup>65</sup> The Commissioner does not have any regional office or activity in that respect, however this is not required by any international standard for SADPs or FAIs.

There is no enough information to evaluate the diversity of the composition of the management of the institution and its staff. In both institutions, the PC and the CPE, there is diversity concerning gender and ethnicity, but other information is not available.

There is very few information available to the **financial control** of the NHRIs. They are all exposed to external control of the State Audit Office, which is not regular, so all got the medium score. However, it is worth mentioning that the Commissioner also develops internal control. Several documents adopted recently confirm this statement: Strategic plan of internal control (2018 - 2020), Annual plan of work for 2018, and the Charter on internal control (2017).

With regards to the **learning and change** criteria, the CPE has established a system of regular strategic planning, with output and impact indicators, and an evaluation system.<sup>66</sup> The Commissioner introduced strategic planning, with output and impact indicators and an evaluation system, but the strategy expired in 2017.<sup>67</sup>

It can be concluded that this is the most challenging domain which impacts the effectiveness of the institutions in all other domains. Therefore, it is necessary to ensure financial independence in terms of sufficient resources and suitable staff in order to allow them to execute their mandate properly. Also, it is important to establish local and regional offices for conducting the work of the NHRIs in order to reach every person that might need to communicate with them.

## Domain 3: Information, Accessibility and Cooperation with Other Relevant Actors

NHRI	Domain 3 score ↓
	<i>min: 0; max: 2</i>
CPE	1.35
PC	1.13
Comm. (FAI)	0.69
Comm. (PDP)	0.94
Comm. (total)	0.82

In the domain of information, accessibility and cooperation with other relevant actors, the CPE scored higher than the other institutions (1.35). The PC scored 1.13, whereas the Commissioner scored 0.82.

When it comes to the **parliamentary scrutiny**, it is important to mention that four years in a row annual reports of NHRIs were not debated at a plenary session.<sup>68</sup> Still, the CPE and PC got a higher score than the Commissioner as their annual reports were debated in competent Committees, although there are no available conclusions and recommendations after discussion.

<sup>63</sup> PC, Annual report 2018,

<sup>64</sup> LPC, Art. 3, paras. 1-2.

<sup>65</sup> CPE, Annual report 2018, 25.

<sup>66</sup> Strategija Poverenika za zaštitu ravnopravnosti (2016-2020), (Strategy of the Commissioner for Protection of Equality), <http://ravnopravnost.gov.rs/propisi/akti-poverenika/>

<sup>67</sup> Strategija upravljanja rizicima u službi Poverenika za informacije od javnog značaja i zaštitu podataka o ličnosti (Risk Management Strategy in the office of the Commissioner for Public Information and Protection of Personal Data), <https://www.poverenik.rs/sr/актуелни-акти.html?start=20>

<sup>68</sup> In 2019, the reports were finally considered at a plenary session.

The Government has an obligation to receive an opinion from bodies on the draft laws and strategies within their jurisdiction, according to special laws,<sup>69</sup> but there is no obligation to provide feedback on the provided proposals due to which all NHRIs got the middle score. For example, the PC has competence to submit opinions on the draft laws and bylaws related to human rights. If he exercises this competence, the Government and the National Assembly are obliged to consider his initiatives. Moreover, the Constitution allows the PC to submit draft laws in his area of jurisdiction.<sup>70</sup> The CPE is also allowed to monitor the implementation of laws and other regulations, initiate the adoption or amendment of regulations in order to implement and improve the protection against discrimination and give opinions on the draft laws and other regulations concerning the prohibition of discrimination.<sup>71</sup> Finally, the Commissioner is allowed to initiate adoption or amending of regulations in order to implement and improve the right of access to information of public importance, as well as to propose measures in order to improve the work of public bodies.<sup>72</sup>

Regarding the **NHRIs cooperation**, there is no memorandum for understanding signed between them. Notwithstanding, the annual reports of all three institutions do report cooperation among them. That cooperation usually means participation in conferences, round tables, meetings and expert meetings in the organization of NHRIs or other organisations,<sup>73</sup> referral to reports of other NHRIs,<sup>74</sup> rejection of complaints if citizens did not use the opportunity to address specialized NHRIs first,<sup>75</sup> joint initiatives, etc. Therefore, all NHRIs got the medium score.

**Cooperation with NGOs** does exist, but it is not structured. Aside from speaking at NGO events, that cooperation means also situation testing, meetings, campaigns, participation in fairs and other promotional activities,<sup>76</sup> Moot courts and prize competitions,<sup>77</sup> etc. Although all three institutions got the middle score, annual reports suggest that the CPE has most extensively developed this cooperation. The PC cooperates with NGOs within the National Prevention Mechanism (NPM) and organizes the “Ombudsperson Day” when he talks with citizens and representatives of the civil sector and holds meetings with representatives of public authorities, pointing to the need to improve respect for citizens’ rights.<sup>78</sup> However, it seems that in 2018 the cooperation between the PC and NGOs deteriorates and in one occasion, he was criticized for giving recommendations which are contrary to relevant international standards concerning persons with disabilities.<sup>79</sup>

In addition to the general obligation of executive and other branches or bodies to provide relevant data to the NHRI, the executive and other branches/bodies should also have an obligation to provide relevant data for evidence on specific cases. That criteria have been satisfied for both the PC and the CPE.

All NHRIs have an **obligation to provide information on rights and remedies**. Information is placed on the website or in publications. However, not all information is written in easy-to-read-language. In that respect, the PC got the minimal score, while the CPE got the medium score, as the majority of publications, handbooks and leaflets are written in easy-to-read-language. Institutions are physically accessible for persons with disabilities, and all institutions can be reached online, by email and via telephone services, and there is flexibility in meeting the time constraints of those seeking access to services. Therefore, they all got the highest mark in terms of general accessibility. When it comes to the question of **accessibility to persons with a disability**, it should be underlined that not all information, communication and other services are accessible to persons with disabilities, regardless of the type of disability. Thus, all NHRIs got the medium score. Nevertheless, it should be underlined the CPE and the Commissioner tend to seriously work on it, as their websites are accessible for persons with disabilities, the latter also having a listening option.

In relation to the **international activity**, the bodies demonstrated very good results, participating in more than seven relevant international events, and all got the highest mark, except the Commissioner for activities in relation to freedom of expression (it received the medium score). They are also **members of relevant international organizations/bodies**.<sup>80</sup>

69 Government’s Rules of Procedure, Art. 39 a) para 4.

70 Constitution, Art. 107, para. 2.

71 LPD, Art. 33, para. 7.

72 LFAIPi, Art. 35, para. 1-2.

73 Commissioner, Annual report 2018, 79.

74 CPE, Annual report 2018, 211.

75 PC, Annual report 2018, 104.

76 Commissioner, Annual report 2018, 80.

77 CPE, Annual report 2018, 2011-2014.

78 PC, Annual report 2018, 72.

79 Saopštenje platforme povodom Godišnjeg izveštaja Zaštitnika građana, <https://platforma.org.rs/saopstenje-platforme-povodom-godisnjeg-izvestaja-zastitnika-gradana/>

80 The PC is a member of GANHRI, AOM, ENNHRI, IOI, EOI, ENO, ENOC, CRONSEE, and the CPE is a member of EQUINET.

When it comes to **professional secrecy**, all NHRIs need to attain a standard for **confidentiality and protection**, within the frame of which they are supposed to be obliged to offer confidentiality to witnesses and whistle-blowers. However, only the PC has its bylaw regulating this issue and prescribing obligation to protect whistle-blower.<sup>81</sup> Other NHRIs act within the general framework for the protection prescribed by the Law on the Protection of Whistle-Blowers.<sup>82</sup>

Finally, only the CPE has a **communication strategy** covering a period for at least three years (2016-2020). The Commissioner’s communication strategy has expired and has not been renewed. No data is available on the Ombudsperson.

In the domain of information, accessibility and cooperation, the weakest point is the debate of annual reports in the National Assembly and the need for more structured cooperation between NHRIs and NGOs. In addition, some NHRIs need to create and adopt communication strategy and its internal rules concerning the protection of witnesses and whistle-blowers.

#### Domain 4: Mandate and Powers

NHRI	Domain 4 score ↓
	<i>min: 0; max: 2</i>
Comm. (FAI)	1.50
Comm. (PDP)	1.50
Comm. (total)	1.50
CPE	1.49
PC	1.35

In the domain of mandate, the institutions were evaluated through specific criteria applicable for their type of institution and bearing in mind the highest international standards that need to be attained. This domain has the best score. Thus, the Commissioner received the highest score (1.50), followed by the CPE (1.49), while the lowest score was given to the PC (1.35).

The PC got the highest scores concerning its competences. He has a competence to address public opinion freely, raise public awareness on human rights issues, and carry out education and training programs and making use of the press. It also has both the power to obtain statements in order to assess situations raising human rights issues and the authority to compel witnesses. He has also a competence to operate amicable and confidential settlement of the complaints through an alternative dispute resolution process.<sup>83</sup> The PC also has unannounced and free access to inspect and examine any public premises, documents, equipment and assets, without prior written notice,<sup>84</sup> and has a broad competence as a **national prevention mechanism**. However, its mandate is limited to the public sector (excluding the National Assembly, the President, the Government, the Constitutional Court, courts and prosecutor’s offices). Also, its decisions are recommendations and are not binding. As the LPC explicitly prescribes that the PC acts in accordance with international law.<sup>85</sup> It has the mandate to promote and ensure the **harmonisation of national legislation with international standards**, but it does not have an explicit mandate to submit an opinion on the subject to international bodies. However, the PC is doing that in practice. In 2018, the PC submitted two **submissions to international bodies**.<sup>86</sup> It is also active in publishing reports.<sup>87</sup> The PC does not have the authority to be a party of the court action. In addition, it has an explicit mandate to protect children’s rights, but not the power to take cases to court and intervene in court cases. Regarding the **initiatives submitted to the national authorities**, the PC was very active and submitted 37 opinions in order to improve the work of the administrative bodies and to improve the protection of human rights and also submitted 5 initiatives.<sup>88</sup> Finally, 93.15 % of his recommendations have been accepted by public bodies in 2018.<sup>89</sup>

81 Rulebook on the procedure of internal alerting in the professional service of the Protector of Citizens, [https://www.ombudsman.rs/attachments/4464\\_pravilnik%20o%20postupku%20unustrasnjeg%20uzbunjivanja.pdf](https://www.ombudsman.rs/attachments/4464_pravilnik%20o%20postupku%20unustrasnjeg%20uzbunjivanja.pdf)

82 Zakon o zaštiti uzbunjivača (The Law on the Protection of Whistle-Blowers), The Official Gazette of the Republic of Serbia, No 128/2014.

83 LPC, Art. 24, para. 2.

84 Ibid Art. 21(1).

85 Ibid Art. 2(2).

86 In 2018, he submitted opinion to CEDAW and GREVIO. PC, Annual report 2018, 92.

87 In 2018 the PC has published Annual 2018 Report, National Preventive Mechanism 2018 Report, special report on problems in the implementation of two specific laws and reports on the visit to particular institutions within the NPM - in total 14 in 2018.

88 PC, Annual report 2018, 17-20.

89 ibid, 16.

The CPE has a **broad mandate** and explicitly covers 19 **grounds for discrimination**, including the residence (provision is an open-clause). It also covers all areas, noted in the ECRI GPR. In addition, it also has a **broad mandate concerning the promotion and achievement of equality**, prevention and elimination of discrimination and intolerance, including structural discrimination and hate speech as well as the promotion of diversity and good relations between persons belonging to all the different groups in society. In addition, the CPE has the obligation to promote equality through training, raising awareness and developing standards. In 2018, the CPE was also very active in submitting initiatives – 37 opinions on draft laws and 9 initiatives.<sup>90</sup> The CPE has also engaged in **strategic litigation** on its own behalf (one strategic litigation was initiated in 2018, and several were ongoing). When it comes to responsibilities within its mandate, the CPE only has a **limited mandate to act as amicus curiae or expert**. Similar to the PC, the CPE has the right to issue recommendations, but not legally binding decisions. The mandate of the CPE includes **independent surveys**, and they are conducted each third year, the last being conducted in 2016.<sup>91</sup> Moreover, the CPE relies on independent research as the basis for its reports, and can submit contributions to international bodies, but according to available data, none was submitted in 2018.

Finally, the Commissioner received the highest score concerning its mandate. First of all, it has a full **mandate and powers for monitoring and oversight** on free access to public information and data protection. It has full **mandate and powers to handle complaints and issue binding** decisions. According to its report, the Commissioner has carried out number of promotional activities for both the general public and data providers in the form of educational activities but also engages the **proactive dissemination of information**.<sup>92</sup> The Commissioner was the most active concerning initiatives – it gave 59 opinions on draft laws and 4 initiatives to challenge the constitutionality.<sup>93</sup>

All NHRIs allow **complaints** to be submitted orally, in written form or on-line. The CPE accepts complaints submitted in a language of the complainant's choosing, in accordance with the Law on the Official Use of Languages and Script.<sup>94</sup> Also, the procedure of submitting complaints is **free of charge** in all NHRIs.

Except for the RCC survey, including the ombudspersons, there is **no available survey on public opinion** on public trust in the other NHRI institutions in 2018.<sup>95</sup>

The final criteria evaluated was the **assessment provided by the European Commission in the last Progress Report**. On this point, the PC<sup>96</sup> and the CPE<sup>97</sup> got the middle score, while the Commissioner got the lowest mark, as the EC pointed out that the majority of public authorities do not comply with the obligation to provide data to the Commissioner regarding citizens' requests for information, and that it remains understaffed and underfunded.<sup>98</sup>

90 CPE Annual report 2018, 244.

91 CPE, Odnos građana i građanki prema diskriminaciji u Srbiji (The Attitude of Citizens Towards Discrimination in Serbia), 2016, <http://ravnopravnost.gov.rs/izvestaj-o-istrazivanju-javnog-mnjenja/>

92 Commissioner, Annual Report 2018, 75-78.

93 Ibid, 68-74.

94 Zakon o službenoj upotrebi jezika i pisma (Law on the Official Use of Languages and Script), The Official Gazette of the Republic of Serbia, No 45/91, 53/93, 67/93, 48/94, 101/05, 30/10, 47/18, 48/18.

95 RCC, Public Opinion Survey, Balkan Barometer 2018.

96 The EC criticized that for the fourth consecutive year, the parliament did not discuss in the plenary the Ombudsman's annual report and hence, no conclusions were made for the Government's review. At the same time, the number of citizens' complaints submitted to the Ombudsman decreased by 19%, while the number of recommendations from the Ombudsman addressed to the authorities remained stable. Also, the percentage of his recommendations followed up by the authorities remains high, although certain recommendations related to "public interest" still have not been addressed. There has been a serious delay in amending the Law on the Ombudsman. EC Serbia 2018 Report, 23.

97 The CPE continued to participate in the work of the ENEBs. Her office introduced an annual award for a municipality with the best practice in promoting tolerance and creating equal opportunities. However, the authorities still need to follow up on the recommendations of the CPE on developing an anti-discrimination policy for employers in Serbia. EC Serbia 2018 Report, 27, 79.

98 Ibid, 20, 24.

## RECOMMENDATIONS

On the basis of the ranking, the main findings and established principal challenges, we developed a set of recommendations. These refer to the national authorities (the Parliament and the Government, and the NHRIs), international actors (European Union and others), and the NGOs.

### NATIONAL AUTHORITIES

- **National Assembly**

In order to fully utilize the contribution of independent institutions to parliamentary oversight of the executive, some obstacles in existing assembly procedures should be eliminated. In order to benefit from full cooperation with NHRIs it is important to carry out the following:

**To raise the awareness of all relevant actors** (MPs, parliamentary groups, committees) **about the role and work of NHRIs**, in order to maximize the cooperation with NHRIs and to create an atmosphere of tolerance, acceptance and appreciation;

**To review reports of NHRIs on a regular basis and to draw clear conclusions** in order to exercise its oversight competence and to evaluate the fulfilment of NHRI's recommendations;

**To regularly consult the NHRIs on issues which fall within their competence**, in order to receive information that is valuable for the exercise of its legislative and oversight functions;

**To introduce provisions in the Rules of Procedure on the competent committees for each NHRI and to specify the deadline for reviewing reports in plenary sessions** in order to give NHRIs information on the date when their reports will be discussed and to allow them to properly prepare for presentation, as well as to oblige the National Assembly to adhere to the deadline;

**To make the process of appointment of a representative of the NHRI to be more transparent and participatory, in discussion with the NHRIs, NGOs and other relevant stakeholders.** The election needs to be based on the evaluation of qualifications and previous working experience related to the work of each NHRI. This is the only way to appoint the best candidate;

**To initiate the process of appointment in due time**, bearing in mind when exactly the term of representative expires. This is relevant not only for the representative but also for his/her deputies in order to allow proper functioning of the NHRI;

**To adopt legislative amendments, in cooperation with NHRIs, in order to specify independence provision, including immunity and prohibition of interference clause, to specify removal criteria and to include conflict of interest provision for both, during and after the term expires** in order to comply with relevant international standards and to guarantee the independence of NHRIs;

**To review the mandate of each NHRI under relevant international standards and to prepare a study on its possible strengthening of the mandate**, bearing in mind the weak points identified in this report and other sources;

**To adopt the staffing plan and to abandon the practice of requiring approval for every new staff member by the Committee responsible for administrative-budgetary issues**, as this seriously endangers NHRIs independence and functioning. In addition, **it is important to ensure that the plan reflects the need to secure diversity in Serbian society**, especially regarding gender, ethnic origin, disability, age and religion;

**To change the Law on State Audit Institution** in order to introduce a provision on regular external financial control of the NHRI;

**To ensure sufficient budgetary allocation** in order to allow proper functioning of NHRIs and to perform their full mandate.



- **Government**

The executive need to further secure independence of NHRIs, to support their work and to understand that they need to cooperate as they are associates and not the enemies. However, since the NHRIs establishment, their relationship was characterized by mistrust and insufficient support.

Therefore, the Government must:

**Provide adequate funding and resources to NHRIs, so they will be able to carry out fully, and without restrictions and limitations, their functions set out within the mandate.** Therefore, the Government needs to accept the financial plan of NHRIs in order to secure their financial independence;

**Exempt NHRIs from the obligation to get an approval of the Ministry of Finance for the staffing plan.** The current practice limits their independence, according to the Law on Civil Servants and need to be changed;

**Refrain from obstruction and any influence and pressure that endangers the independence of NHRIs** and to secure the atmosphere of tolerance and cooperation, which also means to fulfil recommendations and other measures issued by NHRIs.

- **National Human Rights Institutions**

The NHRIs should also be very active not only in advocating legislative changes that will increase their independence but also in exercising their full mandate. In that respect, the NHRIs need to do the following:

**To base the recruitment process on the clear evaluation of the need of the institution**, in order to increase its effectiveness and exercise of its full mandate;

**To recruit the staff which reflects diversity in Serbian society**; especially bearing in mind gender balance, recruitment of representatives of ethnic and religious minorities and persons with disabilities;

**To establish better internal financial control**, in order to enhance the credibility of the institution, and **to advocate the exercise of regular external control by the State Audit Institution**;

**To establish more structured ways of cooperation and mutual support between NHRIs.** It can also include annual conferences on the role and importance of NHRIs, where they will discuss the challenges and obstacles in their work and advocate for legislative and other changes in order to secure better conditions to perform their mandate;

**To establish a more structured way of cooperation with NGOs**, which does not rely only on project activities. This cooperation should assume to maintain regular contacts with NGO representatives to be able to assess the situation in the field, to collect relevant data and information and to discuss possible joint actions;

**To adopt a communication strategy and strategic planning process of development of the NHRI**, setting clear indicators, measures and evaluation. This is important from the perspective of further development of each NHRI and opportunity to assess risks that can undermine their performance and overall results;

**To adopt internal acts on the protection of witnesses and whistle-blowers** in accordance with the Law on Whistle-blowers, in order to increase the level of their protection and to remove doubts if they are protected by and from the NHRI;

**To establish regional offices** that cover the whole territory of Serbia. This is vitally important to the effective functioning of NHRIs in order to allow everyone to communicate with NHRIs. When regional offices are established, it is important to secure their effective coordination and communication;

**To enhance the accessibility of the NHRIs** for all types of disabilities, especially for sensory disability in order to allow everyone to benefit from their protection;

**To enhance the language accessibility of the information** regarding NHRIs competences and to have more information in an easy-to-read language which is clear to everyone. This is an important goal, as ordinary citizens need to understand the mandate and procedure before the NHRI;

**To conduct regular surveys on public opinion on NHRIs** in order to collect relevant data on the perception of citizens on their independence, visibility and effectiveness. The results should be used to reflect the current state and to improve their work.

## INTERNATIONAL ACTORS

Different international actors are important partners in increasing NHRIs capacities and their effectiveness in human rights promotion and protection.

- **European Union**

**To be more explicit when assessing the work of NHRIs in progress reports** in order to send the message to the authorities that some issues, such as a lack of resources and pressure, will not be tolerated, and are a prerequisite for joining the EU.

### Other international actors

**To continue supporting programs that enable NHRIs to perform all of their functions**, especially in relation to their capacities, **as well as to support their cooperation with other relevant stakeholders.** Without their support, NHRIs with very limited financial resources will not be able to perform some activities, such as trainings, organization of Moot courts, publications, etc.

**To support NGOs to monitor the effectiveness and independence of NHRIs on a regular basis.** This will provide necessary data on their performance and will be an incentive for the improvement of their work.

- **NGOs**

Cooperation between NHRIs and civil society is essential in promoting and protecting human rights. Therefore, this is essential that NHRIs maintain a close relationship with civil society and to consider civil society as an important partner in not only providing human rights protection but also in performing its full mandate. Thus, NGOs should particularly do the following:

**To focus on monitoring the effectiveness and independence of NHRIs on a regular basis**, in order to provide reliable information to NHRIs that should be used to improve their functioning;

**To require a more strategic partnership with NHRIs, and to focus on joint initiatives with the NHRIs in order to become real partners in securing the human rights protection** as they both have expertise and experience that can be shared to their mutual advantage. This will allow NHRIs to increase awareness generally of human rights and to provide a greater degree of human rights protection, especially of most vulnerable groups in Serbia;

**To actively take part in proposing and supporting candidates for NHRIs and to seek that the appointment process is transparent and participatory** in order to minimize the politicization of the whole process and to contribute to the selection of the best candidate;

**To review the annual reports of NHRIs, to follow the fulfilment of recommendations and to make public pressure** in those cases when the authorities ignore the situation;

**To condemn every attempt to jeopardize the independence of NHRIs and inappropriate attacks on their representatives** and to enable them to achieve greater public legitimacy.

## Annex: List of indicators

### Domain 1: Independence and ability to work without pressures

Ombudsperson	EB	SADP	FAI
Independent statutory basis	Independent statutory basis	Independent statutory basis	Independent statutory basis
Appointment process	Appointment process	Appointment process	Appointment process
Clear criteria for membership	Clear criteria for membership	Clear criteria for membership	Clear criteria for membership
Term of office	Term of office	Term of office	Term of office
Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest	Avoidance of conflict of interest
Immunities	Immunities		
No instruction from government	No instruction from government	No instruction from government	No instruction from government
Removal	Removal	Removal	Removal
Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure	Submission/agreement to pressure
Public opinion on independence of NHRIs	Public opinion on independence of NHRIs	Public opinion on independence of NHRIs	Public opinion on independence of NHRIs

### Domain 2: Availability of resources and capacities

Ombudsperson	EB	SADP	FAI
Separate and independent budget	Separate and independent budget	Separate and independent budget	Separate and independent budget
Adequate financial resources	Adequate financial resources	Adequate financial resources	Adequate financial resources
Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures	Transparent and meritocratic recruitment procedures
Sufficient human resources	Sufficient human resources	Sufficient human resources	Sufficient human resources
Adequate human resources	Adequate human resources	Adequate human resources	Adequate human resources
Financial control	Financial control	Financial control	Financial control
Pluralism	Pluralism		
Training	Training		Training
Internal structure enables focus on each part of mandate	Internal structure enables focus on each part of mandate		
Regional offices / outreach	Regional offices / outreach		
Learning and change	Learning and change	Learning and change	Learning and change

### Domain 3: Information, accessibility and cooperation with other relevant actors

Ombudsperson	EB	SADP	FAI
Parliamentary scrutiny	Parliamentary scrutiny	Parliamentary scrutiny	Parliamentary scrutiny
Providing information to NHRIs	Providing information to NHRIs		
Cooperation with government	Cooperation with government	Cooperation with government	Cooperation with government
Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRIs	Cooperation with other NHRIs
Cooperation with NGOs	Cooperation with relevant bodies and NGOs	Trans-national cooperation with other SAs	Cooperation with NGOs
Providing information on rights	Providing information on rights	Providing information on rights	Providing information on rights
		Information on rights and assistance to data subjects	
Accessibility	Accessibility	Accessibility	Accessibility
Accessibility to children			
Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities	Accessibility to persons with disabilities
Membership in international networks	Membership in international networks	Membership in international networks	
Participation in international activities	Participation in international activities	Participation in international activities	Participation in international activities
Communication strategy	Communication strategy	Communication strategy	Communication strategy
Confidentiality and protection	Confidentiality and protection	Professional secrecy	

## Domain 4: Mandate and powers

Ombudsperson	EB	SADP	FAI
		Monitoring and enforcement	Monitoring and oversight
Human rights promotion	Promotion and prevention	Promotion	Promotion
Promotion of harmonisation with international HR instruments and implementation			Promotion of pro-active dissemination
Mandate – coverage of sectors	Coverage of grounds of discrimination		
	Coverage – area		
	Equal treatment of all persons without discrimination on grounds of sex		
Human rights protection – powers – investigation	Independent assistance – mandate	Investigations	
Human rights protection – powers – access	Independent assistance – strategic litigation		
Human rights protection – powers – complaints	Independent assistance – issuing recommendations and legally binding decisions		
Human rights protection – powers – courts			
Follow-up on recommendations	Follow up on recommendations		
Initiatives to national authorities	Initiatives to national authorities	Advisory role	Advisory role
	Complaints submission	Handling complaints	Handling complaints
	Complaints submission – language		Complaints submission
	Complaints submission – free of charge		Complaints submission – free of charge
	Independent surveys	Regulatory functions/ authorisations	
Reports	Independent reports		
Submission of contributions to international bodies	Submission of contributions to international bodies		
National prevention mechanism			
Rights of the child			
Public opinion on public trust in NHRIs	Public opinion on public trust in NHRIs	Public opinion on public trust in SA institution	Public opinion on public trust in SA institution
Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report	Assessment of the EC in the last report

WHAT IS BEHIND AND  
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