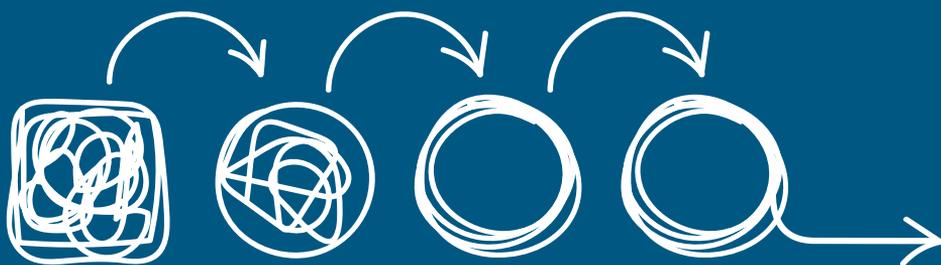


# NATIONAL MECHANISM FOR THE INVESTIGATION OF ARBITRARY INCIDENTS

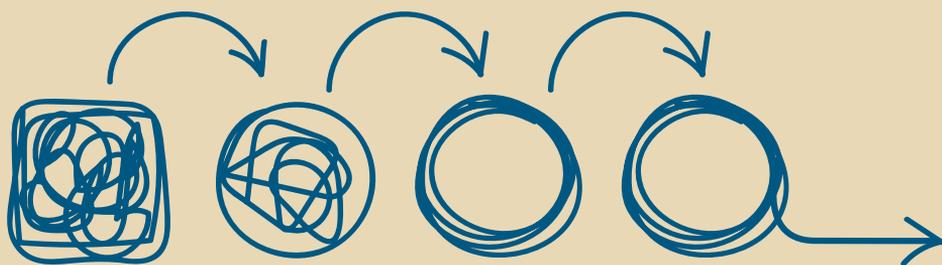
Report 2017-2018





# NATIONAL MECHANISM FOR THE INVESTIGATION OF ARBITRARY INCIDENTS

Report 2017-2018



This Special Report is a product of material processing that arose from the work of the National Mechanism for the Investigation of Arbitrary Incidents, in reference to the security forces and the officers of the detention facilities, of the Greek Ombudsman.

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## Introduction of the Greek Ombudsman

In its modern history, our country has undergone periods of intense political and social disorders. The role of the security forces during these periods has been questioned by significant portions of the population. For many citizens, the security forces often gave the impression that its primary role is not in maintaining internal public security rather that its main goal is protecting and safeguarding the political and social 'status quo'. Likewise, the methods used in ensuring order and safety in detention establishments were subject to strong criticism particularly with respect to the necessity and proportionality of the methods utilised in relation to the objective pursued. This impression, with regard to the operation of both the security forces and the staff of the detention facilities, although objectively different, was not free from criticism even in the post-dictatorial period in Greece. Rather expectedly, there has been a persistent widespread suspicion of the security forces and correctional officers. This suspicion is further intensified by the deep-rooted belief of citizens in the occurrence of cover-ups, the pervasiveness of impunity, and the toleration and even the incitement of arbitrary behaviour by bodies in charge of maintaining order and of protecting public security.

The methods used by and the internal procedures of disciplinary control applicable to security forces and correctional officers has been subject to intense questioning by international organisations for decades. It is well known that Greece's departure from the Council of Europe during the seven-year dictatorship was decided by the regime of colonels in view of the looming condemnation that the country faced for torturing political dissidents and activists advocating for the restoration of democracy. And although during the period of transition to democracy the country returned as a full member of the Council of Europe and ratified the ECHR, convictions on grounds of inadequate investigation of alleged incidents of arbitrary behaviour by officers of the security forces and employees of detention facilities have not ceased.

In 2011, for the first time, the legislator decided to address the phenomenon by setting up a mechanism for investigating arbitrary incidents that is parallel to the internal disciplinary control services. Recognising the existence of incidents of *'unlawful behaviour of the uniformed staff of the security forces towards the citizens, whose investigation is objectively deficient'*, the legislator recorded the main problems of the internal disciplinary proceedings: *"Disciplinary control is often time-consuming, with limited participation and information of the complainant.*



*In many cases, the complainant's reluctance to co-operate with police officers to adequately substantiate the complaint has been recorded. The adverse comments caused by such incidents undermine the prestige of the security forces and affect the morale of the staff. Today, society is showing less and less tolerance to incidents of arbitrary behaviour from state officials. Of course, society accepts the operation of security forces, but requires the simultaneous activation of credible public accountability and control mechanisms”.*

The legislator also expressed the aim of its initiative: to have a new structure to assess complaints and to monitor the investigations carried out on arbitrary behaviour by the officers of the security forces, in order *‘To ensure their rapid and effective investigation and not allow for suspicions of their cover-up in the context of an ill-conceived solidarity between colleagues’.*

Although the 2011 initiative, upon its inception, could be described as an innovative idea on how to deal with arbitrary behaviours, it did not prove to be meaningful, decisive or effective for a number of reasons. First, the Office set up to investigate incidents of arbitrary action in the security forces was subject directly to the Minister for the Protection of Citizens, which did not allow its actual independent operation, both in terms of the official and political leadership of the security forces. Secondly, the Commission investigating the incidents of abuse that would operate in the established Office would be entrusted only with determining the admissibility of the cases denounced. In the event that a case is deemed admissible, the Commission would only be able to refer the case to the competent internal authorities for further investigation. Finally, irrespective of the above-mentioned deficiencies in its design, the Office has never worked. This is because it has never been established. Thus, the first attempt to address the phenomenon of inadequate investigation of the arbitrary behaviour of the security forces remained incomplete, ineffective and meaningless.

The criticism above was adopted by the legislator a few years later, in 2016. The legislator took bold decisions, recognising the adoption of necessary measures to ensure the fair and effective investigation of complaints of arbitrary incidents as *‘primarily a social requirement’*, deemed *‘absolutely imperative in a Rule of Law, so as not to foster any suspicion of cover-up or impunity’* and under persistent pressure from the Council of Europe for advancing substantial reforms in the disciplinary control of the security forces. The Greek Ombudsman, a constitutionally established independent authority, was acknowledged as the appropriate body for the operation of a truly independent mechanism for the investigation of arbitrary incidents. Consequently, the investigative authority of the Greek Ombudsman was extended to include incidents involving the employees of detention

facilities, in addition to the uniformed personnel of the Greek Police, the Fire Brigade and the Hellenic Coast Guards. The Greek Ombudsman was mandated to fully investigate both substantive and procedural terms of disciplinary proceedings; the Authority was also given the ability to initiate investigations. In order to ensure the effectiveness of the action of the Independent Authority as a national mechanism for investigating arbitrary incidents in the security forces and the employees of detention facilities, the legislator ensured the suspension of a disciplinary decision on cases pending before the Greek Ombudsman until the issuance of a report by the Authority, and gave quasi-disciplinary powers to the role of the newly created mechanism, anticipating that a possible deviation of the decision of the disciplinary body from the findings in the report of the Greek Ombudsman will be permitted only upon a specific and comprehensive justification.

Considering the enormous responsibility that it has assumed, the Greek Ombudsman welcomed this special challenge as it is committed to its constitutional mission: strengthening the rule of law, controlling administrative action, consolidating the principles of good administration to all public authority bodies, and the shielding of the fundamental rights of all those living in the country.

In order to meet the specific requirements of the new jurisdiction, the Greek Ombudsman set up a task force consisting of specialised legal experts and approved a special operating regulation for the investigation of arbitrary incidents. It has sought, thereto, since the launch of the Mechanism, the formulation of terms and conditions for the smooth, orderly and effective cooperation with the bodies at issue, achieving, admittedly, a differing degree of response from each one of them.

In the first period of operation, this new, special and particular responsibility of the Greek Ombudsman, as the Mechanism, the Authority was called upon to sufficiently address and remedy a number of issues. It must be noted that proper and adequate staffing of the special team tasked with processing the affairs of the Mechanism has not yet been completed. In addition frequent triggering of ex-officio investigations of incidents impinges on the weakened, compared to internal investigations, research tools to the Mechanism. The inability of the Mechanism to receive affidavit documents, to summon witnesses, to order expert opinions, to access investigative and preliminary investigative material for the needs of the Mechanism's research, are, among other things, deficits in the existing operating framework of the Mechanism that should be remedied in order to strengthen its own effectiveness.

Completing a year and a half, and having already processed a few hundred cases, the Greek Ombudsman publishes its first special report as a National Mechanism for the investigation of Arbitrary Incidents in the security forces and the employ-



ees of the detention facilities. This report includes the most common and important findings of the Authority in its capacity as a Mechanism; the findings from the elaboration of disciplinary cases which has been dealt with; the most important defects, both substantive and procedural, in reference to the monitoring carried out by internal disciplinary bodies; and the first recommendations and proposals for revision of both the practices followed and the institutional framework governing the disciplinary control of the fleets of Greek Police Force, the Fire Brigade, the Hellenic Coast Guard and the employees of the detention facilities.

Strongly committed on the one hand to eliminating of incidents of abuse by the security forces and by the employees of the detention facilities, and to reversing the sense of mistrust of public opinion in reference to their effectiveness, completeness and transparency, and on the other hand, to the safeguarding of fundamental, substantive and procedural rights of those who are confronted with alleged irregular, unlawful behaviour of the employees at issue, the Greek Ombudsman will continue to carry out its mission as the National Mechanism of the Investigation of Arbitrary Incidents, fully aware of the great responsibility it has undertaken by contributing decisively to strengthening good administrative action and the rule of law in the country.

*The Greek Ombudsman*

**Andreas I. Pottakis**

1

# Establishment and Competencies of the National Mechanism for the Investigation of Arbitrary Incidents (EMIDIPA)





# 1. Establishment and Competencies of the National Mechanism for the Investigation of Arbitrary Incidents (EMIDIPA)

Since the beginning of its operation, in the context of its general responsibility for the protection of the rule of law, the Greek Ombudsman has been handling reports on the security forces and officials in the detention facilities and has intervened on key issues, to strengthen the legality of their actions<sup>1</sup>. Indeed, in 2004 the Authority published a special report on “Disciplinary-Administrative Investigation of Complaints against Police Officers”<sup>2</sup>, in which it analysed systematically the usual irregularities of the disciplinary investigation of the Greek Police (ELAS). In this report, an extensive reference was made, inter alia, to the inadequate assessment of the evidence, the misuse of informal research, the lack of impartiality of the investigation in relation to the police involved, the failure to inform the outcome of the investigation, etc. In the same report, it submitted specific proposals concerning the disciplinary investigation on police brutality complaints<sup>3</sup>, with the aim of effectively monitoring any infringement of the legal limits on the exercise of police discretion, as provided by the law.

In September 2013, the Independent Authority with its special report on racist violence<sup>4</sup> highlighted the disparity between official investigations of the Greek Police (ELAS) and the allegations of racist aggression (quadruple in number) in the year 2012, and the phenomenon of impunity, as only one (1) disciplinary case in the same year was finally concluded with the imposition of a penalty of a fine, while the remaining cases were archived. The Ombudsman emphasized that this phenomenon has to be overturned in order to restore *“for the very credibility of the police and the strengthening of the citizens’ trust in police’s impartial judgement and in the constitutional treatment”*.

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1. “Regular permits for prisoners in correctional facilities” <https://www.synigoros.gr/?i=human-rights.el.fulakes.28882>.

2. <https://www.synigoros.gr/resources/docs/astinomikoi.pdf>

3. See also the press release of the Authority for the European Court of justice for police brutality against Greeks Roma <https://www.synigoros.gr/?i=human-rights.el.danews.34031>.

4. “The Phenomenon of Racist Violence in Greece and its Confrontation”, <https://www.synigoros.gr/resources/docs/eidikiekthesiratsistikivia.pdf>.



The absence of effective investigation of these incidents by the Greek authorities was also emphasised in a series of convictions by the European Court of Human Rights<sup>5</sup>. In some of those cases, the ECTHR relied on the Decisions, the relevant findings and the conclusions of the Greek Ombudsman. At the same time, a number of complaints from citizens to the Authority on police brutality were brought before the European Court in Strasbourg<sup>6</sup>.

The strengthening of the rule of law was and is the key requirement in reference to complaints made regarding ill-treatment by the police, and so was raised by the Commissioner for Human Rights and other bodies of the Council of Europe. In order to maintain public confidence in the police, the Commissioner for Human Rights of the Council of Europe in a relevant submission of his opinion<sup>7</sup> proposed the creation of one independent and effective complaints system that would additionally serve as a fundamental means of protecting against ill-treatment and improper behaviour.

In response, the Greek legislator tried periodically to enact solutions, however, these solutions were incomplete in their design and inapplicable in practice: in 2011 it instituted the Office of Treatment of Arbitrary Incidents in the Ministry of Citizen Protection, which, however, was never established<sup>8</sup>. In 2014, a three-member Committee was established at the Office of Arbitrary Incidents<sup>9</sup>, in which it was provided that the Greek Ombudsman would participate as an observer. This particular committee has never worked either. In the end, the Ombudsman was entrusted in 2016 with the special power of acting as a parallel, external mechanism for investigation and monitoring.

Law 4443/16 conferred a specific investigative power for the Ombudsman for specific incidents of blatantly unlawful conduct including: incidents relating to torture or other violations of human dignity as provided for in Article 137a Penal Code, incidents relating to unlawful or wrongful violations of life, health, physical integrity, personal freedom, incidents relating to unlawful use of firearms and racially motivated behaviour. This power consists of;

- 
5. See. Indicative decisions Makaratzis against Greece, 20.12.2007, Zontul against Greece, 17.1.2012.
  6. Zelilov, Bekos-Koutropoulos, Petropoulou-Tsakiri etc.
  7. <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-thomas-hammarberg-concern/16806daa54>
  8. Article 1 L.3938/2011
  9. With the 4249/2014 I Modified the N. 3938/2011.

- (a) independent investigation of complaints;
- (b) the appointment of arbitrary incidents to the security forces for internal investigation alongside with the power of monitoring and recommendation to supplement that investigation, and
- (c) the adoption of a decision, ruling the re-evaluation or the supplement of the disciplinary proceedings, following relevant judgments of the ECTHR.

The National Mechanism for the Investigation of Arbitrary Incidents (EMIDIPA) of the Greek Ombudsman assesses any case that falls within its remit and decides either to investigate it itself or to forward it to the competent disciplinary body. In the first case, the disciplinary body must suspend the adoption of a decision until it has been notified in reference to the conclusions of the Mechanism. In the latter case, the competent disciplinary body must examine the case as a matter of priority and inform the Mechanism of the outcome of the investigation. The Mechanism assesses the outcome of the disciplinary procedure and may request an additional investigation of the case. The disciplinary body is not obliged to implement the recommendations of the Mechanism, but any deviation from them should be specifically justified. The particular process of investigating the cases of the Mechanism, which is distinguished from the general competence of the Authority, is described in the Operating Regulation of the EMIDIPA<sup>10</sup>, which is set out at the end of this report, as Annex I.

The Mechanism deals with cases following a complaint, *ex officio* or upon referral by the competent Minister or Secretary-General. The complaints submitted to the Mechanism must, pursuant to the provision of the law, be named and written and submitted in person or by proxy. It is even possible not to announce the name of the complainant if it is feasible to investigate the case without announcing the name of the complainant. However, if it is impossible to investigate without the announcement of the name of the complainant and the complainant does not consent to it, the complaint is filed in any case. As for anonymous complaints, their filing is provided by the law, but the information contained therein may be evaluated and used in the context of the possibility of *ex officio* intervention.

The law, in fact, provides the Mechanism with the discretion to act *ex officio* with cases following information with specific data on incidents within its competence, especially in cases when such data originate from reports or media broadcasts.

In addition, the Mechanism has the ability to view and to check compliance with

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10. Judgment of Ombudsman F. 10/24727/2017, B' 2065.



convictions of the ECtHR against the country for infringements of provisions of the ECHR, which reveal shortcomings in the disciplinary proceedings or if there is new data that were not evaluated in the disciplinary proceedings or the hearing of the case. The Mechanism shall review these decisions and may decide to re-investigate the case in order to exercise or supplement disciplinary proceedings and to impose appropriate disciplinary action, irrespective of the outcome of the initial hearing of the case.

In the explanatory memorandum of N. 4443/2016, it is clarified that the Mechanism does not replace the judicial and disciplinary monitoring of cases within its competence, but functions in parallel and complementary without depriving monitoring by the natural judge (criminal or disciplinary). In the explanatory memorandum of the constitutive instrument of the Mechanism, it is also noted that, if it is a precondition for independence, both functional and organic, the Mechanism could serve as an additional instrument to ensure the full and effective investigation of the incidents at issue. Notwithstanding the above assumptions, article 19 of Law 4443/2016 amended the statutory law of the Greek Ombudsman and provided that *“when the Ombudsman acts as (...), as well as National Mechanism for the Investigation of Arbitrary Incidents in the security forces and the officers of the detention facilities pursuant to paragraph 1 of article 1 of this Law, deals with cases pending before the courts, judicial or prosecution authorities, until the first hearing in the audience or until the initiation of the criminal proceedings”*<sup>11</sup>. The initiation of the criminal proceedings for the same case, therefore prevents the Mechanism to investigate the case at issue autonomously.

Article 56 of L. 4443/2016 sets out the ability of the Mechanism to have access to the data held by public and general public sectors in relation to cases of its competence and at the same time provides for the access of the Mechanism and its ability to obtain copies of the entire file in reference to a disciplinary case-file of its competence.

In the above described framework of the competences and before the entry into force of Articles 56 and 57 of the law 4443/2016, the Greek Ombudsman sent on 08.06.2017 a letter to the competent Personnel Departments and the other co-competent Services of the bodies under the Ombudsman’s competence in order to find a functional framework of continuous and mutual update allowing for a seamless flow of information to the Mechanism and for the rapid clarification needed by the Mechanism to deal with the investigation of the case at the first

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11. Article 3 par. 4 l. 3094/2003.

stage of investigation. The letter requested that every week all the complaints, administrative examinations and files of disciplinary proceedings for the facts of a possible arbitrariness under article 56 N. 4443/2016 should be forwarded to the Mechanism. In addition, a separate mission of the judgments of the European Court of Human Rights on shortcomings and other irregularities in the disciplinary proceedings was requested, with the relevant disciplinary file, in order for the Mechanism to decide on whether to re-investigate the case.

The head of the ELAS, following the above-mentioned document, issued a relevant order to the competent services, on the basis of which the Mechanism is notified on all the Administrative Inquiry Under Oath (EDE) orders, pursuant to article 26 para. 1 of P.D. 120/2008 and Preliminary Administrative Inquiry (PDE), pursuant to article 28 para. 1 of P.D. 120/2008 which fall within the competence of the Mechanism alongside with the relevant disciplinary files. The response of the services subjected to the Mechanism was not immediate enough. HCG-ELAKT responds gradually until today, handing only a small number of cases. The above-mentioned framework of cooperation determines both the scope and the multitude of the cases which the Mechanism deals with.

The exercise of the competence of the Mechanism is supervised and coordinated by the Greek Ombudsman, assisted by a team of specialists with specialized legal training, in which the head of the Human Rights Circle participates. In December 2018, 6 legal experts participated in the group of the Mechanism.

This first report of the EMIDIPA presents the quantitative and qualitative results of the exercise of the powers of the Mechanism from the entry into force of the provisions of L. 4443/2016, i.e. the beginning of June 2017 up to the end of 2018, both with an analysis of the competences in particular cases and with a statistical representation of the cases. In a separate chapter, the competence of the Mechanism in reference to the judgments of the ECTHR is analysed, while legislative proposals are presented in a subsequent chapter to complement the framework concerning the staff regulation and the disciplinary law to which its personnel are subject. These proposals are either already formulated in the Greek Ombudsman's documentation or are formulated for the first time with this report. In fact, it should be noted that a series of proposals to strengthen the Mechanism to make it more effective and to contribute substantially to improving the conditions under which internal disciplinary control is carried out is included in a relevant document that the Greek Ombudsman submitted to the Minister of Justice, Transparency and Human Rights and the General Secretariat for Transparency and Human Rights. The adoption of these proposals is deemed necessary for the optimum functioning of the Mechanism. The document is set out as such at the end of this report, as Annex II.



# 2

## Statistical data





## 2. Statistical data

Since the commencement of the exercise of the competence of the EMIDIPA in June 2017 until the 31.12.2018 the Mechanism has dealt with three hundred twenty-one (321) cases. Forty-eight (48) of these were related to named complaints, from individuals or associations, while two hundred sixty-two (262) were submitted to the Mechanism by ELAS and five (5) from HCG –ELAKT. Also, the Ministry of Justice, Transparency and Human Rights forwarded to the Mechanism one (1) report, which, however, concerned the acts of a police officer, while in one (1) case the Mechanism initiated its own motion. Four (4) cases –one of which is a group of cases –were forwarded to the Mechanism by the Legal Council of the State and related to the enforcement of condemnatory decisions of the ECTHR.

Of all the cases, twenty-five (25) were deemed to be out of the competence of the Mechanism, either because they concerned an object not covered by the above-mentioned legislative framework (20 cases), or because it was not possible to investigate their content due to lack of data, imprecision or non-cooperation of the complainant (5 cases). Out of the remaining two hundred ninety-six (296) cases, by 31.12.2018 two hundred sixty-nine (269) cases remained under investigation at various stages of processing (awaiting data from the service concerned, awaiting response to a request for completion of the findings).

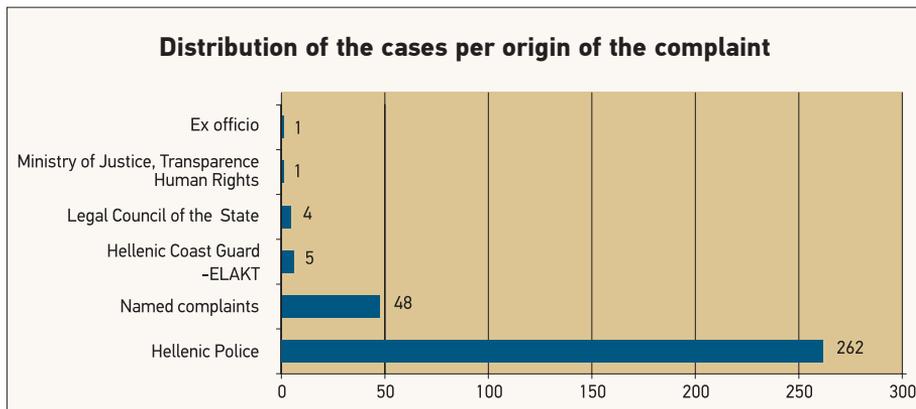
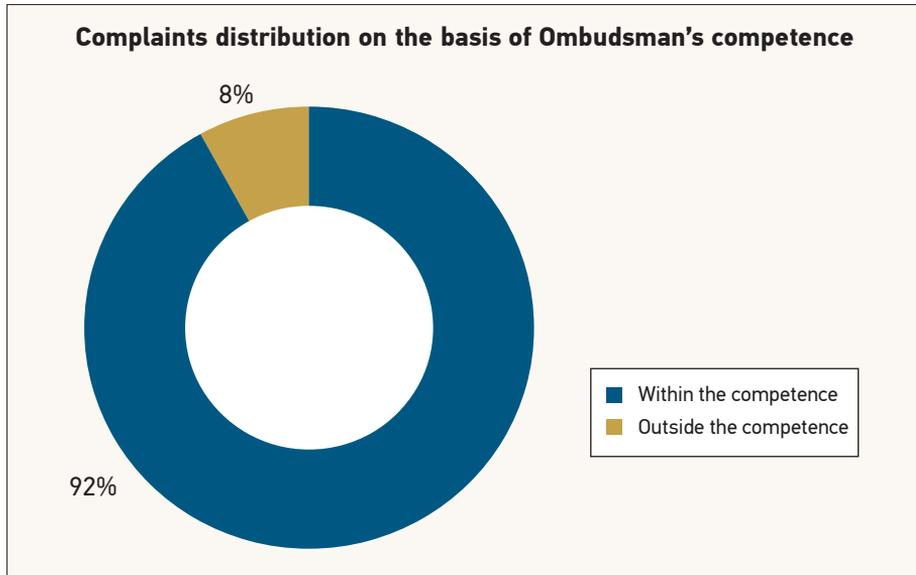
The overwhelming majority of all the cases within the competence of the Mechanism concern ELAS, which is quite conceivable, given the volume of cases forwarded by ELAS itself. In particular, two hundred ninety (290) cases deal with acts and omissions of organs of ELAS, and six (6) cases deal with bodies of HCG-ELAKT.

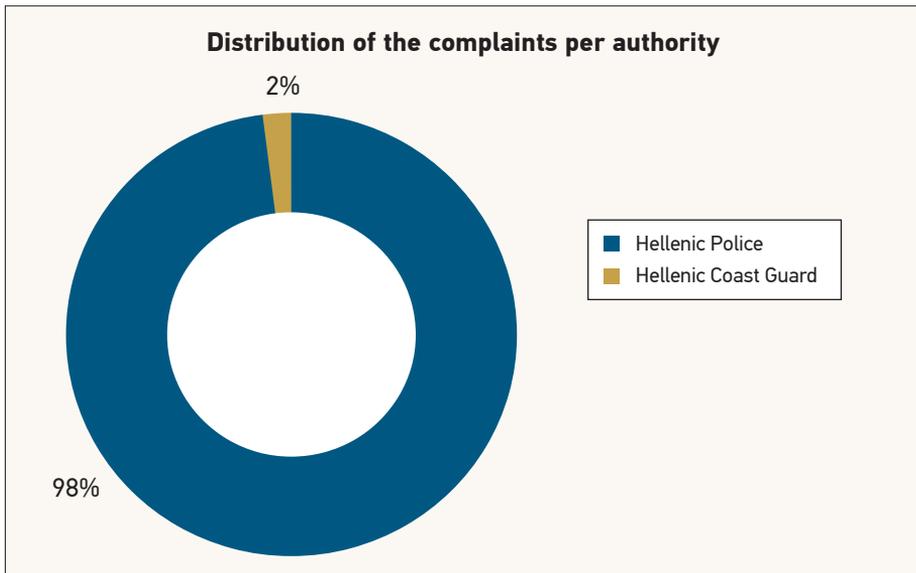
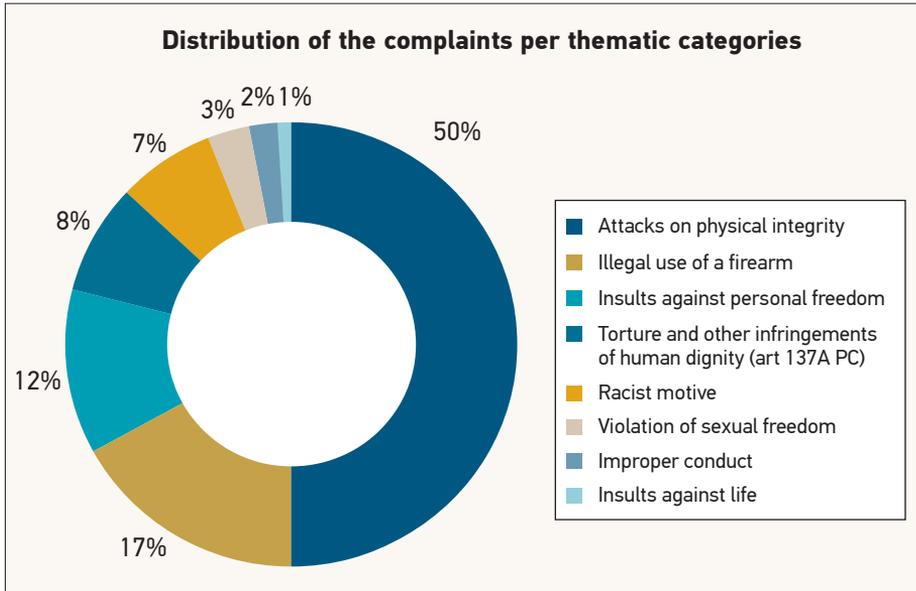
Regarding the cases examined by the Mechanism, twenty-five (25) concerned torture and other infringements of human dignity, within the meaning of article 137A PC, forty nine (49) in illegal use of a firearm, ten (10) in violation of sexual freedom, three (3) in insults against life, thirty-seven (37) in insults against personal freedom, one hundred and forty-five (145) in attacks on physical integrity, seven (7) in improper conduct, while in twenty-one (21) cases the existence of racist motivation was investigated.

Out of all the cases examined by the Mechanism, in eighteen (18) cases, the case was archived in the account that there is no reason for further investigation. The audited service was informed on observations and proposals on the proceedings that were followed, and problems or other issues noted during the examination



of each case. Furthermore, the Mechanism requested the completion of disciplinary inspection in twenty-six (26) cases. ELAS submitted a completed conclusion according to the proposals of the Mechanism in eleven (11) of them, while a response on the remainder is pending.







# 3

## Findings and Observations on investigated cases





## 3. Findings and Observations on investigated cases

### 3.1. Referral for completion

The Ombudsman, in the context of Article 56 of Law 4443/2016, made observations on reports of administrative investigations, either in the form of a Special Administrative Inquiry (EDE) or a Preliminary Administrative Inquiry (PDE), which were communicated to him, by referring them for completion with specific comments. The main reason for referral was the inadequate and / or contradictory justification of the findings due to either the non – use of evidence or the erroneous evaluation and assessment of available evidence. In several cases, investigations have been assigned to persons who do not offer the necessary guarantees of impartiality due to their proximity to the police officers under investigation. Moreover, in some cases, the lack of a forensic report or testimony by the forensic surgeons who had examined the injured citizens, was pointed out. Finally, particular attention was paid to cases where, in spite of the existence of sufficient evidence, the possibility of racist motivations for the alleged misconduct of police officers was not investigated.

Indicative cases of referral that took place within the time period covered by this report are listed below by category and with a summary.

#### ■ *Non – use of evidence*

- › In a case of firearms' use by police officers during an operation to arrest a robbery suspect, the Mechanism pointed out the need to make use of all evidence available in order to discover the truth, noting that:
  - a) out of all the participants in the operation, only those who made use of firearms and the team leader were summoned to testify, although the team consisted of several members,
  - b) the findings of the report do not indicate whether an attempt had been made to seek the driver and any other passengers of a vehicle that happened to be in front and which blocked the passageway for the vehicle of the pursued, nor did it indicate whether there were reasons why the attempt to find those persons was unsuccessful.



- › Similarly, in a case of a citizen complaint for police mistreatment during traffic control, the Mechanism referred the disciplinary case file for completion, noting that the PDE investigator ruled in favor of the absence of disciplinary offenses, unconditionally accepting the police officers' version of the incident and their explanations against the complainant's allegations. Given that the reported incident allegedly took place within the Police Department concerned, the Mechanism underlined the failure to investigate the presence of citizens or other police officers within the premises of that Police Department during the period in question, who could have been witnesses of the event.
- › Likewise, in a case of a foreign citizen complaint for police officer misconduct against him with a possibly underlying racist motive, which allegedly took place during an insurance check in a store of sanitary interest made by a relevant authority with the assistance of police officers, the Mechanism called for the examination of all the staff of the above group, noting that the selective use of the available evidence suggests manipulation of the investigation.
- › Furthermore, during an ordered PDE following a NGO report on the abuse of a Syrian citizen in an island of the North-East Aegean, the findings concluded that the alleged abuse was not verified due to the failure to collect evidence as to the name of the victim and the time of the incident. However, the Mechanism noted that, while the incident was deduced by the PDE report itself to have occurred at the Reception and Identification Center (KYT), only the head of the police within the KYT area was summoned to testify and not the KYT Director who is responsible for the Center by appointment from the Ministry of Immigration Policy. The Mechanism, therefore, proposed the completion of the PDE with a testimony from the competent KYT Director and the Hellenic Police complied with this report.
- › In another case involving the abuse of an arrested person during his transfer to a psychiatric establishment, it was ascertained that during the investigation of the incident no testimonies were received from the medical staff of the institution that were present.
- › In a case involving the use of tear gas, the Ombudsman pointed out that although the PDE report for this event deduced that "the use of tear gas was absolutely imperative in order to counter the severity of the attacks that the police officers received...", the evidence in the file revealed the existence of an opposite testimony from a photojournalist witnessing the use of straight shot guns which he claimed he was able to distinguish by experience that they were tear gas launching weapons. The Ombudsman noted that it had previously sent a number of documents to the Hellenic Police concerning the use

of tear gas, on which he advocated that it should only be used if it is necessary to prevent criminal offenses and in compliance with the relevant standards, meaning that it must not exceed the necessary measure in terms of type and quantity and that it corresponds to a reasonable assessment of the legally protected rights of public order and public health. Despite the reported severity of the attacks, the Ombudsman argued that in this case that the launching of tear gas with straight shot guns could not be considered to be in line with the proportionality principle, since the acceptance of the risk of direct damage to one's health cannot be considered as simple prevention. Referring to legislation on the use of firearms by police officers<sup>12</sup>, which explicitly lays down tear gas ("*permissible chemicals*") as a "*milder measure than shooting*", and taking into consideration that, in accordance with the legislation on firearms<sup>13</sup>, launchers of harmful chemicals or other substances that may cause injuries or health damage fall within the definition of a weapon, the Ombudsman called for the investigation to be completed in order to investigate the proportionality of the use of tear gas straight launch drops in this incident.

■ ***Incorrect evaluation / assessment of evidence***

- › In a case involving an alien's complaint about inappropriate police behaviour against him with a possible racist motive, the Mechanism observed irregularities in the investigative process, which gave rise to suspicions of biased evaluation of the evidence. Under Disciplinary Law for Police Staff<sup>14</sup>, the PDE investigator examines the witnesses verbally, but may only do so under oath if he/she deems it necessary for witnesses whose testimony is essential in order to solve a case. In this case, the choice of the investigator to examine under oath only the witness, who contradicted the complainant's allegations and not the other witnesses, suggests that only her testimony was deemed essential for seeking the truth, which does not appear to be justified by the facts of this case. In the same case, the Mechanism pointed out that the investigator carried out an unfounded and arbitrary interpretation of the testimony of one of the witnesses, unjustifiably concluding that the latter could be confused about the identity of the parties involved in the alleged incident. As the Ombudsman observed, it is clear from the report findings that the author has

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12. Art. 3 par. 2 of Law 3169/2003.

13. Art. 1 par. 1 of Law 2169/1993.

14. Art. 24 par. 3 of Presidential Decree 120/2008 "Police Staff Disciplinary Law".



failed to assess this testimony which made it clear that the witness personally knew the citizen whom he described as a victim and therefore would not accept the alleged police officer as the victim.

- › Likewise, in a case concerning inflicted injuries during a suspect's arrest, it was pointed out that the investigator should have been more precise and specific in the recording of the evidence collected and should have made use of the oral testimonies<sup>15</sup> gathered, in order to assess the adequacy of the investigation findings' justification.
- › Also, in a case of use of force on a detainee during transfer, the Ombudsman pointed out that the involved police officers' testimonies were identical, and the investigator did not take into consideration the use of milder measures in order to resist the detainee's aggressive behaviour.
- › In a case concerning a complaint about racist motivation, where the report's conclusion was exonerating, and where the complainant, who was represented by a non-governmental organization, had refused to testify on the grounds that he did not trust the investigative process as being without impartiality, the Mechanism pointed out that the investigator did not exhaust all possibilities for direct communication with the complainant, and ultimately called the Hellenic Police to refer the case back to the relevant Police Department and ordered the investigation's completion. At the same time, it urged the complainant to testify, indicating the guarantees of impartial investigation provided by the new legislative framework. Indeed, the Police Department was ordered to carry out a supplementary PDE, the complainant testified, and the Police Headquarters sent a new report, which is being studied.
- › In a case involving the use firearms by police officers during an operation to arrest a suspect for robbery, the Mechanism referred the disciplinary case file to be completed, noting that the PDE investigator had failed to take into account and evaluate the findings of the expert's report on the persecuted citizen's vehicle, as well as photographs of the vehicle, which clearly depict the spots that were affected by the police officers' projectiles. The Mechanism has pointed out that these omissions make the administrative inquiry inadequate, since these pieces of evidence are of critical importance for the assessment of the risk of the shots and of the proportionality between the risk and the intended purpose. With regard to the conclusion on the safety of the shots, which was based only on the fact that there were no physical injuries, the

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15. According to the provisions of Art. 24 par. 3 of Presidential Decree 120/2008.

Mechanism noted that the risk of the shots should not be evaluated by the outcome, i.e. the occurrence or not of specific damage to legal rights, but the risk of damage that the use of firearms entailed under the circumstances. Lastly, it pointed out the failure to investigate the exhaustion of all the milder and equally appropriate means and the absence of a warning on the use of firearms, noting that during the examination of the arrested person, the latter was not asked whether the police officers had declared their status and whether they had issued a clear and comprehensible warning about the imminent use of firearms or whether they threatened him with firearms before proceeding to use them.

- › In a case involving a complaint about the abuse of a foreign detainee after his arrest by the police, the PDE findings concluded that the event was not verified because “according on the medical reports, he never voiced complaints of abuse by police officers to the doctors who examined him, nor was he examined for injuries caused by abuse”. The Mechanism observed that the only way to ascertain whether the cause of the problem was reported to the doctor who examined the detainee, would be to get a testimony from the doctor. The Mechanism points out that making precise references to all the findings is absolutely necessary for the PDE, however, their evaluation and the existence of a causal relationship with the reported case is another issue.
- › The Mechanism also noted that the connection pointed out in the PDE report between the patient’s poor mental health and his complaints does not seem to be confirmed by the psychiatric report that was drawn 2 days before his complaint. Following the referral of the PDE report, the investigation was supplemented with detailed testimonies from doctors and psychiatrists. In a case involving the abuse of an arrested person during his transfer to a psychiatric establishment, it was found that the evidence taken into account during the investigation did not include a forensic report or a testimony from the doctor who had examined the detainee after the incident.
- › In another case involving infliction of physical injuries during the arrest of a suspect, it was found that the forensic report drawn up was not taken into account. In the latter two cases, the competent authorities of the Hellenic Police are expected to respond.



- ***Impartiality guarantees of the Administrative Inquiry investigators***
  - In a case concerning a citizen's complaint about his mistreatment by a police officer, the Mechanism pointed out that there was undue proximity between the officer who conducted the PDE and the person under investigation, given that both served in the same Police Department.
  - Similarly, in a case involving a citizen's complaint of police misconduct against him during a check, the Mechanism expressed its general reservation as to whether there was enough distance between the investigator and the officers under investigation, given that both parties served in the same subdivision. In both cases, the Mechanism referred to the content of the Order No. 6004/12/63 of 08.10.2015 of the Hellenic Police Chief, according to which, the investigation of complaints of police abuse or misconduct against citizens, whenever deemed necessary through a PDE, must be entrusted to police officers with whom the officers under investigation have no administrative dependencies, which means, to officers of another service.
- ***Investigation of racist motives***
  - With regard to the existence or the investigation of racist motivation in cases of physical violence, in a specific case, the Mechanism referred the disciplinary investigation to be completed in order to investigate the existence of racist motivation since the testimony under oath of an arrested minor during the criminal procedure, which was included in the disciplinary investigation file, showed that the police officer directed phrases of such content at him. In reference to the relevant ECTHR case law for a thorough investigation of complaints, to the fact that the alleged victim referred to such incident, to the increased protection of minors against risks which was sought by the legislator<sup>16</sup>, and to the relative order of the Chief of the Hellenic Police, the Mechanism referred the disciplinary investigation for completion in order to investigate whether there was racist motivation.
  - In addition to the above, the Mechanism, with reference to the relevant ECTHR case law, referred the disciplinary investigation to be completed in other cases where the findings of the relevant reports indicated a lack of racist motivation without providing justification for that conclusion in a previous section.

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16. See Law 4443/2016 and Art. 97 of Presidential Decree 141/1991.

In one of these reports, it was pointed out that the general statement that no racist motivation was found is not enough to justify this conclusion, but specific references to the testimonies have to be made. Also, in cases where speech that could be attributable to racist motives and in particular a case involving racist opinions or comments on social media posts, the Mechanism referred the relevant disciplinary investigation for completion on grounds of inadequate justification, noting that the social media account owner is not responsible for other users' comments.

### ■ *Incidents during police checks*

Data on daily police practices and civilian control cases are listed below along with the Mechanism's related actions and remarks:

- › During an inspection of vehicles suspected of maneuvering in an area in Western Attica by a crew of the DIAS group, a quarrel occurred between one of the police officers carrying out the check and a driver, leading to injuries for both of them. Charges were raised against the driver for the violation of Articles 308 (physical harm), 361 (verbal abuse) and 333 (threat) of the Penal Code, while the police officer was sued by the driver for the violation of Articles 308 (physical harm) and 361 (verbal abuse) of the Penal Code. Ultimately, the driver was prosecuted by the competent prosecutor for the violation of Articles 167 par. 1 (resistance against authorities), 308 par. 1A, 315 par. 2 and 361 par. 1 of the Penal Code, while a preliminary investigation is pending against the police officer. The Mechanism made remarks on the PDE through a report and referred it back for completion, since only the contradictions in the citizens' testimonies were taken into account, but not those in the police officers' testimonies. In addition, the investigation focused solely on how the police officer was injured and not how the arrested person was injured, in spite of the relevant medical certificate and the photographs. It was also not investigated whether the injury was a result of police behaviour<sup>17</sup>. After the relevant report of the Mechanism, the PDE was supplemented and, in order to comply with the report's remarks, the investigator examined additional persons, further investigating and justifying the arrested person's injury, concluding that it was caused during the interception attempt made by other police officers to stop the quarrel.
- › In another case of the same sort, DIAS group police officers carried out an inspection in the center of Athens on two suspects and filed a case file against

17. The Mechanism's findings included relevant references to similar ECHR case law.



them for breach of Articles 167 (resistance against authorities) and 361 (verbal abuse) of the Penal Code. The suspects, during their detention, filed a lawsuit against the police officers who carried out the inspection for violations of Articles 308 (physical injury) and 259 (breach of duty) of the Penal Code. The Mechanism referred the relevant PDE to be completed with reference to relevant ECTHR rulings, on the grounds that the report assessed and found contradictions only in the detainees' testimonies, but not in the police officers' testimonies, and only made a brief remark on it and did not assess or justify the findings of the detainees' forensic reports, which indicated that physical injuries were inflicted by a "blunt object" (pointing out that the medical examiners who could have shed light on the investigation had not been summoned to testify under oath), and only noted that there was no evidence of racist motivations, without providing justification. In compliance with the relevant remarks of the Mechanism, the supplementation of the PDE was ordered and the remarks made by the Mechanism were investigated and justified and new persons were examined under oath, according to the observations made. Indeed, following the Mechanism's remarks, the completed PDE report was sent to the competent Prosecutor's Office.

### 3.2. Expression of General Remarks – Observations

The Mechanism monitored and made remarks on reports of administrative inquiries (either in the form of EDE or PDE), but did not refer them back for completion, as they were deemed complete, making use of all the available evidence and having justified the proposed conclusions. However, in such cases, it was considered appropriate to express general remarks in order to further improve the relevant process in future similar cases. There are at least ten (10) cases involving administrative inquiries that were forwarded by the Hellenic Police Headquarters and the general remarks of the Mechanism are the following:

- Avoiding judgments of intentions or motives that are not proven and are based on subjective assessment by the investigator and evaluating the police officer's behaviour in accordance with the provisions of Presidential Decree 254/2004 in order to judge its correctness.
- Avoiding the following methods for countering complaints' and testimonies' credibility:
  - i) Invocation of contradictions and generalities, which are not specified, in order to undermine the complainants' credibility,
  - ii) The use of the complainants' criminal records, which do not have causal

connections with the investigated act. It is not just unnecessary, but it can also damage the necessary impartiality to investigate an incident of arbitrariness.

- In cases involving the use of firearms by police officers:
  - i) A detailed record of the facts is needed in order to assess the compliance with the provisions of the law on the use of firearms,
  - ii) In the disciplinary investigation report, the compliance with the provisions of Article 3 of Law 3169/2003 and the principles established in paragraph 2 should be investigated and evaluated in detail and independently and more importantly whether the principles of necessity and proportionality were upheld,
  - iii) The inspection of audiovisual content concerning the investigated incident should be done by the investigator.
- As for the examination of witnesses within the disciplinary investigation procedure:
  - i) Under oath testimony of non – police witnesses should be collected and assessed in order to enhance the objectivity of the disciplinary investigation,
  - ii) In cases where investigation is conducted by another authority<sup>18</sup> under the order of the investigator, the questions that he/she wishes to submit to the witness should be included in the ordered investigation. The witness examination report should be included in the disciplinary investigation file along with the relevant order.
- Copies of all the pre-interrogation reports of the relevant criminal case file should be included in the disciplinary investigation report under Article 9 of Law 2713/1999 and not only copies of the report of the criminal court proceedings.
- Regarding the use of the envisaged suspension of the disciplinary procedure due to parallel criminal proceedings, it has been pointed out that the suspension is at the discretion of the competent authority, but must be exercised subject to a judgment on necessity in order to not eliminate the autonomy of the two procedures, whereas in the case of criminal investigation, the option of suspending the disciplinary procedure provided for in Article 48 par. 3 of Presidential Decree 120/2008 shall be elected only if prosecution occurs.

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18. Under the provision of Article 33 par. 2 of Presidential Decree 120/2008.



- Necessary distance between the investigator and the persons under investigation: The Mechanism voiced doubts in three (3) cases as to whether there was appropriate distance between the investigating police officer and the police officers under investigation, since in two of those cases the investigator and the investigated person served in the same subdivision, while the third one involved a detainee's abuse inside a police station where both the investigator and the investigated person served.
- Specifically, for cases of abuse, the Ombudsman reiterates its position that the provision for EDEs should be added to the PDEs and to all internal administrative inquiries for serious disciplinary offenses, so that the investigator comes from another department. Assigning the investigation for all internal investigations to an officer of another department will ensure the objectivity of the investigation and the impartiality of the investigating authority (in addition to the increased hierarchical status). Indeed, in the event of a referral, the Mechanism reiterated this general position on the basis of relevant organizational provisions and practices in specific services where there is a competent department for conducting administrative inquiries<sup>19</sup>.
- In cases of abuse of detainees or detained persons, it was pointed out through reference to ECTHR case law<sup>20</sup> that when there is medical indication of abuse, the burden of proof lies with the police.
- In cases involving irregular immigrants or refugees: it has been stressed that providing health care is necessary for all detainees. In addition, the Mechanism pointed out that FRONTEX, through its liaison office, must be informed that there are testimonies given by rescued individuals concerning the removal and the disposal of personal items into the sea (so that FRONTEX can take the initiative and give instructions to all the other vessels that patrols and safeguards the Greek seas) even when there is no disciplinary liability for the Greek Coast Guard officers.
- The special obligation of the State to protect minors was highlighted.

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19. See Art. 29 par. 5 of Presidential Decree 7/2017, which defines the responsibilities of the Administrative Support Department of the Attica Direct Action Directorate, and Art. 10 par. 1a of Presidential Decree 7/2017 for the Human Resources Department of the Administrative Support Sub – Directorate of the Police Directorate of Attica.

20. *Zelilof v. Greece* case dated 24.05.2007, § 44, following evaluation of the complaint, the medical records, the severity of the physical harm etc., § 47, 51.

# 4

## Autonomous Investigations by the Mechanism





## 4. Autonomous Investigations by the Mechanism

### 4.1. Episodes in Moria Lesvos

The Greek Police Headquarters notified to the Mechanism an order for Administrative Inquiry Under Oath (EDE) after complaints about bodily injuries with a potential racist motive, allegedly taking place in the 18.7.2017 at the Moria detention centre and in police detention centres in Mytilene, during the suppression of episodes. The Mechanism decided to conduct a direct independent investigation in parallel with the EDE. The Mechanism stated that the order to carry out the EDE is unreasonably limited, as it is confined to the events of the detention centre and does not extend to the general operations of those detention centres. As part of the direct investigation, the Greek Ombudsman's task force visited the detention centre and the Police Directorate of Lesvos, was briefed by the management of the Centre and received copies of the content of the EDE file as formulated so far, while it contacted a non-government organisation to obtain copies of medical attestations as these have not yet been included in the EDE file. The investigation is ongoing.

### 4.2. Abuse of aliens at the Tavros pre-departure centre

The Mechanism has decided to conduct an independent investigation into a case that was put into consideration by the Greek Police Headquarters on alleged abuse with a potential racist motive against Algerian detainees at the Tavros Detention Centre on 31.05.2017 to suppress their protest. To this end, it had requested, in the initial phase of the investigation, the transmission as soon as possible of any staff reference or other document for the 31.05.2017 incident, as well as copies of the medical advice for the injured persons, in accordance with the law'.<sup>21</sup> The first relevant information was provided two months later, and the Greek Ombudsman noted that the delay in granting such information is an objec-

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21. *"The Ombudsman may ask for evidence from any Public Service or Service of wider Public sector that are compelled to notify him or to transmit copies...The obligation of observation of medical secrecy does not constitute reason of refusal of issuing of documents"*, No 56 paragraphs 7 laws 4443/2016.



tive reason for a two (2) month extension of the initial statutory period of three (3) months given for an independent investigation to take place by the Mechanism. In the decision to extend that deadline, the Mechanism pointed out that in the future a way should be found, in cooperation with the competent authorities, to receive the information needed for its research without delay so as not to prolong the outstanding clarification of the facts reported as arbitrary incidents. Following the conclusion of the Mechanism on the disciplinary inquiry carried out, the completion of the investigation was ordered. But, unfortunately, until now the report concerning the supplementary inquiry is still expected by Mechanism for it to establish compliance with the remarks and observations of the Mechanism and to consider the investigation to be complete.

### **4.3. Conditions of detention in the Attica Police Headquarters (GADA)**

A person arrested for criminal proceedings filed a petition, denouncing that the conditions of his detention in the Attica Police Headquarters (GADA) exacerbated his already burdened state of health, for which he was allegedly to have informed the police in the first place. The Mechanism forwarded the report to the Greek Police Headquarters, which conducted a PDE and sent its findings. The Mechanism found the PDE finding to be inadequate as the legal valuation of essential elements of the complaint was skipped, thus, Mechanism itself carried out an autonomous supplementary investigation which is ongoing.

# 5

## Implementation and Enforcement of judgments of the ECTHR





## 5. Implementation and Enforcement of judgments of the ECTHR

In cases where the ECTHR has issued judgements concerning Greece, which reveal shortcomings in the disciplinary proceedings or new elements not evaluated in the disciplinary procedure or in the court proceedings, the Mechanism is responsible for monitoring these cases. Thus, the Mechanism serves as the independent control mechanism for the enforcement of these ECTHR judgements. In exercising this specific competence, the Mechanism shall review disciplinary proceedings in total and decide to re-investigate them, in order to exercise or supplement disciplinary action and to enforce appropriate disciplinary penalty, irrespective of the initial court proceedings.

It is noted that this competence does not correspond to the general responsibilities of the National Monitoring Mechanism for the Implementation of the Judgments of the ECTHR, which constitutes an advisory body belonging to the General Secretariat for Human Rights of the Ministry of Justice<sup>22</sup>.

The Mechanism deals with the cases after the relevant judgment of the ECTHR and the disciplinary file are sent to it by the Personnel Departments of the competent departments of the security forces and the employees of the detention facilities<sup>23</sup>. In its letter dated in 8.06.2017 to the competent authorities, which communicated the 09.06.2017 entry into force of the provisions of ar. 56 and 57, L. 4443/2016, and therefore the entry into operation of the Mechanism, the Greek Ombudsman, requested the separate transmission of cases and judgments of the ECTHR.

The first relevant judgments of the ECTHR sent to the Mechanism were judgments against the country issued before the entry into force of N. 4443/2016, and thus before the operation of the Mechanism. These decisions were sent to the Mechanism by the Legal Council of the State (NSK) (and not the Personnel Directorates of the competent services of the security forces and the Employees of the Detention Facilities, as required by N. 4443/2016), in order to examine the possibility of any resumption of disciplinary proceedings against the perpetrators

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22. Art. 62-66 l. 4443/2016.

23. See Article 56 l. 4443/2016.



of incidents which have been the subject of the conviction of our country in these particular cases<sup>24</sup>.

The cases dealt with by the Mechanism, during the period covered by this report, are presented below.

### **5.1. Decision *Zontul versus Greece* (17.01.2012)**

Following the dispatch of the specific conviction of the ECTHR by SLC in 2017, the Mechanism exercised its responsibility to review the case and ask for new or supplementary disciplinary proceedings to be conducted to ensure that appropriate disciplinary action is imposed irrespective of the result of the initial hearing of the case. In the judgment in *Zontul versus Greece* of the ECTHR of 17.01.2012, the Court expressed certain doubts as to the existence of a thorough and effective disciplinary investigation against port officers. The investigation was only conducted for minor offences which then resulted in minor disciplinary penalties for the offences that took place in 2001, to the detriment of a migrant from Turkey who denounced his rape with a baton.

In the relevant report of the EDE 2001 the rape complaint of the victim was described as a “slap” and as an “exercise of psychological violence”. The Mechanism decided to re-investigate the case and to assert its responsibility for independent investigation, it asked the Head of the Coast Guard to order a new disciplinary investigation into the case, taking into account the findings of the ECTHR, noting that the disciplinary misconduct that should be checked is described in paragraph 86 of the ECTHR as rape, in accordance with the facts definitively ascertained by Court-martial of Chania (decision 62/2004) and the Revisiartic Court-martial (decision 161/2006). The Greek court described the act as a serious insult to sexual and human dignity and the ECTHR as torture, both of which fall under the heavier offences of article 137 A PC and the Greek Ombudsman noted the following:

- (a) The interpretation of article 3 of the ECHR by the ECTHR in the ad hoc case of *Zontul* obliges that the judgment of each competent body is in line with the ECTHR’s interpretation of article 3, thus the inclusion in article 137A PC must be made in the light of the interpretation of the ECHR by the ECTHR in the specific case.
- (b) Irrespective of the legal characterisation of the occurrence as a torture or oth-

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24. Number 111568/574.438/27-7-2017 and 188886/354707 documents of State Legal Council

er serious violation of human dignity, the disciplinary offence is different from the act already investigated and is not hindered (*nebisinidem*) by a new disciplinary investigation of the case.

Following the letter of the Mechanism, the Coast guard ordered an EDE to be re-conducted for the case. This development was a first step in compliance with the disciplinary procedures in the judgment *Zontul versus Greece* of the ECTHR.

Following the new disciplinary investigation ordered by the Head of the Coast guard in September 2017, the Mechanism received in May 2018 the conclusion and the relevant dossier of the new administrative investigation by the competent bodies of the Coast guard, in accordance with N. 4443/16, to consider its completeness. The Mechanism, in principle, pointed out that the order to repeat the disciplinary procedure by the Head of the Coast guard, following its letter, is a positive step given the Coast Guard's solid view that "*disciplinary action for the second time for the same offence is not permitted*", as expressed on its 04.06.2007 response to the letter from the Greek Ombudsman following a report by Mr. Zontul. The Mechanism also referred to the importance of the rule of law in general for the proper investigation of a torture case by the same competent public service.<sup>25</sup>

On the contrary, in the 13.04.2018 finding of the new EDE, there was a re-investigation and acceptance of what the Mechanism referred to in its 11.08.2017 letter, i.e. that the disciplinary offence that should be ascertained is different from that in the initial investigation. Following an overview of both the letter of the Mechanism and the decision of the ECTHR, as well as of the criminal pre-trial and the records and decisions of the Hellenic Justice, the conductor of the EDE conducted a re-investigation and re-collection of evidence, and also called witnesses to testify. His main conclusion, however, was that while it seems in principle possible to initiate a statutory disciplinary prosecution for heavier disciplinary offences of the port officers concerned, these have been statute-barred. The crucial element for the disciplinary judge of the Coast Guard is that the general rule of the five-year period statute-barred, plus two years of suspension during the court proceedings is applicable<sup>26</sup>, except in cases where the statute-barred time of disciplinary misconduct follows the statute-barred time of the crime.

For the Mechanism, the main problem that arises in the *Zontul Case* concerning L. 4443/2016 goes back to the broader issue of the demarcation of international

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25. Supreme Court 1146.2/03/2007.

26. Art. 38 par. 13 l. 4504/2017.



jurisdiction in relation to our domestic law: the statute-barred period shall not be suspended while the individual appeal is before the ECtHR which is not a quasi-sectarian court. It is therefore necessary, in the absence of a relevant legal provision, for the legislator to assess whether an increased power will be given to the judge of the ECtHR through obliging the disciplinary judge to rule in line with the findings of the ECtHR in relation to its determination whether article 3 of the ECHR was breached in order to fully protect individuals against conduct constituting torture, inhuman or degrading treatment.

The Mechanism noted that the recent Law 4443/2016 predicts the suspension but not the retroactive abolition of the statute-barred period. Any clause on the retroactive abolition of the statute-barred period, which constitutes institutional legislation in substantive criminal law, would, moreover, raise questions of constitutionality as regards the elimination of offences. The conclusion, therefore, of the new EDE as regards the statute-barred period for disciplinary offences was deemed justified. However, in view of the long pending compliance with this judgment of the ECtHR in the findings of the disciplinary proceedings of 2001 and the subsequent statute-barred period, the Mechanism proposed to the Coast Guard, as a measure of compliance, a written expression of apology from the head of the administration of the competent department, in order to provide the victim with a moral satisfaction and as a practical commitment on behalf of the administration, that no similar irregularities in the disciplinary proceedings will occur in the future.

Furthermore, the Mechanism, with regard to other general compliance measures, which are covered by the government's legislative initiative, pointed out that, on the basis of the Zontul's case, it could be proposed that the word "deliberate" ("deliberate challenge") be eliminated from the definition of torture in para. 2 of article 137A PC, as well as to consider the possibility that serious insults of human dignity, physical integrity etc. as provided in paragraph 3 of the same article become felonies, so that short statute-barred period not to occur in case of serious infringements of article. 3 of the ECHR, for which the ECtHR seized.

Upon a newer 10.08.2018 order from the Coast Guard, the administrative inquiry was supplemented but only in relation to the structure of the report. In response, the Mechanism issued a new document which reiterated the proposals already made on the initial findings of the new EDE.

## 5.2. Decisions *Makaratzis versus Greece (2001, 2004)*, *Celniku versus Greece (2007)*, *Karagiannopoulos versus Greece (2007)*, *Bekos-Koutropoulos versus Greece (2005)*, *Petropoulou-Tsakiris versus Greece (2007)*, *Zelilof versus Greece (2007)* and *Galotskin versus Greece (2010)*

The Mechanism examined the above cases which were sent by the NSK and has remained unexecuted for a long period of time. These cases are concerned with irregularities of the disciplinary proceedings, for which the ECTHR ruled, that they constitute infringements of article 3 of the ECHR, in regard to effective investigation of complaints of abuse in the security forces. Since the law does not distinguish as to the time of the adoption of the transmitted decisions, the competence of the Mechanism is accepted as being capable of being triggered by the transmission of decisions earlier than the entry into force of articles 56-58 of L. 4443/2016 (as provided in article 78 of the same law), i.e. judgments adopted before 09.06.2017 and cases that remain unexecuted in respect of the disciplinary part. However, L. 4443/2016 does not contain a retroactivity clause for cases already statute-barred before they reach the Mechanism.

With regard to the above judgments of the ECTHR, which refer to very old cases of abuse, from which the commencement of the statute-barred period of the respective criminal offences is calculated, the characterization of the relevant offence as a felony or, on the contrary, as a misdemeanor, with a statute-barred period of principally 15 or 5 years respectively is crucial in order to prevent the decision of re-disciplinary investigation from being ineffective. It is apparent from the body of the judgments of the ECTHR that most disciplinary cases are not within the limit of the statute-barred period, rather they have already long exceeded this limit. Specifically:

- ***Makaratzis*** decision concerns an incident of bodily injury and use of a firearm that had taken place on 13.09.1995. In this decision, liability is attributed for an act of violence (§ 72), a defective police operation (§ 72), a faulty disciplinary investigation (§ 78) and a faulty judicial investigation (§ 78), and there seems to be no question of racist motivation.
- ***Karagiannopoulos'*** decision concerns an incident of bodily injury and use of a firearm that had taken place on 26.01.1998. In this decision, liability is attributed for an act of violence (§ 62), a defective police operation (§ 62) and a faulty disciplinary investigation (§ 70), while explicitly the allegation of racist motivation is rejected (§ 79).



- **Celniku** decision concerns an incident of death and use of a firearm that had taken place on 21.11.2001. The decision acknowledges that the state is liable for the defective police operation (§ 59) and a faulty disciplinary investigation (§ 70), while the allegations of violence are expressly rejected (§ 54: *“The detonation is not due to the police’s deliberate action but to the sudden reaction of the victim... the Court considers that the party State cannot be held responsible for the use of lethal force”*) and racist motivation was also rejected (§ 81).
- In the **Bekos-Koutropoulos** decision, the Court assumed the existence in 8.5.1998 of inhuman and degrading treatment of two (2) Roma men by police officers within the meaning of article 3 of the ECHR (§ 48, 51, 52), as well as violation of article 3 due to lack of effective of both disciplinary and judiciary investigation (§ § 53-55), while the Court considered that it was not proven beyond doubt that the abuse was racially motivated (§ 67). The Mechanism found that, based on the Judgment of the ECtHR, a disciplinary investigation should have been pursued to remedy the deficiencies observed by the Court; specifically:
  1. Imposing a proportional disciplinary sanction on the inhuman and degrading conduct suffered by the applicants from two police officers, in accordance with the finding of the already carried out EDE, i.e. imposition of a penalty of idleness and temporary dismissal, instead of the minor fine which was finally imposed on one of them,
  2. Investigation of racist motivation of the police officers’ behaviour in question, by any appropriate means of proof, in accordance with the guidelines given in paragraph 74 of the judgment of the ECtHR. It is noted, however, that 19 years and 7 months had elapsed until the relevant judgment of the ECtHR was forwarded by NSK to the Mechanism.
- In the **Petropoulou-Tsakiris decision**, the Court dismissed the substantive violation of article 3 of the ECHR because of insufficient evidence of dangerous bodily harm against a pregnant Roma (§ 42). The treatment denounced allegedly took place on the 28.01.2002. However, the Court found a violation of article 3 on the proceedings during the investigation of the case by the Greek Justice (§ 52) and during its disciplinary investigation (§ 53) and accepted, that discrimination existed (violation of article 14 in conjunction with article 3) in terms of procedure (§ § 64-66). The Mechanism found that, on the basis of the judgment of the ECtHR, a disciplinary investigation should have been followed to remedy the defects observed by the Court which is as follows:

1. There should be an EDE Order and not just informal investigation,
2. An investigation should be conducted and all the necessary actions should take in order to find the applicant and call them to testify, as well as of any possible witness and not just the five police officers participating in the incident,
3. Research should be conducted in a way that ensures that all necessary evidence such as forensic reports are collected,
4. An investigation should be carried out by a senior officer without active involvement in the police operation in question,
5. Research should be conducted in a non-discriminatory way and should also investigate possible racial motives for the mistreatment of the applicant.

However, the alleged mistreatment occurred on the 28.01.2002, it is therefore 15 years and 10 months before the relevant ECTHR decision was forwarded to the National Mechanism.

- In the *Zelilov* decision, the Court has assumed that there has been a violation of article 3 of the ECHR because of the treatment of a prisoner by the Police on 23.12.2001 (§ § 50-52), and also because the authorities did not conduct an effective investigation, both administrative and judicial (§ § 60-61). On the other hand, it rejected the allegation of racist motivation, because this was not proved beyond doubt (§ § 74-76). The Mechanism found that, on the basis of the judgment of the ECTHR, a disciplinary investigation should be pursued to remedy the defects observed by the Court, namely the lack of effective and thorough investigation and the inconsistency of the EDE during the assessment of the reliability of the testimonies of the applicant and the witnesses involved in the incident, as opposed to the testimonies of the policemen. However, as the alleged mistreatment occurred on the 23.12.2001, 16 years has elapsed until the relevant ECTHR decision was forwarded to the Mechanism.
- In the *Galotskin* decision, the Court accepted that there was inhuman and degrading treatment by police officers on 23.12.2001 within the meaning of article 3 of the ECHR (§ 40), infringement of article 3 and due to a lack of effectiveness in both the disciplinary and the judicial investigations (§ 50). Additionally, it accepted the existence of infringement of article 6 (1) of the ECHR due to the duration of the criminal and administrative court proceedings. The Mechanism found that, on the basis of the judgment of the ECTHR, a disciplinary investigation should have been pursued to remedy the defects



observed by the Court, namely the lack of an objectivity during the assessing of the reliability of the testimonies, resulting in the disparity of the treatment of the testimonies of the applicant and the witnesses involved in the incident, and of the policemen. However, the reported abuse occurred on the 23.12.2001, so 16 years has elapsed before the decision of the ECTHR was transmitted by NSK to the Mechanism.

The abuse and bodily harm in all the above cases of *Makaratzis*, *Karagiannopoulos*, *Bekos-Koutropoulos*, *Petropoulou-Tsakiris*, *Zelilov* and *Galotskin*, even if following a new disciplinary investigation, is proved to have taken place then new cases cannot be brought forward as they have already been statute-barred. The same applies to the case of *Celniku*, which concerns an occurrence of death, but, as the ECTHR itself has expressly found, it could not be attributed to an intentional act, so, in domestic criminal legislation, it is a misdemeanour. Therefore, a possible disciplinary investigation could not result in the initiation of disciplinary proceedings, nor is there any provision in the legal framework for an ‘*above the law*’ disciplinary procedure without finding anybody responsible. In view of the above, the Mechanism noted that there is no legitimate reason to refer to ELAS for disciplinary review of the cases submitted to the ECTHR, due to the long-overdue limitation of the relevant disciplinary offences. However, the Mechanism requests the view of the NSK, in case it is different (due to specific elements of the disciplinary file and the judicial course of each case), regarding the statute-barred period to be disclosed to the Mechanism.

Therefore, the Mechanism considered that for such cases the country’s only emerging method of compliance remains the enrichment of the regulatory framework or the related circulars in order to avoid irregularities in police operations and in disciplinary or criminal investigation procedures such as those found by the ECTHR. In addition, in view of the long pending non-compliance of the deficiencies of the disciplinary proceedings with the judgments of the ECTHR and given that the statute-barred period is due in most of them, it requested that its considerations on general legislative measures based on judgments of the ECTHR, be taken into account by the competent Committee of the Ministry of Justice, Transparency and Human Rights. In particular, whether it would be possible to examine the possibility of stricter sentences for violations of article 137 A CC in the future, so that serious cases of mistreatment of detainees, namely serious infringements of human dignity, physical integrity, etc. which now fall under paragraph 3 of the 137A PC and constitute violations of article 3 of the ECHR, would not to be regarded as mere misdemeanour, so that similar offences in the future are not subject to short statute-barred periods.

With regard to the old pending, and already statute-barred cases, the Mechanism is working to propose as a general measure of compliance to the Government that a written expression of apology be issued by the head of the administration of the competent department, that could work both as a moral compensation for the victim and as a practical commitment by the administration that there will be no repetition of similar irregularities in the disciplinary process in the future.

### 5.3. *Decisions Andersen versus Greece (26.04.2018) and Sidiropoulos@Papakostas versus Greece (25.04.2018)*

These are decisions that, on the basis of when they were issued, fall undoubtedly under the competence of the Mechanism and were forwarded by the NSK, alongside with the file of the initial disciplinary investigation by the Police Personnel of the Headquarters of Police, as they concern police personnel.

- The *Sidiropoulos and Papakostas* case concerned a complaint of abuse at the Police Station of Aspropirgos during a police check of two motorcyclists, who claimed that they were subjected to torture (electric shock) with a rod. Both incidents are reported to have taken place on the night of the 13th to 14.08.2002. An informal investigation was initially carried out by 14.08.2002 and an EDE was subsequently ordered on the 23.08.2002, which was completed by the 20.04.2003 by proposing a penalty of reprimand, while the responsible disciplinary body ultimately imposed a penalty of fine 100 euros on 08.07.2003 to the disciplined police officer for possession and use of a portable radio (wireless transceiver) without permission. The culpable officer withdrew from his service on the 29.01.2010, at his request, and upon his departure he was promoted from the rank of sergeant to the rank of lieutenant, at his request. Before his retirement, eight years after the end of the disciplinary proceedings, criminal proceedings against him begun (20.04.2003), his request for an appeal was rejected (09.03.2007), while constant postponements and interruptions of the court proceedings took place before the Mixed Jury Court of Appeal (MOE). This was followed by his conviction at first instance, i.e. sentencing him to 6 years of imprisonment and a 10-year deprivation of civil rights, for torture (art. 137 A, 137 B PC) by the Mixed Jury Court (MOD) of Athens on the 13.12.2011. The Mixed Jury Court of Appeal (MOE) of Athens, subsequently (14.02.2014) imposed, by merger, a total sentence of five years ' imprisonment and a 5-year deprivation of civil rights, converting the custodial sentence into a pecuniary one, i.e. 5 euro/day of imprisonment, payable at 36 instalments.

The complaint lodged on 13.12.2011 before the ECTHR for infringement of



the substantive part of art. 3 of the ECHR (prohibition of torture, inhuman or degrading treatment or punishment) was declared to be inadmissible on the 21.4.2016. By the decision on the 25.1.2018, the ECtHR ruled that there was a violation of articles 6 and 13 of the ECHR as a result of the duration of the first instance trial and the absence of an effective remedy. The ECtHR also found the violation of article 3 of the ECHR as regards to its procedural arm, because *' the criminal and disciplinary law system, as applied in particular, proved to be far from being duly rigorous and incapable of exercise the appropriate deterrent effect to ensure effective prevention of unlawful acts such as those denounced by the applicants '* (§ 99).

In particular, the subject of the Court's investigation concerned the State's positive obligation to take appropriate measures to prevent torture or punishment or treatment of inhuman and degrading persons who are under state control (§ 83). This positive obligation corresponds to an absolute right, in which no derogation may be granted, under any condition (§ 84). In this context, the Court reminded that, when state officials are accused of offences involving mal-treatment, it is important to cease them from their duties during interrogation or trial and to dismiss them if they are convicted (§ 88). In light of all the proceedings (§ 89), the Court has in principle assessed that the penalty payment ultimately imposed on the offender is not appropriate or dissuasive (§ 95) as it is manifestly disproportionate to the significance of the maltreatment (§ 96).

As regards the EDE procedure, the proceeding was terminated before the completion of the criminal proceedings, the Court stated that the case was archived by a decision on the 08.07.2003 due to a lack of evidence on the use of an electrical shocking device and the policeman was sentenced to a fine of 100 euros, because he brought and used a portable transmitter-receiver, without having previously obtained permission. Meanwhile, the policeman left the service on his own request.

The Court noted that the two proceedings (disciplinary and penal) reached very different conclusions and that the perpetrator had never suffered the consequences of his actions as a policeman, since he left the Police on his own initiative. He served in the Police for eight (8) years after these events, without incurring the consequences of his actions. It also recalled that the lack of rigour in the implementation of the penal and disciplinary system, as in this case, does not prevent security forces from committing unlawful acts similar to those denounced by the applicants (§ 97). In particular, the criminal and disciplinary law system as applied in this case is far from being properly

rigorous and was not capable of exerting adequate deterrent effect to ensure effective prevention (§ 98). Under these circumstances, the outcome of the disputed proceedings against the policeman did not provide adequate redress for the value, to which article 3 of the ECHR is devoted (§ 99), therefore there was a breach of the procedural arm of article 3 (§ 100).

This case was sent to the Mechanism both by PDE and by the competent Department of police Personnel of the Hellenic Police Headquarters. The latter service sent almost all of the file of the EDE to the Mechanism, which had been carried out for the specific facts. The Mechanism, after examining the findings report, the proposal of the disciplinary body on this report and all the elements of the EDE dossier, in the context of its competence, pointed out from the outset that the Personnel Departments should send to the Mechanism not only the decision of the Court with the disciplinary dossier, but also copies of the documents and the decisions referred to in those documents, as well as an indication on the relevant document on the statute-barred period of the disciplinary misconduct and the applicable provision of the disciplinary law in the case at issue.

Furthermore, the Mechanism found that, given the conviction concerned the crimes referred to in articles 137A par. 1 per. (a) and para. 2 and 137 B para. 1 per. (a) PC and irrespective of the final penalty imposed, according to articles 111 in para. 2 per. (b) and 113 PC, the statute-barred period for these offences equals to suspension during the court proceedings for 20 years and, consequently, the crime and the relevant disciplinary offence has not been statute-barred. Since the person subject to the disciplinary proceeding is no longer in the service of the Hellenic Police, since at his request the policeman was discharged due to the age limit, there is no longer a link with the service. The link with the service is a crucial element in order to establish disciplinary accountability. In order to impose the penalties provided for in article 4, para. 3 of P.D. 22/1996 (which is applied as a more propitious law, due to article 58 P.D. 120/2008) or in article 6 para. 3 of P.D. 120/2008 due to extending the duration of disciplinary action requires the existence of an active disciplinary procedure, which is not yet completed and therefore no extension of disciplinary responsibility shall apply, and no re-investigation of the case shall take place, pursuant to the provisions of article 1, para. 6 of L. 3938/2011. However, in order to avoid future convictions on the same issues, it proposed a series of legislative changes both in criminal and disciplinary law which are presented in the next chapter of the present report.

- In the **Andersen case**, the appeal concerned an incident of abuse of an arrested person for theft on 18.09.2008 in Thessaloniki. The applicant, a Norwegian citizen, argued that in the detention facilities of the Deputy Security many po-



licemen beat him with kicks and punches on his face and feet and that he was struck with batons on his right knee and ankles. In its 26.04.2018 judgment, the ECTHR ruled that there was no infringement of article 3 of the ECHR in its substantive part but found a breach in the procedural part of the same article, both in the disciplinary and the criminal investigation of the case.

Furthermore, the Court referred in detail to the medical certificates which the applicant received after his examination on 19.09.2008, after the postponement of the flagrante delicto procedure, he was released and examined by a medical practitioner of the General Hospital G. Genimatas. According to the medical certificate administered by the particular hospital on 22.09.2008, the applicant claimed that he had been mistreated twenty-four hours ago. Also, in his certificate of 02.12.2008 from Papageorgiou Hospital, the applicant went to the emergency room on 19.09.2008, time 21:17. After his arrival in Sweden, the applicant was also examined at Södervärn Hospital in Malmö and was administered by this hospital a medical certificate dated 24.02.2009.

As regards the administrative investigation of this case, it should be noted that the Greek Ombudsman in a letter dated 09.01.2009 to the Police Directorate of Thessaloniki invited it to investigate effectively the allegations of the applicant. On 05.02.2009 the head of the Thessaloniki Security Directorate ordered an investigation into the events of the 18.9.2008, which was commissioned by a police officer of the Narcotics division of this very Directorate. On 20.03.2009, the officer to whom the investigation was commissioned suggested the filing of the case. On 28.05.2009, the head of the Thessaloniki Security Directorate completed the administrative investigation of the incident, concluding that no liability could be attributed to the police officers involved. In particular, he accepted the testimonies of police officers according to which the applicant reportedly fell off a wall during his escape attempt. It also found that the policemen had stated that the arrest of the applicant did not take place calmly and that they were forced to resort to force, which allegedly caused *"at most just one scratch"*.

In the case of criminal investigations, it should be noted that on 10.10.2010, the applicant's complaint was rejected by the Prosecutor of Misdemeanours in Thessaloniki (order No 178/2010). Under order No. 1/11, which was communicated to the applicant on 25.01.2011, the district attorney of the appeal court ratified that order.

The Mechanism, after receiving the decision of the ECTHR and the decision of the competent disciplinary body with the entire file of the EDE, which had been conducted for the specific facts by the Police Department in September 2018 (the

decision of the ECTHR has been sent as well by the PDE), has indicated that it has no jurisdiction over the criminal proceedings for which the judgment of the ECTHR records basic irregularities<sup>27</sup> and that the points of the decision referred to the district attorney do not fall within its competence.

Contrary to the irregularities in the disciplinary proceedings, it pointed out that the ECTHR, having reiterated its settled case-law on article 3 of the ECHR and the obligation to carry out an effective, thorough and speedy investigation (§ 48.49, 51, 55, 56), at first focused on the lack of objectivity of administrative research and specifically referred to (§ 61):

- (a) the persons entrusted with the administrative investigation who were colleagues of the policemen suspected of being involved in and not supervised by an independent authority;
- (b) the authorities responsible for the investigation which relied mainly on the testimonies of nine police officers.

In addition, the ECTHR referred to multiple failures and deficiencies in the investigation concerning the assessment of the medical findings in relation to the applicant's allegations for mistreatment (§ 61, 62 and 64). Furthermore, the doubts regarding the alleged abuse are attributed by the ECTHR *inter alia* to the lack of a thorough and effective investigation by the authorities (§ 73 and 74).

On the basis of the findings of the ECTHR and the other elements of the case, the Mechanism pointed out that the new disciplinary investigation of the case by the Greek Police should intend to remedy the deficiencies of the disciplinary proceedings, namely the lack of impartiality of the disciplinary investigation, both in terms of the conduct of the investigator and of the assessment of medical certificates, as well as the observance of equal distances between the complainant and the police bodies involved. However, as it has also held in previous disciplinary cases for which the ECTHR and which are already statute-barred, it is not possible to initiate disciplinary control against the monitored organs in accordance with the provisions of article 56 L. 4443/ 2016. In particular, in accordance with the above-mentioned provisions on the calculation of the statute-barred period, the time elapsing from the adoption of a decision of the competent disciplinary body (per case) until the date of transmission of the decision of the ECTHR to

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27. As for non-examination of necessary witnesses of the Prosecutor, including the doctors, the lack of adversarial examination of the police and of the claimant but also the fact that the prosecution reiterated its layout most of the findings of the administrative investigation and criminal proceedings opened against the applicant, § 65 decision.



the Mechanism, is not taken into account for calculation. However, although it is considered that the competence of the Mechanism exists for older cases, since the law does not distinguish based on the time of transmission of the decisions, it does not provide retroactive abolition of the statute-barred period institutional framework. Moreover, a retroactive abolition of the statute-barred period institutional framework would raise questions of unconstitutionality. In this case, the case was brought to the Mechanism on the 24.08.2018 by the NSK, while the controlled acts of the bodies involved took place on 18.09.2008 and no disciplinary action was brought against them, since they were deemed not to be obliged to be disciplinarily controlled pursuant to the decision dated 28.05.2009 of the competent disciplinary supervisor of the Director of the Directorate of Security of Thessaloniki. Moreover, an indictment against them in relation to the exact same acts was filed (No. 78/2010, dated 10.10.2010 order of the District Attorney of Misdemeanors in Thessaloniki). Consequently, the provisions laid down in article 7, para. 1 of the P.D. 120/2008 in reference to the five-year statute-barred period of disciplinary offences was completed on 19.09.2013, given that there was no reason for its suspension, pursuant to the provisions of par. 2 of the same article, then there is no doubt for the application of the provisions of para. 2 for the longer statute-barred period, given that no criminal assessment of these acts by the competent public prosecutor authority took place.

Moreover, in that judgment, the ECTHR finds that there was no infringement of article 3 of the ECHR in its substantive part. Therefore, the case cannot be investigated again.

However, in order to implement the conclusions of the ECTHR decision and to avoid future convictions for the same issues, the Mechanism proposed some general compliance measures to be taken, i.e. the completion of PD 120/2008 for ensuring the needed distance between the conductor the EDE and the persons under the administrative investigation in cases of abuse. The circular-order of the Hellenic Police Headquarters<sup>28</sup> is not sufficient for this purpose, since it is a typical condition for safeguarding objectivity of the investigations, which the current regulatory provisions of P.D. 120/2008 do not fully ensure. It also proposed reviewing the issuance of circular instructions by ELAS, in regard to the need for careful assessment of medical certificates in the internal investigation of similar complaints in relation to the allegations of an applicant, particularly in the determination of the origin of the wounds found and other analytical guidance as given in the above decision of the ECTHR.

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28. See number. 6004/12/63 dated by 8.10.2015.

# 6

## Legislative proposals to improve disciplinary law





## 6. Legislative proposals to improve disciplinary law

With its documents and findings, the Mechanism on cases in which it has in any way addressed has commented on the improvement of specific issues relating to disciplinary law and staff regulations of the employees under its competence.

### 6.1. Ensuring Impartiality of the conductors an EDE

The Mechanism, in cases with which it dealt with and in complaints related to abuse in the form of physical integrity or health which do not constitute acts subject to article 137 A PC but minor injuries, found that the corresponding administrative examinations of ELAS were mainly attributed to a senior or a higher-ranking officer of the examined police officer who did not necessarily belong to another Directorate. This choice, of course, is in line with the disciplinary law applicable to police personnel. Specifically, P.D. 120/2008 in article 26 para. 4 expressly provides, solely for the EDE relating to disciplinary offences as provided in article 1, para. 1, per. c of the same decree. (i.e. for acts which constitute torture and other insults of human dignity), the assignment to an officer of a Secretary or an assimilated Agency, other than that to which the police officers are subjected administratively. There is no corresponding provision for the PDE.

However, it has been pointed out in a former relevant special report of the Greek Ombudsman<sup>29</sup> for the corresponding provision of the preexisting Presidential Decree 22/1996, that this provision for the EDE is a positive step on safeguarding their objectivity and impartiality. However, it is partial as it does not cover all internal administrative investigations. In order to ensure the objectivity of the investigation and the impartiality of the investigating body (let alone the increased hierarchical substance of what is ensured in practice), it would be better if an officer of another department, by law, is assigned for all internal investigations. To the extent that the corresponding provision and the applicable PD 120/2008 remain the same in terms of content, the Mechanism proposes the addition of an equivalent to article 26 para. 4 of P.D. 120/2008 for the EDE on crimes referred to in article 137A PC and in article 24 para. 2 of the same PD, that will concern

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29. See, Special Report of the Greek Ombudsman 2004: 'Disciplinary and Administrative Investigation of Complaints against Police Officers', pp. 16, 54-55 and 80-81 website in Greek <https://www.synigoros.gr/resources/docs/astinomikoi.pdf>.



PDE on cases of misconduct related to mistreatment, citing to the expressly provided offences of articles 10, para. 1 and 11 para. 1. It goes without saying that, according to PD 120/2008, it is envisaged to carry out an EDE for offences drawing imposition of a higher disciplinary penalty, but it should not be overlooked that article 26 of the PD requires serious evidence for the implementation of an EDE and that the competent bodies are reluctant and usually choose the PDE to investigate such incidents. Therefore, in order to protect the credibility of the administrative inquiry, the choice to assign an officer from another Directorate to conduct the investigation seems necessary.

Objective difficulties, such as distance and location (especially on islands), may hinder the adoption of such a proposal, however, these should not be an excuse especially if the seriousness of the complaints and the gravity of the acts that have been denounced is taken into consideration. This proposal is formulated based on the corresponding provisions of the disciplinary law of the staff of ELAS, however its adoption should be considered in the context of the disciplinary law of the remaining staff under the jurisdiction of Mechanism.

## **6.2. Suspension of disciplinary proceedings due to criminal court proceedings**

As regards to the use of the envisaged suspension of the disciplinary procedure due to parallel criminal court proceedings, it was noted that the suspension is at the discretion of the competent institution, but it should be exercised on the condition of necessity, so that the distinction of these two procedures will not be abolished, whereas in the case of criminal pre-trial proceedings, such a suspension should only occur if prosecution is exercised.

In practice, it is established that the competent bodies in cases where the disciplinary offence is a criminal offence, as well as the fact that they cannot rule on criminal offences before the judgment of the Criminal court is used as an argument for the disciplinary discharge of the controlled organ and/or the position of the filing of the case. It is also noted that there are cases where the suspension of the disciplinary proceedings is chosen until the completion of the pending criminal proceedings.

In order to remove, in practice, the doubts concerning the interpretation of the provision on the suspension of the disciplinary proceedings, in view of a corresponding criminal offence, it is appropriate to put a time limit on the possibility of using the suspension of the disciplinary procedure. In particular, it could be envisaged in case of investigation of disciplinary misconduct constituting a

criminal offence pursuant to PC, the exceptional suspension of the disciplinary proceedings may only be allowed after the service of the summons or subpoenas pursuant to the CCI, in reference to the very same acts. In this way, it is ensured that the disciplinary body will suspend the disciplinary proceedings only in case of an expected appraisal of a criminal court following a prosecution, without hindering the progress of the disciplinary proceedings while the criminal pre-court proceedings are pending.

### **6.3. Imposition of sanctions on former officials whose omissions and actions led to the country being convicted by the ECTHR**

On the occasion of a conviction by the ECTHR against our country for the breach of criminal and disciplinary proceedings in a case of torture, the Mechanism, since it considers the termination of membership of the subject from the Reserve as insufficient for the effectiveness and deterrent effect of disciplinary law, it proposed the provision of a relevant addition to article 6 of the para. 3 of P.D. 120/2008. This proposal is based on financial content sanctions against retired pensioners in the form of a lump sum deduction or percentage of pension, in case our country was convicted by the ECTHR in compensation for violation of ECHR provisions due to deficiencies in disciplinary or criminal law proceedings which investigated unlawful behaviour.

Alternatively, it is suggested that it could be envisaged for cases of former state officials, where the disciplinary procedure has been terminated and is not subject to the provisions of article 6 paragraph 3 of P.D. 120/2008 or in corresponding provisions on the extension of the duration of disciplinary responsibility, that a legal framework is established wherein the state is able to claim from the former state official the compensation it has given to individuals following the judgement of the ECTHR and from when the judgement became final, in case such a possibility is not already foreseen by existing relevant provisions.

### **6.4. Mandatory availability in case of criminal prosecution for the crimes of Articles 137 A and 137 B PC**

In P.D. 120/2008, the administrative measures for suspension (article 15) or temporary movement (article 16) are at the discretion of the competent institution. On the basis of a conviction decision of the ECTHR in the detriment of our country for irregularities in the criminal and the disciplinary procedure, the Mechanism



proposed for the cases of committed crimes of articles 137 A, 137 B PC (equivalent disciplinary offence of article 10 para. 1 per c of P.D. 120/2008) to amend P.D. 120/2008 so that when criminal prosecution is carried out for such offences, the measure of pulled desk must be expressly imposed. And in case an EDE is carried out (without or prior criminal proceedings) the measure of temporary movement in a Service must be imposed in a way that the investigated personnel will not perform the tasks under Article 137 A PC i.e. “prosecution or interrogation or investigation on criminal offences or misconduct or execution of sentences or safekeeping or custody of detainees” (including those prosecuted).

### **6.5. Early briefing of disciplinary bodies for prosecution and thus ensuring the autonomy of the two procedures**

On the occasion of a case investigated with a conduction of an EDE by the agencies of ELAS, the Mechanism made observations and in particular commented on the access of the conductors of the administrative inquiry to the criminal proceedings. Furthermore, the Mechanism noted that the obligation to inform the competent authorities of the prosecution of administrative public servants is provided in article 114 paragraph 6 of the State Code of Public Political Administrative Officials and Civil Servants of legal persons incorporated under public law (State legal entities) (ratified by article 1 L. 3528/2007). On the other hand, for police personnel, the provision of article 9 N. 2713/1999 shall apply, i.e. the copies of the criminal file are received at the end of the preliminary interrogation conducted either by police services or by a judicial officer (in which case they are sent by the Prosecutor) to be included in the disciplinary file-case. In order for the main interrogation to be covered by this provision for police personnel, the Mechanism proposed to add to the second subparagraph of article 9 N. 2713/1999 the words ‘or main interrogations’ after the word ‘preliminary interrogations’ and upon a relevant reference to the explanatory memorandum of the Regulation to grant the copies after the defendant has been summoned by the Prosecutor to testify, the time when the secrecy of the main interrogation ceases.

A provision which is moving in the right direction and could also be added to Article 9 L.2713/1999 in order to ensure that the competent bodies are kept informed and that the judicial officers are not burdened with more workload, is the provision of the second subparagraph of paragraph 8 of Article 38 L. 4504/2017 for the officers of HCG-ELAKT. This provision provides for the obligation of the Registrar of the Court or the Judicial Council to immediately notify the Minister

of Shipping and Insular Affairs of the referral or dismissal rulings during any instance of jurisdiction, as well as the judgments in any instance of jurisdiction both convictional and not guilty. This ensures that the competent authority is kept informed in order to comply with the provisions of disciplinary law.

### **6.6. Adjustment of the framework on the duration of the penalty of idleness alongside with dismissal for specific disciplinary offences related to misdemeanours at the expense of physical integrity and personal freedom**

On the occasion of the case referred to in the previous proposal, which was investigated by the services of the Greek Police with an EDE, the Mechanism commented on provisions of disciplinary law which deal with the offences consisting of attacks on physical integrity or personal freedom. Para. 3 of the article 10 P.D. 120/2008 provides for the possibility for the Disciplinary Board to impose the lighter penalty of suspension with dismissal, by assessing the seriousness of the offence, the character of the culprit and the circumstances under which they were committed. In addition to the fact that the provision above provides for a second assessment of the data according to article 9 P.D. 120/2008 have already been evaluated for sentencing, it also specifically refers to certain misdemeanours including the illegal use of force under article 330 PC and the illegal detention under article 325 PC. Considering that in article 10 para. 1 per. (h) P.D. 120/2008 misdemeanours of article 18th chapter of PC, personal injuries are not included, and these will be subject to disciplinary offences provided in article 11 para. 1 per. (z) and (ia) P.D. 120/2008, the Mechanism considered it appropriate to propose a review in the future on the adjustment of the idleness with dismissal framework, and to remove the misdemeanours of articles 325 and 330 PC from the provision of article 10 para. 3 P.D. 120/2008.

### **6.7. Legislative provision for compulsory preservation of video material in case of incidents of violence or injuries in Detention Facilities, detention Centres or centres of service of the Greek Police or HCG-ELAKT**

The cases been dealt with by the Mechanism showed that, in cases of abuse with the use of physical violence and consequent injury of persons, it is necessary to maintain any video material, as this is evidence material of the facts and of



the acts of the competent state officials. Bearing in mind that, according to the settled case-law of the ECtHR, persons detained are in a vulnerable position<sup>30</sup>, it should be expressly provided that in the Detention Facilities, as well as in the detention premises of the Greek Police and the HCG-ELAKT which have video surveillance systems, in the event of an injury, bodily harm or in general violence against persons detained or deprived of their freedom, the footage should be kept in a means of storage and should be forwarded, not only to the competent bodies for the preliminary interrogation, but also to the body responsible for the administrative investigation of the case to be part of the disciplinary-administrative investigation. The storage of the material in a specific external means of storage shall be followed by a relevant report and be kept in a room not accessible to the staff. With this solution, the preservation of the material, the restriction of access to it and its transmission to the authorities responsible for the administrative investigation will be safeguarded.

## **6.8. Limiting the time spent on conducting investigations and giving opinions on reports on administrative inquiries findings**

In many of the administrative inquiries dealt with by the Mechanism, an issue which often emerged is that of exceeding the time for conducting and that of the informal extension of the investigation period. In order to facilitate a faster and more thorough administrative inquiries, as well as to help the conductors in their work, a provision should be made in PD 120/2008 for the disciplinary law of police personnel and corresponding provisions should also be made for the staff of other security forces and detention facilities which fall within the scope of the Mechanism's. This provision should put an obligation on the services to respond in priority to requests from the conductors of administrative inquiries. It is also necessary to provide that, in order to extend the period of investigation, the conductor must indicate and explain a specific or emerging reason in place requiring such an extension, and these particular reasons should be justified from the body deciding such an extension. In the same context, the provision of the article 39 para. 6 should be either repealed or amended and the phrase "*but without due cause... the offence*" should be removed.

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30. See Decision dated by 27.08.01992 over the case Tomasiv. France, §. 113

## **6.9. Counter-hearing of witnesses in disciplinary proceedings**

Pursuant to article 33, para. 1 CCI, the provisions relating to the summoning and hearing of witnesses and the manner in which the person is heard shall respectively be applied to the disciplinary procedure. Since the ECTHR has pointed out the non-counter-hearing of witnesses in spite of the respective applicant's request particularly in criminal proceedings, it would be better that this particular method is applied in disciplinary procedure with several guarantees. For this purpose, in cases falling within the competence of the Mechanism, the counter-hearing of persons in the context of the administrative inquiry in the presence of representatives of the Mechanism could be envisaged. This way, the compliance with all the guarantees provided would be monitored, the secondary victimisation of complainants will be prevented, and at the same time the impartiality of the investigation will be ensured. However, given the capabilities and the potential of the Mechanism, its approval on conducting the particular inquiry should be requested. The possibility of asking questions will be given to the conducting body of the inquiry, who will also submit the questions that have been indicated to him by the representative of the Mechanism.

## **6.10. Adoption of regulatory acts pending on the disciplinary law of employees' subject to the Mechanism, modernisation and improvement of old provisions**

In keeping with both the principles of good lawmaking and the protected trust of the managed and disciplined audited, loose ends in relation to the adoption of normative acts and the exercise of the relevant legislative authorisation should be resolved and the relevant acts should be issued. It is noted that the provided article 51 L. 4504/2007 Discipline Regulation of HCG-ELAKT, notwithstanding the relevant deadline in the authorising provision, has not yet been issued. Furthermore, in the same context, legislation in the field of disciplinary law, which is becoming obsolete, should be updated and improved, while the legislation concerning the personnel of the bodies subject to the Mechanism should be codified; for example, article 96 L. 4249/2014 provides authorization for such a codification, but it has not applied yet.



### 6.11. Issues relating to legislation on the use of arms

Law 3169/2003 regulates the use of firearms by police officers and in article 3 provides in detail, and in accordance with the internationally applicable provisions, the use of firearms and the principles that govern it. In this context, the relevant legislation on the use of arms from other security forces and the external guard must also respect the same principles in the use of firearms taking into account the specificities of each case. The relevant legislation concerning the use of firearms should be updated in order to meet the needs and to safeguard human rights. The firearm and the use of weapons by the fire service is governed by the b.d.656 of 14-10-1972 and perhaps it would be advisable to update it.

The use of firearms by a police officer gives rise to an obligatory report to the judicial authorities and also to the competent police authority and by extension any use of firearms is investigated by the inquiry of an EDE.<sup>31</sup>

The non-monetary recognition given to police personnel in the form of the police prize for bravery, in accordance with article 4 of P.D. 622/1998, can be awarded *“for an exquisite act of bravery, which took place in a gunfight with gangs or armed insurgents or gunmen persons dangerous to Public Order and Security or foreign propaganda bodies, which act in a group or in a single way, in which he has demonstrated his life in imminent and obvious danger and which is objectively far beyond the execution of the well-meaning duty.”* The attestation of the act of bravery is made upon the execution of an EDE according to article 1 para. 2 of P.D. 144/1991. There is no doubt that the legal basis and the procedure are different. The very finding of the EDE on the use of firearms without doubt should coincide with the outcome of the EDE concerning the award of the police prize for bravery or other morale recognition. In fact, it should be provided that the conclusion of the EDE report on the use of firearms is needed to ascertain and assess the act of bravery; if the EDE determines the unreasonable use of a firearm, the relevant recognition should not be awarded.

### 6.12. Protection of civil servants-witnesses of arbitrary incidents

The articles 26, 110 and 125 of the Code of Public Political Servants and Servants

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31. See art.4par.10 of the l.3169/2003 and the provisions forecasted in n.2 par.8 on the same law ministerial decision

of State legal entities include provisions on the administrative protection of public servants, which are part of the protection of public-interest witnesses and generally of individuals who contribute to the disclosure of acts of corruption in the public sector. These particular provisions are aimed at avoiding the unfavourable treatment of the persons concerned during the necessary time for the judicial investigation of the case.

Apart from the fact that these provisions concern only the denunciation of acts of corruption, in the specific provisions for the personnel of the security forces on the relevant issues, such as L. 2713/1999 for the Home Affairs Office, respective provisions are not included, hence servants in the security forces could be subject to them solely upon the general provision of article 2 of the Code of Public Political Servants and Servants of State legal entities. Therefore, the witnesses of acts provided for in L. 4443/2016, which fall under the responsibility of the National Mechanism for the Investigation of Arbitrary Incidents, in case that they are colleagues of the accused of such acts, are not encouraged to denounce such acts nor are they protected when they do so.

Therefore, if the legislator's intention continues to be the confrontation of incidents of arbitrariness by the staff of the security forces and the detention facilities, and given that the monitoring and solving of the criminal activity of officials *"By their colleagues shows serious peculiarities for the sake of emotional links, poorly understood our colleague of solidarity, interventions by hierarchical outranked for leniency treatment, pressure by common acquaintances, threats to them, threats to members of their family and their property, etc."*,<sup>32</sup> it must take immediate legislative initiatives at least to protect civil servants-witnesses in case of arbitrary incidents by their colleagues.

In this context, the following should be foreseen for the officials who are witnesses of arbitrary incidents by their colleagues:

- (a) The "it goes without saying" provisions for their protection, and in particular:
- The prohibition of any unfavourable treatment of officials who testify or complain in writing to the competent (disciplinary or non) institutions or the Mechanism on acts of arbitrariness by their colleagues as provided for in Article 56 L. 4443/2016 and thereby the reversal of the burden of proof in disciplinary proceedings in favour of officials who materially contributed to the disclosure and prosecution of acts of arbitrary incidents,

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32. See statement of reasons n.2713/1999



- The provision of the anonymity of officials in the disciplinary proceedings and the allowance of the complainant to have access to their data solely either in the disciplinary proceedings or after a prosecutor's order, so that his particulars can be used for a pending trial,
- (b) The possibility at their request, in case they have lodged or denounced in writing to the competent (disciplinary or non) institutions or the Mechanism, of exceptional movement or transfer to a service of their selection and the mandatory satisfaction of their request by the competent bodies.



# Annex I





# Annex I

## Regulation of Operation EMIDIPA

**Number. F. 10/24727/2017.**

### **Regulation of Operation of the National Mechanism for the Investigation of Arbitrary Incidents**

THE GREEK OMBUDSMAN

Having regard to:

1. The Provisions:

a) Of L. 2477/1997 (A' 59) "The Greek Ombudsman and Body of Inspectors-Public Administration Auditors", as in force

b) Article 8 of L. 2623/1998 (A' 139) "Recasting of electoral registers, organisation and exercise of the electoral right of the hetero citizens, modernisation of the electoral process and other provisions", as supplemented and in force.

c) Of L. 3051/2002 (A' 220) "Constitutionally patented independent authorities, amendment and supplementing the public sector recruitment system and related arrangements", as in force, and in particular the par. 5 and 7 of article 2 thereof.

d) Of L. 3094/2003 (A' 10) "The Greek Ombudsman and other provisions", as in force.

e) Of L. 3861/2010 (A' 112) "Enhancing transparency by mandatory posting of laws and acts of government, Administrative and self-governing bodies on the Internet" Clarity Programme "and other provisions", as in force.

f) of L. 4443/2016 (A' 232) and in particular articles 56-57 on establishing a national mechanism for the investigation of arbitrary incidents in the security forces and the employees of the detention facilities.

g) P.D. 273/1999 (A' 229) "Regulation of operation of the Greek Ombudsman", as amended and in force.

2. The fact that this decision does not cause any expenditure on the State budget.



3. The service needs,

***We decide:***

the establishment of a Regulation of Operation of the National Mechanism for the Investigation of Arbitrary Incidents

**I. General**

1. The National Mechanism for the Investigation of Arbitrary Incidents (EMIDI-PA) is a special responsibility of the Greek Ombudsman and is exercised in the framework defined by law 4443/2016(Part D, articles 56-58 and 77). EMIDIPA is functionally and organisationally integrated with the Greek Ombudsman.

2. The implementation of the competences of the EMIDIPA may be delegated by a decision of the Greek Ombudsman to an Assistant Ombudsman, who is assisted by a special group (“EMIDIPA.” group), composed of members of the Authority’s scientific and administrative staff, appointed by a decision of the Greek Ombudsman.

3. The Greek Ombudsman prepares annually a general action plan of the EMIDIPA, which includes, indicatively, information and communication actions for this specific competence, visits to the monitored Services and detention facilities under its jurisdiction.

4. For the needs of the EMIDIPA a specific database, which is an annex to the Integrated Information System, is maintained, the access to which is provided to the Greek Ombudsman, the competent Assistant Ombudsman and to the members of the group of EMIDIPA

**II. Initiation of the investigation procedure by the EMIDIPA**

5. EMIDIPA. Seised cases ex officio, following a complaint or on referral by the competent Minister or the Secretary-General.

6. a. Complaints about arbitrary incidents, either in person or by proxy, are accepted at the Greek Ombudsman’s Reception Office. The complaints must be named and written and can be directed towards strangers. In case of an oral or anonymous complaint, the following shall apply.

b. The Public Reception Office shall provide general information on the operation of the Mechanism, identify the complainant or his attorney and check the standard details of the complaint. The complainant may come forward with a lawyer or an interpreter. If he does not know Greek and come without an interpreter, an interpreter may be a member of the Greek Ombudsman’s staff with sufficient knowledge of the foreign language in which the communication will be made. When the complainant requests it in writing, it shall be labelled as such for the

preservation of his anonymity. In this case, the person shall be notified and will be informed if it is not possible to investigate the incident without disclosing its identity.

7. a. Written and named complaints are entered in the Special Database and receive a protocol number.

If the complainant declares that he is unable to draw up a document, the oral name of the complaint may be made before the Senior Investigator (SI) of the Greek Ombudsman who serves the Citizen's Reception and Information Bureau, provided that the latter considers that the reasons invoked by the complainant. If appropriate, a member of the EMIDIPA may be called. The cooperation of the complainant with the Senior Investigator may, if deemed appropriate, be done in a place where the confidentiality and anonymity of the first is ensured.

The SI draws up the complaint and an additional report, which refers to the reason why the complainant is unable to write his complaint. This report is signed by the complainant and the SI who drafted it, since the SI finds that the complainant has fully understood the content of his complaint and the legal consequences that it entails. Then the complaint, after being signed by the complainant, is recorded in the data phase and forwarded to the EMIDIPA.

b. Anonymous complaints, obtained in any way (in person, by post, by fax or by electronic sending/web), irrespective of whether they contain sufficient information to investigate, they are forwarded to the EMIDIPA with a label of anonymity as per the protocol. If the anonymous complaint is submitted to the Citizen's Reception and Information Bureau in person, it is received, registered and the complainant is informed that its examination will be assessed for any ex officio intervention.

8. Complaints received by the Greek Ombudsman upon referral by the relevant Minister or the Secretary-General shall be forwarded to the EMIDIPA for evaluation.

### **III. Processing of complaints**

9. After the complaint is registered in a special database and within a reasonable time, the Greek Ombudsman evaluates it and, if it falls under the jurisdiction of the EMIDIPA it shall be decided to further process it within 10 days in one of the following ways:

- (i) Investigation by the Greek Ombudsman.
- (ii) Promotion to the competent disciplinary body and monitoring.
- (iii) Location in the Archive/Filing



## 10. Investigation by the Greek Ombudsman.

a. The Greek Ombudsman shall decide to investigate a complaint or an incident, in particular where it is deemed appropriate for the purpose of carrying out his mission due to the seriousness of the alleged act, the severity of the offence in connection with the vulnerability of the deceased, the prevalence of arbitrary conduct etc. If it is appropriate to investigate the case, the competent disciplinary body shall be informed in writing of the fact that an investigation is being carried out in order to suspend any disciplinary decision for three months, if it is not extended by derogation for another three months. The same document requires the verification of the exact details of the complainant and the EMIDIPA asks to be informed whether the case is already being investigated and if so, if administrative measures have been imposed at the expense of the disciplinary control. If disciplinary file-case has been formed, the Greek Ombudsman requests copies of the file details at each stage.

B. EMIDIPA investigates the case based on the general investigation procedure of law 3094/2003 and the present Regulation.

Prior to drafting the findings, the auditee is called in writing to take note of the research data and to expose his/her views (art. 20 para. 2 S) within a specific time limit. The document must describe in detail the act for which it is to be examined and the procedure followed (art. 56 and next, L. 4443/2016). The auditee sets out his views orally and answers questions from the Representatives of the EMIDIPA, who were nominated for this purpose. For his testimony, a report is drawn up, signed by him and the representatives of the EMIDIPA. The auditee may submit a memorandum, on which clarification questions may be asked. In this procedure the auditee may be represented by a lawyer.

C. After the examination of the auditor if the deadline expires, the EMIDIPA proceeds to the issuing of a judgment, which sends to the disciplinary head of the auditor, for his own actions in accordance with the relevant disciplinary provisions.

D. The conclusion of the EMIDIPA must specify: (a) The objective findings of the investigation, in particular those which lead to the inclusion of the occurrence in specific operations referred to in article. 1 of L. 3938/2011, as replaced with article. 56 § 1 A-D of L.4443/2016, (b) the subjective elements, i.e. the fault of the complainant, (c) The evidence collected and from which the above findings arise.

E. If the EMIDIPA considers that the decision of the disciplinary body departs from the operative part of its findings without specific and reasoned reasoning, acts in accordance with the general provisions of law 3094/2003, and communicates its views to the competent Minister for his own actions.

F. After the end of the procedure the EMIDIPA shall notify the complainant of the relevant finding and, moreover, at his written request, those particulars of the dossier for which there is no obstacle to access under the terms of L. 2472/1997, 2690/1999 and 3471/2006 or other special provisions. If the investigation is carried out following a referral by the competent Minister or the Secretary-General, he shall be informed and receive the relevant finding.

#### 11. Promotion and Monitoring

(a) The complaint shall be forwarded to the competent disciplinary body with an investigation order, with specific reference to the obligation of ar. 56 L.4443/2016 to consider the case as a matter of priority. Among others, it is investigated whether the disciplinary body has already initiated a disciplinary investigation into the particular case.

b) The case is registered in a database by disciplinary body, so as to be easy to follow. This Database shall be informed for compliance with the deadlines laid down in the specific provisions of each disciplinary process and shall encompass a capability of alert. Upon contact with the competent disciplinary bodies, it is commonly defined an acceptable procedure that will make it effective and immediate to monitor the course of the cases under review by the EMIDIPA.

c) After the examination has been completed by the disciplinary body, and before the decision is taken, the dossier of the case is sent to the EMIDIPA. If it is deemed appropriate, it shall be referred for completion within 20 days of receipt of the dossier (see par. 8 L. 4443/2016). This period may be extended under the terms of ar. 4(2) of the law. 2690/1999.

#### 12. Location in Archive/Filing

By a decision of the Greek Ombudsman, the following are archived;

(a) the inadmissible named complaints, when the facts described do not constitute the acts monitored by the EMIDIPA. Where the complainants can be examined in the context of the general jurisdiction of the Greek Ombudsman, the case is referred to the concerned Department of the Ombudsman.

(b) The alleged complaints, when their content is unintelligible, completely vague, incomplete and the complainant did not come forward to present any additional information.

(c) The complaints, in which the observance of the anonymity, requested by the citizen, makes the continuation of the investigation impossible. In this case, the person concerned shall be informed that his complaint will be affixed to the file if he/she does not consent in writing to the announcement of his name.



(d) All Anonymous complaints, provided that they are not considered appropriate in the procedure of ex officio investigation.

In the above under A, B, C cases, the complainant shall be informed in writing

#### **IV. Completion of the procedure**

13. In the complaints carried out by the EMIDIPA, the intervention of the Authority shall be completed by the decision of the disciplinary body which is in line with the conclusion of the EMIDIPA or if the disciplinary body deviates from the EMIDIPA decision, it is required to provide a justification for the deviation, taking in account that the EMIDIPA hasn't referred the case back due to lack of reasoning.

In the complaints referred for scrutiny, the intervention of the Authority is completed by the decision of the disciplinary body and the expiry of 20 days without the EMIDIPA. has been referred back to completion. In cases introduced after a named complaint, a relevant document is sent to the complainant, who shall be informed as provided in paragraph 10f of the present.

14. If, after the expiry of the inspection of the EMIDIPA or after the notification of the audit by the competent disciplinary body, sufficient evidence of guilt arises for one of the offences of article 1 of L. 3938/2001, as replaced by article 56 of L. 4443/2016, the case is referred to the prosecutor under the terms of article. 5, para. 8d of L. 3094/2003.

#### **V. ECTHR Conviction judgments**

15. The judgments of the ECTHR against Greece, which reveal shortcomings in the disciplinary proceedings or new evidence not evaluated in the disciplinary investigation or the hearing of the case, reach EMIDIPA from the Personnel Departments of the relevant departments (Security Forces and Detention facilities) and are registered in the Database, which ensures the possibility of monitoring them. The length of time that has passed of the statute barred period must be entered upon the registration of the case into the EMIDIPA database, taking into account that the statute barred period is discontinued from the time that the judgment was issued until the time that the case is entered into the said database. The statute barred period is, once again, in effect from the moment that the case is registered to the EMIDIPA database.

16. Within ten days of the occurrence of the judgment of the ECTHR, the EMIDIPA, decides:

(a) If the case is not required to be re-investigated, in which case it shall disclose its findings to the Department of Personnel of the competent department, in order to put the case in archive;

(b) Whether an inspection from the internal service itself shall be carried out in accordance with the provisions of L. 3094/2003 and the present Regulation;

(c) If the case is to be referred to the competent disciplinary body, when a new investigation and completion of disciplinary review is ordered in the context of the judgment of the ECtHR. In the referral document the EMIDIPA may indicate specific interrogative acts, to be carried out, or particulars to be taken into account, in accordance with the judgment of the ECtHR.

17. The handling of the above cases is a special chapter in the Annual Report of the EMIDIPA

#### **VI. Final provision**

18. The issues of the operation of the EMIDIPA not specifically regulated by this Regulation, are subject to the general provisions of the Regulation of Operation of the Greek Ombudsman (PD 273/1999) and Law 4443/2016.

This decision is to be published in the Official Gazette.

Athens, 8 June 2017

The Greek Ombudsman

ANDREAS POTTAKIS





# Annex II





## Annex II

### Letter of Ombudsman to the Minister of Justice, Transparency and Human Rights and to the Secretary-General for Transparency and Human Rights

Below is the letter, in its entirety, as it is sent by the Ombudsman to the Minister of Justice Transparency and Human Rights and the General Secretariat for Transparency and Human Rights proposing specific modifications and the legislative framework of the Mechanism with a view to enhancing its effectiveness.

Athens, October 26, 2018

No. Prot. Gr.Syn. 135

#### To:

K. Michalis Kalogirou  
Minister for Justice, Transparency and Human Rights  
96 Mesogeion street, 115 27 ATHENS

Mrs Maria Giannakaki  
Secretary-General for Transparency and Human Rights  
96 Mesogeion street, 115 27 ATHENS

### **SUBJECT: Proposals to improve the legal framework of the National Investigation Mechanism for Arbitrary Incidents**

Honorable Mr Secretary,  
Honorable Mrs Secretary-General,

One year after the launch of the National Mechanism for the Investigation of Arbitrary Incidents EMIDIPA(09.06.2017), based on the experience of the Independent Authority from the daily implementation of the legislative framework governing the operation of this special competence (art. 1 para. 1 L. 3938/2011 as replaced



by Art. 56 of L. 4443/2016, Articles 3 and 4 N. 3094/2003 as replaced by Art. 19 and 20 N. 4443/16) it is appropriate to evaluate this framework. With this letter, we would like to express to the Ministry of Justice, Transparency and Human Rights, that holds the legislative initiative, our proposals to amend the existing arrangements, as well as the addition of new provisions that are deemed necessary for the optimum fulfilment of the mission entrusted to the Authority by the legislator of L. 4443/2

## A. The legislative framework of EMIDIPA investigation in general

The provisions of Law 4443/2016 which regulate the way the Greek Ombudsman exercises this special competence have largely succeeded in establishing a functional framework but feature some omissions which do not guarantee the Independent Authority's investigation effectiveness to the maximum extent. Improvements to the legislative framework are necessary both in order to strengthen the National Mechanism with specific institutional tools so that its independent investigation does not appear weakened compared to the corresponding internal disciplinary investigations of services controlled by the National Mechanism, and also to improve the substantive cooperation with the competent services. The proposed changes concern the following:

**- elimination of the investigation impediment when prosecution occurs for the same case for which a disciplinary investigation is under way** (article 4 par. 4 of Law 3094/2003). This is important due to the independent but relevant nature of the EMIDIPA disciplinary procedure and the criminal procedure.

When the acts under investigation constitute crimes and the interrogation process is ordered, the time until its completion and the referral of the case to the competent court allows for the completion of the disciplinary investigation and the investigation by EMIDIPA prior to the referral and the criminal trial or the issuance of an exoneration decree.

Additionally, it is paradoxical that the internal disciplinary procedure is not obstructed, while the EMIDIPA investigation is. According to the explanatory report to Law 4443/2016, the Ombudsman does not substitute for the disciplinary control of the staff, but *“operates in parallel and in complementary fashion”* and *“otherwise follows the procedure provided for by the disciplinary law of each service to which the person under investigation belongs”*. For this reason, the fundamental principle of disciplinary law should apply in this case, that the disciplinary procedure is separate and independent from the criminal procedure (Art. 114 of Civil

Service Code, Art. 48 of Presidential Decree 120/2008, Police Staff Disciplinary Law), so that the investigation by the Independent Authority which is parallel to the disciplinary procedure may not be suspended by any criminal prosecution or criminal proceedings. In order to eliminate this impediment, a paragraph should be added to Article 1 paragraph 2 of Law 3938/2011 and the second subparagraph of Article 4 par. 4 of Law 3094/2003 should be restored to the extent that it does not refer to the EMIDIPA.

- the explicit provision concerning the power to **summon witnesses, receive testimonies under oath, order experts' opinions** within the framework of EMIDIPA operation.

In order to provide for this possibility, it should be added to paragraph 7 of Article 1 of Law 3938/2011, as replaced by Article 56 of Law 4443/2016, according to which *"the Ombudsman's senior investigators possess, in the context of EMIDIPA investigations and for the purposes of these investigations, the powers of special criminal investigators under Articles 34, 183 and 251 of the Criminal Procedure Code"*. They may thus have the power, in the context of EMIDIPA investigations, to summon witnesses and to examine them, to conduct autopsies with the assistance of experts and to do whatever is necessary for the collection and keeping of evidence. Such a choice is in line with the provision of Law 3938/2011, as it is currently in force after Law 4443/2016, but it does not affect the competences of other authorities in the preliminary criminal procedure according to the Criminal Procedure Code. At the same time, it limits the scope of these powers which fall within the scope and type of the investigation provided for by Law 4443/2016.

- the explicit **removal of confidentiality of the (pre) investigative material** for the needs of the EMIDIPA investigation.

In order to ensure such access, information on the progress of the parallel criminal case, as well as the provision of information from the competent Prosecutor's Office, which was not included in the file of the disciplinary case, it would be advisable to add a provision in which the competent Prosecutor's Office is required to respond and provide the requested information from the relevant criminal case file at the request of the National Investigation Mechanism For Incidents of Power Abuse. Also, the corresponding answer should elaborate as to whether the data is covered by the secrecy of the criminal procedure or whether the accused and under disciplinary investigation person has access to the relevant file.

- the amendment of Article 1 par. 3 of Law 3938/2011 regarding the **EMIDIPA investigation deadlines**.

**In particular, provision should be made for the deadlines' suspension**



**when further information has been requested from the competent Service by EMIDIPA, while these deadlines should be considered as indicative (as provided for the relevant disciplinary bodies, see Art. 39 of Presidential Decree 120/2008).**

- **ensuring the uninterrupted flow of information** on complaints and internal administrative inquiries by the relevant incident services that fall within its responsibilities.

This can be achieved by amending paragraph 8 of Article 1 of Law 3938/2011 in order to explicitly provide for the obligation of the competent services to inform the Mechanism *“during the filing of each complaint and after the completion of their investigative acts until the imposition of disciplinary sanctions”* (a provision corresponding to that of paragraph 5 of article 4 of Law 3094/2003).

- the explicit **provision of reservations concerning investigations** on cases, which EMIDIPA decides to forward for investigation to the competent authorities, if they are evaluated as being of greater severity than originally estimated.

A similar reservation in favor of the Authority's responsibility to perform its own investigation has been provided for if a case is forwarded to the competent authority for re-investigation due to a conviction by the ECHR (Art. 1 par. 6 of Law 3938/2011 and see Art. 4 par. 5 of Law 3094/2003).

- **a relevant provision for at least the referral of the disciplinary authority's decision to the Minister**

This necessity arises in cases of unjustified deviation from EMIDIPA reports, whether these were drafted following an investigation (Art. 1 par. 4 of Law 3938/2011), or they were drafted in order to identify shortcomings in internal investigations conducted by the Administration (Art. 1 par. 8 of Law 3938/2011).

- the amendment of Article 1 par. 1 of Law 3938/2011 in order to also include **judicial police staff**, provided that the proposed draft law under discussion is forwarded for a vote.

- the amendment of the last subparagraph of paragraph 8 of article 1 of Law 3938/2011 in order to explicitly provide for the right of a person with reasonable interest to **learn about the EMIDIPA report** for cases where the investigation was conducted by competent authorities prior to the decision of the competent disciplinary body.

## B. The legislative framework specifically on the implementation of ECTHR decisions

- The reservation of Law 4443/2016 for **ne bis in idem** is problematic due to its generality, which may result in defects in the disciplinary procedure which cannot be cured. Incorrect disciplinary procedure cannot be repeated if it was conducted for the right misconduct.

- The main issue arising from Law 4443/2016 concerns the **determination of international jurisdiction in relation to our internal law**: the lapse period is not suspended by the individual appeal, the ECTHR is not a court of appeals, there is no explicit commitment in our legislation that the legal classification of a disciplinary offense by the ECTHR prevails.

It is the Ombudsman's position that **the special provision of Law 4443/2016** on the disciplinary proceedings compliance procedure could be interpreted as implying **the disciplinary body's commitment to the legal characterization of the disciplinary offense by the ECTHR** *due to the unity of the legal order*, (see *Zontul case for the interpretation of Art. 137A of the European Convention on Human Rights as interpreted by the ECTHR*). This commitment, however, should be included in an explicit legal provision for the definition of the ECTHR's competence with regard to the disciplinary trial's autonomy. It should be noted that in the various individual disciplinary systems, it is defined that the disciplinary body is bound to accept the existence or not of the facts by irrevocable court decisions of Greek justice. It would be preferable, however, for the disciplinary body's commitment to legal characterizations by the ECTHR to be explicitly specified by law.

- For the calculation of the **lapse period** provided for by the disciplinary provisions, the law (Art. 56 par. 6) defines that the time period from the issuance of the competent disciplinary body's decision **until the receipt of the ECTHR decision by the Greek Ombudsman** does not count. It should be further provided that, along with the decision and the relevant disciplinary file, the competent services are obliged to indicate the dates and the lapse suspension period to the EMIDIPA.

There is, however, an implementation issue regarding ECTHR decisions prior to Law 4443/2016, which already emerged during the first year of operation of the Mechanism due to a number of decisions not enforced in the disciplinary procedure (Zontul, Makaratzis Group decisions), which the Legal Council of the State referred to the Ombudsman with this special responsibility.

Given that the law does not make any distinction as to the issuance timing of the decisions referred, the activation of EMIDIPA's competence through the re-



ferral of decisions issued prior to the entry into force of Articles 56-58 of Law 4443/2016, so decisions issued before 9-6-2017 and remain unenforced as to the disciplinary part, has been accepted **with regards to legal interpretation**, therefore it is a question of explicit provision. In this case, however, it is crucial to refer disciplinary cases which have reached lapse time (especially for the relevant criminal offense<sup>33</sup>) with a corresponding indication of the occurrence of the lapse period, since Law 4443/2016 provides, as stated above, for the suspension but not for the retroactive abolition of the lapse period. A possible retroactive lapse period abolition clause, which constitutes an institution of substantive criminal law, would also raise concerns of constitutionality with regard to the elimination of the criminal characterization.

### C. EMIDIPA organizational framework

The Mechanism's organization requires a coherent internal structure, internal and flexible operating rules and computerized support tailored to the needs of the Mechanism. However, in addition to the authority's internal organization, in order to be able to meet the requirements of the special responsibilities, it is in need of:

- a specific and adequate **budget steadily provided** for the exercise of responsibilities which extend across the country.

In order to achieve the smooth operation of EMIDIPA, it is necessary to create and add to the provisions of the annual state budget the necessary funds for the operation of EMIDIPA.

- a provision for better organization, staffing and operation of EMIDIPA structural positions to be filled by armed staff via transfers, with the exception of any general or special provisions, following interview procedures as provided for under Law 3094/2003 and with the exception of other procedures through the mobility system (the importance of staffing EMIDIPA by various institutions is also highlighted in a relevant report of the Commissioner for Human Rights of the Council of Europe).

- a provision for conducting seminars regarding EMIDIPA at the Security Corps Faculties.

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33. The disciplinary offenses of police staff under Art. 70 of Presidential Decree 120/2009 expire, depending on the severity of their punishment, after 2 or 5 years, unless they also constitute criminal offenses, in which case they fall under the longer lapse period of the criminal offense

Hoping that the suggestions above will contribute to our common goal, further arming the framework for the effective operation of the National Mechanism for the Investigation of Arbitrary Incidents, I remain at your disposal for collaboration.

With appreciation  
Andreas Pottakis  
The Greek Ombudsman



## Abbreviations

<b>ECTHR</b>	European Court of Human Rights
<b>EDE</b>	Administrative Inquiry Under Oath
<b>ELAS</b>	Hellenic Police
<b>EMIDIPA</b>	National Mechanism for the Investigation of Arbitrary Incidents
<b>ECHR</b>	European Convention on Human Rights
<b>KYT</b>	Reception and Identification Center
<b>LS-ELAKT</b>	Hellenic Coast Guard
<b>NSK</b>	Legal Council of the State
<b>PDE</b>	Preliminary Administrative Inquiry
<b>PC</b>	Penal Code

