



Committee on the Elimination of Racial Discrimination

Observations of the Commissioner for Human Rights of the Republic of Poland concerning measures aimed at the implementation of the provisions of the Convention on the elimination of all forms of racial discrimination in the years 2014-2019

The following information takes into consideration the concluding observations of the Committee on the Elimination of Racial Discrimination presented after the examination of the joint XX and XXI periodic report submitted by Poland (CERD/C/POL/CO/20-21)

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I. Information about the reporting institution

The Commissioner for Human Rights (Commissioner) is a constitutional body appointed to protect and supervise the observance of human and civil rights. The Commissioner's role is performed independently of other public authorities. The powers of the Commissioner are set out in the Constitution of the Republic of Poland as well as in the Act of 15 July 1987 on the Commissioner for Human Rights. The Commissioner is appointed by Sejm (lower chamber of the Parliament) with the approval of Senate (higher chamber of the Parliament) for a 5-year term of office.

The Commissioner plays the roles of National Human Rights Institution (NHRI/Ombudsman), National Preventive Mechanism (visiting body for the prevention of torture and other cruel, inhuman or degrading treatment or punishment), independent equality body (referred to in the EU anti-discrimination directives) and independent body monitoring the implementation of the Convention on the rights of persons with disabilities (CRPD), according to art. 33 (2) of CRPD.

In the fulfilment of his duties, the Commissioner takes into account the human rights protection standards set out in international legal instruments including the Convention on the elimination of all forms of racial discrimination.

The Commissioner is a National Human Rights Institution with an "A status".

II. Observations on the implementation of the Committee's recommendations of 2014

Bodies established under the international human rights treaties

Ensuring sufficient human and financial resources for the Commissioner

1. The Commissioner is a constitutional body that holds several mandates in the area of monitoring the observance and protection of human and civil rights in Poland (see item I), pursuant to the powers granted to the Commissioner under the Act on the Commissioner for Human Rights.¹ Despite the Commissioner's requests and recommendations of international monitoring institutions, including CERD², the Commissioner office has not been allocated with sufficient resources that would ensure comprehensive and effective implementation of its tasks. The scope of duties of the Commissioner institution has been increased but, at the same time, financial resources made available to the Commissioner for the implementation of those duties have been reduced.
2. The budget that is requested by the Commissioner is a subject to approval by the Parliament. In the years covered by this report, the Commissioner was granted the budget in the amounts lower than requested. Moreover, during the subsequent years, that budget was reduced. In 2015, the Commissioner received a budget lower than in 2014 and amounting to PLN 38,602,000. In 2016, the Commissioner requested an increase of the amount by 18%, up to PLN 45,566,000 but the Parliament decided to further reduce the allocated funds by PLN 9,947,000 i.e. to PLN 35,619,000 which was equivalent to the budget allocated to the Commissioner in 2011 (when it amounted to PLN 35,424,000). In 2017, the budget of the Commissioner totalled PLN 37,182,000, despite the fact that the amount requested by the Commissioner was PLN 41,039,000. The amount requested for 2018 was PLN 42,639,000 but the amount allocated by the Parliament was PLN 39,433,000 - the increase over the 2017 budget was primarily related to expenditures on the refurbishment works carried out in the Commissioner's buildings in Warsaw.
3. To sum up, in the period 2014-2018 the Commissioner requested budgetary allocations in the overall amount of PLN 212 782 000. In practice, the total amount granted by the Parliament was PLN 190 007 000. The lowest budgetary allocation was the one for 2016: it amounted to PLN 35,619,000 and constituted 78.2% of the amount that the Commissioner applied for. The Commissioner budgetary allocations for the individual years are presented below (Table 1).

¹ Act of 15 July 1987 (Journal of Laws - Dz. U. of 2018, item 2179, as amended).

² Item 9 of the CERD concluding observations (CERD/C/POL/CO/20-21).

Table 1. Financial resources of the Commissioner

	2014	2015	2016	2017	2018	Total
Draft budget (funds requested)	41,549,000	41,989,000	45,566,000	41,039,000	42,639,000	212,782,000
Financial plan (funds allocated)	39,171,000	38,602,000	35,619,000	37,182,000	39,433,000	190,007,000

4. At the end of 2018 the employment level in full-time equivalents amounted to 294. In recent years that number has remained on a similar level (Table 2). Additionally, it should be pointed out that the Department for Equal Treatment, which is largely responsible³ for execution of tasks stemming from the Convention on the elimination of all forms of racial discrimination, counts only 11 employees: 9 lawyers, 1 person responsible for social research and 1 administrative employee.

Table 2. Employment level in the Office of the Commissioner in full-time equivalents

As of	Employment level in full-time equivalents
2014-12-31	288
2015-12-31	286
2016-12-31	294
2017-12-31	296
2018-12-31	294

Statutory powers of the Commissioner to combat racial discrimination

- In cases where both sides are private entities, the Commissioner may indicate to the claimant what remedies can be used. If, in a given case, a decision has been reached by a relevant authority (e.g. the court), the Commissioner may consider getting involved in the proceedings and present the applicable standard of human rights protection in the particular area.
- The statutory powers of the Commissioner fully materialize in cases when failure to act (despite the application filed in accordance with law) or action of a public authority or

³ That Department is vested with the execution of tasks of the Commissioner as an equality body, in compliance with the Act of 3 December 2010 on the implementation of certain provisions on equal treatment (Journal of Laws - Dz. U. of 2016, item 1219) and the body responsible for the implementation of the CRPD.

another body commissioned to perform tasks on its behalf, exert a negative impact on the freedoms and rights of an individual.

7. The basic duties of the Commissioner include responding to publicly manifested instances of prejudice on the grounds of one's nationality, ethnicity or religion. Manifestations of such prejudice, especially when they assume the form of violence or public incitement to hatred, may fulfil the constitutive elements of crimes prosecuted by public indictment but they also constitute a violation of the prohibition of discrimination specified in Article 32(2) of the Constitution of the Republic of Poland. Moreover, they also threaten the essence of the democratic society.
8. In order to ensure the proper execution of entrusted tasks, the legislator provided the Commissioner with legal means of action. Their application entails certain obligations on the part of public bodies and institutions. Only by establishing the link between the powers of the Commissioner with the obligation to act on the part of an authority addressed by the Commissioner in a given case one can be certain that the Commissioner will be able to effectively exercise his mandate and persons whose rights or freedoms were violated will be able to fully enjoy their constitutional right to seek help from the Commissioner.⁴
9. The Commissioner may, *inter alia*, demand that the competent prosecutor instigates preparatory proceedings in cases concerning crimes prosecuted by public indictment.⁵ This legal remedy is used by the Commissioner when he strives to break the passivity of an authority established to prosecute crimes as well when he determines, in the course of explanatory proceedings, that a crime could have been committed in the case at hand. In compliance with a well-established practice in the field of judicial doctrine and case law, law enforcement agency (public prosecutor) addressed by the Commissioner with a request to initiate preparatory proceedings in an indicated case should do so without delay. The request made by the Commissioner assumes the form of a qualified notification which is not subject to prosecutor's verification and shall result it to the instigation of proceedings. The decision to instigate preparatory proceedings (in cases concerning crimes prosecuted by public indictment) is, therefore, the obligation of the Prosecutor's Office, if it is requested by the Commissioner.
10. What raises Commissioner's concern are cases in which prosecutors, having received a qualified notification from the Commissioner, refuse to open an inquiry with regard to hate crimes, despite the fact that they constitute offenses prosecuted by public indictment and prosecutors are familiar with the judicial rulings concerning the powers of the

⁴ Pursuant to Article 80 and Article 209 of the Constitution of the Republic of Poland.

⁵ Article 14 (5) of the Act on the Commissioner for Human Rights.

Commissioner.⁶ The Commissioner encountered such refusals with respect to cases of promoting the ideology of racial separatism by the Mazovian group of the National-Radical Camp (from Pol. ONR)⁷ as well as presenting an anti-refugee election campaign spot, broadcast prior to local elections in 2018 by the Election Committee of the Law and Justice Party (PiS) which could satisfy the definition of a hate crime on the grounds of one's nationality, ethnicity and religion.⁸ In both cases prosecutors first refused to instigate the inquiry and relevant proceedings were initiated only after they were ordered by the court which examined related complaints lodged by the Commissioner.

Protection against discrimination – institutional solutions, legal awareness

11. The Labour Code and the Act on the implementation of some regulations of European Union regarding equal treatment provide for legal protection measures against discrimination on grounds of race or ethnic origin.
12. The measures of protection against discrimination provided for in the Act on Equal Treatment are not effective. This is evidenced primarily by the low number of cases with court's judgment of damages. Since the entry into force of this Act in 2011, there were only a few such cases, which does not reflect the actual scale of discrimination in Poland.
13. The Commissioner is also of critical opinion on the scope of compensation that is possible under the Act on Equal Treatment. Such compensation, according to court rulings, covers solely material damages and is not due for non-material damages. Yet, in most cases concerning violation of the equal treatment principle, protection is sought, primarily, not of property rights, but rather of personal dignity. Consequently, if no property damage occurred, the individual may only seek compensation for the infringement of his/her personal rights as provided for in the Civil Code. However, in such cases the use of procedural facilitation, in particular the reversed burden of proof, is not applicable.
14. The Commissioner is concerned about the limited knowledge of the rights of victims of discrimination. Only one in five people (21%) has correct information and declares that discrimination in employment is prohibited by law. The rest of the society admits that does not know how discrimination in employment is treated by law (36%) or even claims that such a ban does not exist in law (also 36%). In addition, these indicators have deteriorated in recent years.

⁶ In each notification submitted pursuant to Article 14(5) of the Act on the Commissioner for Human Rights, the Commissioner mentioned the rulings of courts which explicitly specified the obligations of prosecutors who receive such notifications.

⁷ XI.518.91.2017.

⁸ XI.518.66.2018.

15. The knowledge of anti-discrimination law as regards the area of access to services is also not satisfactory. Less than one fifth of respondents (17%) believe that discrimination in access to services is legally prohibited without any exceptions. Eight out of a hundred respondents claim that such a ban exists, but there are exceptional situations in which it can be circumvented. 43% believe that discrimination in access to restaurants, shops or other publicly offered services is not prohibited by law. 31% were not able to answer such a question.
16. The best-known institution dealing with supporting people experiencing discrimination is the Commissioner for Human Rights, which was indicated by 22% of respondents. As many as 40% could not point to such an institution, and every seventh questioned (14%) claimed that there are no institutions involved in supporting people experiencing discrimination.
17. According to the Act on Equal Treatment, the Government Plenipotentiary for Equal Treatment draws up and submits to the Council of Ministers a National Action Program for Equal Treatment, defining the objectives and priorities of actions for equal treatment. No comprehensive evaluation of such Action Plan for the period 2013-2016 had been carried out. The Government Plenipotentiary did not submit the Program for the following years to the Council of Ministers, despite the announcement of its preparation. In addition, there is no data confirming the activity of the "national mechanism for equal treatment", coordinators and plenipotentiaries cooperating with the Government Plenipotentiary, who were to be appointed in ministries and voivodship offices.

Incitement to hatred and hate crimes

The scale of hate-motivated crimes. The phenomenon of underreporting

18. The Commissioner is concerned to observe more and more instances of conduct that is penalized by the Penal Code⁹ as hate crime.¹⁰ What acts as a proof for the increasing scale of such crime is, *inter alia*, the number of preparatory proceedings conducted by prosecutors' offices across the country in hate crime cases, published every year by the National Prosecutor's Office.¹¹ As that data show, in 2015 1548 proceedings were conducted in hate crime cases, including 1169 in new cases, and in 2016 that number

⁹ Act of 6 July 1997 - Penal Code (Journal of Laws - Dz.U. of 2018, item 1600, as amended).

¹⁰ Examples of such conduct include, *inter alia*, public promotion of a fascist or another totalitarian system and public incitement to hatred due to national, ethnic, racial, religious grounds or lack of religious denomination (crime under Article 256(1) of the Penal Code), publicly insulting an individual or a group of people on the grounds of their nationality, ethnicity, race, religion or lack of religious denomination (crime under Article 257 of the Penal Code), as well as using violence or unlawful threats against a group of people or a particular person due to his/her nationality, ethnicity, race, political persuasion, religion or lack of religious denomination (crime under Article 119 of the Penal Code).

¹¹ Excerpts from annual reports are available at www.pk.gov.pl.

increased to 1631, including 1314 new cases. Data for 2017 mention 1449 proceedings in hate crime cases, including 1156 new cases. Those numbers, however, fail to include reported cases in which prosecutors refused to start the inquiry. The Prosecutor's Office Report mentions 1708 cases registered in 2017 and probably this is the number that should be compared with data from previous years. The Prosecutor's Office has not presented data for 2018 yet.

19. Statistical data published by the National Prosecutor's Office indicate a yearly increase of the number of proceedings conducted by law enforcement agencies with relation to incidents motivated by hate and associated with the use of violence. In 2015 165 of such cases were recorded, in 2016 – 263 and in 2017 that number rose to 350, which accounted for 20% of all cases concerning hate crimes recorded in that year. Since 2016 it is the Muslims or persons associated with Islamic faith who have been the most popular target of attacks motivated by prejudice. In as many as 363 cases recorded in 2016, what motivated the perpetrator of a prohibited act was the fact that the victim or victims were allegedly or actually Muslim. That number, in comparison with 2015, almost doubled. That trend prevailed also in 2017 and Muslims were still the main target of hate-motivated crime (the Prosecutor's Office recorded 328 of such cases).
20. In 2018 the Commissioner, in cooperation with the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, implemented a project striving to examine the scale of *underreporting*, that is to estimate the number of hate crimes that are not reported to the law enforcement agencies.¹² The research was performed using the *Respondent Driven Sampling* method, which consist in conducting interviews with respondents who later recruited further research subjects from their own social networks. The research was conducted on Muslim and African community in the Mazowieckie voivodeship as well as Ukrainians in Małopolskie voivodeship. More than 600 respondents from those communities were asked about experiencing hate crimes which were grouped in six categories indicated by researchers (insult, threat, property destruction, violation of physical integrity, violence and sexual assault). It has been established this way that over 18% of Ukrainians, 8% of Muslims and as much as 43% of individuals from Sub-Saharan Africa experienced at least one hate crime in the period 2016-2017. Results obtained in this way were used to estimate the number of hate crimes in analysed communities. As a result, it was determined that in case of the Ukrainians in the Małopolskie voivodeship – the largest analysed group – as many as 44 000 hate crimes could have been committed in the period 2016-2017 against this community. Regarding to the Muslims and persons from Sub-Saharan Africa, those numbers for Mazowieckie

¹² Project *Building a comprehensive criminal justice response to hate crime*, financed from the EU funds - see <https://www.osce.org/projects/criminal-justice-response-hate-crime>

voivodeship only, reached accordingly around 4300 and around 3000 hate crimes. The research revealed that only 5% of incidents in question are reported to law enforcement agencies.¹³

Combating hate speech online

21. The Commissioner observes the need to undertake actions aimed at creating effective tools for reducing the phenomenon of hate speech on the Internet, that is online statements which promote the racist, fascist or other ideologies and incite to hatred or insulting particular persons or groups of people on the grounds of their nationality, ethnicity, religion or lack of religious denomination. The Commissioner presented his recommendations to the Minister of the Interior and Administration¹⁴ and to the Prime Minister.¹⁵ Suggestions submitted by the Commissioner were supposed to be examined by the Interministerial Team for Combating Fascism and other Totalitarian Systems as well as Incitement to Hatred due to national, ethnic, racial or religious differences or lack of religious denomination appointed by the Prime Minister.¹⁶ In the end, however, that issue was beyond the scope of tasks entrusted to the Team in question.¹⁷ So far, neither the Ministry of the Interior and Administration, nor the Chancellery of the Prime Minister presented their substantive stance on the Commissioner's recommendations.
22. Recommendations presented by the Commissioner still remain valid. The Commissioner believes that an effective fight with the phenomenon of hate speech on Internet requires the following measures:
- a. appointment of a new institution which, in cooperation with the representatives of the online sector and non-governmental organizations, will develop or initiate the development of a code of good practices and will later monitor and enforce the fulfilment of obligations imposed on online service providers with respect to counteracting hate speech on the Internet,
 - b. the new institution should receive powers to examine complaints about the activity of website administrators and conduct own explanatory proceedings in that regard,

¹³ Full report *Analysis of the nature and scale of non-reported hate crimes committed with respect to members of selected communities in Poland* available at: <https://www.osce.org/odihr/412448>.

¹⁴ Letter of 11 April 2018, XI.518.50.2017.

¹⁵ Letter of 19 February 2019, XI.518.50.2017.

¹⁶ Team appointed under the order of the Prime Minister No. 24 of 20 February 2018 (M.P. item 205).

¹⁷ The Commissioner was informed about the fact that the Interministerial Team received his demands in a letter from the Minister of the Interior and Administration of 8 May 2018, ref. No. BMP-0790-3-4/2018/MKa. In a letter of 7 May 2019, ref. No. BMP-0790-1-6/2019/PS, the Minister of the Interior and Administration notified the Commissioner that the issue of hate speech on the Internet was beyond the scope of tasks entrusted to that Team.

- c. the principles of cooperation between Internet service providers and law enforcement agencies should be made more precise, also with respect to the obligation to gather information about illegal content and its sources and make it available to the law enforcement agencies,
- d. Internet service providers should be under the obligation to notify law enforcement agencies any identified crimes related to hate speech and to inform relevant supervisory bodies in case of determining that an organization, in conducting its operations, refers to totalitarian methods or practices or accepts hatred based on race or nationality, which is forbidden by law pursuant to Article 13 of the Constitution of the Republic of Poland,
- e. the obligation that is already imposed on Internet service providers to remove any content constituting hate speech or to block access to it within a specified time as from receiving credible information about such content should be made more precise,
- f. the obligation should be imposed on major Internet service providers to monitor stored data in terms of detecting and deleting content that constitutes hate speech,
- g. a statutory prohibition on the use of hate speech online should be introduced – the content that should be perceived as hate speech is any comment that disseminates, incites, promotes or justifies hatred on the grounds of race, as well as xenophobia, anti-Semitism or other forms of hatred motivated by intolerance, including intolerance expressed in the form of aggressive nationalism, discrimination or hostility towards minorities, migrants or persons that originate from migrant communities.¹⁸

Prevention of the public propagation of racist symbols and content as well as symbols and content referring to totalitarian systems, including fascist and Nazi. Enforcement of the prohibition of the operation of parties and organizations promoting such ideologies

23. Recent years saw relatively frequent instances of the promotion, in the public space, of racist, fascist or Nazi symbols and content, as well as symbols and content that directly refer to the Third Reich ideology promulgating hate and disrespect for persons of other nationality, ethnic origin or religion. Such content was presented by radical nationalistic organizations: Szturmowcy (eng. Stormtroopers), Niklot, National and Social Congress as well as Autonomic Nationalists during public gatherings – starting from the Independence March in Warsaw on 11 November 2017 and ending with the National Labour Day celebrated on 1 May 2018. In January 2018, the TVN24 TV station presented a documentary "Polish Neo-Nazi's" which depicted persons and organizations involved in a

¹⁸ In compliance with the recommendation of the Committee of Ministers of the Council of Europe contained in recommendation No. R 97 (20).

series of concerts and gatherings during which content directly derived from the Third Reich ideology was promoted and salutes were given to pay tribute to Adolf Hitler.¹⁹

24. The Commissioner is concerned about instances of propagating the fascist system, racist ideology and anti-Semitic slogans by participants of public assemblies. There happen cases when the use of fascist symbols or statements which can be considered hate speech become the reasons for dissolving such assemblies by local governments. On 1 March 2018, a representative of the municipal office of Wrocław dissolved a demonstration organized by nationally oriented community and supporters of the Śląsk Wrocław football club. The reason was the anti-Semitic slogans shouted by the participants during the march, among others such as "Away with the Jewish occupation.". On 1 August 2018, the mayor of Warsaw decided to dissolve the Warsaw Uprising March organized by the Mazowsze province's division of the National Radical Camp (Obóz Narodowo-Radykalny). The assembly was dissolved because of those participants who had flags and t-shirts with symbols relating to those of organizations that propagate the totalitarian regime.
25. Racist symbols in the form of Celtic crosses were also spotted during the third march commemorating the Cursed Soldiers, which took place in the town of Hajnówka (Podlaskie voivodship) on 24 February 2018. The participants of the march were shouting „National Hajnówka” and „Bury, our hero” by which they commemorated Romuald Rajs whose nom de guerre was Bury and who was accused of crimes committed in the Podlasie region in late January and early February 1946 against Belarusian people – members of the orthodox church, which has been documented by the Institute of National Remembrance. One of the participants was wearing the „SS-Totenkopf” symbol with a skull and bones, and the letters ŚWO (as in the phrase “Śmierć wrogom ojczyzny”, i.e. death to the enemies of the homeland). That march was not dissolved.

Having analysed recordings taken during those events and made available on the Internet, the Commissioner sent a notification about a suspicion of a crime consisting in the propagation of the fascist system of state and in public incitement to hatred and to insulting a group of people on the grounds of their nationality (Article 256(1) of the Penal Code). However, the investigation relating to the case was discontinued by a prosecutor from the District Prosecutor's Office in Białystok.²⁰ Actions of the participants of the march were not assessed by the prosecutor as crimes. The image of a skull with bones, which followed the pattern of the SS-Totenkopf symbol, was considered by the prosecutor to represent another historical symbol, a badge of honour of the National Military Association, which was introduced in December 1945, although, as the prosecutor noted, the specific graphic design of that badge has not been preserved. The

¹⁹ More on this case see point 30.

²⁰ Decision of 17 September 2018, file ref. no. PR Ds. 1194.2018.

prosecutor also came to the conclusion that the showing of the Celtic cross symbol in a public place did not necessarily have to be associated with racism, hate speech or propagating the totalitarian system of state. The prosecutor's office did not refer to the slogans and words shouted by the participants of the march.

The Hajnówka division of the Regional Court in Bielsk Podlaski considered the complaint lodged by the Commissioner, overruled the decision taken by the Prosecutor's Office and forwarded the case back for reconsideration.²¹ In its reasoning the court indicated that the evidence gathered in the case had not been analysed by the prosecutor's office with sufficient care and it was looked upon only from a single point of view. When considering whether there had been features of public incitement to hatred or of the propagation of racism and the fascist system, the prosecutor ignored the important social, religious and ethnic context. He did not take into account the specificity of the place where the march took place (the town of Hajnówka is a region with many nations and many religions), the date on which it was held, and the clear reference to Rajs who was called Bury. In the opinion of the court, the prosecutor also made an omission as he did not seek expert opinions about the meaning of the symbols of the Celtic cross and the Totenkopf symbol with a skull in a triangle and with the letters ŚWO. At present, the proceedings regarding the case are ongoing again.

26. The Commissioner is alarmed about the activity of neo-fascist movements. At the same time, the Commissioner shares the view that one of the reasons for the disturbing growth of the acts of violence committed by some radical, right-wing organizations is the sense of impunity among members of such groups.²²
27. It is necessary to implement into the Polish legal system the solutions that recommend states to penalize membership in organizations that promote or incite racial hatred or involvement in any types of such activity.²³ Article 13 of the Constitution of the Republic of Poland prohibits the existence of organizations whose programs are based upon totalitarian methods and practices of Nazism, fascism and communism, as well as those whose programs or activities presume or sanction racial or ethnic hatred. The fact that such a provision is included in the Constitution demonstrates the legislative significance of this prohibition as a guarantee of the democratic system of state and respect for human dignity. The importance of that provision should, therefore, make the legislator implement

²¹ Decision of 13 December 2018, file ref. no. VII Kp 186/18

²² Resolution of the European Parliament of 25 October 2018 concerning an increasing number of neo-fascist acts of violence in Europe (2018/2869(RSP), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0428+0+DOC+XML+V0//PL>

²³ In line with CERD General Recommendations No. 35 of 26 September 2013, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11

such solutions which could make the prohibition in question truly effective. The mechanism enabling identification and delegalization of an organization whose program or activity reflect the attributes specified in Article 13 of the Constitution seems to be insufficient: it does not, namely, act as a deterrent for groups which are willing to disseminate hateful ideologies under various banners and in changing organizational structures. This fact justifies the inclusion in the Penal Code of the provision which penalizes the membership in organizations that promote totalitarian ideologies or incite to racial hatred or the participation in any types of such activities. It should be pointed out that a similar solution was adopted in the Penal Code in the context of penalizing participation in an organized criminal group. Article 258 of the Penal Code, which could act as a model for the argued change, provides for criminal liability of persons who participate in organized groups aimed at committing a crime, set up such groups or lead them.

28. In his motion to the Prime Minister the Commissioner argued for the inclusion in the Penal Code of regulations penalizing organizations which promote totalitarian ideologies or incite to hatred or participation in any of such activities.²⁴ That letter of intervention alongside with the recommendations of the Commissioner concerning combating hate crime online was submitted to the Interministerial Team.²⁵ Yet, the Team failed to take presented ideas into consideration.
29. The Commissioner emphasizes that the very possibility of announcing as illegal those organizations that promote fascism or other totalitarian regimes or inciting hatred on the grounds of nationality, ethnicity or religion is not enough to eliminate such movements from public life. Delegalization procedures are also long-lasting which makes them not effective.
30. An example may be the procedure of delegalizing the Pride and Modernity (Duma i Nowoczesność) association, which has been ongoing since February 2018. The association's members were responsible for organizing the aforementioned celebrations of Adolf Hitler's 128th birthday in a forest near the town of Wodzisław Śląski. The main evidence in the case was a recording made during the event, which was discovered by journalists of TVN24. According to media reports, during the celebrations the organizers said that "Adolf Hitler was one of the best strategists, leaders and thinkers of all times, as he had a vision to unify the nation, and that vision was based on pride, honour and loyalty. Hitler was a real gentleman who fascinated women and who was loved by children. He was a decent man, he never used ugly words and did not allow other people to misbehave.

²⁴ Letter of 15 February 2018, XI.518.5.2018.

²⁵ See points 21-22.

NSDAP, when it was led by Hitler, promoted family values, motherhood, fatherhood, as well as respect and honour." There was also a toast "to Adolf Hitler and our beloved Poland" followed by the shouted words "Sieg heil".

The motion to delegalize the association, established in 2011 in Wodzisław Śląski, was filed by the head of Wodzisław Śląski's local government. The proceeding was joined by the District Prosecutor from Gliwice which has been conducting the investigation regarding the propagation of the Nazi system by members of the association. The case is currently pending at the District Court in Gliwice. The latest hearing took place on 5 July 2019 when the court heard the chairman of the association.

The Pride and Modernity association, despite the pending above-mentioned procedure, still has the status of "public benefit organization" and as such may be the beneficiary of people's donations amounting to 1% of their annual personal income tax.

31. At least since December 2017, the District Prosecutor's Office in the Krowdrza district of Kraków has been conducting a proceeding concerning the possibility of taking steps to delegalize the National Radical Camp. In the course of the proceeding, the Public Prosecutor requested the Commissioner several times for information on the progress of the penal-law proceedings conducted as a result of the Commissioner's notifications about the presentation of content that was fascist or inciting to hatred on the grounds of race or nationality, which was done by persons who supported the National Radical Camp. Each time the Commissioner provided relevant information (i.e. on the proceeding regarding the said march commemorating the Cursed Soldiers, held in Hajnówka, and regarding the propagation of the racial separatism ideology on the website of the Mazowsze province's division of the National Radical Group). The activities of the Prosecutor's Offices have not brought yet any results.

Outcomes of the work of the Interministerial Team for combating the promotion of fascism and other totalitarian systems as well as crimes consisting in incitement to hatred on the grounds of national, ethnic, racial or religious differences or lack of religious denomination – remarks of the Commissioner for Human Rights

32. Recommendations developed by the Interministerial Team focused on amendments to Article 256 of the Penal Code in the part referring to offenses of public promotion of fascism or other totalitarian system (Article 256(1) as well as Article 256(2) of the Penal Code), which provides for a penalty to a person who disseminates, produces, preserves or imports, acquires, stores, possesses, presents, transports or transfers a print, record or other object containing the content specified in item 1 of that Article or constituting medium comprising fascist, communist or other totalitarian symbols (Article 256(2)). The Team primarily suggested increasing criminal sanction for the prohibited acts mentioned

in the provision from two to three years of deprivation of freedom. Further demands concerned, *inter alia*, the inclusion in the list of attributes of an offence under Article 256(1) of the Penal Code of public promotion of a communist and Nazi system, criminalization of acts consisting in promoting fascist, Nazi, communist and other totalitarian ideologies that argue for using violence to influence political or social life, activity features of an offense specified in Article 256(2) of the Penal Code manifested in the activity of offering materials mentioned in the said provision. The Interministerial Team also suggested penalization of acts associated with paying tribute or other forms of commemorating individuals responsible for Nazi and communist crimes, committed in the public and non-public domain.

33. Some proposals put forward by the Interministerial Team have been incorporated into the draft act on amending the Act - Penal Code and some other acts. The Act was adopted by the Parliament on 13 June 2019. Yet, the President of the Republic of Poland decided to submit, as part of preventive control measures, a motion to the Constitutional Tribunal with a request to examine the compliance of that document with the Constitution of the Republic of Poland. The draft act gave a new wording to Article 256 of the Penal Code: public promotion of the Nazi and communist system was added as an attribute of a prohibited act mentioned in par. 1; conduct consisting in public promotion of Nazi, communist, fascist ideology or an ideology calling for the use of violence to influence political or social life (newly added par. 1a) was penalized; and offering and disposing of printed materials, records or other objects containing symbols described in the act was added as an attribute of the prohibited act mentioned in art. 265(2) of the Penal Code. At the same time, the provision stated clearly that for the commission of the crime the symbols in question must be used for the purpose of promoting content penalized in the provision. The legislator also followed the recommendation of the Interministerial Team with respect to increasing the scope of punishment: conduct described in Article 256 of the Penal Code is liable to the penalty of deprivation of freedom for three years. The regulation does not provide for the possibility to adjudicate fine or the penalty of restriction of freedom.
34. The Interministerial Team appointed by the Prime Minister failed to put forward any proposals which could significantly increase the effectiveness of combating hate crimes. Increasing the criminal sanction for the crime described in Article 256 of the Penal Code from two to three years of deprivation of freedom will definitely not contribute to that. Additionally, supplementing the provision with previously unmentioned activities of promoting the communist and Nazi system as well as adding the crime of promoting Nazi, communist, fascist ideologies or an ideology calling for the use of violence to influence political or social life is merely a formality and will not bring a major breakthrough. In the

view of the Commissioner, all the acts mentioned above already fulfilled the attributes of the crime specified in Article 256(1) consisting in public promotion of fascist or other totalitarian systems. There is, namely, no doubt that communist and Nazi system belonged to totalitarian establishments that were mentioned previously by the provision and promoting fascist or other totalitarian ideologies, including ideologies calling for the use of violence, were tantamount to promoting fascist or other totalitarian systems that was already subject to punishment. The modification put forward by the Interministerial Team that was later reflected in the amendment of Article 256 of the Penal Code may eliminate possible interpretational ambiguities in that scope but it definitely fails to play a role in increasing the effectiveness of prosecuting hate crime.

35. The above-mentioned draft act amending the Penal Code additionally provides for a change of Article 53 of the Penal Code. Currently the provision allows the court to take into account the motivation of the perpetrator while determining the punishment but it fails to specify what kind of motivation deserves court's special attention. Yet, in line with the draft, the provision in question will also include a new notion of aggravating "incriminating circumstances" that will also be taken into consideration by the court while determining the punishment. Such circumstances have been listed in an open catalogue contained in par. 2a of the provision in question. In compliance with (2a)(7) one of the "incriminating circumstances" is the fact of "committing a hate crime with a use of violence due to victim's belonging to a certain national, ethnic, racial group, political affiliation or religion or lack of religious denomination". What is not considered as "incriminating circumstance" is the sole motivation of the perpetrator related to hatred on national, ethnic, racial or other grounds. In line with the literal wording of the provision, incriminating circumstances arise only when the perpetrator commits hate crime with a use of violence. The proposed amendment fails, therefore, to meet the recommendation of the Committee on the Elimination of Racial Discrimination²⁶, which explicitly called on Poland to acknowledge racial motivation of the perpetrator as "incriminating circumstance". The rationale behind introducing "incriminating circumstance" in the version proposed in the amendment to the Penal Code is questionable also for another reason. It should be, namely, remembered that committing a hate crime with a use of violence due to victim's belonging to a certain national, ethnic, racial group, political persuasion or religion or lack of religious denomination constitutes an offence as such in line with Article 119(1) of the Penal Code. Therefore, it is difficult to justify the introduction to the Penal Code of an "incriminating circumstance" that is equivalent to a crime already described in the Code.

²⁶ Cf. Concluding observations on the joint XX and XXI periodic report submitted by Poland (CERD/C/POL/CO/20-21), letter C, item 8.

The effectiveness of law enforcement agencies' actions taken in hate crime cases. An example of the Commissioner's intervention in a case concerning the promotion of the racial separatism ideology

36. An ongoing monitoring of proceedings conducted by law enforcement agencies in hate crime cases led the Commissioner to express some doubts as to whether all groups that are at risk of that crime are duly protected from it and whether actions targeting some of those groups are not treated with certain leniency by the Polish authorities. Doubts of the Commissioner concerning the effectiveness of protection against hate crime refer in particular to migrants, including refugees, Muslims as well as some national or ethnic minorities. In numerous cases examined by the Commissioner, law enforcement authorities prematurely discontinued proceedings, groundlessly refused to instigate them or conducted them in a lengthy manner without explaining the reasons for taken decisions in a unambiguous way that is compliant with the rule of law. In the view of the Commissioner, they contributed in this way to the creation of the image of the society which accepts negative conduct, such as promoting fascism or racist ideology or spreading hatred motivated by prejudice.
37. In his letter of intervention to the Prosecutor General²⁷ the Commissioner referred to 31 cases conducted by the law enforcement agencies between 2015 and 2019 which were, at various stages, subject to the Commissioner' monitoring and in which the actions of prosecutors' offices or their decisions raised concerns in terms of their compliance with the standards formulated, *inter alia*, by the European Court of Human Rights, such as the principle of objectivity and exceptional diligence in revealing hateful motivation in the acts of perpetrators. The Commissioner requested the Prosecutor General to examine all reported cases and assess, within his competencies, whether the proceedings in those cases were properly conducted. He also requested the Prosecutor General to verify whether decisions to discontinue proceedings or refuse to instigate them can find relevant justification in legal provisions and evidence gathered in respective cases. So far, the Commissioner has not received any response.
38. In the context of the implementation of the provisions of the Convention on the elimination of all forms of racial discrimination by Poland and in particular its Article 4 which orders State-Parties to the Convention to condemn all propaganda based on the ideals or theories stating the superiority of one race over another but also to take relevant measures aimed at eradicating all forms of incitement to this type of discrimination one should mention one case reported by the Commissioner to the Prosecutor General which

²⁷ Letter of 23 January 2019, XI.518.7.2019.

related to the promotion of racial separatism ideology by the so called Mazovian group of the National-Radical Camp.²⁸

39. In the said case the Commissioner made a notification²⁹ to the prosecutor's office about the suspected crime consisting in the public promotion of totalitarian system and public incitement to hatred on racial grounds, as referred to in Article 256(1) of the Penal Code, by publishing a text entitled: *Racial separatism - response to multi-culti in the XXI century* on the website www.onrbrygadamazowiecka.pl. In his notification the Commissioner pointed out those fragments of the publication in which the author calls for *the restoration of the primacy of the white race*, suggests that groups unaccepted by him/her, that is individuals with skin colour other than white, immigrants from beyond Europe as well as refugees, have a destructive impact on the European society and constitute serious threat to others, groundlessly blames persons of other descent for *increasing crime rates (assaults, robberies, rapes and murders)* or even ascribes blame for *the cultural and civilization genocide of the native white inhabitants*. The Commissioner also mentioned the conclusion of the publication's author who argued that the only effective method for protecting Europe against collapse is the need to create a society based on *the principle of white race superiority*, whose political system would prohibit *race mixing* and order the resettlement of individuals of certain ethnicity to their place of origin in order to *restore the world order*.
40. The prosecutor discontinued proceedings in the said case claiming that the act described by the Commissioner in the notification fails to fulfil the attributes of the public promotion of totalitarian system and public incitement to hatred on racial grounds³⁰. In the opinion of the prosecutor, presenting racial content is not equivalent to incitement to hatred on racial grounds or promoting totalitarian systems. The prosecutor also failed to notice any fragments in the article that should be considered incitement to hatred on the grounds of one's nationality, ethnicity or race. The Commissioner made an appeal against the ruling of the prosecutor to the competent district court. The appeal is still waiting for examination.

Comments on the language of public debate and political debate

41. The Commissioner is concerned about the progressive radicalization of the language of public debate (including the language used by the media) in relation to the subject of migration, in particular from Muslim countries. This phenomenon was described e.g. in

²⁸ XI.518.91.2017.

²⁹ See points 7-10.

³⁰ Ruling of the District Prosecutor's Office for the Ochota district of Warsaw, of 31 May 2019, ref. no. PR 2 Ds. 1343.2018.

the report ordered by the Commissioner and entitled *Negative portrayal of Muslims in the Polish press*³¹. Based on the monitoring of texts published by over ten leading press titles, conducted in the period from September 2015 to September 2016, researchers described the contexts in which topics concerning Muslims, migrants and refugees were presented (the context-building words, although not synonymous, were often used in the publications interchangeably). As it turned out, the picture painted by the media in articles about the migration crisis in Europe was dominated by the contexts (or metaphors) of attack, invasion, civilization clash, or even alternative war in which methods such as terrorism and “social jihad” were used. The radicalization of the media language was particularly visible in its hyperbolization. It consisted in the gradual replacement of neutral terms with their negatively-loaded equivalents, as e.g. the word *influx* in the context of migrants/refugees was gradually replaced by such pejorative terms as a *wave, flood, tsunami, incursion or invasion*.

42. The topic of migration from Muslim countries has also been used in political campaigns in a way that strengthened xenophobic approaches among that part of the society who are unwilling to accept migrants arriving to Poland. An example can be a TV spot that was used by the Law and Justice party in 2018 during the local government election campaign and that was anti-Muslim and anti-immigrant in nature. The spot was partly stylized as a news programme and presented a vision of Poland in 2020, in a situation when local governments decided to accept migrants despite a different policy of the government. Excerpts from statements made by the current opposition party’ politicians were combined with images showing a border crossing, not existing in reality, where there was a queue of Arabic men waiting at the border. Those images were followed by ones showing riots, acts of aggression and attacks as well as crowds of people, cars on fire and officers with weapons opposing aggressive and masked people. The images were accompanied by music and narrator’s comments that imitated a journalist’s commentary that increased tension, about representatives of local governments who were members of the Platforma Obywatelska (PO) political party and who were getting ready to accept refugees. As a result of their acceptance, districts of Muslim migrants appeared and residents were afraid to walk the streets after dark; sexual assaults and acts of aggression became elements of life. For most of the time during the spot, there were also information bars which are associated with news programmes and which included the words: refugee crisis; will Poland look like this in 2020.

In the opinion of the Commissioner, the spot had features of incitement to hatred on the grounds of nationality, ethnicity and religion, as referred to in Article 256(1) of the Penal

³¹ Report of the Public Debate Observatory of the magazine entitled *Kultura Liberalna [Liberal Culture]*, ordered by the Commissioner, drawn up and published in 2017 is available at: https://www.rpo.gov.pl/sites/default/files/The_Negative_Portrayal_of_Muslims_in_the_Polish_Press.pdf.

Code. A prosecutor from the District Prosecutor's Office in Warsaw, however, declined the Commissioner's motion to initiate an investigation in the case.³² In justifying his decision, the prosecutor concluded that the spot contained no messages that incited or encouraged either non-acceptance or hatred. The prosecutor also stated that the election campaign spot was a part of the local government elections campaign and was constructed in such a way so as to attract attention and expresses opinions about migration to Poland, but without attempting to convince anyone to develop any specific attitudes, including hatred towards Muslims or migrants. The statement that the spot, during the local government election campaign, was made and used for the specific needs of that campaign only in order to express the opinions of its authors was repeated by the prosecutor in the justification of his decision several times. It was underlined that the authors of the spot exercised their freedom of expression as guaranteed in Article 54(1) 1 of the Polish Constitution.

In his complaint against the District Prosecutor's decision to refuse to initiate an investigation, the Commissioner recalled that pursuant to Article 14(5) of the Act on the Commissioner for Human Rights, a notification submitted by the Commissioner requires the Prosecutor's Office to initiate a proceeding regarding the reported case, if that case relates to an offense subject to ex officio prosecution. The Commissioner also noted that incitement to hatred does not have to include incitement to violence or other criminal acts as such. Just like in the election campaign spot in question, such incitement is also present if it is sought to build distrust, rejection or even hatred towards a specific person or group of persons (in that case, foreigners of Islamic religion). In this context, the Commissioner referred to a verdict of the Supreme Court³³ which concluded that hate speech features are also seen when there are verbal or written statements that seek to build strong dislike, anger, lack of acceptance, or even hostility towards individuals or entire social or religious groups, or due to their form, support and increase such negative attitudes. The Commissioner also reminded that in accordance with the standards arising from the case law of the European Court of Human Rights, in cases of attacks that involve insult or slander regarding a particular group of people, authorities should decide to stand on the side of the victims of such statements rather than protect the inappropriate exercise of the freedom of speech.

The court agreed with the Commissioner's complaint and annulled the decision of the prosecutor. Finally, an investigation was initiated in the case but has not yet been completed.

³² Decision of the District Prosecutor of Warsaw, of 17 November 2018, file ref. no. PO 1 Ds. 239.2018.

³³ File ref. no. IV KK 406/06.

43. The Commissioner agrees with the opinion of Ms Karima Bennoune, UN Special Rapporteur in the field of cultural rights who, in her mission statement issued following her visit to Poland on 5 October 2018³⁴, concluded that *like many countries today, Poland is currently experiencing political and cultural polarization*. In the rapporteur's opinion, *The impact of language in debates about identity must be carefully considered and inclusive language used to refer to all inhabitants of Poland so as not to reinforce dynamics of othering and ideas that within the population of Poland some are "us" and some are "them"*.
44. Unfortunately, according to the Commissioner, at present there are fully opposite trends in the public debate. An example is the recent prevailing tone used with regard to the Ukrainian minority and the individual personal attacks on representatives of that community. In July 2018, the head of the Lublin Voivodeship government notified the Public Prosecutor's Office in Lublin about the suspected offence consisting in insulting the Polish Nation by one of the leaders of the Ukrainian minority and the co-chairman of the Joint Commission of the Government and National and Ethnic Minorities. According to the head of the Voivodeship government, the person offended the Polish Nation during the celebrations held on 8 July in Sahryn to commemorate the Ukrainians murdered by Polish armed officers in March 1944. According to head of the Voivodeship, the Polish Nation was insulted among others by the following words: "We are standing in front of the monument that commemorates the lives sacrificed by inhabitants of Sahryn and the surrounding villages, who died on the tragic morning of 10 March 1944. It is worth recalling that over 74 years ago, citizens of Poland - Ukrainian members of the Orthodox church were killed on the land where their ancestors lived for centuries. They were killed by other citizens of Poland because they spoke another language and had another religion. This crime against humanity was committed by members of the Polish nation, partisans from the Polish Home Army, who operated as soldiers of the Polish Underground State". In November 2018, the District Prosecutor's Office in Zamość discontinued the investigation and stated there were no grounds for concluding that those words, spoken in public, insulted the Polish Nation or the Republic of Poland. However, the notification sent to the Prosecutor's Office with regard to the statement could and still may have a preventing effect (so-called freezing effect) on representatives of this or other minorities who will refrain from expressing similar opinions.
45. Another example can be the statement made on TVP Info public television channel in relation to the co-founder of the anti-racist association "Never Again". During the programme "W tyle wizji" on 24 January 2019, one of the co-hosts said: "Some hate

³⁴ See: Communication of 5 October 2018 after the visit to Poland of Ms Karima Bennoune, UN Special Rapporteur in the field of cultural rights, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23690&LangID=E>

- speech now. Mr Pankowski is one of the most despicable person I have ever come across in my life. (...) We are talking about a man who earns his living by (...) accusing Poles of fascism. He travels around the world and tells lies about Polish anti-Semitism". The Commissioner requested the National Broadcasting Council to examine the case and possibly react to those words. By the way, anti-Semitic statements of that journalist were mentioned in a report published by the US Department of State in the series of Country Reports on Human Rights Practices for 2018, in the part on Poland. According to the authors of the report, the journalist was to say that the Jews were a part of their own destruction, but the journalist continues to work for the public television programmes.
46. More and more groups, in their public statements, refer to the need for engaging greater resources to counteract hate speech. Already in November 2016, concern about a sudden increase in xenophobia against foreigners studying in Poland was expressed by the Conference of Rectors of Polish Universities (KRASP). In their joint appeal, they requested competent state authorities to effectively ensure to foreign students the safety from such situations, and emphasized that acts of physical or psychological violence against foreign students or disrespect for their cultures may negatively impact the image of Poland and make the Polish university community feel ashamed. On 2 February 2018, representatives of fifteen organizations of national and ethnic minorities issued a joint statement in which they expressed their concern about increasing instances of aggression related to nationality, ethnicity or religion in the Polish society. They called on the President of Poland, the government and the parliament to counteract all forms of xenophobia, intolerance and anti-Semitism. On 18 January 2019, a statement calling on prosecutor offices and the police to intensify activities counteracting hate crime was issued by the association of Roma people in Poland. The authors of the statement mentioned that over several years, the association filed several dozen notifications of suspected offences under Articles 119, 256(1) and 257 of the Penal Code (concerning punishable threats motivated by ethnicity, propagation of fascism or racism, incitement to hatred, or insults on the grounds of nationality or ethnicity), yet the commencement of the proceedings was refused (and in one case, proceedings were discontinued) because of the lack of features of prohibited acts. Shortly thereafter, on 21 January 2019, the National Association of Legal Advisors called upon decision-makers to adequately react to acts motivated by hatred and to use the appropriate language in the public and political debate.
47. In the opinion of the Commissioner, despite such appeals, xenophobic behaviours have not yet been clearly condemned by the representatives of public authorities. To the contrary, some actions, such as the aforementioned election campaign spot used in 2018, may incite xenophobia and, consequently, the level of risk of hate crimes.

The situation of national and ethnic minorities

48. The Commissioner is alarmed about the negative stereotypes concerning national and ethnic minorities, especially Ukrainian, Roma and Jewish ones that still prevail in the Polish society.
49. In recent years, in the broadly understood public debate, there were more and more negative or even hateful comments directed at the Ukrainian community (both Ukrainian national minority as well as migrants from Ukraine). Such comments often referred to the Polish-Ukrainian history. Yet that history was treated in those instances in an instrumental and selective manner. The anti-Ukrainian tone in the public debate is also accompanied by an increasing number of attacks on persons speaking Ukrainian as well as recurring instance of destroying memorials commemorating events and individuals of importance to Ukrainian community living in Poland. Increased number of such incidents is visible, *inter alia*, in the aforementioned statistics published on an annual basis by the National Prosecutor's Office. According to that data, the number of proceedings instigated by the prosecution in cases of hate-motivated acts directed at Ukrainian community or persons associated with it went up from 37 in 2015 to 190 in 2017. That data, as the research conducted by the Commissioner indicates³⁵, demonstrate an alarming trend but not the scale of the phenomenon.
50. To counteract the emergence and strengthening of negative stereotypes one needs to undertake educational measures consisting, first and foremost, in the incorporation of information regarding national and ethnic minorities as well as their history and culture to curricula of primary schools. It would be desirable to involve representatives of respective minorities in the creation of relevant teaching materials.
51. It is also necessary to pursue anti-discriminatory educational activities and promote an open and tolerant attitude to persons and social groups of different culture and background among pupils and students. The Minister of National Education confirms that one of the tasks of schools is to shape and develop the attitude of respect for human rights, equal treatment and tolerance among pupils.³⁶ In the opinion of the Commissioner the currently applicable core curriculum for schools fails to sufficiently cover the issue of human rights and equal treatment. At the stage of pre-school education it is difficult to notice any content devoted to that matter at all. Also at subsequent stages of education – in primary and secondary school – these issues are discussed to a very limited extend. Additionally, the previously clearly defined obligation to implement anti-discriminatory measures covering the whole community of pre-schools, schools and other education

³⁵ See points 18-20.

³⁶ Letter of the Minister of National Education to the Commissioner of 5 October 2017, file No. DPPI-WPPIP.4010.457.2017 (XI.800.3.2017).

establishments³⁷, with the aim to shape the desired attitudes among students and ensure the observance of societal norms, was abolished. The failure to include that obligation in the provisions concerning the requirements for schools and other establishments³⁸ does not mean that pre-schools, schools and other educational establishments are not supposed to realize anti-discriminatory activities. Yet, it means that such activities are not subject to pedagogical supervision. Furthermore, an ongoing public debate in the course of which individuals express their aversion for "otherness" effectively discourages teachers from discussing such issues. In the opinion of the Commissioner the said change is unjustified and has a negative impact on the quality of education.

52. The exercise of the right of national and ethnic minorities to learn a minority language and be instructed in that language under the general education system requires one to provide access to relevant handbooks for children and teenagers. Yet, the Commissioner regularly receives signals that pupils who want to exercise their right to learn their language start a new school year without necessary didactic materials. It is the public authorities who are responsible for finding handbook authors and developing a publishing plan early enough to make sure that all interested parties have access to necessary educational materials.
53. It is necessary to create a relevant incentive plan to encourage pupils to learn the language or receive instruction in the language of the minority that they identify with. Under the current circumstances the decision to study a minority language is an additional burden for pupils and goes beyond the standard school obligations. Therefore, exercising the right to learn a given language results in negative consequences in the form of additional duties whose fulfilment is by no means rewarded.

The situation of the Roma community

54. The situation of the Roma minority undergoes gradual improvement, which can be attributed to the activity of numerous Roma organizations as well as the operation of the *Programme for the integration of Roma community in Poland in years 2014-2020*.³⁹ What deserves recognition is whole idea of the creation and existence of the *Roma Programme* which finances activities undertaken largely by Roma organizations aimed at supporting

³⁷ The obligation to pursue such activities resulted from the regulation of the Minister of National Education of 6 August 2015 on the requirements for schools and other establishments (Journal of Laws - Dz.U. item 1214). The fulfilment of that obligation was verified under pedagogical supervision conducted pursuant to the provisions of the regulation of the Minister of National Education of 27 August 2015 on pedagogical supervision (Journal of Laws - Dz.U., item 1270).

³⁸ Regulation of the Minister of National Education of 11 August 2017 on the requirements for schools and other establishments (Journal of Laws - Dz.U. item 1611).

³⁹ Programme established under resolution No. 202/2014 of the Council of Ministers of 7 October 2014; hereinafter: *Roma Programme*.

Roma culture but also improving dire conditions in which a significant part of that population lives. This form of support should be viewed as state's attempt at fulfilling the obligation to actively foster full and actual equality in the economic and social life.⁴⁰

55. The sheer existence of the *Roma Programme* does not suffice to effectively counteract exclusion from the social and economic life that a large part of the Roma community is facing. The example of Roma settlements in Małopolskie voivodeship shows that Roma who have been living in dramatically difficult housing conditions for several generations, deprived of any real opportunities on the local job market and fully dependent on social welfare are unable to improve their lot. Therefore, their fate depends, to a large extent, on the support from the state and in particular the involvement of the local self-government units. Yet, no cooperation between local communities and local authorities or even an obvious conflict between them often make it impossible to deliver actual assistance to the Romani people and the use of funds from the *Roma Programme* in an effective way. The consequences of the lack of involvement of the local self-government units are particularly visible when the local self-government owns the land on which Roma settlements are located. In such an instance it is the local authorities that decide whether to undertake necessary repair and construction work in the said settlements.
56. Roma settlement in Maszkowice (in Łącko municipality, Małopolskie voivodeship) may serve as a good illustration showing how the reluctance of local authorities to get involved in real support measures affects the situation of the Roma community. The settlement in Maszkowice, inhabited by around 270 persons, comprises a group of residential and utility buildings, most of which constitute unpermitted structures that were largely constructed even several decades ago, mainly on the land owned by the municipality. The standard of those buildings is dramatically low. The quality of construction materials, the way they were used as well as the passage of time have rendered most of the buildings unsuitable for housing people. Most of them pose a real threat to the health or even life of their residents. Despite the suggestions of the Małopolskie voivodeship governor, the letters of intervention written by the Commissioner as well as expectations of the Roma community, the authorities of Łącko municipality decided not to undertake comprehensive measures, financed under the *Roma Programme*, which would result in the redevelopment of the settlement area, *inter alia*, by replacing the current, deteriorating structures with a new multi-family building or year-round residential containers with a suitable standard. Yet, the municipality's authorities are reluctant to embark on such a plan. Instead, they initiated proceedings before the locally competent District Inspector of Building Control

⁴⁰ That obligation stems from Article 4(2) of the Framework Convention for the Protection of National Minorities of 1 February 1995 (Journal of Laws - Dz.U. of 2002, No. 22, item 209), Article 6 (2)(1) of the Act of 6 January 2005 on national and ethnic minorities and regional languages (Journal of Laws - Dz. U. of 2017, item 823).

which resulted in around 40 administrative decisions ordering the demolition of unpermitted structures located in the settlement. The residents of those unpermitted structures do not have means to voluntarily execute those decisions. In consequence, enforcement proceedings initiated by the building control inspectorate led to the imposition of fines of up to 40 thousand zloty on the Roma, which were supposed to force them to demolish their own homes.

57. What also raised the Commissioner's concern was the problem of using means provided under the *Roma Programme* by the municipal authorities of Limanowa (Małopolskie voivodeship). The resources in question were allocated for the purchase of new houses for several Roma families from Limanowa. Yet, they were located on the territory of other local self-government units, *inter alia*, in Czchów (Czchów municipality, also in Małopolskie voivodeship). The purchase of such real estate allowed the local self-government authorities to offer assistance to the Roma that could actually increase their standard of living but the condition for benefiting from that help was the resettlement to another municipality and abandonment of the current local community. Ultimately, despite the judgement of the Supreme Administrative Court which questioned the possibility of one municipality purchasing real estate located on the territory of another one, the Limanowa authorities managed to persuade some Roma families to move to Czchów. The authorities of Czchów fail to come to terms with that fact: they consistently refuse the Roma the right to register at the new address, conclude an agreement for disposal of sewage and connecting the real estate to water. They even went as far as to discontinue the removal of municipal waste from the estate.
58. In the opinion of the Commissioner the concept of the *Roma Programme* requires modification. The Commissioner notices the need to, *inter alia*, allocate a separate part of the *Roma Programme* for investment activity. The execution of investment measures should at the same time be subject to increased supervision, also in terms of the quality and purposefulness of carried out investment work. One should also create financial mechanisms which would encourage local self-government units to make use of the available resources. What could constitute such a mechanism is, for example, an additional subsidy for the implementation of own tasks for municipality involved in providing assistance to Romani people. One should also consider creating legal conditions allowing individuals, that is residents of Roma settlements, to use resources available under the *Roma Programme*. In this sense, the support provided under the *Roma Programme* would be similar in its form to social welfare benefits and could be used in accordance with the wishes of beneficiaries - for the renovation of their current dwellings or the purchase of a new real estate.

59. The residents of the Maszkowice settlement as well as other, similar Roma settlements are regular social welfare beneficiaries. As an example, Romani people from Maszkowice, even though they account for merely 1,5% of the municipality's overall population and around 12% of the total number of people benefiting from various forms of social support, receive benefits accounting for 20% of all resources allocated yearly by the municipality for social welfare. It is difficult for the Roma to find an alternative source of income. While talking to the Commissioner they also point out that they have virtually no chances of finding employment. Neither completed supplementary training nor new professional qualifications seem to help in finding a job. Potential employers are not willing to employ persons of Roma nationality, which is perceived by the Roma as a sign of discrimination on the labour market. In many cases that the Commissioner is aware of the only real employer for the Roma are municipality and their municipal units which offer solely ad-hoc work or clean-up work. Yet, in principle, such work is performed on a temporary and part-time basis.

The situation of the Jewish community

60. According to the last report of the National Prosecutor's Office concerning proceedings conducted by law enforcement agencies in hate crime cases, 112 incidents of anti-Semitic nature were recorded in Poland in 2017. In comparison with similar data for previous years, one can observe that the number of incidents of such nature recorded by the law enforcement bodies is declining: in 2016 - 160 of such cases were recorded and in 2015 – 208 cases. When evaluating that trend, however, one needs to bear in mind that not all cases are reported to the law enforcement agencies. This, in turn, in the opinion of the Commissioner may result in significant underestimation of the scope, nature and characteristics of anti-Semitism in Poland.

61. The report of the EU's Fundamental Rights Agency⁴¹ presents the results of the survey analysing the experiences and perceptions of Jews on hate crime, discrimination and anti-Semitism. Over 16 000 respondents identifying with the Jewish nationality from 12 EU member states, also from Poland, participated in the survey. The study demonstrated that almost one third of respondents in Poland (32%) experienced at least one incident of anti-Semitic nature in the period of 12 months preceding the survey (similar results were obtained in Spain - 32% and Sweden - 30%; in Germany 41% of respondents had such experiences). Poland also stands out among 12 EU countries when it comes to offensive comments placed on the Internet and social media - 20% of respondents from Poland declared having encountered such comments (the report fails to provide clear data in that

⁴¹ Report *Experiences and perceptions of anti-Semitism - Second survey on discrimination and hate crime against Jews in the EU*, December 2018.

scope from other countries). At the same time, merely 7% of respondents claim that the Polish government is effectively combating the phenomenon of anti-Semitism. According to the report, in Poland 79% of anti-Semitic incidents is not reported to the authorities at all (that figure, however, does not differ from the average for the remaining EU countries covered by the research).

62. Anti-Semitic statements in the public debate were increasingly noted in the first months of 2018, in the context of the discussion on the amendment to the Act of 18 December 1998 on the Institute of National Remembrance and the Commission to prosecute crimes against the Polish nation.⁴² The amendment, adopted by the Sejm on 26 January 2018, defined a new type of crime in the Act on the Institute of National Remembrance. According to the proposed Article 55a of the Act, a fine or a penalty of up to 3 years of imprisonment was to be adjudicated on persons who, publicly and against the facts, claim that the Polish nation or the Polish state was responsible or co-responsible for the crimes committed by the German Third Reich. The same penalty was to be imposed for the crime of "blatantly reducing the responsibility of the actual perpetrators of those crimes." Eventually, after the criticism and after the President of Poland requested the Constitutional Tribunal to examine the amendment's compliance with the Constitution, the law was amended again and the controversial provision was repealed. The proposed regulation was intended to eliminate the so-called defective codes of memory, which are reflected e.g. by statements in which Nazi concentration camps that existed in the territory of Poland were named "Polish camps". However, the report *Attitude towards Jews and their history after the implementation of the Act on the Institute of National Remembrance*, drawn up for the Commissioner by the Centre for Research on Prejudice of the University of Warsaw, showed that the result of the amendment was opposite as the frequency of use of the statements that were planned to be eliminated increased. The phrase "Polish concentration camps" was searched five times more frequently using the google engine. Following the public debate on the Act on the Institute of National Remembrance, Poles' opinions on the history of Polish-Jewish relations became polarized. The number of people assessing Poles' approach at the time of the wartime occupation as idealized increased significantly (twofold, as regards the number of people convinced that all the Poles were engaged in saving Jews), but at the same time the percentage of Poles who mentioned acts of collaboration with the German occupant increased. An analysis of social networking sites also revealed that immediately the amendment of the Act on the Institute of National Remembrance, i.e. at the end of January and the beginning of February 2018, clear anti-Semitic language was more often found in mainstream discussions. Anti-Semitism was also more frequently present in statements made by public figures and the media where anti-

⁴² Journal of Laws - Dz. U. of 2018, item 2032, as amended.

Semitic prejudice had rather been a taboo before, and where people using such language had been excluded from the public debate.

Discrimination of citizens of other countries

Detention of foreigners and juveniles

63. The Act on foreigners⁴³ provides for the possibility for placing a foreigner in a guarded detention centre if a relevant decision obliging him/her to return to his/her country of origin may be issued. Pursuant to the Act on providing foreigners with protection on the territory of the Republic of Poland⁴⁴ also foreigners applying for the refugee status, including families with children, may be placed in such centres. Both acts provide at the same time for the possibility to prescribe measures in relation to apprehended foreigners alternative to detention which may secure administrative proceedings conducted in their cases. Alternative, non-isolation measures mentioned by the acts include: the obligation to report at a prescribed authority at specified times, payment of financial surety or imposition of an obligation to reside in a designated place.
64. The data of the Border Guard demonstrate that the introduction of measures alternative to detention after 1 May 2014 resulted in the reduced number of families with children being placed in detention centres. However, such measures are not a rule in proceedings against apprehended foreigners, but rather an exception from the rule generally applied to foreigners, namely detention. This practice of the Border Guard and courts should be changed, which is possible under the currently applicable legal provisions.
65. On 10 April 2018 the European Court of Human Rights issued a judgement in the case of *Bistieva and Others v. Poland* (application no 75157/14). The case concerned a family from Chechnya, parents with three children born in the period 2006-2013, which was placed in the guarded centre for foreigners subordinate to the Border Guard where they were supposed to await the decision about their deportation from the territory of Poland. In the end the foreigners left the centre - it turned out that they are allowed to stay on the territory of Poland due to legal and residence-related situation of one of their children. In the application submitted to the ECHR the foreigners accused Poland of disproportionate interference in their right to private and family life caused by placing them in a guarded centre, which in their view did not constitute a necessary measure. The ECHR declared that detention should be the last resort applied only when no other, alternative measure which can secure ongoing proceedings can be adjudicated. Furthermore, the ECHR stated that in case of detaining children in guarded centres the authorities should, in particular,

⁴³ Act of 12 December 2013 (Journal of Laws - Dz.U. of 2018, item 2094, as amended).

⁴⁴ Act of 13 July 2003 (Journal of Laws - Dz.U. of 2018, item 1109, as amended).

make sure that detention does not violate the child's best interest. The authorities cannot in such a situation content themselves with the statement that it is in the child's best interest to be placed in the guarded centre together with parents.

66. Under detention conditions the juveniles' constitutional right to education is not and cannot be realized. Despite unquestionable efforts of the Border Guard, educational authorities and schools, activities organized in centres fail to comply with core curricula. What is missing are comprehensive legal regulations which would specify the obligations resting on mentioned institutions in the area of providing instruction to juveniles residing in guarded centres. It is also unclear on what principles should that instruction be provided and funded. As a result, education to the said group of foreigners is only provided based on a mutual agreement between the Border Guard, public schools and educational authorities and depends on their good will and capabilities.
67. The Commissioner believes that a legislative initiative needs to be undertaken to introduce a total ban on placing juveniles and their parents or guardians in guarded centres for foreigners. There is, namely, no doubt that conditions prevailing in guarded centres, in particular prison-like regime, are not suitable for children. Staying in such establishments may be a traumatic experience for children and may negatively affect their psycho-physical development.
68. During the inspection visits carried out at guarded centres for foreigners the representatives of the National Preventive Mechanism (NPM) encountered individual cases of persons whose stay in the said establishments proves the ineffectiveness of the system of identifying violence and torture victims, which would normally prevent the placement of such individuals in detention facilities. Guarded centre residents included persons who reported being victims of torture or violence either in their countries of origin or transit countries in respect to whom the NPM experts could diagnose possible PTSD symptoms. In 2017 the NPM identified six such individuals and in 2018 another six. Under the currently applicable regulations, persons whose psycho-physical state may indicate that they experienced violence should not be placed in guarded centres at all. In case they have already been placed there they should be released from them immediately. Yet, in cases identified by the NPM that mechanism failed. It shows that a proper procedure for identifying torture victims residing in detention centres and those applying for refugee status should be established.

69. The Commissioner is also concerned about the planned implementation of the strategic document entitled "Polish Migration Policy"⁴⁵ by the Ministry of the Interior and Administration. The document outlining the direction of the state's migration policy is supposed to offer a response, *inter alia*, to the needs of economic policy concerning acquisition of foreign employees with relevant qualifications to fill in the gaps on the job market that can be attributed to demographic trends. The document specifies that one of the objectives of the migration policy will be the development of preventive measures consisting in the detention of foreigners in guarded centres or custody. The governmental draft amending the Act on granting protection to foreigners on the territory of the Republic of Poland, which has been discussed for several years, is heading in the same direction. The draft foresees restricting the possibility of applying non-custodial measures, alternative to detention with relation to apprehended foreigners. It also provides for certain automatism in the placement in detention centres of foreigners whose requests for granting international protection are to be examined in the so called border mode foreseen for individuals filing the above-mentioned requests upon crossing the border of the Republic of Poland.

Lack of effective access to the refugee procedure

70. Since 2015 the Commissioner has been receiving numerous complaints from foreigners who attempt, in vain, to enter the territory of Poland through border crossings in Terespol (border with Belarus) or Medyka (border with Ukraine) with a view to applying for international protection in Poland. By principle, declarations made at the border crossing during the clearance procedure concerning the intention to apply for international protection in the Republic of Poland should result in foreigner's admission to Poland and acceptance by the Border Guard of a relevant application for this protection. Yet, complaints addressed to the Commissioner as well as observations during the inspection visits carried out by the employees of the Office of the Commissioner on border crossings⁴⁶ suggest that in many cases Border Guard officers performing the border clearance procedure do not accept declarations from foreigners about the intention to file for protection, thus preventing them from submitting a relevant application. As a result, they refuse foreigners the right to enter the territory of the Republic of Poland.

71. Each time when following a border clearance a Border Guard officer decides that there are no grounds for admitting a given foreigner on the territory of Poland, he draws up a note

⁴⁵ On 20 March 2017 the Ministry of the Interior and Administration published a communiqué announcing the annulment by the Council of Ministers of the document *Polish migration policy* that has been in force since 2012. So far no new document in that scope has been adopted.

⁴⁶ The inspection visits at the border crossing in Terespol took place on 11 August 2016 and 15 May 2018. The inspection visit at the border crossing in Medyka took place on 6 - 7 October 2016.

from the conducted interview. Such a note, however, constitutes an internal document only and is usually laconic in nature: in most cases it comprises no more than three sentences. In line with the practice witnessed during the inspection visits, the officer does not describe the course of the whole interview and does not record all statements made by the foreigner but focuses only on information that, in his view, is of key importance for determining the purpose of foreigner's arrival to Poland. The content of the note and selection of comprised information lie solely at the discretion of the Border Guard officer who conducts an interview with the foreigner. Interviews are not recorded in any other way and the notes are not read out to foreigners. Therefore, they have no opportunity to verify or rectify information contained therein. For the same purpose it is also not possible for other Border Guard officers, including superiors of the officers conducting interviews, to verify the notes. The impossibility to verify the course of interviews which have a profound impact on the identification of foreigners seeking international protection in Poland denies that sensitive group guaranteed and effective access to procedures for examining applications for international protection. The need to establish such guarantees derives from the item 25 of the preamble and Article 6(2) of the 2013/32/EU directive on joint procedures for granting and withdrawing international protection.⁴⁷ In the opinion of the Commissioner the statutory obligations of officers in terms of documenting the course of an interview with foreigners during border checks should be made more precise. Interviews with foreigners during border checks should, as a rule, be documented using uniform interview forms that include, as an obligatory item, the question whether the foreigner intends to seek international protection in Poland. The Commissioner addressed, *inter alia*, the Minister of the Interior and Administration with the request to introduce relevant regulations in that matter.⁴⁸

⁴⁷ The directive of the European Parliament and the Council dated 26 June 2013 on joint procedures for granting and withdrawing international protection (recast, OJ L.2013.18.60, as amended).

⁴⁸ Letter of 30 March 2019, XI.543.3.2019.