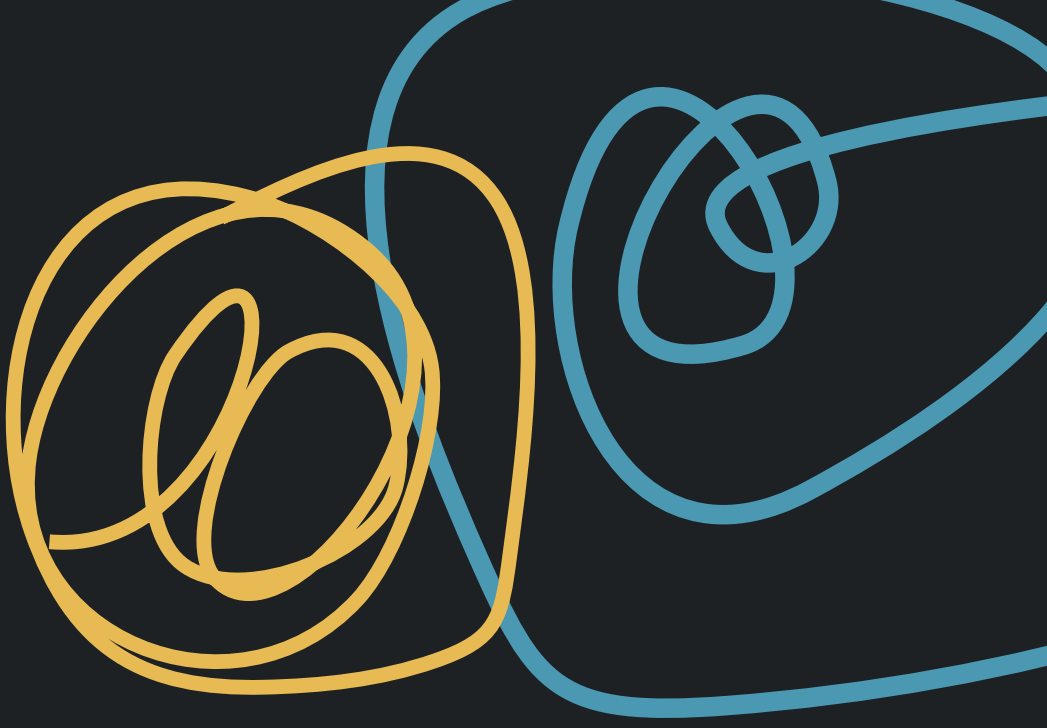


2022 SPECIAL REPORT

NATIONAL MECHANISM FOR THE INVESTIGATION OF ARBITRARY INCIDENTS

(EMIDIPA)

THE GREEK OMBUDSMAN
INDEPENDENT AUTHORITY

NATIONAL MECHANISM FOR THE INVESTIGATION OF ARBITRARY INCIDENTS (EMIDIPA)

2022 SPECIAL REPORT

THE GREEK OMBUDSMAN
INDEPENDENT AUTHORITY

TEAM

This Special Report is a product of material processing that arose from the work of the National Mechanism for the Investigation of Arbitrary Incidents team of the Greek Ombudsman, under the supervision of the Ombudsman Andreas I. Pottakis.

National Mechanism Team:	**Vicky Vasilantonopoulou** **Nikos Douladiris** **Sergios Drosos** **Maria Liadi** **Anna Lytra** **Maria Mavrogeni** **Stergios Preventis** **Chrysi Hatzi**
Drafted & Edited by	**Vicky Vasilantonopoulou** **Maria Mavrogeni**
English language editing	**Sarina Singh**
Publication coordination	**Eleni Adamantidou** **Vasiliki Delegou**
Artistic design and layout	**Daphne Bei, bei.daphne@gmail.com**
English translation	**Lexicon URL: http://www.lexicon.com.gr**
Language review	**Chrysanthi Galati chrysanthigalati@yahoo.com**

Please forward any inquiries regarding this report to the following e-mail address press@synigoros.gr

The Special Report was printed in 2023, in 500 Greek and 100 English copies, and the full version of the Report is available on the website of the Greek Ombudsman: https://www.synigoros.gr

ISSN: 2945-1744, Dimensions: 17x24cm, Pages: 152

17 Halkokondyli Street, 104 32 Athens

(+30) 213 1306 600

www.synigoros.gr

THE GREEK OMBUDSMAN

@Synigoros

ISSN 2945-1744

CONTENTS

Introduction

The assignment to the Ombudsman of the special competence for investigating cases of arbitrariness by security forces and penitentiary employees stresses the importance of enhancing the mechanisms of accountability and transparency when investigating every incident. The prerogative of taking coercive measures and exerting force, which is recognised to uniformed personnel of enforcement agencies within a liberal state and society, must be strictly limited to a necessary and proportional extent and be subject to thorough, substantive, and continuous control, while criminal and disciplinary sanctions should directly correspond to the gravity of the arbitrary or abusive action. Otherwise, the hard-fought trust relationship between security forces and society breaks down, and instead of enhancing the sense of security, the actions of uniformed agents intensify uncertainty among citizens.

The Ombudsman's contribution, through the Mechanism's independent, external, and impartial review and control function, is firmly established as a counteracting factor for any possible lack of trust, or even confidence, of the alleged victim for substantial and effective criminal and disciplinary investigations.

Full consolidation of procedural and substantive guarantees of effective, transparent, non-discriminatory investigations, consistent with the dictations of the rule of law and the jurisprudential principles, are not expected to be achieved at once. Changing the institutional framework alone is not enough, a change in culture of the investigator and the body as a whole is also necessary. It requires persistent efforts, without derogations or concessions. The common objective of not only society as a whole, but also of the forces that are subject to the oversight powers of the Mechanism, is the continuous progression of investigations, the establishment of transparent, substantive and impartial procedures, close observance of substantive and procedural guarantees, so as to strengthen citizens' confidence in the reliability of disciplinary investigations.

The report for 2022 is structured similarly to the reports of the previous years, to facilitate the comparative and systematic review of the degree of compliance

of the internal disciplinary bodies with the recommendations and findings of the Ombudsman's Mechanism. At the same time, the report aims to enhance transparency and focuses on groups of cases or independent incidents that have raised public concern.

In 2022, the restrictive measures taken to control the spread of the COVID-19 pandemic were lifted. The lifting of these measures is directly reflected in the volume of cases the Mechanism was asked to investigate in the previous year. Indeed, following the de-escalation of the COVID - 19 pandemic and the gradual lifting of the relevant restrictive measures, the number of cases involving the security forces that were referred to the Mechanism for investigation returned to pre-pandemic levels, i.e. those of year 2019, as the security forces had been assigned the task of monitoring compliance with these measures and this resulted in a number of complaints of violence and other forms of police abuse in the two previous years. It is worth noting that, compared to pre-pandemic data, the number of citizen complaints filed to EMIDIPA increased nearly by 50% - which solidly demonstrates the high level of public confidence in the Mechanism and in its safeguarding functions and the Mechanism's ever-increasing recognition by the general public.

These complaints included reported refoulements through the country's land and sea borders. Complaints related to cases of alleged refoulement filed directly to the Ombudsman appeared to be increasing. Characteristically, in 2022 the FRONTEX Fundamental Rights Officer notified to the Ombudsman, as required under the relevant European Regulation [Regulation (EU) 2019/1896, Article 111(4)], five (5) new complaints in addition to the two (2) complaints he had submitted in year 2021. The need for substantially independent border control mechanisms is becoming increasingly relevant as the European Union proceeds with the discussion on the adoption of the regulatory measures outlined in the New Pact on Migration and Asylum. Both the European Union Agency for Fundamental Rights (FRA) and the LIBE Committee of the European Parliament recommend, in this regard, to make full use of the existing powers and expertise of the national mechanisms (e.g. the Ombudsman in Greece) and provide maximum independence safeguards.

Upgrading the quality of disciplinary control of uniformed personnel of enforcement agencies and staff of penitentiary facilities may act as a catalyst in the reduction of arbitrary incidents and the restoration or reassertion of citizen's confidence. The Ombudsman's Mechanism remains committed to this

mission, flatly refusing any compromise to or derogation from the transparent, impartial, and independent investigation of each reported incident.

An analysis of the cases for which the Mechanism issued a report in 2022 shows that almost half of the internal administrative investigations of disciplinary bodies were referred by the Mechanism for completion, due to material deficiencies in terms of completeness of the investigation or the documentation of the disciplinary bodies' judgment, while only one (1) in ten (10) internal administrative investigations were found to be complete and thoroughly documented. Moreover, a certain number of cases that are set aside by the EMIDIPA tends to become established, despite the fact that disciplinary investigation was found to be incomplete for practical reasons that prevented its thorough completion.

In addition, exercising its power to investigate complaints on its own, the Ombudsman decided in 2022 to conduct an independent investigation, parallel to that of the Hellenic Police, in three (3) cases concerning police arbitrariness against members of the Athens and Piraeus Bar Associations and alleged refoulement of an Afghan interpreter of FRONTEX - a case that was referred to the Ombudsman by the FRONTEX Fundamental Rights Officer.

In 2022, the Ombudsman used his option to refer to the Minister of Citizen Protection any cases where departures from the findings of the Mechanism were considered to be unjustified or poorly substantiated. Thus, the four (4) new incidents involving reportedly arbitrary conduct on the part of uniformed personnel of the security forces were referred back to the same Minister within 2022, in addition to the six (6) other cases that had been referred in the previous years. All disciplinary bodies, as well as the political and operational hierarchy of the bodies that are subject to the control of EMIDIPA are expected to confirm emphatically their commitment to support investigations with diligence and impartiality. It is an invariable principle of the Authority that the outcome of these cases, and the initiatives and decisions of the political leadership will demonstrate how solidly the Administration recognises the de facto binding nature of the Authority's findings, while giving a clear message of sincere willingness and commitment by internal bodies to improve internal investigations on cases of arbitrary conduct. The Ombudsman insists on the use of the referral to the competent Minister instrument, in cases of unreasoned failure of internal investigations to comply with the Ombudsman's relevant findings, given that this constitutes «*a substantial safeguard for the*

Administration's internal investigations", ", as the accompanying explanatory memorandum to the relevant provision characteristically proclaimed.

The enhancement of the Mechanism with the necessary expert staff is imperative due to the constantly rising volume of caseload. In December 2020, the institution of five (5) new expert personnel positions was envisaged by law; the actual recruitment depends on the overall planning for the public sector and the relevant funding that will be allocated to the Independent Authority. However, as it is noted in the Mechanism's 2021 report, given the selection process to be followed and the wider planning in the public sector, the recruitment provided by law in 2020 is not expected to be completed within 2023.

Since 2018, the Independent Authority had highlighted that further strengthening the effective operation of the Mechanism, and the Ombudsman as a whole, while guaranteeing independence and impartial judgment, presupposes the enactment of a number of organizational and functional arrangements for the Ombudsman, in compliance with the «Venice principles", the set of 25 standards for the Ombudsman institution, elaborated by the Venice Commission and unanimously approved by the Committee of Ministers of the Council of Europe and adopted by the UN with a relevant resolution. One of the necessary arrangements is the establishment of a procedure for the selection of Ombudsman staff by the Authority itself, a provision that is neither innovative nor new, as in essence it is the procedure that had been foreseen by the founding legislator of the Greek Ombudsman.

The Ombudsman will inexorably and indisputably continue to carry out his Constitutional mission with the same institutional responsibility, with ever greater experience and expertise.

Andreas I. Pottakis
The Greek Ombudsman

1. The independent authority's mandate as a national mechanism for the investigation of arbitrary incidents

The operation of the National Mechanism for the Investigation of Arbitrary Incidents (EMIDIPA) is provided for under Article 1 of L 3938/2011 (A' 61), as originally replaced by Article 56 of L 4443/2016 and then by Article 188 of L 4662/2020 (A' 27)[1].

Within the scope of this specific competence, the Independent Authority shall collect, record, evaluate, investigate, and further suggest disciplinary action to the competent services, when complaints for actions of the uniformed personnel of the Hellenic Police, the Port Authority- Hellenic Coast Guard, the Fire Brigade, as well as the personnel of penitentiary facilities, are filed, which occurred in the exercise of their duties or as an abuse of their power, concerning:

a) torture and/or other violations of human dignity within the meaning of Article 137A of the Penal Code,

b) unlawful intentional violations of the right to life, physical integrity or health, personal freedom, or sexual freedom,

c) illegal use of firearms; and

d) unlawful conduct for which there are indications that it was carried out with a racist motive, or which presents an implicit element of any other kind of

1. With Article 56 of L 4443/2016, the responsibility provided for in Article 1 of L 3938/29011 was assigned to the Ombudsman, while with Article 188 of L 4662/2020 the responsibilities of the National Mechanism were further strengthened.

discrimination on grounds of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic disease, family or social status, sexual orientation, gender identity or characteristics.

Cases are brought before the National Mechanism in writing and non-anonymously, *ex officio* or upon referral by the competent Minister or Secretary General. Upon exercising the EMIDIPAS's power, the Ombudsman, after evaluating the above complaints, decides whether it should be investigated by the Independent Authority itself, or it should be forwarded to the competent Services for investigation, subject to its own responsibility for its own investigation following the disciplinary procedure. In this case, upon completion, the services are obliged to send their findings and the complete file of the administrative investigation to the Independent Authority, in order to assess whether it needs to be supplemented. Until the Ombudsman sends a resolution, the competent disciplinary bodies suspend the adoption of a decision. After taking into account the Ombudsman's conclusion, they are required to comply with the Ombudsman's recommendations, while any deviation from the Ombudsman's findings requires specific and detailed reasoning.

In 2020, under L 4662/2020 the legislator, responding to the relevant recommendations of the Ombudsman, gave the Mechanism effective powers of inquiry, similar to those of the internal disciplinary mechanisms of security forces, as well as instruments to further strengthen the decisive effect of its observations, investigations, and findings on disciplinary controls. In this context, inter alia, the Ombudsman informs the Minister about cases for which a deviation from its findings with insufficient reasoning is found, at each stage of the disciplinary procedure, about any actions of the Minister, in his capacity as disciplinary head. EMIDIPA does not replace the judicial review and disciplinary control of incidents within its jurisdiction; nevertheless, its operation is parallel and complementary, without depriving the investigated of the legal judge (criminal or disciplinary[2]).

In addition, the Mechanism is called upon to reconsider those cases for which the European Court of Human Rights has convicted Greece of violating the provisions of the European Convention on Human Rights, due to lack of disciplinary procedure or due to the existence of new evidence that was not considered in the disciplinary investigation or the trial. After taking into account

2. Article 1 para. 9 L 3938/2011, as in force.

in particular what the ECtHR acknowledged, as well as the expiry of the limitation period, EMIDIPA decides whether there needs to be a reinvestigation of the case.

EMIDIPA's action is supervised and coordinated by the Ombudsman, while its operating procedure is provided in the new Rules of Operation of the Mechanism[3].

An important aspect of the Mechanism's activity is its cooperation with similar bodies, primarily at European level. For the said activity, please refer to chapter seven (7) of the present Report.

3. Government Gazette 10/23145/2020, B' 2359.

2. Statistical Assessment

In 2022, two hundred and ten (**210**) cases were referred to the Ombudsman concerning the special competence of the National Mechanism for the Investigation of Arbitrary Incidents (EMIDIPA)[4] (30% down compared 2021, returning to pre-pandemic levels (2019: 208 cases). Such decrease was the result of the de-escalation of the pandemic of COVID - 19 and of the gradual lifting of the relevant restrictive measures, as the delegation of compliance controls to the security forces led to a number of complaints for violence and other forms of police arbitrariness in the previous two years. In any case, the statistical assessment carried out in this chapter reflects, as every year, only part of the incidents of arbitrariness, which is indicative of the unknown number of cases where the persons concerned failed to exercise their right to report the incident. Reluctance to engage in formal and lengthy procedures coupled with the fear of being targeted by the Authorities prevents certain victims from exercising their rights. As a result, certain cases are never brought before the relevant disciplinary bodies.

The vast majority of the cases brought before the National Mechanism in 2022 [in particular one hundred and sixty (**160**) cases], were forwarded by the Hellenic Police, which, although remains the main source of the National Mechanism's cases, in 2022 forwarded 30% fewer cases to the Independent Authority compared to the previous year. In addition to what is said above with regard to a reduction in the number of incoming cases in 2022, it remains to be seen whether the reduced inflow of cases from the Hellenic Police practically reflects an emerging trend of circumventing the National Mechanism in practice, which is often manifested by the delayed referral of cases to the Ombudsman (i.e. Cases are only referred *after* the relevant administrative investigation is

4. Article 1 § 1 L 3938/2011, as replaced by Article 56 L 4443/2016, and then by Article 188 L 4662/2020: «*...a) torture and other violations of human dignity within the meaning of Article 137A of the Penal Code; b. unlawful intentional violations of the right to life, physical integrity, health, personal freedom, and sexual freedom; c. illegal use of a firearm; d. unlawful conduct for which there are indications that it was carried out with a racist motive, or which presents an implicit element of any other kind of discrimination on grounds of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic disease, family or social status, sexual orientation, gender identity or characteristics".*

complete) or failure by the competent disciplinary bodies to comply with the requirement to suspend the decision until the National Mechanism's renders its findings.

On the other hand, only two (**2**) cases came from the Hellenic Coast Guard, over four (4) in 2021, while, for yet another year, the General Secretariat for Crime Control Policy failed to refer cases involving acts or omissions of the staff of Detention Centres, despite the explicit requirement of the law[5] for immediate forwarding of the relevant administrative investigation orders to the Ombudsman.

The number of citizens who addressed the Independent Authority to complain about arbitrary conduct from security bodies has also decreased [forty-four (**44**) complaints - 40% fewer than the previous year]. Such decrease is once again attributed to the fact that the measures to control the spread of the COVID-19 pandemic were lifted and the special powers of the Hellenic Police Force to monitor compliance therewith - which largely served as a means to intensify police suppression - were abolished. It is worth noting that, compared to pre-pandemic data, the number of citizen complaints filed to EMIDIPA increased by 47% (**30** cases in 2019) - which solidly demonstrates the high level of public confidence in the National Mechanism and in its safeguarding functions and the Mechanism's ever-increasing recognition by the general public.

Lastly, three (**3**) complaints were forwarded by the FRONTEX Reporting Mechanism[6], while the Legal Council of the State notified the Ombudsman of one (**1**) ECtHR judgment condemning Greece[7], which, following a request by the Authority for the forwarding of the administrative investigation file by the competent Hellenic Police Division, was brought to the attention of the National

5. Article 1 para. 3 of Law 3938/2011, as amended, reads as follows: "*The orders for conducting administrative inquiries into incidents falling within the competence of the National Mechanism for Investigation of Arbitrary Incidents pursuant to paragraph 1 of this Article shall be promptly forwarded to the Ombudsman, so that he can decide, in accordance with the previous paragraph, whether the Independent Authority should carry out investigation on its own or monitor the internal investigation, reserving his right to carry out his own investigation, informing the relevant agency accordingly*".
6. In accordance with Art. 111 (4) of EU Regulation 2019/1896, in 2022 FRONTEX forwarded to the Ombudsman a total of five (5) complaints for illegal refoulement of foreigners by the Greek Authorities, two (2) of which were already being investigated on the basis of complaints that were filed directly to the E.M.I.D.I.P.A. by the alleged victims. (See chapter 4.1 of this report on the investigation of cases of illegal refoulement).
7. ECtHR judgment, *Torosian v. Greece,* 07.07.2022 (App. No. 48195/17).

Mechanism on 28.02.2023, so that the latter could decide whether to repeat or not of the disciplinary procedure, in accordance with Article 1 para. 5 of Law 3938/2011.

Two hundred and four (**204**) of the incoming cases fell within the competence of the Mechanism, while only six (**6**) were set aside due to lack of competence. Four (**4**) cases of those lying within the competence of the National Mechanism concerned acts or omissions of the bodies of the Hellenic Coast Guard. Two (**2**) of them were forwarded, as already mentioned, by the Hellenic Coast Guard itself, one **(1)** related to acts or omissions of Detention Centre employees and came from a detainee's complaint, while the rest concerned acts or omissions of the uniformed personnel of the Hellenic Police - which, of course, is due, among others, to the systematic forwarding of the orders for administrative inquiries by the Hellenic Police Headquarters.

The subject of the cases examined under the EMIDIPA's jurisdiction during the year 2022 concerned:

Physical integrity or health: 76 cases	35%
Personal freedom: 47 cases	23%
Racist motive or discrimination: 28 cases	13%
Illegal use of a firearm: 25 cases	12%
Torture and violations of Article137A of the PC: 22 cases	11%
Sexual freedom: 6 cases	3%
Attacks upon a person's life: 6 cases	3%

The statistical assessment of the above cases shows that six (6) out of ten (10) cases concern physical violence or violations of personal freedom, while many cases (12%) involve a racist motive.

Year on year, the subject-matter of the complaints remains more or less invariable - save for the complaints for torture or other insults to human dignity, within the meaning of Section 137A of the Penal Code, which now represent 11% of the total cases, having increased by four (4) percentage units.

During 2022, the Ombudsman issued case-file reports in one hundred thirteen (**113**) Cases. Forty-four (**44**) of those cases were referred back to the Administration on grounds of poor inquiry and/or inadequate justification

of findings; in thirty-eight (**38**) cases the National Mechanism made recommendations for minor corrections or general recommendations to avoid similar deficiencies in the future; in thirteen (**13**) cases the investigation was found to be thoroughly completed; twelve (**12**) cases were set aside, although the disciplinary control was considered insufficient, due to practical problems that prevented its completion, while in two (**2)** cases cases it was considered that the reported incidents lay outside the competence of the EMIDIPA. At the same time, utilizing his statutory option to refer cases to the competent Minister, the Ombudsman brought four (**4**) cases to the attention of the Minister of Citizen Protection, where departures were identified from the operative part of his findings, without specific and detailed justification, awaiting eagerly the Minister to take legal action as disciplinary director of the competent agencies. In addition, exercising his power to investigate complaints on his own, in 2022 the Ombudsman decided to conduct an independent investigation, parallel to that of the Hellenic Police, in three (**3**) cases involving arbitrary conduct on the part of police officers against members of the Athens and Piraeus Bar Associations, and illegal repatriation of an Afghan interpreter of FRONTEX - a case that was forwarded to the Ombudsman by the FRONTEX Fundamental Rights Officer[8].

As the statistical assessment of the above data shows, the rate of administrative inquiries that were referred on grounds of substantial deficiencies in terms of completeness of the investigation and/or substantiation of the disciplinary bodies' findings remains high (**40%** of the cases examined on the merits), while cases in which the investigation was unreservedly considered thoroughly completed represent merely **12%** of the total cases. This finding should raise concern to the Administration, as, despite the National Mechanism's contribution and constant remarks on the regular shortcomings of administrative investigations, shortcoming are still identified in a large number of cases, undermining the quality of internal control.

With regard to the subject matter of the cases that were referred by EMIDIPA back to the authorities for further investigation, more than half of those cases (**23 out of 44**) involve physical abuse complaints. The second most frequent subject is violations of personal freedom **(10 out of 44 cases)**. While showing how frequent these complaints are in all cases that are brought before the Authority, these rates further indicate that (i) medical findings are often poorly

8. Art. 111 para. 4 of Regulation (EU) 2019/1896.

collected and evaluated / reconciled against the reported actions, and (ii) the reversal of the burden of proof, as a principle, is not applied in all instances, as per ECtHR case law. Instead, the burden of proof is imposed on the authorities whenever they are dealing with persons arrested or detained by them or generally under their control[9].

As regards the disciplinary sanctions proposed by the bodies conducting the administrative inquiries, in four (**4**) cases the sanction of dismissal was recommended, in eleven (**11**) cases a fine was recommended and in one (**1**) case a reprimand was recommended. Based on the above, one understands that, in the vast majority of cases, administrative investigation leads to a recommendation to set the case aside. This raises reasonable doubts as to whether the persons/bodies under disciplinary investigation are treated with the proper level of strictness, as dictated by ECtHR case-law, so that similar conduct is effectively prevented in the future[10].

Committed to the objective of improving the quality of administrative investigations and restoring public confidence in disciplinary procedures, EMIDIPA now counts over five years as an independent external mechanism that monitors investigations on cases involving arbitrary conduct. The sections below analyse, among other things, the main interventions made by the Mechanism in the past year, the malfunctions and shortcomings most commonly identified in internal administrative investigations and the Authority's conclusions based on its activities in year 2022.

9. ECtHR judgments, inter alia *Zelilov v. Greece,* 24.05.2007, *Bekos Koutropoulos v. Greece,* , 13.12.2005, *Aksoy v. Turkey,* 18.12.1996: *"Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the ECHR".*

10. ECtHR judgment, *Sidiropoulos and Papakostas v. Greece*, 25.04.2018.

3. Assessment and Conclusions for 2022

This year's special EMIDIPA report, the fifth in a row, is consistent with the - roughly equivalent - age of the institution, which after various legislative attempts followed by a -not-so-flattering for Greece- report of the Commissioner for Human Rights of the Council of Europe, was finally inaugurated at the beginning of June 2017, when the provisions of Law 4443/2016 came into force. By assigning this task to the Ombudsman, the legislator tried to shield its safeguarding role in two ways, i.e. both at a practical and a symbolic level, by affording the newly-established Mechanism the guarantees and safeguards appropriate to an Independent Authority. In this context, EMIDIPA is an important legislative breakthrough, that is intended to reinforce the rule of law and at the same time create a different culture, free from its dark historical origins and shaped on the basis of the protection of human rights, the obligation of accountability and public trust.

For the same reasons, EMIDIPA's findings are often substantiated by reference to the European Convention on Human Rights and its interpretation by the ECtHR. The establishment of human rights at the international level and the supranational effect of the relevant case-law[11], constitute the very essence of this choice, which reinforces the importance of the Authority's recommendations and demonstrates the effects of unjustified departures from such recommendations. A structural component of this choice is the fact that respect for human rights is pinpointed as a key criterion for assessing governmental policies and eventually the legitimacy of the States themselves at the international level[12]. In support of this choice, the legislator has

11. Chrysogonos K., 2001, *"The European Convention on Human Rights in the domestic legal order "Greece's difficulties in adjusting to the European public order of human rights"* Ant. N. Sakkoulas Publications, p. 401 ff. and Zolotas T., 2010, "The binding effect of court precedent and ECtHR judgments on the national courts", *"EfimDD*, Vol. 1.
12. Chouliaras A., 2015, "Human Rights, Critical Criminology and International Penal Justice" in Karydis V. and Chouliaras A., *"Ethical Panic, Power and Rights – Modern Approaches - Ombudsman*, Sakkoulas Publications, Athens – Thessaloniki, pp. 181 – 207.

recognised that EMIDIPA is also empowered to act as a national mechanism for the enforcement of ECtHR judgments. As theorists add, reference to human rights performs a dual function: It serves as a connection point between what is local and what is universal, by introducing a newer cross-cultural criterion for evaluating how different national legal systems address important social issues[13].

In this context, the systematic way in which the same shortcomings and deficiencies of internal investigation procedures concerning disciplinary misconduct are recorded in almost every single annual report of the Mechanism and the persistence of such deficiencies over time, despite the Authority's repeated recommendations and interventions, forced the Authority last year to point out the risks arising from the gap between "paper" and "real" legislation[14]. This year's findings, as same are detailed in the individual chapters of this report, not only confirm the same trend, but further record a new risk that arises from the exacerbation of previously recorded deficiencies.

The empirical basis of this inverse course - taking into account, in addition to the above, the recent legislative improvements that took place on the basis of the relevant EMIDIPA recommendations, as regards both (i) the content of police disciplinary law (Article 1 of Presidential Decree 111/2019) and (ii) the functions of the Mechanism itself (Article 188 of Law 4662/2020) - is primarily based on the Authority's findings. Thus, in 2022, the Ombudsman issued, in a number of disciplinary cases, dual referral findings, underlining once again the failure of disciplinary bodies to comply with his prior recommendations **(F. 250375, F. 253320, F. 250692, F. 259978, F. 261397, F. 247702, F. 307705, F. 254610, F. 267188, F. 272705, F. 297117, F. 297117)**. In four (4) disciplinary cases he issued a finding/letter addressed to the competent Minister, informing him of the unjustified refusal of disciplinary bodies to follow his recommendations **(F. 282183, F. 267199, F. 259616, F. 273254)**. The same refusal is repeatedly identified in three (3) disciplinary cases, for which relevant findings/letters were submitted to the competent Minister during the period 2020 - 2021, yet to no avail **(F. 230990, F. 241354, F. 237463)**. In

13. Cohen S., "Human Rights and Crimes of the State: "The Culture of Denial", reprint in D. Friedrichs "*State Crime Vol. 1. Defining, Delineating and Exploring State Crime",* Dartmouth, Ashgate, p. 71 – 73.
14. EMIDIPA Special Report for the year 2021, p. 27 et seq.

several cases, the Ombudsman noted the poor quality of disciplinary reports, by derogation from the requirements of Directive / Circular no. 6004/1/22-xiii/14.10.2008 of the Chief of the Hellenic Police. **(F. 283199, F. 250375, F. 282183, F. 287630, F. 259269, F. 266790, F. 274521, F. 238822, F. 241904, F. 254610, F. 268772, F. 299498)**. Several other cases were set aside due to practical difficulties that prevented completion of the disciplinary investigation. The Ombudsman, of course, persistently pointed out the deficient nature of the investigation process **(F. 253320**, **F. 244866, F. 250692, F. 278647, F. 266790, F. 266795, F. 274743, F. 247702, F. 268772, F. 254610, F. 268772, F. 276291)**.

This empirical foundation is further solidified if the disciplinary reports of the Hellenic Police Force are taken as a basis (instead of the Authority's findings), in which recommendations to set the case aside are the dominant rule in the vast majority of disciplinary controls. Suffice it to say, once more, that disciplinary responsibility was imputed in merely sixteen (16) out of one hundred and thirteen (113) cases that were handled by the Mechanism in 2022. This conclusion is upheld in both (2) convicting judgments that were issued by the ECtHR against Greece in mid-2022[15] and early 2023[16] respectively, for violations of the procedural requirements of Art. 3 of the ECHR. Both judgments point out that the applicants did not benefit from an effective investigation, both at the criminal and the disciplinary level - thus extending the (already long) list of similar judgments.

Interdependence between disciplinary and criminal proceedings and the frequent institutional instrumentalisation they entail; strong preference for conducting preliminary disciplinary investigations over disciplinary proceedings, even in cases of serious allegations; pointless, and often selective and/or deficient reference to the applicable legislation, as opposed to the obligation to provide specific and detailed reasoning; failure to collect or timely collect critical evidence and failure to evaluate and utilise such evidence; inactivation of the strong institutional safeguards offered by the option to notify the competent Minister and disciplinary officer; the institutional practice of "bypassing" the Ombudsman by issuing disciplinary decisions that do not rely on his prior findings; the unjustified disregard for - or even opposition

15. ECtHR judgment, *Torosian v. Greece,* 07.07.2022.
16. ECtHR judgment, *B.Y. v. Greece*, 26.01.2023.

to - his recommendations and, lastly, the disregard for the ECtHR judgments despite their supra-legislative effect, which is even greater in the case of the States convicted thereunder, illustrate the qualitative nature of disciplinary deficiencies and at the same time reflect the content of the competent bodies' refusal to comply with the legislative requirement to carry out thorough and effective investigations.

In this context, it is worth stating as an example that, out of the total number of cases that were brought before the Authority in 2022 in relation to allegations of racist conduct or discriminatory treatment by police officers, merely four (4) cases were effectively investigated for racial motivation **(F. 307706, F. 266792, F. 273572, F. 265531)**. This gets even more interesting when one considers that, in the context of complying with the relevant convicting ECtHR judgment[17], Greece (i.e. The Chief of the Hellenic Police) has proceeded *inter alia*to issue a series of Directives - Circulars[18], insisting on the requirement to investigate racist motive, both in criminal and disciplinary cases concerning police misconduct against persons that belong to vulnerable, ethnic, religious or social groups and against foreigners. It is noted that the persons conducting the disciplinary control are liable to take all steps necessary to identify and disclose the existence of a racist motive, either independently or as partial motive in case there are multiple motives. In fact, this requirement is consistently pointed out in every disciplinary control order where the alleged victim belongs to one of the above-mentioned groups.

In addition to the intensity arising from the competent bodies' failure to comply with national and international commitments and, by extension, the deficit arising in the effectiveness of controls, the above finding is quite enlightening also with regard to which persons are usually the victims of the abusive conduct of security forces. For yet another year, a significant number of cases that were either forwarded or submitted as citizen complaints directly to the Ombudsman, indicate that the victims of police misconduct can be mainly classified in four categories: (a) young persons, sometimes minors or even children; (b) foreigners, regardless of their status in the country; (c) Roma people; and (d) women. The majority of complaints concern misconduct impairing the victims'

17. ECtHR judgment, *Bekos & Koutropoulos v. Greece,* 13.12.2005.
18. See the reply under prot. no. 7100/4/3/24.05.2006, under prot. no. 4803/22/210-κ΄/26.06.2006 and under prot. no. 6004/12/35/27.12.2007, 7100/25/14-δ΄/08.11.2014.

physical integrity, human dignity, personal or sexual freedom, not to mention human life itself. Combinations of these offences are also quite frequent and expand the range of insults. Furthermore, persons meeting more than one of the above features run a much great risk of victimisation.[19] **(F. 315425, F. 315929, F. 316964, F. 320709, F. 316621, F. 322317, F. 323120, F. 324108, F. 327194, F. 329372, F. 327637, F. 326329, F. 325231, F. 322583, F. 321173, F. 320725, F. 318220, F. 315972, F. 311654, F. 320170, F. 312863, F. 313296, F. 329294, F. 329282, F. 328837, F. 328837, F. 323359, F. 321177, F. 311343, F. 311343, F. 310520, F. 310811, F. 310900, F. 311338, F. 313453, F. 315428, F. 313763, F. 305775, F. 314881, F. 317197, F. 318154, F. 318253, F. 319253, F. 319757, F. 320176, F. 321258, F. 322777, F. 322584, F. 322579, F. 323123, F. 325628, F. 326678, F. 327127, F. 327762, F. 327831, F. 327898, F. 328221, F. 329287, F. 329664, F. 310513, F. 313985, F. 311344, F. 312481, F. 314891, F. 315430, F. 328855, F. 328853, F. 328065, F. 327801, F. 327737, F. 327443, F. 326059, F. 325238, F. 324831, F. 323743, F. 322584, F. 322579, F. 321174, F. 312049, F. 323946, F. 323738, F. 314952, F. 320707, F. 322582, F. 323121, F. 324105, F. 324512, F. 325625, F. 325866, F. 329284, F. 310899, F. 313638, F. 314158, F. 316963, F. 325230, F. 330502)**.

The repeated targeting of these groups and their inevitable reduction to a kind of "easy enemies"[20] (internal and external) leads to a recycling not only of social stereotypes, but also of social automatisms. This practice is based on various latent notions, such as the notion of 'threatening diversity'[21], which (i) not only inhibits the critical control of police intervention, but even affords law enforcement bodies a sort of "moral superiority" and "statutory legitimacy", and[22] (ii) contributes to the diffusion of a generalised mutual fear. The former relies on vague and indefinite terms, such as "danger" or "general crime", with no attempt to substantiate these notions, and it is coupled with exaggeration,

19. Young J., 1986, "The failure of criminology: The need for radical realism", in Young J. & Matthews R. *Confronting Crime*, Sage Publications.
20. Cristie N., 1986, "Suitable Enemies" in H. Bianchi & R. Van Swaaningen (eds) *"Abolitionism – Towards a non – repressive approach to crime* Amsterdam, Free University Press, p. 42 – 54.
21. Karydis V. 2015, ""New" Migration and Social Panics: The Greek Experience" in V. Karydis & A. Chouliaras *"Ethical Panic, Power and Rights - Modern Approaches - Ombudsman"*, Sakkoulas Publications, Athens - Thessaloniki, pp. 89 - 105.
22. Young J. 2009, "MORAL PANIC: Its origins in Resistance, Ressentiment and the Translation of Fantacy into Reality"; *British Journal of Criminology* v. 49, p. 4 – 16.

even on actual social issues. The latter is mainly triggered by solid incidents of physical abuse and repression, which in turn discourages the victims from exercising the right to report the incident, thus leading to grey areas and dark figures with regard to police misconduct. In this context, the new concept of social defence provides rational arguments against ambiguous, sometimes extreme, behaviours.[23]

The way the pandemic was handled is a typical example in this regard. As argued in the special EMIDIPA report for 2021, the fact that compliance with the administrative measures applied in the context of the pandemic was monitored by the police has given those measures the character of anti-crime policy objectives, while rendering them a means of intensifying repression, mainly against the social groups mentioned above. The reduction in the number of complaints that were filed to the Authority in 2022 - which dropped to nearly pre-pandemic levels - and the parallel removal of these measures, confirms both the above assertion and the inappropriate nature of the control practice that was applied. At the same time, social targeting, which in 2022 was often associated with the mass presence of certain social groups in public spaces, such as concerts, protests, building occupations, as well as with illegal repatriations, combined with the identified aggravation of the deficiencies of disciplinary controls, justify the increase in the number of "dark incidents".

Against this background, the Mechanism once again resorts to the rhetoric of human rights, as same is established in both the law and the case law, pointing out that, in a state governed by the rule of law, the legitimacy of police intervention is usually founded on the exact opposite basis and finds its legal and political limitation in its safeguarding function. The reversal or annulment of this balance turns the bodies most responsible for ensuring the rule of law into habitual violators of legally guaranteed rights, paving the way for institutional aberrations and state regression. Preventing and remedying these situations therefore requires institutional counterbalances and structural reformations. In this context, the Committee of Ministers of the Council of Europe, exercising increased surveillance on the country due to its poor adaptation so far, continues to await updated empirical and qualitative data in relation to disciplinary investigations of reports on police misconduct,

23. Ancel M., 1995, *"The New Social Defence"*, (transl.) H. Sagounidou - Daskalaki, Athens, Nomiki Vivliothiki.

in order to record the effective impact of the relevant measures as a whole, whether they relate to legislative arrangements or recommendations by the Ombudsman. Accordingly, in this context, the request for financial support and further staffing of the EMIDIPA remains pending.

4. The interventional role of EMIDIPA

4.1 Investigation of complaints and cases of unlawful pushbacks

Following numerous complaints after 2017 concerning unlawful pushbacks at the borders, for which the Independent Authority has launched *ex officio* investigation[24] as part of its general power to safeguard legality and protect fundamental rights, the objective was - and still is - the official response and effective investigation of the reported Police/Coast Guard misconduct on the part of the Administration. The criticality of this request consists in (i) the practical difficulties that prevent the effective investigation of these incidents, consisting primarily in the highly vulnerable status of the alleged victims and their inability to protect themselves, and (ii) the practice of the Authorities to deny the incidents, which undermines both the institutional prestige of the Authorities involved and the functional status of the rule of law.

Designating insults to personal freedom and physical integrity as "misconduct"[25] and the Ombudsman as a National Mechanism for Investigating Arbitrary Incidents has triggered a change in the Administration's attitude in late 2019, when the first orders were given for administrative investigations by the Hellenic Police on incidents allegedly involving pushbacks in Evros, which drew the attention of the Media, while up until then there was sheer denial of the incidents and zero investigation[26]. In 2021, the Nation¬al Mechanism received reports on return incidents from the Aegean islands in which both the Hellenic Police and the Port Authority were involved. Both bodies initiated official administrative investigations (the Port Authority proceeded with an EDE, while the Hellenic Police with a PDE) when the National Mechanism for-warded them

24. Such *ex officio* investigation was launched in June 2017, on alleged pushbacks in the Evros region, involving hundreds of immigrants (see Ombudsman's Interim Annual Special Report of April 2021 https://www.synigoros.gr/?i=human-rights.el.files.791636).
25. Article 56 of Law 4443/2016.
26. Ombudsman's Interim annual Special Report of April 2021, op.cit.

the complaints, as stipulated by law. These investigations are monitored by the Ombudsman as a National Mechanism in terms of completeness and can be referred back to the Authorities for further investigation[27].

In 2022 sixteen (16) more complaints were added to the twenty-one (21) illegal pushback reports that were filed to the National Mechanism from 2019 to 2021[28]. The increasing trend in 2022 follows public awareness on systematic pushbacks of large numbers of persons from the country's land or sea borders, as reported in the Media and on the Internet, and the official records of public and[29] international bodies[30]. The incidents reported to the National Mechanism appear to be the tip of the iceberg, given that, by definition, these practices are kept away from the public eye and largely in public silence. Given that (i) these are anonymous complaints and (ii) they lead to a formal investigation by the National Mechanism, the added value of these cases for the constitutional right to report administrative misconduct and the duty of accountability of state institutions is quite evident.

It is worth noting that this year also saw an increase in the number of cases brought before the Ombudsman by the FRONTEX Fundamental Rights Officer, in accordance with Art. 111 para. 4 of Regulation EU/2019/1896. Based on this Regulation on the European Border and Coast Guard, in 2021 the FRONTEX Reporting Mechanism notified to the Ombudsman, as a national human rights protection mechanism, two pushback (2) complaints from aliens in Evros. In the first of these cases, in 2022 the Ombudsman returned for the second time the findings of the Hellenic Police with specific remarks as to the need to take all steps necessary to find the complainant and the fact that no arrest was recorded with respect to the complainant - which may not be considered as evidence that there was no pushback by the Greek authorities, because, if all legal administrative procedures had been applied, there would have been no room for illegal pushbacks **(F. 297117)**.

27. For the EMIDIPA's referral back of a relevant 2019 PDE for supplementation, see the EMIDIPA report of 2019, p. 46 - 47: https://www.synigoros.gr/?i=human-rights.el.files.699386.
28. In addition to the fifteen (15) complaints that are being examined as part of the Authority's general power in the context of the *ex officio* investigation, op.cit
29. Recording Mechanism of the National Human Rights Commission https://nchr.gr/ektheseis.html.
30. United Nations High Commissioner for Refugees, 21.02.2022 https://www.unhcr.org/gr/24995-news-comment-unhcr-warns-increasing-violence-human-rights-violations-european.html.

In the second case, which concerned an Afghan FROTEX interpreter and was publicised by the Authority[31], the Ombudsman decided to conduct his own parallel investigation, considering the available evidence and the slow progress of the administrative investigation **(F. 308485)**. Furthermore, in 2022 the Ombudsman received another five (5) reports from the FRONTEX Reporting Mechanism concerning pushbacks in Evros, two (2) of which had already been submitted both to FRONTEX and the Ombudsman by the alleged victims. In addition to the above, in another 2022 case that is monitored by the Mechanism, the Hellenic Coast Guard launched a Sworn Administrative Inquiry, after receiving a Serious Incident Report (SIR) from FRONTEX[32] concerning an alleged pushback in Chios. These cases render even more evident the need for transparency and accountability with respect to allegations involving fundamental rights violations at the Greek borders, which are also Schengen borders, while the close monitoring of investigations by the Independent Authority serves as an institutional safeguard to that effect.

For all alleged unlawful pushback cases, the Ombudsman, as a National Investigation Mechanism, has requested thorough investigation of the incidents, irrespective of how the reported actions were committed and the enforcement authorities involved. To this end, the Ombudsman has forwarded the relevant complaints to the Administration for internal investigation and monitors the investigation process, reserving his right to conduct his own investigation, as per art. 1 para. 1 of Law 3938/2011, as in force. The Ombudsman has pointed out to the Administration that the relevant reports raise the following issues for investigation: a) issues of unlawful pushbacks, which constitute violation of personal freedom and non-compliance with the procedure of arrest and administrative treatment for any irregular migrant, and even more so for asylum seekers; b) issues of violation of international protection rules, given that any unlawful pushback of an asylum seeker constitutes not only a violation of personal freedom but also put the protection of life and protection against torture in jeopardy, in violation of the principle of non - refoulement; c) issues of ill-treatment by police authorities that may constitute torture, violations of physical integrity or degrading treatment, possibly with a racist motive. In cases where someone is stranded at sea, there is also a risk to life. At the same time, as a result of the subjection of the above acts and omissions to Law 3938/2011

31. https://www.synigoros.gr/?i=kdet.el.news.892069.
32. In 2023 more investigation orders were issued by the Hellenic Coast Guard in relation to 2022 and 2020 incidents, on the basis of a FRONTEX SIR.

as "arbitrary" incidents lying within the specific powers of the Ombudsman as a National Investigation Mechanism, forced pushbacks often constitute multiple violations of other fundamental rights, such as family cohesion, protection of children's rights, etc.[33]

In the relevant administrative investigations that are under way, the National Mechanism often identifies deficiencies, e.g. failure to examine the alleged victim and important witnesses, judgements as to the role of state authorities or the reports of foreigners infringing upon the arms' length principle, failure to record the arrest of the victims mentioned above (often used as evidence of non-refoulement) etc.[34] The monitoring of these cases by the National Mechanism is intended to disseminate and consolidate the jurisprudential principles of effective investigation, which, according to the invariable ECtHR rulings, is assessed not on the basis of its specific result, but rather, on the basis of its ability to produce results, i.e. how possible it is identify the circumstances of the incident and the perpetrators and impute responsibility accordingly[35]. The Ombudsman points out that, in a recent convicting ECtHR judgment against Greece concerning a pushback to Turkey, whereby Greece was convicted for violations of the procedural requirements of Art. 3 ECHR (prohibition of torture, inhuman and degrading treatment), the Court stressed that the lack of evidence of a substantive violation of Art. 3 *"is largely due to failure by the national authorities to carry out an effective and in-depth investigation"*[36]. Accordingly, the ECtHR ruled that the *"absence of a thorough and effective investigation"* was also "*largely*" due to the failure to prove the attempted refoulement to the Turkish coast of the boat carrying migrants that sank in Farmakonisi in 2014.[37]

It is also worth noting that, according to the Ombudsman's findings in numerous cases (e.g. in 2022 in 7 out of 16 complaints of that year), the reported refoulement does not involve new comers at the border, but rather, foreigners

33. Reports forwarded by the FRONTEX Reporting Mechanism often refer to violations of the Charter of Fundamental Rights of the European Union on the rights of the child, the rights to asylum, family cohesion, property, effective remedy, etc.
34. EMIDIPA special report for the year 2021, p. 85 – 89.
35. ECtHR judgments, *Konstantinopoulos v. Greece*, 22.11.2018, *Makaratzis v. Greece,* 20.12.2004.
36. ECtHR judgment, B.Y. v. *Greece*, 26.01.2023, appeal no. 60990/14, para. 89.
37. ECtHR judgment, *Safi et al. v. Greece*, 07.07.2022, appeal no.5418/15, para. 155. The Court ruled, however, that there was a violation not only of the procedural but also of the substantive requirements of Art. 2 ECHR as regards the positive obligation of the State to protect the right to life.

who have been arrested in the country (i.e. document checks at the city centre, e.g. Thessaloniki, Alexandroupoli, etc.) and lack any legalisation documents or these documents are withheld by the police authorities (e.g. proof of asylum seeker or recognised refugee status) **(F. 302076, F. 313698, F. 314881)**. In one particular case, this practice involved a special stay permit of a Ukrainian citizen **(F. 329287)**. The persons concerned, including unaccompanied minors, are often detained without further formalities and "blindly" refouled through Evros, **(F. 318253, F. 319253)**. As a result, the Authorities lose trace of them thereafter.

In cases of refoulement in general, in particular in the cases described above, there is legitimate concern as to the implementation of the UN International Convention on enforced disappearance of persons[38] through acts of governmental bodies[39]. The Convention lays down sanctions to felony degree, aggravating circumstances when the act involves minors, designates concealment as serious misdemeanour[40], etc. The Ombudsman points out that, given the criminal gravity of the offences concerned, a hierarchical order does not howsoever eliminate the nature of the act as an offence and that this rule[41] prevails over any national laws dictating otherwise [Article 28(1) of the Constitution], given the supra-national effect of the international convention, which is ratified by Greece. The escalation of reported violations of fundamental rights that was identified and recorded in 2022, which entails a similar escalation of threatened sanctions, renders the obligation to effectively investigate illegal refoulements a very important stake for the rule of law. Conversely, the refusal or failure to carry out reliable controls opens the way to illicit governmental practices and, by extension, to institutional mutations.

38. The current term is *"forced disappearance"* - see Section 322 PC, paras. 2 – 6. "Forced disappearance" was established in Section 322A of the Penal Code, as introduced by Article Two of Law 4268/2014 that ratified the international convention.
39. A situation where a person is deprived of his/her freedom *"by a government official or by persons or groups of persons acting with the permission, support or consent of a state authority, provided that the latter refuse such deprivation or conceal the victim's whereabouts or location (forced disappearance)",* Section 322 (2) PC.
40. A misdemeanour bringing a minimum sentence of three years' imprisonment, unless a graver sentence applies under the provisions on participation - Section 322 para. 4 PC.
41. Section 322 para. 5 PC.

4.2. Referring the unjustified deviation from the National Mechanism's reports of findings to the Minister

The amendment of article 1 of Law 3938/2011 two years ago, by article 188 of Law 4662/2020, has, among other things, afforded the National Mechanism an additional tool to ensure the effectiveness of its findings and observations in the disciplinary process - a tool intended to function, according to the relevant explanatory memorandum, as*"an essential safeguard for internal investigations conducted by the Administration".* Thus, if a poorly justified departure from the Authority's findings is identified, the Ombudsman is now empowered to inform the competent Minister, at any stage of the disciplinary procedure, of any actions taken by him as disciplinary director of the uniformed personnel of the respective Unit.

This regulation provides the National Mechanism with an additional communication channel with the Administration, but, most primarily, it effectively shields the institutional guarantee that the Authority's findings will not be disregarded, save on the basis of specific and thorough justification. This promotes transparency in disciplinary procedures and accountability of the competent bodies, while at the same time reinforces the Ombudsman's monitoring role as an independent, external and impartial mechanism, and the *de facto* binding nature of his findings.

4.2.1. Cases referred in year 2022

4.2.1.a. Unlawful detainment and physical abuse against lawyers at the Court House of Thessaloniki (F. 259616)

This case concerns an incident that took place in 2018 at the Thessaloniki Courthouse between lawyers and police officers who were on duty as Court room security officers. The complainants claim that they were verbally abused by the police officers and illegally detained. One of them even claims to have been physically abused, when she was dragged towards the Commander's office by the arm. In an act of protest against the incident, the Managing Board of the Thessaloniki Bar Association decided that its members would refrain from all Courts nationwide for a day.

After the case was referred back to the Administration by the Ombudsman

on grounds of deficiencies identified in the initial investigation, the additional administrative examination focused on the summoning of a medical expert to provide an opinion as to whether there is a causal link between the reported abusive actions and the medical findings identified through the initial investigation. When the Minister of Citizen Protection was informed, the National Mechanism considered it appropriate to point out that it was rather surprising that an expert was called to provide an expert opinion on the case, when numerous medical reports have been presented and the physicians that issued those reports were never called to testify on the potential relevance of their findings to the incident, despite their direct involvement in the incident, as they were the ones that physically examined the victim - each of them in his own medical capacity.

Moreover, as the Authority repeatedly observes, an administrative investigation may only be considered thoroughly substantiated if it includes, apart from an assessment of the medical findings, a medical report on the potential causes of the injury, reconciled against the complainants' allegations. In case of doubt, the case facts should be also established through sworn examination of the physicians involved, in terms of the severity and the probable causes of the injuries, in reconciliation with the victim's allegations and the witness statements.

In this regard, the Authority referred to settled ECtHR case law upholding that the vulnerability of persons in custody or generally under the control of the police or other Authorities requires the burden of proof to be reversed and, by extension, shifted to the Authorities as regards the causes of the injury and the reasonable degree of force applied[42]. In the same context, the Ombudsman noted that the main concern of those conducting the administrative inquiry must be the procedure and evidence to prove that the accused officer has not committed the reported act, rather than how the victim will prove that he/she has actually sustained physical abuse or injury.

In addition to the above, the Ombudsman pointed out the rule of independence of disciplinary proceedings from the corresponding criminal proceedings, noting (i) that the scope of criminal breach of duty is narrower than that of disciplinary breach of duty - a position that is fully supported by case law; and (ii) that the Public Prosecutor's order to set the criminal complaint aside neither generates

42. ECtHR judgment, *LM and EK v. Greece,* 13.12.2005.

precedent[43] nor is binding on the persons conducting the administrative investigation, given that it is not equivalent to an irrevocable acquittal by a criminal court or an irrevocable acquittal issued by a Court council, as required by Art. 48(2) of Presidential Decree 120/2008.

As regards the finding of the body conducting the Sworn Administrative Inquiry that there was no racist motive, in the sense of discriminatory treatment on grounds of gender, this finding is poorly substantiated, as it fails to specify how the evidence pointing in that direction was collected. The Ombudsman's experience shows that it is not widely understood that racial profiling is both prohibited, as discriminatory treatment, and ineffective. Furthermore, the National Mechanism has consistently noted that the concept "discriminatory or racist treatment" does not essentially entail that the cause of discrimination is verbalised. This also arises from the wording of the law on administrative misconduct[44]. Furthermore, in addition to specific criminal laws, there is also the concept of harassment, which constitutes discrimination: *"harassment is any form of unwanted conduct linked to a cause of prohibited discrimination, which is intended to or produces the effect of insulting an individual's dignity or creating an intimidating, hostile, de-grading, humiliating or offensive environment*[45]*"*.

Lastly, as regards the requirement to search for any existing audiovisual material from security cameras or persons present in the courtroom, no reference is made in this regard, yet no explanations are provided as to why such evidence has not been sought and used. Timely collection and examination of any available video material is key in gaining thorough understanding of the case facts, especially in cases like the one at hand, where the opposite testimonies of the two sides render it imperative to find evidence that substantiates either view, in the most convincing and objective manner possible.

In July 2022, the Hellenic Police Headquarters ordered a supplementary Sworn Administrative Inquiry in accordance with the Ombudsman's remarks, yet no further developments have been communicated to the Authority ever since.

43. SC 383/2012.

44. Article 1 para. 1 case d of L 3938/2011 as originally replaced by Article 188 of L 4662/2020: *"d) unlawful conduct for which there are indications that it was carried out with a racist motive, or which presents an implicit element of any other kind of discrimination on grounds of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic disease, family or social status, sexual orientation, gender identity or characteristics"*.

45. Art. 2(c) of Law 4443/2016.

4.2.1.b. Police violence against protesters in Thessaloniki 2015/ (F. 267199)

The investigated incident took place in 2015 in Thessaloniki, during a solidarity march that was organised on the occasion of the International Day for Migrants. Six citizens, university students in their majority, reported that they had been beaten by police officers of the "M.A.T" squad (Order Restoration Squad), while two of them (one minor seriously injured) pressed charges, which led to conviction of one officer on first instance, on grounds of dangerous physical harm.

A Preliminary Administrative Inquiry was conducted on this case, and the case was eventually set aside. Following the conviction of one officer as above and the pressing of charges against all officers under investigation for the offences of perjury and false statement committed in a serial manner, the decision to set the case aside was withdrawn and a Sworn Administrative Inquiry was ordered. However, despite the existence of clear indications that a specific disciplinary offence had been committed, as it emerges also from the testimonies of the officers accused[46], the investigating officer again proposed to set the case aside.

Following the above, instead of completing the administrative investigation in compliance with the remarks set out in the Authority's referral - or departing from it for specific, thoroughly detailed reasons - the competent disciplinary issued directly a decision to set the case aside, thus bypassing the institutional role of EMIDIPA, invoking the conditional statutory limitation of the sentence that was imposed on the police officer on first instance, in accordance with Article 64 paras. 1 and 2 of Law 4689/2020, and eventually set the criminal file aside in respect of the other offences, by order of the competent Public Prosecutor, as per Section 47 of the Code of Penal Procedure.

When the Minister of Citizen Protection was informed, the Ombudsman pointed out that, in the first case, the criminal court has not made an irrevocable judgment as to whether the facts substantiating the disciplinary offence have actually taken place, and that the conditional statutory limitation is not equivalent to an acquittal, nor it is binding on the disciplinary body. In the second case, the Ombudsman once again points out that the prosecutor's order is not

46. Art. 26(8) first section of Presidential Decree 120/2008: «*If the Sworn Administrative Inquiry reveals clear indications that a specific disciplinary offence has been committed by a police officer, the latter shall be called to provide a defence testimony*".

equivalent to a final court order or an unappealable order of a judicial council - which would be binding on the disciplinary body as regards the case facts, in accordance with Article 48 of Legislative Decree 120/2008 on the independence of the two procedures. In any case, as it is expressly provided for in Article 64(2) of Law 4689/2020, the statutory limitation of the sentence does not preclude the imposition of administrative penalties provided for by law.

In addition, the Ombudsman noted that, by derogation from the requirement to provide thorough reasoning arising from the principle of ethical evaluation of evidence, the decision to set the case aside contained no adequate assessment of all witness statements or a reasonable and convincing explanation as to the cause of the (serious, in some cases) physical injuries that were inflicted upon the complainants, that would prove beyond reasonable doubt that the injuries were not caused by the police officers concerned[47]. This way, the administrative investigation fails to comply with the rule of reversal of the burden of proof, as same is enshrined in ECtHR case-law, in the cases involving physical abuse against persons in police custody, under arrest or generally under the control of the police[48].

Instead, the deciding body selectively quotes extracts from the witness statements, offering no justification as to why the rest of their content is not taken into account. Similarly, no adequate justification is provided as to why the testimonies of the eyewitnesses [who have confirmed, in their majority, that there was violence on the part of the police (based on the disciplinary and the criminal file of the case) against the two complainants - in fact some of the witnesses were hit themselves, a fact that is attested by medical reports] were found to be non-reliable due to alleged contradictions.

On the other hand, it appears that the testimonies of the police officers relied upon by the disciplinary body were found to be more credible than those of the eyewitnesses, again without sufficient justification. Thus, one identifies a selective, inconsistent attitude as regards the evaluation of evidence, which, contrary to the requirements of the ECtHR case-law, violates the arms' length principle that needs to be implemented in assessing the credibility of the

47. ECtHR judgement, *Aksoy v. Turkey,* 18.12.1996.
48. ECtHR judgement, *Zelilov v. Greece,* 24.05.2007, para. 47. *"...given the serious nature of the applicant's physical injuries, the Government bears the burden of proving by convincing arguments that the use of force was not excessive"*.

allegations raised by the complainant and the police officers involved[49].

The failure to apply the arms' length principle has also been pointed out by the Ombudsman in his referral, where he notes that the officer conducting the Sworn Administrative Inquiry (i) cites extracts that are incriminating for the complainants, taken from court judgments which, however, exonerated them from the charges against them, and (ii) failed to take into account the judgment convicting the police officer concerned and failed to assess the fact that the police officers were accused of the offences of perjury and false testimony.

Following the above, in July 2022 the Hellenic Police Headquarters forwarded the Authority's letter to the competent Directorate General, ordering revocation of the decision to set the case aside and performance of a supplementary Preliminary Administrative Inquiry, *"if the validity of the National Mechanism's opinion is established"*, otherwise disclosure of the causes of disagreement with the Authority's recommendations, with specific and detailed reasoning. The Ombudsman has not received any further information on the case ever since then.

4.2.1.c. Squat raid in Koukaki in December 2019 (F. 273254)

In the previous annual EMIDIPA report[50] extensive reference was made to the fact that the administrative investigation that was conducted into a series of complaints against police officers in the context of evacuation operations that took place in three occupied buildings in Koukaki, Attica, had been returned to the Authorities for further investigation. More specifically, the Ombudsman attended the Preliminary Administrative Inquiry that was conducted by the competent disciplinary bodies for the purpose of establishing the validity of the facts reported in various electronic publications, with regard the police operations of 18.12.2019 (evacuation of buildings under occupation at Matrozou, Arvalis and Panaitoliou streets). The above publications mentioned that there was excessive and illegal use of force that resulted, among others, to the injury of three family members inside their home, which was arbitrarily entered by the police, and to one woman being shot point-blank in the chest with a plastic bullet.

After identifying unjustified departures from the observations contained in the

49. Ibid.

50. EMIDIPA special report for the year 2021, p. 54 et seq.

Authority's referral, the Ombudsman informed the competent Minister, pointing out that, with regard to the investigation concerning the operation at Matrozou Street, the person conducting the supplementary Preliminary Administrative Inquiry once again invokes the Public Prosecutor's instruction to dismiss the alleged victims' criminal complaint against the officers concerned, as per Sections 51 and 52 of the Code of Penal Procedure, in particular the instructions of the Public Prosecutor at the Court of Appeal, and cites its content almost verbatim, as a basis for his finding that no disciplinary liability is established on the part of the police officers under investigation.

The reasoning of the disciplinary body disregards the rules of autonomy and independence[51] governing the relationship between disciplinary and criminal proceedings, as dictated by the different purpose served by each procedure. The independence of the two proceedings has been consistently emphasised in ECtHR case-law[52], as well as in Council of State case-law[53], which concludes that, if the judgment of the criminal court is not equivalent to a final judgment or an irrevocable acquittal granted by a judicial council, then it is merely taken into account by the disciplinary body, which however may issue a decision different from that rendered by the criminal court. In any case, court precedent and legal theory both specify that the disciplinary body is bound by the judgment delivered in criminal proceedings only as regards the facts that were accepted by the criminal court and does not extend to the acquittal or conviction of the officer concerned. This binding effect derives from the strong safeguards entailed in criminal proceedings, while the requirement for an unappealable penal judgment serves the exact same purpose.

Beyond that, the transformation of empirical facts into formal legal concepts and their subsequent characterization as disciplinary offenses belongs to the substantive discretion of the disciplinary body.[54] The legislator of disciplinary law aims at ensuring that disciplinary body's commitment is bound by the reasoning of the criminal judgment concerning the facts of the case as well as by the liability of the person prosecuted, and not by its operative part: *"It is self-evident, of course, that the disciplinary body must make its own judgment as to the disciplinary liability of the person prosecuted, even when bound by an*

51. Art. 48 of PD 120/2008.
52. ECtHR judgments, *Kemal Coskun v. Turkey* 23.03.2017, *Mullet v. France* 13.09.2007.
53. Council of State plenary session 4662/2012.
54. Piraeus Administrative Court of Appeal 10/2014.

irrevocable criminal judgment, and therefore a decision in which the official's guilt would act as an "automatic" consequence of the criminal conviction would not be lawful".[55] This is because the autonomy and independence existing between disciplinary and criminal proceedings indicates that there are different rules of law regulating the conduct of a certain circle of persons, i.e., that of the civil servants, yet on different terms and conditions. In light of all the above, the Ombudsman considered it appropriate to point out that, in any cases where Article 1 para. 4 of Law 3938/2011 is applied to complete the investigation, due account should be taken of the judgment issued in the meantime by the competent criminal court, acquitting the complainants of the charges pressed against them and the contradiction of its reasoning with the assumptions of the Public Prosecutor's instructions.

As regards EMIDIPA's observations concerning the need to investigate the complainants' assertions about the use of excessive force against them (they were stepped on by the officers *""with their knees and boots, even on the head and neck")*, the person conducting the supplementary Preliminary Administrative Inquiry once again limited himself to invoking the prosecutor's instructions and the opinion expressed therein that the officers took appropriate restraining action. Given that the prosecutor's instructions did not specify the exact actions that were taken to immobilise the persons arrested, the disciplinary investigation remains incomplete, as it fails to establish whether the form of force used by the police was appropriate and lawful. In fact, it remains to be seen whether the photographs included in the disciplinary case file show a police officer's boot print on the clothes of one of the arrested persons, as it is argued by the complainants. The Ombudsman has reiterated the ECtHR position on the degrading nature of this type of treatment when it occurs in the context of pre-planned police operations, rather than in the context of a heated reaction to unforeseeable events, and when the level of force used is not justified under the circumstances.[56]

Despite the fact that the Preliminary Administrative Inquiry was completed, the validity of the other assertions raised by the complainants (police officers' conduct humiliating and insulting to human dignity, in fact one of the claimants was restrained with both hands behind his back, his shirt over his head like a

55. Pikrammenos M., 2013, 'The relationship between disciplinary and criminal proceedings in view of Article 6 of the ECHR", in *Journal of Administrative Law,* iss. 2, p. 254.
56. ECtHR judgment, *MÎTU v. Moldova*, 30.06.2020.

hood and his body exposed to the cold, having lost his hearing aid and sight glasses) has not been assessed. The Ombudsman pointed out once again that, as the ECtHR has ruled, using a hood or similar techniques to deprive a person of one or more senses causes fear, anxiety and a sense of inferiority to the victim, and is humiliating and degrading and capable of breaking down his/her physical or emotional resistance.[57]

Departures from EMIDIPA's observations without proper justification are also identified in the investigation of compliance with Articles 96 para. 2 and 108 para. 1(b) of Presidential Decree 141/1991, laying own conditions for searching and, primarily, arresting persons that are legally persecuted at their residence against their will. The evidence collected raises doubts as to whether the search conducted at the complainants' home to locate persons who had run off from the adjacent building that was under occupation was carried out in the presence of the competent Deputy Prosecutor all along. However, the completed Preliminary Administrative Inquiry failed to clarify the case facts relevant to this crucial aspect of the case.

The investigation was also deficient as to whether the offence laid down in Section 241 of the Penal Code - which protects a person's home as a demonstration of the right to privacy and an individual legal right established under Article 9 of the Constitution - was solidly established. The issuer of the findings report failed to use the means of proof designated by the Authority to investigate and justify his findings as to whether the conditions for lawful entry into the complainant's home were met, in particular whether the applicable legal formalities were observed.

Lastly, as regards the investigator's (ineffective) request to the Athens Prosecutor's Office to be delivered copies of the audiovisual and audio files included in the relevant criminal files, the Authority pointed out that the investigator could have directly addressed the television and radio stations that broadcast that content, and request to be given copies for disciplinary investigation purposes.

As regards the part of the investigation concerning a police operation that was conducted at a building located at Panaitoliou Street, in compliance with the relevant EMIDIPA recommendation, the person conducting the supplementary Preliminary Administrative Inquiry examined as a witness the forensic expert

57. ECtHR judgment, *Ireland v. United Kingdom*, 18.01.1978.

who examined the woman that was shot point-blank in the chest with a plastic bullet. However, although the issuer of the report quotes verbatim the findings of the forensic expert's report and the testimony of the above witness, who confirmed that the physical injury identified was caused by a plastic bullet used by the Special Anti-terrorist Unit ("EKAM"), he then failed to assess and consider this specific evidence.

According to ECtHR case-law, when a person is injured during detention or arrest by the police, the injuries caused in this manner are, in principle, a strong presumption of facts.[58] In these cases, the burden of proof is on the authorities, who are liable to provide reasonable explanations as to the causes of the injury, effectively rebutting the complainant's allegations. Such reversal of the burden of proof derives from the inherently authoritative relationship between the arrestor and the arrestee and the general restriction of personal freedom by the enforcement authorities.[59] In the present case, the fact that the arrested persons raised no resistance that would justify the use of force, and the fact that no other circumstances justify the injury that was caused the arrested person, lead to the only reasonable explanation that the victim was shot with a plastic bullet during the police operation - which the authorities are liable to prove never happened.

As regards the investigation into the circumstances and lawfulness of the use of a plastic bullet gun, which is governed by the provisions of Law 3169/2003 on the use of weapons by police officers, the investigation remains deficient, despite the actions taken to collect additional evidence. More specifically, as part of the administrative investigation of the case, it was not examined whether the shots fired during the police operation indeed qualify as "intimidating shots", so that the conditions for their lawful use are met; instead, the shots were designated as such merely on the basis that the first shot was used by the police officers for intimidation purposes.

Furthermore, despite the relevant EMIDIPA observation, there was deficient investigation as to whether the principle of proportionality was applied, as the investigator failed to assess the level of force used - which definitely qualifies as use of a weapon- or the type of risk generated by the shots as opposed to the risk of harm arising for the police officers (who, notably, carry special equipment

58. ECtHR judgment, *Salman v. Turkey*, 27.06.2000.
59. ECtHR judgment, *Gunaydin v. Turkey*, 13.12.2005.

to protect their physical integrity) from the fact that they were exposed to objects thrown at them. Moreover, as the Authority has consistently noted, the risk inherent in shooting should not be assessed based on the outcome of the operation (i.e. whether a legal interest was impaired or not) but rather, based on the risk of harm inherent in the use of a weapon under the circumstances.

In addition, although the person conducting the Preliminary Administrative Inquiry eventually added to the disciplinary case file the internal order issuedfor operational use of the guns in question, he then confined himself to quoting verbatim the contents of that order in the factual background of his findings, without verifying whether that order had been complied with, in particular whether the requirements concerning the targeted spot of the shot and the firing distance had been observed, in order to prevent the risk of causing serious physical injury to civilians, or even fatalities. The risk inherent in the use of a plastic bullet gun and the possibility of fatality is also stated in the manufacturer's instruction manual, which was included in the disciplinary file as part of the additional investigation. No reference was made, however, to its contents in the investigator's report.

Thorough investigation of the legality of the use of the gun, including a check of compliance with the conditions of Article 3 of Law 3169/2003 and the internal order, must also be carried out with regard to the use of the gun by a police officer of EKAM during the evacuation of the building at Matrozou Street, which was not included in the scope of the disciplinary investigation, at any stage of the process, nor is mentioned in the investigator's report.

In conclusion, the Authority expressed serious concerns as to the type of disciplinary control that was chosen to investigate the complaints (Preliminary Administrative Inquiry), which is not consistent either (i) with the gravity of the complaints - which by definition need to be investigated by more experienced police officers, in the context of a Sworn Administrative Inquiry - or (ii) with the existence of strong evidence, which was not acknowledged as compelling evidence and therefore disregarded, even though it should have led to the conduct of a Sworn Administrative Inquiry, in accordance with the provisions of Art. 26 para. 1 of Presidential Decree 120/2008.

As at the date of this report, the Ombudsman has received no information in respect of any actions taken by the competent Minister as disciplinary director of the uniformed personnel of the Hellenic Police.

4.2.1.d. Police violence against a young man in Volos in June 2020 (F. 282183)

Another case - whose referral back to the Administration authorities was recommended in the previous annual report of the National Mechanism - concerns an incident of police violence against a young man, which took place in the early summer of 2020, in the city of Volos. According to the complaints, the victim was initially exposed to police violence outside the courthouse courtyard, where a crowd of citizens were gathered, protesting against incidents and arrests that had taken place the previous day. The complainant was hit with police batons and kicked on his body while lying on the ground. The abusive treatment allegedly continued inside the police car that was used to carry him to the Police Station, as well as inside the police station, where, among other things, a police officer allegedly punched him in the ribs, while the victim was held by the arms by other officers.

When the victim came out of the police station, he was allegedly assisted by civilians, as he was unable to walk, who drove him home. From there he contacted his parents, who then called an ambulance. The victim was then admitted to the Emergency Wing of the General Hospital and then to the Surgical Clinic, where he stayed and received further treatment. One month after the incident, the victim passed away. The day after his death, the police authorities were ordered to conduct a preliminary investigation into the case, which was then upgraded to a Sworn Administrative Inquiry that led to proper disciplinary action.

I. Addressing the Minister of Citizen Protection for unjustified departures from his findings, the Ombudsman primarily pointed out a number of omissions and deficiencies, which prevented the effective examination and handling of the completed file, given its extensive volume. Such deficiencies are consistent neither with the character of the investigation as 'completed' nor with the level diligence the investigator was liable to apply, in accordance with the instructions of Order / Circular No. 6004/1/22-xiii/14.10.2008 of the Chief of the Hellenic Police, taking also into account his experience, given his rank.

Thus, instead of the required level of accuracy, clarity, objectivity, avoidance of repetitions and brief reference to the criminal aspects of the case, which would help the reader gain thorough understanding of the case facts, the factual background of the report merely cites the relevant part of the original

report, and then merely quotes verbatim certain witnesses testimonies that were taken by recommendation of the Authority. No reference is made to the criminal case files that were opened for this case, or to whether and how they were related, whether and why they were set aside, or to any pre-trial material arising from these files, despite the fact that the disciplinary file indicates that specific criminal files were invoked and even contained sufficient evidence. Moreover, no reference is made to the technical consultant's report, which was sought and added to the disciplinary file as part of the administrative inquiry completion process.

Despite the deficient and selective nature of the report, whose factual background only makes reference to part of the evidence collected and part of the relevant control procedures conducted, one understands from the contents of the report why deficient reference is made to the above in its reasoning - although this is clearly a wrongful practice. On the contrary, it is difficult to understand why the testimonies of eyewitnesses and other important witnesses were not considered and assessed in the reasoning of the report, although they are thoroughly described in the factual background thereof. Thus, despite the new evidence that was added to the disciplinary file following further investigation, the explanatory part of the second report is identical to that of the previous (original) report, even though the deficiencies identified in the latter lead to an order for further investigation. The only new element found in the second disciplinary report relates exclusively to the new memoranda that were submitted by some of the police officers under investigation, which, however, merely make reference to the contents of their previous memoranda or merely reproduce almost the exact same arguments. Thus, the operative part of the new report is identical to that of the previous one.

At this point, it is worth pointing out the departure noted in the reasoning of the disciplinary report from the observations of the aforementioned Order/ Circular, which dictates that, in the reasoning of the administrative findings *"... the personal conclusion and perception of the person drafting the report is not merely a vague, frivolous or arbitrary figment of his/her imagination, but rather, the result of sound reasoning, i.e. of the ability to collect, summarise and add up information to form a conclusion, and must be supported by evidence and thoroughly justified".*

In the same direction, theorists add that, abandoning the system of legal evidence and adopting the system of moral evidence does not mean moving

towards a regime of potential subjective arbitrariness on the part of the criminal or disciplinary judge. On the contrary, it means focusing the evidentiary process on contemplation and explanation of the result and, by extension, on substantive, rather than formal, reasoning.[60] In the present case, the required reasoning is covered by Sections 139 of the Code of Penal Procedure in conjunction with Article 8 of Presidential Decree 120/2008, whereby disciplinary reports and the relevant disciplinary judgments must be thoroughly and specifically reasoned. The absence of specific and thorough reasoning, which is also required under the Constitution (Art. 93 para. 3) is the principal subject of the appellate review by the Court of Cassation.

Accordingly, the principle of free evaluation of evidence, as expressed in Section 177 of CPP, which, by extension, includes the moral evidence system, does not imply that the evaluation of evidence is left to the arbitrary discretion of the criminal court or competent disciplinary body. On the contrary, it means that, in principle, any evidence can contribute to the forming of their conviction without restriction (Section 179 CPP), without hierarchical evaluation of evidence (Section 178 CPP) and without predefined interpretations. The lack of hierarchy of the evidentiary value and the binding nature of evidence obliges the disciplinary mechanism not to be limited to the collection of certain evidence only, but to take all the necessary steps to achieve the completeness of the relevant disciplinary case file.

Based on the above one reasonably concludes - given also that the report of findings reflects the purpose and scope of the investigation conducted - that, in so far as the additional investigation disregards the issues that needed to be addressed, for which such additional investigation was ordered, it fails to meet the required substantive standards, although it meets the formal requirements of Art. 188 para. 4 of Law 4662/2020. As a result, the additional investigation is not only deficient, but could be viewed as a "sham" process, due to the additional problems posed by the sheer citation of the original allegations and conclusions and the failure to assess the new evidence, which is totally disregarded. The paradox here, however, is not only the difference identified between form and substance, but also the finding that, the greater the new evidence, the more it is disregarded - a phenomenon that clearly exacerbates the ineffectiveness of the investigation.

60. Papadamakis A., 2016, "The relationship between disciplinary procedure and criminal proceedings", in *Crime and Criminal Repression in a Time of Crisis - Volume published in honour of Professor N. Kourakis,* A.N. Sakoulas Publications, p. 530.

In his referral, the Ombudsman highlighted (i) the inexplicable delay in bringing disciplinary proceedings, despite the ECtHR case-law dictating otherwise[61], (ii) the fact that the disciplinary investigation was *a priori* and unjustifiably limited to the disciplinary offence of brutal treatment of civilians, as same is laid down in Art. 11 par. 1(k) of Presidential Decree 120/2008. The investigator's failure to explain and substantiate this choice in his supplementary report, despite the Authority's recommendations, and the unjustified continuation of the investigation, as same is thoroughly reflected in the additional investigation documents, eventually limited the scope of the investigated complaint to the incidents that took place outside the courthouse and the officers involved in those incidents and, consequently, led to limited imputation of disciplinary liability. Based on these facts, the disciplinary offence charged on the offender, serving as confirmation of what was sought from the outset, not only predetermines the scope of the applicable sanctions, but also somehow charts the course of a self-fulfilling prophecy.

II. These findings are further reinforced by the fact that a significant number of witness testimonies given in the form of sworn statements as part of the additional investigation, or in the form of written memoranda filed in the course of the criminal proceedings initiated by the complaint that was filed by the victim's parents, were not used or comparatively evaluated. The eyewitnesses to the incident outside the court house argued in their entirety that: (a) the alleged victim posed no threat nor moved against the police officers, but rather, was designated by the security officer / driver of the police car that was used to transport one of the persons arrested during the incidents that had taken place the previous day; (b) following this, the victim was approached by three members of the Crime Prevention and Suppression Unit ("OPKE")and one member of the Police Cyclists Unit ("DIAS"), who was later identified by the complainants; (c) The physical violence that was exercised against the alleged victim, after he had already fallen on the ground, which included blows with police batons and kicks from all four police officers - who were fully armed - was not only unprovoked but also excessive.

None of these witnesses was asked whether they knew or saw if the three officers continued to assault the victim inside the vehicle, as the victim asserts in his complaint and as it is heard in the audio-visual material / footage taken by an eyewitness. However, the authorities were unable to identify such witness,

61. ECtHR judgment, *Bouyid v. Belgium*, 28.09.2015.

also during the additional investigation. The investigators failed to seek other video footage from traffic control cameras or other eyewitnesses, who were present at the incident based on the evidence collected during the additional investigation, e.g. the drivers of the taxis that were parked nearby or the lawyer of the person that was arrested the day before.

Some of the eyewitnesses examined as above were the persons who assisted the alleged victim and drove him home after he left the police station. They provided a thorough description of the victim's physical condition at the time, the type of abuse he had been subjected to at the police station, as same was described by the victim himself, and the state of shock and fear he was in at the time.

It is worth noting that the above testimonies were repeated, free of contradictions or discrepancies, at two different times, i.e. both during the criminal investigation of the case that was initiated as a result of the criminal complaint that was filed against the police officers, and during the supplementary disciplinary investigation of the case. It is also worth noting that the above testimonies are consistent with those of the paramedics, who confirmed that the victim felt pain in the ribs and that he boarded the ambulance and entered the hospital's emergency department on a patient transportation trolley. Accordingly, these testimonies are consistent with those of the nursing and medical staff who treated the patient, which generally describe that, at the time he was admitted to hospital he was in a state of intense anxiety, unable to communicate, totally unstable and refusing to cooperate because he was in pain and because he was afraid of what might happen to him next.

Consistent with the above, a third group of witnesses, who appearingly visited and conversed with the victim after the reported incident, testified that his mental health deteriorated and that his mental state was vulnerable because the victim was a former drug user, which is also confirmed in a document issued by the Director of the Psychiatric Ward of the city's General Hospital. These testimonies appear to be confirmed by another medical report that was issued by the Mental Health Centre of the 5th Health Region of Thessaly & Central Greece.

Reinforcing the allegations that the victim suffered multiple severe injuries - all of which were confirmed by medical reports, sworn testimonies and established facts as inflicted upon the victim after he was brought to the police

station - as noted in the Authority's referral report, the additional testimonies of the nursing and medical staff confirm that the victim's medical condition called for close monitoring - a conclusion also repeated in the technical consultant's forensic report. Following extensive analysis of the findings, the forensic report concludes that the victim *'sustained serious physical injury by a sharp instrument, consistent with the facts described in the report'*, and adds that, at the time of the victim's death, his injuries had not healed - which is also consistent with the relevant Forensic Autopsy Report.

Despite this new evidence, no effort was made to re-evaluate the case from a disciplinary perspective, as the investigator failed to carry out an assessment of the evidence, which would naturally force him to reasonably question the facts/ effectively rebut them / enrich them or assess them on a comparative basis. On the contrary, he acted as if "no new evidence existed' and opted to maintain the same scope of disciplinary investigation, the same disciplinary charges and, by extension, the same type of disciplinary liability. Characteristically enough, the reasoning against the new evidence consists in the defence memoranda that were filed by the officers concerned before the disciplinary investigation was resumed and were included in the original report. Thus, as regards the police officers who were not re-examined, although the new evidence pointed to them, the additional administrative procedure was not so much "additional" but rather, a sheer repetition of the original investigation. The same applies in part to the persons who continue to bear disciplinary liability, inasmuch as the new evidence, although corroborating the victim's allegations, is inadequate to extend the scope of the disciplinary investigation, to the extent their new explanations include no new arguments.

III. The basic impact of such "repetitive" practice is the unconditional acceptance of the deficiencies, much more the errors, inherent in the officers' allegations, as same are noted in the Ombudsman's referral. The most important of those being the disputed legitimacy of disclosing certain documents of the disciplinary file to third parties (i.e. documents that contained sensitive personal data such as medical opinions and tests and violated the secrecy of the disciplinary procedure). In fact, despite the independent disciplinary liability this action entails, some of the accused officers continue to invoke in their new memoranda the Medical Report that was obtained in this manner.

Another impact relates to the fact that the disciplinary file was partly forwarded to the Public Prosecutor's Office, since it is apparent from its contents that, at

the time it was submitted, the disciplinary file did not include the Authority's referral that declared the Sworn Administrative Inquiry incomplete and ordered further investigation. Given that the initial disciplinary file was the only pre-trial material contained in the criminal file that was opened *ex officio*, one reasonably concludes that the criminal prosecution that was eventually initiated relied on a presumably incomplete disciplinary file, in respect of which further investigation had been ordered. Another paradox arising in this case is that, although the disciplinary procedure was resumed and completed, the new evidence collected has not been forwarded to the prosecution authorities nor reconciled against the contents of the criminal case file and therefore not included in the criminal file, as it is partly inferred from the bill of indictment. In any case, the disciplinary file does not contain the relevant forwarding document. According to a relevant document issued by the Public Prosecutor's Office, the criminal file does not even contain the technical consultant's forensic report.

This practice, however, contributes not only to the instrumentalisation of criminal investigation but also to establishing self-reporting as a method of conducting disciplinary investigations. The fact that the police officers concerned invoke the public prosecutor's instructions that were issued in the context of the aforementioned criminal proceedings - which, as already mentioned, relied entirely on the disciplinary procedure that was initially conducted, which was poorly substantiated, as it mainly relied on the police officers' allegations - clearly leads to a circular, ineffective administrative investigation. This is also upheld by ECtHR case-law, according to which, investigation conducted by the police in respect of police conduct based primarily on statements provided by police officers, cannot be independent and, therefore, effective.[62]

In the same context, it is worth mentioning Circular No. 1/2023 of the Deputy Prosecutor of the Supreme Court, where, based on the recent conviction of Greece (ECtHR case *Torosian v Greece,* 07.07.2022) the Court rules, *inter alia*, that in cases concerning allegations of abuse involving violations of Art. 3 of the ECHR, *"where the complaint is directed against penitentiary employees and police officers, the preliminary criminal investigation will not be conducted by a police investigating officer, but rather, by the Prosecutor of the Court of First Instance himself [Section 30(1) of the Code of Penal Procedure]. If the supervising prosecution officer appears to be 'involved' in the investigated incident, according*

62. ECtHR judgment, *Emin Huseynov v. Azerbaijan,* 07.05.2015.

to Section 567 of the Code of Penal Procedure and Section 85 of the Correctional Code (Law 2776/1999 op. cit.), the competent prosecutor of the Court of Appeal will be informed accordingly so that he/she can carry out the investigation in accordance with Section 32 of the Code of Penal Procedure and ensure the independence of the investigator from the investigated persons".

In the same context, the ECtHR notes that, in these cases, the main purpose of the investigation is to ensure the effective implementation of the national laws that protect the right to life, prohibit torture and inhuman and degrading treatment or punishment in cases involving State officials or agencies, and ensure accountability and, by extension, effective administration of justice. The ECtHR therefore argues that even the institutional and hierarchical independence guaranteed by the investigation conducted by prosecution authorities vis-à-vis the officers concerned is not sufficient *per se*, as *"the obligation to investigate is not an obligation to produce results, but rather, an obligation to use effective means and procedures [...] Any inadequacy in the investigation that undermines its ability to determine the circumstances of the case or the persons responsible, entails a risk of violating the required effectiveness standard"*.[63] In conclusion, the Court rules that undermining procedures, taking inadequate measures and failing to remedy deficiencies infringes upon the procedural requirements of Art. 3 ECHR on the conduct of effective investigation, and this is not outweighed by the imposition of sanctions.[64] A similar violation occurs when *"the authorities appear to have readily accepted the facts as presented by the officers that conducted the arrest [...] They also readily accepted the police's allegations"*.[65]

In this regard, the ECtHR underlines that, in those cases where the aforementioned deficiencies or shortcomings consist in witness summoning issues[66] or key witness examination issues,[67] by derogation from the principle of equality of arms due to the decisive role of evidence, then, in addition to the above violation there is also a violation of Art. 6 para. 1 ECHR, as the fairness of the proceedings is also undermined. The same position is upheld by the Strasbourg Court in any cases where *"the national court convicted the applicant by considering decisive (i) the incriminating testimonies of the police*

63. ECtHR judgment, *Baranin & Vukcevic v. Montenegro,* 11.03.2021.
64. Ibid.
65. ECtHR judgment, *Parnov v Moldova,* 13.07.2010.
66. ECtHR judgment, *Bondar v. Ukraine*, 01.05.2019.
67. ECtHR judgment, *Ter – Sargyyan v. Armenia*, 27.10.2016.

officers who stopped the victim and engaged in abusive conduct against him and (ii) the statements of their fellow officers who were present at the incident, giving lesser probative value to the statements of the four defence witnesses, on the grounds that the persons who knew the applicant failed to provide sufficient guarantees of credibility".[68] According to the same reasoning, the fact that the officers' testimonies were not contested because they were corroborated by the testimonies of other officers who were present at the scene, precludes all possibility that the latter were unwilling to testify against their colleagues. In fact, the lesser probative value that was given to the testimonies of the defence witnesses was attributed to the fact that they knew the applicant.

This brings to light the third consequence arising from showing complete disregard to the witness testimonies in the context of the supplementary disciplinary proceedings, which consists in the poor substantiation of prioritising the testimonies and allegations of the officers concerned. In fact, such prioritisation comes with total lack of any effort to highlight or resolve any contradictions arising from such testimonies and allegations. Although, as part of the supplementary disciplinary investigation, the investigator sought to obtain video footage from the CCTV system installed at the police station concerned, as per the Authority's recommendations (but merely received a reply that no such footage was available), he failed to collect similar footage from cameras potentially installed at the entrance or at the building's exterior, considering in particular that the building concerned accommodates multiple police agencies. Similarly, he failed to obtain video footage from any security cameras of adjacent buildings or residences.

The only explanation that was given during the supplementary investigation by one of the two officers as to his presence at the police station concerned and the presence of his colleague - who allegedly beat the victim - given that they were off duty at the time and had previously left the police station, was that *"this is quite common"* and *"this is what we normally do"*. The "cases" concerned involve transportation of persons to the police station for identity checks. In this particular case, based on the police allegations and other contents of the case file, it is quite clear that the alleged victim was driven to the police station accompanied by four officers and guarded by two officers and that the decision and the responsibility for these actions, according to Art. 60 of Presidential Decree 141/191, lay with the Officer on Duty, who, however, stated that the

68. ECtHR judgment, *Boutafalla v. Belgium,* 03.06.2022.

victim was guarded by all four officers who brought him in. Lastly, the alleged victim was described as being quiet and handcuff-free and that he was waiting on a bench at the public waiting area without ever raising his voice.

Apart from being vague, these explanations are logically inconsistent with the testimonies of the civilians who found and picked the victim up as he was leaving the police station, as well as with the contents of the medical reports subsequently issued and the testimonies of the medical and nursing staff who took care of the victim. Similarly, the facts described above are inconsistent with the police allegations that the victim was "raging" and aggressive and that he threatened the officers a few minutes before his arrest. The victim's criminal conduct, as same is thoroughly described in the Incidents and Accidents Log that was produced as part of the supplementary investigation, consisted in shouting slogans in defence of the person who had been arrested the previous day, who *"shared views"* with the victim, very close to the officers responsible for escorting the prisoner to the police station.

However, no consideration was given to the difference between the above description and the relevant audiovisual and photographic material or the fact that slogans and comments against the detention of the person arrested the previous day were widely heard in the context of the protest that took place in support of the prisoner. Similarly, another fact that was recorded in the Log, i.e. that the violent police intervention against the victim was ultimately triggered by (i) suspicions that he had committed a crime, and (ii) the fact that the victim was known to the officers from his involvement in various collective actions and his general "criminal" activity, was never considered. Given that the alleged suspicions merely relied on the victim's appearance and verbal reaction, and that his alleged "general criminal activity" merely consisted in his systematic participation in collective actions, the Authority underlined in its referral the need to investigate the possibility that the victim had been targeted by the police, in order to establish the legitimacy of his prosecution and any potential discriminatory treatment against him.

In this context, although the person conducting the supplementary investigation admits in his report that there are discrepancies between (a) the police statements, which confirm that the identity of the victim was known to the police officers and (b) the simultaneous denial of this fact, which the latter put forward through their allegations, he concludes, without reference to any other evidence, that, based on the evidence included in the case file, no

correlation was established between the conduct of the police officers under investigation and the victim's beliefs or social status. This conclusion, however, is logically inconsistent with the evidence collected, because, as it derives from the eyewitness testimonies that were included in the file in the context of the supplementary investigation, the police made a violent intervention against the victim after the latter had been pointed out by one of the officers present (the driver of the police car that was used to drive the person arrested the previous day to the police station). It is worth noting that such designation was made right before the officer in question got on the police car, while the arrested person was already in it. This is confirmed by the relevant images.

It is also worth noting that, according to the testimony of the person that was arrested the previous day (who was also any eyewitness to the events that took place outside the courthouse of Volos), as the officer concerned was about to get into the car, he suddenly moved towards the victim, stood in front of him and then went back and quickly got into the car, while at the same time the other officers approached the victim. According to the same witness, inside the car the officer concerned mentioned the victim's surname and insulted him. Although this statement is quoted in its entirety in the supplementary investigation report, it is not further considered.

In conclusion, the Ombudsman pointed out once again the restrictive nature of Art. 3 HCHR, which leaves no room for exceptions, unlike other provisions of the Convention, or departures, irrespective of the conduct of the person concerned or the gravity of the offence committed.[69] By referring to specific ECtHR judgments, the Authority sought in its referral to highlight the material content of such an absolute restriction, as same is crystallised in ECtHR case-law. In light of the above, the Authority underlined the requirement for direct, well-substantiated, independent, publicly scrutinised and thorough investigation that generates conclusions 'beyond reasonable doubt', while the investigation authorities bear the burden of refuting the allegations raised by the complainant. Failure to conduct such an effective investigation creates a strong presumption as to potential violations of Art. 3, leading potentially to the conviction of the States involved.

At this point, the Authority highlights the binding effect of ECtHR judgments, pointing out that, following a quick review, Greece was convicted approx. nine

69. ECtHR judgment, *Ramirez Sanchea v. France,* 04.07.2006.

times for violations of Art. 3 ECHR over the last fifteen years.[70] The majority of these convictions mainly concern the procedural requirements of Article 3 and rely on the deficient nature of the investigations conducted by the authorities in relation to complaints for abusive conduct by law enforcement officers.

After the competent Minister was informed as above by the Ombudsman, in March 2023 the Hellenic Police Headquarters forwarded the Authority's letter to the competent General Police Directorate, requesting further disciplinary investigation, otherwise the issue of a decision by the competent disciplinary body stating that any departures from the operative part of the Authority's report would have to be thoroughly and specifically justified. Ever since then, the Ombudsman has been awaiting to receive an update on the case.

4.2.2. Cases referred in year 2021

Regarding the two (2) cases that were referred to the Minister of Citizen Protection in the previous year and included in the Special Report of 2021, it is noted that both cases were referred by the Minister to the competent Hellenic Police agencies, for a review of the Ombudsman's recommendations. Namely:

4.2.2.a. In the case concerning hate speech through systematic posts of racist and abusive content on a well-known social medium **(F. 230990)**, in his letter to the Minister the Ombudsman pointed out that, although the disciplinary procedure had included additional testimonies in compliance with the Authority's recommendations, it was still unjustifiably identified with the criminal proceedings and was completed based entirely on the criminal court's judgment.

This practice led the Authority to point out that, in this case, the disciplinary procedure appears to be drifting away from its very purpose (i.e. independent investigation to identify disciplinary misconduct) and to be merely a sham process, as it refers to the criminal proceedings, thus derogating not only from the provisions of art. 48 of Presidential Decree 120/2008, but also from the disciplinary prosecution order itself, which also covers offences that are purely disciplinary in nature. As the Authority states in its previous Special Report, the Hellenic Police Headquarters ordered an investigation of all new evidence that was not investigated or sufficiently investigated, underlining the requirement

70. ECtHR judgments, *D.Z. v. Greece,* 24.05.2007, N.Z. v. Greece, 17.01.2012, *Sidiropoulos and Papakostas v. Greece,* 25.04.2018, *Andersen v. Greece,* 26.04.2018, *Konstantinopoulos et al. v. Greece,* 22.11.2018, *Torosian v. Greece,* 07.07.2022, *B.Y. v. Greece,* 26.01.2023.

for specific and detailed reasoning, in case any departures are made from the Authority's remarks. In midsummer 2021, the Authority was informed that the review of its letter to the Minister and of its previous findings attached thereto indicated no evidence which had not been investigated in the context of the initial Sworn Administrative Inquiry, without further justification, without supplementary investigation and without answers to the questions posed.

4.2.2.b. In the case involving physical abuse against a civilian during his arrest in the context of an incident that originally involved only civilians **(F. 244541)**, the Ombudsman referred to the ECtHR case-law on reversal of the burden of proof when a person of good health is placed under custody by the police and bears injuries at the time they are released, and pointed out the obligation of the Authorities to provide adequate and convincing explanations about the causes of the injury. The deficit as to the independence of the disciplinary investigation identified also in this case infringes directly upon the relevant investigation order, which calls for the detection of purely disciplinary misconduct, among other type of misconduct, consistent with the theoretical and jurisprudential assessments that the scope of disciplinary investigation by definition exceeds that of the criminal investigation. After the Ombudsman's letter to the competent Minister, the Hellenic Police Headquarters ordered additional disciplinary investigation in line with the findings and observations of EMIDIPA. The completed investigation report and the disciplinary case file were forwarded to the Authority. An assessment is now pending as to their completeness and compliance with the observations of the National Mechanism.

4.2.3. Cases referred in year 2020

With regard to the four (4) cases that were referred to the competent Minister in 2020 (all referenced in a special section of EMIDIPA's Special Report for that year) it is noted that two of these cases **(F. 249152 and F. 254783)** underwent further investigation in accordance with the legislative requirements and the recommendations of EMIDIPA, thus reinforcing the institutional role of the Authority. Following the above, there being no other room for further intervention, the Authority recommended that the cases be set aside, making at the same time certain general observations. With respect to case **F. 249152**, relating to use of force against detainees at a Detainment Centre during a raid of a special unit of the Hellenic Police in 2018, which was reported by the Council of Europe, the relevant observations are thoroughly laid down in chapter six hereof referring to the enforcement of ECtHR judgments.

The other two cases **(F. 241354 and F. 237463)** are still pending, yet the Authority has so far received no information as to any further disciplinary actions or investigation. In this context, it is once again noted that:

4.2.3.a. In the case concerning use of force against a minor, who was taken to the police station as a suspect of theft in Thrace **(F. 243154)**, in his letter to the Minister the Ombudsman noted that, although the disciplinary investigation was furthered twice on the basis of two referral decisions issued by the Authority, it failed to provide the explanations necessary to reverse the burden of proof, as required with regard to persons sustaining physical injury while in police custody - a requirement that is even more imperative in this case, as the person concerned is a minor and enjoys increased protection. As previously illustrated, ECtHR case-law underlines the obligation of state authorities to provide satisfactory and convincing explanations as to the causes of the injury, which cast doubt on the validity of the victim's assertions, irrespective of whether the police officer concerned is acquitted by the criminal courts.[71]

In addition, the Ombudsman notes the wider scope of the disciplinary proceedings in relation to the criminal trial and the implausible (and unproven) claim that the minor's injury occurred in the short period after getting out of the security vehicle and until his transfer to hospital Due to that the case had been filed at the beginning of 2021 by the Headquarters of the Hellenic Police, despite the suspension provided in art. 188 para. 4 L 4662/2020, the evaluation of the content of the Ombudsman's letter to the Minister was requested, in combination with the investigation of the points of the disciplinary case file which either were not addressed sufficiently or were not addressed at all, emphasizing once again the obligation of specific and detailed reasoning. The Authority has not received any update since then.

4.2.3.b. As regards the complaint that was filed by a detainee to the Ombudsman regarding torture and severe violation of his human dignity during a DNA specimen collection process that was conducted by the police **(F. 237463)**, the National Mechanism launched an independent investigation and requested a disciplinary investigation of the incident. Due to the unreasonably selective, but also incorrect provision on behalf of the Hellenic Police of the information requested by the Ombudsman, the case could not be further investigated and was therefore filed.

71. ECtHR judgment, *Karagiannopoulos v. Greece,* 21.06.2007, et al.

Regarding the internal procedure, the Authority, commenting on a series of serious deficiencies and errors, suggested a corresponding supplementation of the investigation, and also a possible changing of status, turning the ordered PDE into an EDE, for reasons of impartiality and due to the severity of the complaints. Instead of furthering and harmonising the administrative procedure to the Ombudsman's findings or providing specific and thorough reasoning for any departures therefrom- as per the explicit requirements of Art. 188 par. 4 of Law 4662/2020 and Art. 9 (c), and 12 of the EMIDIPA Rules of Operation - the Ombudsman received the decision by which the case was filed. In that way not only was there an absolute bypassing of the institutional role of the National Mechanism for the Investigation of Arbitrary Incidents, but also a derogation from the obligation set by the above-mentioned legal framework on the suspension of the disciplinary decision until the Authority's final conclusion. That obligation exists both in cases, where the National Mechanism is monitoring an administrative inquiry, or is conducting its own investigation.

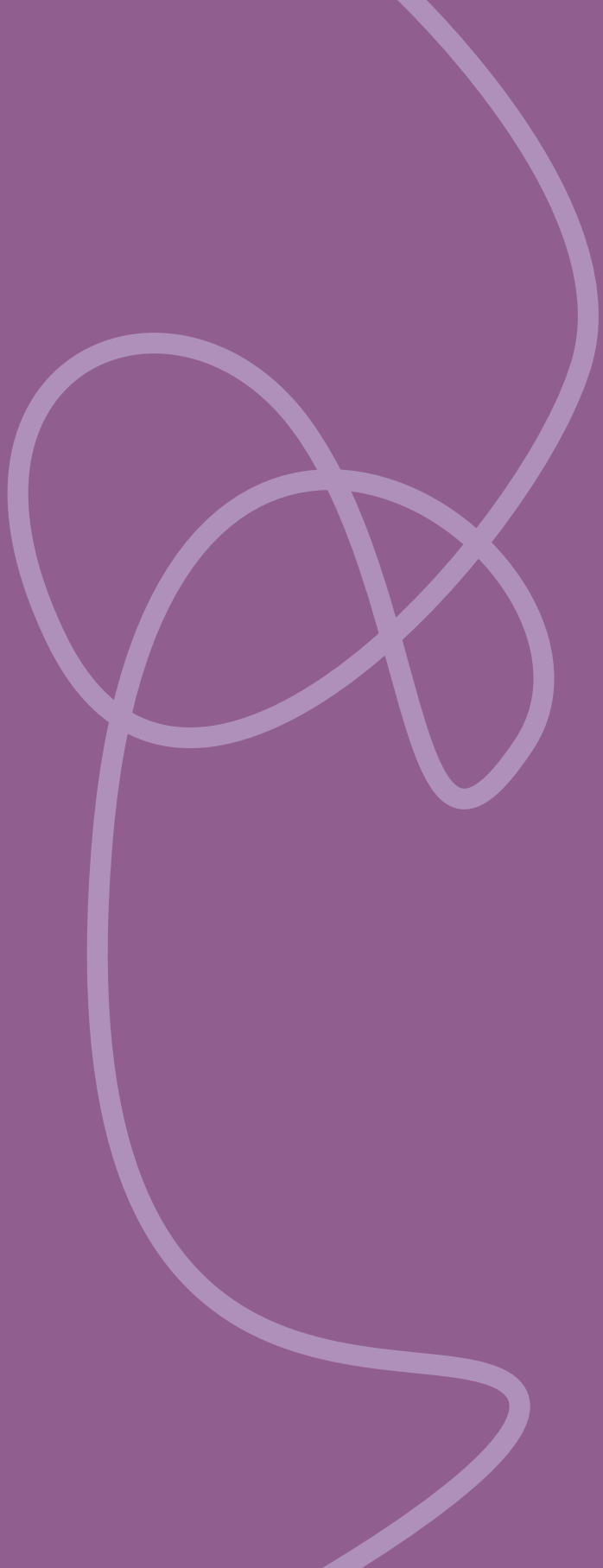
In his letter to the Minister, the Ombudsman noted once again the serious deficiencies identified in the disciplinary investigation and the equally serious evidence that was collected in relation to the investigated incidents; referred to the police's practical refusal to grant the Authority access to information that was essential for its own investigation, and pointed out once again the independence of the criminal proceedings from the disciplinary investigation. In the beginning of 2021, the headquarters of the Hellenic Police initially requested the assessment of the Ombudsman's opinion validity, emphasizing the need for a specific and de¬tailed reasoning and then proceeded with the revocation of the filing and an order to supplement the PDE due to a divergence of opinion between EMIDIPA and the Hellenic Police. The Ombudsman has not been informed of further developments regarding the internal investigation of the case.

It is worth noting that this case was in the meantime referred to and heard by the ECtHR, which, however, did not examine the case on the merits for procedural reasons.[72] This decision, as well as the fact that the ECtHR proceedings were concluded before the internal administrative procedure was completed, render even more imperative the immediate furtherance and the upgrading of the disciplinary investigation. This is further reinforced by the fact that the case in question was not the subject of a criminal trial, as it was previously set aside by

72. ECtHR judgment, *Aspiotis v. Greece* 01.03.2022.

virtue of a public prosecutor's order, which, however, generates no substantive precedent[73]. In light of these developments, and given also that the EMIDIPA is unable to conduct its own investigation for the reasons mentioned above, the case was never examined in the merits, despite the gravity of the allegations and the reported acts of the investigated officers.

73. As the Supreme Court case law confirms: "*Lastly, according to Section 57(1) of the Code of Penal Procedure, court precedent, the violation of which establishes a right of appeal under Section 510(1)(1)(b) of the same Code, arises from a final court judgment, which rules on the merits of the charges concerning the same offence and the same defendant, even if the act is characterised differently in the new prosecution process. On the contrary, the order of the Public Prosecutor at the Misdemeanours Court to set the criminal complaint or report aside as unlawful or manifestly unfounded in the merits or ineligible for judicial assessment, as per to Section 43(3) of the Code of Penal Procedure, generates no precedent. In the present case, if the dismissal order is approved by the Prosecutor of the Court of Appeal, the Prosecutor at the Misdemeanours Court has a right to dismiss, as per Section 57 of the Code of Penal Procedure, any new complaints filed against the same person relying on the same facts or on insignificant variations or additions to the case facts. Thus, limited 'quasi-precedent' is created, which applies at the stage preceding the prosecution*" - see Supreme Court judgment 484/2020. Such limited quasi-precedent, however, is disregarded if new facts are subsequently established or if the procedural requirements for criminal prosecution are fulfilled - see Supreme Court Penal Chamber, judgment 1780/2009.



5. Commonly identified shortcomings of the disciplinary investigation procedures

5.1. As to the collection and assessment of evidence

5.1.1. Witnesses and witness testimonies

5.1.1.α. Search and summoning of witnesses

The crucial role of witnesses, particularly eyewitnesses, in the discovery process, and their crucial importance in establishing the true facts of each case, are invariably acknowledged by the ECtHR[74], and constitute a critical issue that is often highlighted by theorists.[75] The Greek legislator therefore refers to the relevant procedural requirements, which are binding also on the disciplinary bodies, not only indirectly, as a result of the analogous application of the rules of criminal law to the disciplinary law applicable to police officers, but also by making explicit reference to the need to find and examine witnesses and summon defence witnesses, in the context of bothy the preliminary and the sworn administrative inquiry.[76] In light of the above, the search for material witnesses, the taking of material sworn testimonies and their comparative evaluation and synthesis, is invariably mentioned in each EMIDIPA annual special report. However, despite the statutory acknowledged contribution of witnesses as an independent means of proof and the Ombudsman's insistence on their effective protection, disciplinary investigations continue to fall short of witness statements, as the latter appear to be more and more scarce in number and lesser in quality.

74. ECtHR judgments, *Emin Huseynov v. Azerbaijan* 07.05 2015, *Makaratzis v. Greece,* 20.12.2004.
75. Triantafyllou A., 2014, *Issues of Testimonial Evidence in Criminal Proceedings,* P.N. Sakkoulas.
76. Articles 8, 24 and 26 of Presidential Decree 120/2008.

It is worth noting that, of all the cases that were handled by the Ombudsman in 2022, deficiencies relating to witnesses and witness testimonies represent the largest portion of his findings. The most frequent deficiency relates to the need to expand the circle of witnesses, so that it is not merely limited to police officers - whether they are involved in the reported incident or otherwise **(F. 244537, F. 292904, F. 297202, F. 297928, F. 298754, F. 296768, F. 276291, F. 284468, F. 288914, F. 268772, F. 238822, F. 297568, F. 269220, F. 305139, F. 257104, F. 295453, F. 299498, F. 290226, F. 268405, F. 290617, F. 288732, F. 274521, F. 294876, F. 307705, F. 259269, F. 250375, F. 267630, F. 274743, F. 266790, F. 278647, F. 244866, F. 287630, F. 266795 F. 307097, F. 302214, F. 310677)**. Equally frequent is the ECtHR view that investigations conducted by the police in relation to the conduct of police officers, which are mainly limited to statements made by police officers, lack the element of independence and are therefore ineffective, due to the hierarchical structure and, in any case, the professional solidarity existing among the police officers.[77] The ECTHR reaches the same conclusion when the police officers' allegations are raised unreservedly and/or with particular ease.[78]

A variation of this basic deficiency is failure to summon witnesses, although the case facts indicate that witnesses were indeed present at the scene. The most typical case relates to complaints from civilians for unlawful use of force by the police during public gatherings. In this case, minimal - if not zero - effort is made to find eyewitnesses or other key witnesses, and a small number of police officers are selectively summoned, mostly police team leaders, even when many more officers can be identified. **(F. 274521. F. 276045, F. 289101, F. 295453, F. 284468, F. 293295, F. 290226, F. 274521, F. 250375, F. 288914, F. 257104, F. 305524)**.

The issue relating to partiality and selectivity in the witness selection and summoning process is greater in any cases where the complainants state that they are able to identify the police officers involved, and even state the officers' squad number or describe the officers' specific features, yet no action is taken in that direction, either through a show of photographs **(F. 274521, F. 287630)**, or through cross-examination **(F. 290226)**. In the few cases where photographs of police officers are indeed shown to the witnesses, the photos are either too old (**F. 238822**) or partially presented **(F. 299498),** which hardly adds to the

77. ECtHR judgment, *Emin Huseynov v. Azerbaijan,* 07.05 2015.
78. ECtHR judgment, *Parnov v. Moldova,* 13.07.2010.

effectiveness of the overall process. In any case, the ECtHR concludes that, in cases of police operations, the fact that the police officers involved were wearing helmets or masks bearing no other insignia, e.g. warrant number, and the fact that the eyewitnesses and victims are unable to identify the officers who applied excessive and arbitrary force, undermine the effectiveness of the investigation from the outset, practically ensuring the acquittal of the officers involved. In this context, since the investigating authorities are unable to identify the causes of the injury caused to the victims and the persons responsible, and establish compliance with the principles of necessity and proportionality with regard to the force applied, the investigation is considered as not meeting the criteria of Art. 3 ECHR as regards the effectiveness of the control and the procedural requirements of the same article are therefore not met.[79]

Thus, at a protest march that took place in the city of Ioannina on the anniversary of the "Polytechneio" uprising, although there were multiple press reports on the use of fierce and extensive police force and video footage confirming them, only five (5) police officers were summoned to testify and only four (4) eventually underwent investigation, although many more officers were recorded on video. It is noted that, based on the relevant operational plan, two support squads, three police teams deployed on Heroon Polytechneiou Street, "quick response" teams, security teams using vehicles, arrest teams, and O.P.K.E. rapid intervention teams were involved in the operation. No effort was made to identify eyewitnesses among the civilians that appear on the video footage to be witnessing the incidents. Similarly, the paramedics who collected the injured civilians, the doctors and the nursing staff who treated them, the University executives who visited and talked to the arrested students and the citizens who commented anonymously on the video footage were not summoned to testify **(F. 290226)**.

A similar practice was followed in another case of police violence against demonstrators, this time in the city of Rethymnon, where, although there was video footage and medical reports attesting the injury of two civilians, the investigation was limited to four (4) police officers in charge and only two (2) [out of fifty-three (53)] officers accused, while no effort was made to identify the civilians who witnessed the incidents from nearby residences and commercial stores or the doctors and nursing staff who treated the persons injured. In fact, the complainant's details were obtained from the Media that

79. ECtHR judgment, *Hentschel & Stark v. Germany*, 09.11.2017.

posted her complaint on the Internet only five (5) months later; as a result, it was impossible to trace her, because her personal data had been erased in the meantime, in compliance with the applicable data protection laws **(F. 289101)**.

The same practice seems to be applied in cases involving a smaller number of officers involved **(F. 276294, F. 283183, F. 293309, F. 320709, F. 285263, F. 245165, F. 296768, F. 299498, F. 268405, F. 290929, F. 269220, F. 305139, F. 297568, F. 307705, F. 259269, F. 287630, F. 274743, F. 266790, F. 278647, F. 277946, F. 244866, F. 287630, F. 266795)**, like the one concerning unlawful insult to a minor's dignity and personal freedom. The minor victim was the only person that was called to testify, although the incident took place early in the afternoon on a central street of Exarchia, in the presence of three friends of the victim, after they had taken a ride on their bikes and while they were returning home. Except for the victim's father, who filed the complaint, no other parents were called to testify, and, although the police team involved in the incident was identified, the investigators only summoned the heads of the four police teams that were active in the broader area at the time **(F. 294876)**. It is worth noting that this practice is consistently applied even in cases where the Ombudsman has made recommendations for the summoning of witnesses, either from the outset, when the case is initially opened **(F. 296768, F. 295453)**, or in the context of a referral for further disciplinary investigation **(F. 257104)**.

Slightly different is the practice of failing to summon witnesses in a timely manner, which is mainly identified in cases where either the alleged victim or the witnesses are foreigners. In these situations, failure to timely summon the witnesses undermines the effectiveness of the disciplinary process, as it often renders it practically impossible to locate the witnesses. The degree of such deficiency varies based on the legal status of the civilians concerned, which affects the possibility of finding them and at the same time triggers their fear of being potentially targeted **(F. 276291, F. 296768, F. 290617, F. 266790, F. 269220, F. 246381, F. 264452, F. 266506, F. 281504, F. 283183)**. During an administrative investigation that was triggered by a publication and video footage on unlawful insult to the physical integrity and personal freedom of a foreigner in the context of a police check, again in the area of Exarchia, it was impossible to locate the person concerned, although he held a residence permit, because his exact place of residence was not known at the time, which made the disciplinary investigation impossible **(F. 276291)**.

Similarly, in the context of an investigation into alleged abuse of foreign detain-

ees at a police station, possibly with a racist motive, the two persons designated as victims in the complaint were not summoned because one of them had been deported two days before the order for an administrative investigation was issued, whereas the second one could not be located at the address stated in the voluntary departure note, whereby he had been released **(F. 264452)**. Returning to the content of its previous reports, EMIDIPA points out again the need for prioritises examination of foreign victims and witnesses and, by extension, the need for effective compliance with established procedures.[80] At the same time, the adoption of a proactive approach in collecting evidence from detainees was recommended by the Council of Europe Committee (CPT), which noted, during a visit in Greece in 2015, that *"the procedure must be conducted in such a manner that the persons concerned are given a real opportunity to make a statement about the way they were treated"*.[81]

By contrast, the practice of disregarding these procedures (i.e. preferring to not even summon the victims **(F. 295874, F. 277946, F. 290929, F. 287630, F. 297117)**, or leave it up to the criminal investigators to locate the witnesses, as part of the independent criminal investigation that is conducted in parallel to the disciplinary procedure **(F. 238822, F. 241904, F. 290632, F. 286869)** or even leave the task of finding the witnesses on the victims themselves **(F. 290617, F. 294876, F. 284468, F. 247702, F. 250692, F. 292982)**, through pointless and unjustified omissions and/or delays in the actions lying within the scope of the investigation **(F. 268772, F. 238882, F. 250692, F. 276291, F. 274521, F. 289101)**, or even in issuing disciplinary investigation orders **(F. 299498, F. 282183)**, is practically equivalent to denying the case facts *per se*. In these situations, it is not only the principle of legality that is being undermined, but even more so the principle of substantive justice, especially when the severity of the complaints inevitably affects the gravity of the denial. These complaints relate primarily to violations falling under Articles 2 and 3 ECHR, due to the absolute nature of the prohibitions imposed thereunder.

As the ECtHR has repeatedly ruled and EMIDIPA repeatedly upholds in its findings and special reports, as a result of the absolute nature of the prohibitions, satisfactory and convincing explanations ('beyond reasonable

80. EMIDIPA special report for the year 2019 and 2020.
81. CPT Recommendation following a visit to Greece from 14 to 23 April 2015 (see CPT/Inf (2016) 4 part, paras. 40 – 42, https://rm.coe.int/-14-/1680931ad4).

doubt) are required, including evidence that is backed by the case facts[82], as well as effective rebuttal of the allegations raised by the victims or their relatives,[83] reversal of the burden of proof[84], independence, promptness and sufficient public scrutiny to ensure the accountability[85] and effective punishment of the persons responsible.[86] The Court emphasises that in cases involving State officials or organisations, the main purpose of the investigation is to ensure effective implementation of the national laws protecting the right to life and prohibiting torture and inhuman and degrading treatment or punishment and to ensure accountability and, by extension, effective administration of justice.

In light of the above, the ECtHR notes that even the institutional and hierarchical independence guaranteed by the investigation conducted by prosecution authorities vis-à-vis the officers concerned is not sufficient *per se*, as *"the obligation to investigate is not an obligation to produce results, but rather, an obligation to use effective means and procedures [...] Any inadequacy in the investigation that undermines its ability to determine the circumstances of the case or the persons responsible, entails a risk of violating the required effectiveness standard*[87]*"*. According to the Court, strict compliance with the above requirements, even in cases involving general police force[88] or mass control operations,[89] or in complicated situations involving anti-terrorist operations and organised crime prevention,[90] and the strict standards that should govern the investigation in cases involving violations of Articles 2 and 3 ECHR is dictated by the fact that *"what is at stake here is nothing less than*

82. ECtHR judgment, *Ireland v. United Kingdom,* 18.01.1978.
83. ECtHR judgment, *X & Y v. Russia*, 22.09.2020.
84. ECtHR judgments *Salman v. Turkey*, 27.06.2000, *Popa v. Moldova*, 21.09.2010.
85. ECtHR judgment *Patsakis et al. v. Greece,* 07.02.2019.
86. ECtHR judgment, *Lazaridou v. Greece,* 28.06.2018.
87. ECtHR judgment, *Baranin & Vukcevic v. Montenegro,* 11.03.2021.
88. ECtHR judgment, *Al Skeini et al. v. United Kingdom*, 07.07.2011. Accordingly, the national legislator (Article 119 (e) of PD 141/1991) dictates that, when a person to be arrested *"... is in a crowd or in a group that is in cheer or under conditions or circumstances that may provoke the uprising of the crowd against the police officers who attempt the arrest and therefore the disruption of public peace and the cancellation of the arrest, then, as long as there is no risk of escape or disappearance, the arrest must be cancelled to prevent a potential uprising for his liberation, otherwise efforts must be made to ensure that the arrest is made by adequate police forces. If the offender is caught in the act, he/she should not be arrested if the crime is a minor offence and the arrest could potentially cause civil disruption or more serious offences"*.
89. ECtHR judgment, *Hentschel and Stark v. Germany,* 28.02.2019.
90. ECtHR judgment, *Ramirez Sanchez v. France,* 04.07.2006, para. 115 – 116.

public confidence in the state's monopoly on the use of force".[91] Conversely, any departure from these requirements could be seen as potential tolerance of unlawful actions or even as complicity undermining the rule of law.[92] Thus, "excessive" force, that is, force that is not essentially required to carry out a duty, is considered as intended to punish the victim or causing them fear and humiliation, and is therefore considered a clear indication of an intention to commit torture.[93] Insofar as the need for absolute protection of human life and dignity leaves no room for exception or relativity on any grounds, the excessive application or violation of the principles of necessity and proportionality in the application of police force is assessed irrespective of the conduct of the person sustaining it and the nature of the crime such person may have committed.[94]

In this context, the ECtHR concludes that undermining the applicable procedures, taking inadequate measures and failing to remedy deficiencies infringe upon the procedural requirements of Article 3 ECHR on the conduct of effective investigation, and that this is not counterbalanced by the sanctions threatened.[95] In cases where the above inadequacies or deficiencies relate to the summoning of witnesses[96] or the examination of key witnesses,[97] by derogation from the principle of equality of arms due to the decisive role of the evidence concerned, then, in addition to the above violation, there is also a violation of Art. 6 par. 1 ECHR, as the fairness of the proceedings is undermined. The same position is upheld by the Strasbourg Court in any cases where *"the national court convicted the applicant by considering decisive (i) the incriminating testimonies of the police officers who stopped the victim and engaged in abusive conduct against him and (ii) the statements of their fellow officers who were present at the incident, giving lesser probative value to the statements of the four defence witnesses, on the grounds that the persons who knew the applicant failed*

91. ECtHR judgment, *Fountas v. Greece,* 03.10.2019.
92. ECtHR judgment *Patsakis et al. v. Greece,* 07.02.2019.
93. ECtHR judgment, *Dedovsky et al. v. Russia*, 15.08.2008. See also Symeonidou - Kastanidou (2009) *"The concept of torture and other violation of human dignity in the Penal Code", Poinika Chronika,* v. ΝΘ/2009. In national law, Article 2(3) of Presidential Decree 254/2004 determines when and on what terms the police can resort to violence.
94. *As the prohibition of torture and inhuman or degrading treatment or punishment is absolute, independent of the victim's conduct, the nature of the offense allegedly committed by the applicant is irrelevant to the purposes of Article 3."*, ECtHR judgment, *Saadi v. Italy,* 28.02.2008.
95. ECtHR judgment, *Baranin & Vukcevic v. Montenegro,* 11.03.2021.
96. ECtHR judgment, *Bondar v. Ukraine,* 01.05.2019.
97. ECtHR judgment, *Ter-Sargyyan v. Armenia,* 27.10.2016.

to provide sufficient guarantees of credibility".[98]

In light of the above, Greece counts a number of convictions because *"the exact circumstances of the presumed confrontation between the applicant and the police officers, in particular the applicant's conduct that allegedly triggered the use of force and the exact cause of the injuries were not identified during the investigation"* and because the public prosecutor's order to set the case aside *"repeated most of the findings of the administrative investigation and the criminal proceedings launched against the applicant",*[99] because *"the authorities failed to take prompt action as soon as the matter was brought to their attention",*[100] because *"the persons allegedly involved were not investigated"*, and because eyewitnesses testified with great delay, despite the fact that they were identified early on in the process.[101]

5.1.1.b. Evaluation and use of witness testimonies

Similar charges have been brought against Greece in relation to the evaluation and use of witness statements in the context of complaints for police misconduct. More specifically, the ECtHR held Greece liable for violations of the procedural requirements of Art. 3 ECHR on grounds of *"selective and somehow inconsistent approach with regard to the evaluation of evidence by the bodies conducting the investigation",*[102] and also because *"different standards were applied in evaluating witness statements, as the statements of the civilians involved in the incident were considered to be biased, whereas those of the police officers were not",*[103] and because *the senior police officer and the prosecutor failed to dig deeper, although they were faced with contradictory statements",*[104]

Based on these facts, it is quite striking that these practices are still applied in the context of administrative investigations, as it is attested in EMIDIPA's findings for year 2022, given that they *de facto* fail to secure the prestige of either the Hellenic Police and Greece as a country. Failing to abide with the arms' length rule in reading and processing of sworn statements and, by extension,

98. ECtHR judgment, *Boutafalla v. Belgium,* 03.06.2022.
99. ECtHR judgment *Andersen v. Greece,* 26.04.2018.
100. ECtHR judgment, *Konstantinopoulos et al. v. Greece,*22.11.2018.
101. ECtHR judgment, B.Y. v. Greece, 26.01.2023.
102. ECtHR judgment, *D.Z. v. Greece,* 24.05.2007.
103. ECtHR judgment, *P.G. v. Greece,* 14.01.2010.
104. ECtHR judgment,*Konstantinopoulos et al. v. Greece,* 22.11.2018.

reproducing and citing the police allegations in a biased manner - often verbatim - solely with the argument that the complainant is not credible (an argument that is often raised vaguely or based on trivial / secondary facts) is hardly a recent discovery as far as investigation deficiencies are concerned. In this case, a person's capacity as a police officer *per se* serves as solid presumption of the legality of his/her actions and, by extension, as a presumption of truthfulness for his/her allegations**(F. 267188, F. 305139, F. 297199, F. 301695, F. 247702, F. 266795, F. 259978, F. 274743, F. 259269, F. 253320, F. 289415, F. 266790, F. 306009, F. 283183, F. 289101, F. 272705, F. 320709, F. 260670, F. 276045, F. 297117, F. 285259, F. 305524, F. 307097, F. 302214)**. The Ombudsman has repeatedly commented on the inadequacy of this bipolar mechanism, which circumvents the safeguards of impartiality and objectivity and the principle of specific and thorough reasoning, which also apply to the disciplinary procedure.[105]

In this context, the Ombudsman concludes that this practice does not fade out, much less is abandoned, but rather, it is reinforced by blaming the victims or accusing them of retaliation or financial exploitation. The first accusations refers to: (a) cases where the focus and purpose of disciplinary control are reversed and the officer's behaviour is (surprisingly) used to assess the behaviour of the complainant **(F. 261397, F. 289415, F. 253320, F. 286869, F. 283183, F. 272705, F. 292982)** and the eyewitnesses **(F. 305524)**, ; b) cases where the roles are reversed and the alleged victims become the offenders and are normally prosecuted for resisting or disobeying the police officers involved **(F. 273254, F. 288732, F. 247702, F. 274521, F. 289101)**; but also, conversely, c) cases where the victims are deemed to have maliciously refrained or failed to react to the humane measure when being brought in or arrested **(F. 267188)**. The second category almost exclusively comprises cases where the victim files a criminal or formal complaint against the police officers involved **(F. 297568, F. 250375, F. 301695, F. 244866, F. 259269, F. 273254, F. 297117, F. 266792)**, while part of it concerns allegations of that the victim has caused self-harm **(F. 266790, F. 307705, F. 272705)**.

It is also worth noting that this classification is not necessarily solid or absolute. In fact, the ways in which these categories are often correlated also define the extent of their diversity. On a number of occasions, the filing of a criminal complaint against the police officers involved or even a statement by

105. EMIDIPA special report for the year 2021, p. 103.

the victim of his/her intention to press charges, automatically triggers his/her arrest for resisting or defying arrest, through use of the process applicable to offenders caught in the act **(F. 307706, F. 290927, F. 247702)**. The threat of arrest, taking in or detention, and generally the intimidation of the alleged victims serves as a mild alternative to the repressive mechanism, which in turn involves practices of retaliation and instrumentalisation of institutions and the law **(F. 288732, F. 290017, F. 297199)**. Thus, schematically, if a civilian reacts to the police force, he commits defiance; if he fails to react he is accused of not defending himself; if he exercises the procedural right to press charges he is considered to be retaliating and when he fails to press charges or waives the charges he is simply lying.

In the context of this complicated bipolar scheme, the claimant's assertion that, during the time he was detained at a police station, a police officer who had previously hit and insulted him, allowed another civilian to punch him twice in the head, is refuted without further evidence (apart from the police statements), despite the fact that the disciplinary file contains the offender's confession that confirms the victim's assertion **(F. 297199)**. Similarly, in a case involving the death of a foreigner at a Temporary Detention Centre ("PROKEKA"), the outcome of the disciplinary investigation was fully identified with the statements of the Commander of the agency concerned, while no account was taken of the testimonies of two co-detainees of the deceased, which would naturally trigger an effort to find additional evidence before releasing the officer from all disciplinary responsibility and/or identify any potential medical responsibility **(F. 296768)**.

This case further highlights the practice of completely disregarding witness testimonies when evaluating and substantiating disciplinary investigations, if such testimonies contradict the allegations raised by the police officers under scrutiny. EMIDIPA notes that this practice, too - which is actually an extension of the practice of disregarding the arms' length principle and the principles of impartiality and transparency of disciplinary investigations - is also applied in several cases involving complaints against police misconduct, where even strong contradictions in the officers' assertions are ignored, as well as the obvious deficiency in the evidentiary value of the officers' statements, which are often identical in content **(F. 286869, F. 283183, F. 289101, F. 320709, F. 288914, F. 241909, F. 290226, F. 299498, F. 288732, F. 268772, F. 297568, F. 277946)**. In this context, witness testimonies are often treated "as

if they never existed", as they are neither assessed nor used in the reasoning of the relevant findings and, by extension in the operative part of the relevant disciplinary reports.

Most typically, the factual background of supplementary disciplinary reports includes additional witness statements - sometimes with full reference to their content - as proof of compliance with prior recommendations, yet the reasoning and operative part of the report remains the same, even verbally identical, to that of the original (presumably deficient) disciplinary report **(F. 267188, F. 254610, F. 267199, F. 282183, F. 261397, F. 247702, F. 307705, F. 295453, F. 241904, F. 272705, F. 273254)**. As a direct result of this practice, the additional administrative procedure ordered is deprived of its character as a supplementary procedure, ending up a sheer repetition of the original procedure. Most importantly, though, a sheer repetition of the original investigation does not serve the purpose of establishing the true facts. By contrast, it is a blatant departure from such purpose, and reproduces the designated deficiencies, omissions and irregularities, thus contributing to their practical consolidation.

The principle of free evaluation of evidence may not be opposed against these manipulations because, the way it is phrased in Section 177 of the Code of Penal Procedure, as incorporating the moral evidence system, it does not imply that the evaluation of evidence is left to the arbitrary discretion of the criminal court or competent disciplinary body. On the contrary, it means that, in principle, any evidence can contribute to the forming of their conviction when they seek to establish the true facts, without restriction (Section 179 CPP), without hierarchical evaluation of evidence (Section 178 CPP) and without predefined interpretations. The lack of hierarchy of the evidentiary value and the binding nature of evidence obliges the disciplinary mechanism not to be limited to the collection of certain evidence only, but to take all the necessary steps to achieve the completeness of the relevant disciplinary case file.

The rule of moral evidence does not substitute - in fact dictates - a specific and thorough reasoning. To extend this requirement to disciplinary law is legitimate under Article 8 of Presidential Decree 120/2008, as part of the general requirement for substantiation of the penal judgments that is established under Section 139 of the Code of Penal Procedure. A combined reading of these provisions shows that disciplinary reports and any disciplinary decisions pertinent to them must contain *specific and thorough reasoning*, and further

emphasises the obligation of the body conducting the disciplinary control to state *"the basis, manner and reasons of its conviction".*[106] This points to a clear rationale, appropriate evaluation of the evidence, leading to a comprehensible explanation of the final decision made by the disciplinary body and, by extension, discovery.[107] Without reasoning there can be no proof.[108] Therefore, in the system of moral proof, the criminal judge and, by analogy, the competent disciplinary body, are not free to decide on the basis of their beliefs or feelings, but according to specific rules, the observance of which is subject to critical scrutiny. The absence of specific and thorough reasoning, as required under the Constitution (Art. 93 par. 3) is a principal ground for appellate review by the Court of Cassation.

In this context, the Ombudsman has repeatedly pointed out that the formal evaluation and selective utilisation of evidence constitute deficiencies, as the freedom to evaluate evidence reaches its jurisprudential limit in the requirement for reasoning, so that the judicial judgment is not reduced to "innermost" convictions (conviction intime).[109] Fully aligned with the above is also Order/ Circular no. 6004/1/22-xiii/14.10.2008 of the Chief of the Hellenic Police, which, among other things, underlines that *"the personal conclusion and perception of the person drafting the report is not merely a vague, frivolous or arbitrary figment of his/her imagination, but rather, the result of sound reasoning, i.e. of the ability to collect, summarise and add up information to form a conclusion, and must be supported by evidence and thoroughly justified".*

For the same reasons, witness testimonies may not be disregarded or set aside due to preferential treatment of established police practices / customs, personal judgments, general and vague manipulations or police experience. **(F. 282183, F. 274743, F. 250692, F. 288914, F. 303273, F. 287630, F. 253320).** Reliance upon the customary nature of a practice does not in itself constitute sufficient justification. Similarly, the Authority underlines that the

106. Androulakis N., 2014, "Criminal evidence as reasoning and the completion of it", in *Nomiko Vima*, v. 62, p. 1095.
107. Mitsopoulos G., 2005, *Issues of general theory and logic of law,* Ant. N. Sakkoulas Publications, p. 186.
108. Androulakis N., 2017, *Seeking and finding the truth in criminal proceedings,* P. N. Sakkoulas Publications.
109. Special Report of the Greek Ombudsman, 2004, Disciplinary - Administrative Investigation of Complaints against Police Officers https://www.synigoros.gr/resources/docs/astinomikoi.pdf.

customary nature of a practice does not, in itself, constitute an affirmation of lawfulness. For reasons of legal certainty, any customs or practices adopted in the context of police operations or controls must be consistent with, and not substitute for, specific regulatory safeguards.

5.1.2. Audiovisual material

According to national law, in particular Art. 8, 23, 24 and 26 of Presidential Decree 120/2008, the duty to conduct investigation in order to establish the truth as to whether police officers have engaged in disciplinary misconduct includes, in principle, the full range of investigative tools and, by extension, investigative options guaranteed under the Code of Penal Procedure, and must take precedence over the investigation of disciplinary offences allegedly committed by police officers against civilians. The significance of this obligation is also acknowledged in ECtHR case-law, particularly in relation to police misconduct lying within the range of violations laid down in Art. 3 ECHR. In these cases, the absolute nature of Art. 3, in conjunction with Art. 1 of the Convention, require the conduct of an independent, thorough and exhaustive investigation,[110] in the context of which the authorities must utilise all tools at their disposal to collect evidence in a timely manner and investigate the circumstances under which the reported events took place,[111] including, *inter alia, video footage.*[112] The emphasis given by the Court to the task of seeking and collecting video footage pinpoints how critical this means of proof is for the effectiveness of the investigation.[113] It is therefore specified that, failure to secure video footage that ensures the effectiveness of the investigation should be counterbalanced by other investigative measures, taking into account both **the specific circumstances, which apply independently and compose the factual incidents of each case under investigation, and the actual range of investigation practices.**[114]
In light of the above, the ECtHR has identified a violation of Art. 3 ECHR, considering the investigation to be deficient on grounds that the existing video

110. ECtHR judgment, *Konstantinopoulos et al. v. Greece*, 22.11.2018.
111. ECtHR judgment, *Nachova and others v. Bulgaria*, 06.07.2005.
112. ECtHR judgments, *Milić and Nikezi v. Montenegro,* 28.04.2018, *Konstantinopoulos et al. v. Greece,* 22.11.2018.
113.ECtHR judgments, *Lapshin v. Azerbaijan,* 20.05.2021*, Magnitskiy and Others v. Russia*, 27.08.2019.
114. ECtHR judgment, *Hentscheland Stark v. Germany,* 09.11.2017.

footage was not presented in its entirety and without further processing, because it was deleted within one month, which is the - extremely tight - applicable statutory retention deadline. As highlighted in further detail: "*Had this not been the case, the authorities may have had strong evidence at their disposal to prove or disprove the applicant's allegations (...) With those important pieces of evidence missing, the authorities were, in the Court's view, hardly in a position to perform a thorough and effective investigation into the applicant's arguable claim that he was ill-treated by police officers. The above omissions necessarily prevented the national courts from making as full findings of fact as they might have otherwise done. An adequate investigation would have required diligence and promptness".*[115]

The same argument forms the basis of the - well-established - practice applied by the Ombudsman, i.e. to request in advance the person conducting the disciplinary investigation to promptly (in any case timely) secure the relevant video footage and include it in the disciplinary case file. For the reasons described above, such request is made quite emphatically in cases of torture and other offences against human dignity or unlawful impairment of a person's physical integrity or health. However, neither the persistent nor the urgent nature of the request, that stems from legislative and jurisprudential commitments, seems to have a drastic effect towards its fulfilment. In the vast majority of disciplinary investigations into incidents involving police misconduct towards civilians, which were handled by the Mechanism in 2022, no video footage was sought or obtained and no justification was provided in this regard as required by the law. **F. 297199, F. 299498, F. 278647, F. 266795, F. 259978, F. 307705, F. 294876, F. 274521, F. 268772, F. 274743, F. 296768, F. 259269, F. 274443, F. 289415, F. 292904, F. 292982, F. 293309, F. 296770, F. 259616, F. 297202, F. 310677, F. 298754, F. 297928, F. 307097, F. 302214, F. 300278, F. 286869, F. 283183, F. 290930).** Equally unjustifiable is the practice of only obtaining part of the available footage **(F. 260670, F. 273254, F. 289101)**.

In a case involving a complaint of two young girls that, during their arrest and detention, they were punched in the face by police officers, near Exarchia Square, the person conducting the disciplinary investigation failed to search for and collect video footage, either from traffic control cameras or from cameras in buildings/stores located close to the location where the incident took place,

115. ECtHR judgment, *Pósa v. Hungary*, 07.07.2020.

or from CCTV cameras of the Police Department of Exarchia, where they were taken and detained, despite the Authority's recommendations to the opposite. The absence of other refuting evidence makes such investigational omission even graver, as efforts were made to rely on the assertions of the police officers concerned, who claimed that the victims have caused self-harm, while no without further investigation was conducted to identify the number of officers involved, the type of relationship they had with the victims or their physical superiority over the two young women, or the cause of the injury **(F. 307705)**.

In cases, however, where the disciplinary investigator seeks to obtain audiovisual material from the police stations in which the alleged victims were brought in, arrested or detained, the response that is usually given in relation to the absence of such material is that the police / security stations concerned, even the Hellenic Police Headquarters, have no CCTV systems installed **(F. 250692, F. 261397, F. 288914, F. 305139, F. 274521, F. 268772, F. 294876, F. 307706, F. 264452)** or, more rarely, that the camera system installed lacks a recording functionality **(F. 260670, F. 303425)**. On the other hand, in the rare cases where the answer indicates that there is a camera system installed comprising a recording feature, the investigator's failure to obtain and produce video footage is justified by the fact that such material is retained for a very short period of time **(F. 288914, F. 266506)**.

In these situations, the basic argument that is raised derives from Decision no. 58/2005 of the Data Protection Authority, according to which: *"the data will be retained for a maximum period of seven (7) days, after which the data shall be deleted"* which is reportedly binding also on the Traffic Control and Monitoring Operations Unit ("THEPEK"), which manages the C4I camera system. Within this framework, the lapse of seven days renders any attempt to seek audiovisual material useless, due to its stipulated prior deletion.

Regarding this argument, the Ombudsman has repeatedly argued that lengthy references to the decisions of the Data Protection Authority must take into consideration Directive 1/2011 of the same Authority on the *"Use of video recording systems for the protection of persons and goods"*, Art. 8 of which provides that the data must be retained for a specified period of time depending on the purpose sought every time. If this purpose is related to an incident (e.g., theft, robbery, beating, etc.) against a third party, the controller is allowed to keep the images data for a period of three (3) months. This means that in all cases involving complaints for excessive police force, particularly in cases

involving allegations of physical injury, the disciplinary investigation order can ensure that the relevant material is obtained in a timely manner.

By comparing the above findings with a number of cases for which video footage is available, EMIDIPA has drawn the conclusion that the footage is privately owned, in the sense that it is almost exclusively recorded by civilians who are present at the reported incidents, and is subsequently made public mainly through social media, or, less often, through television. The second conclusion is that these cases mostly concern allegations of unlawful police force in the context of public gatherings **(F. 293295, F. 288914, F. 274521, F. 282183, F. 295453, F. 290226, F. 284468, F. 289101, F. 285259)**. However, these conclusions can easily turn into questions, if one reviews the content of Presidential Decree 75/2020, which lays down the necessary legal framework governing image and sound recording at public gatherings, which permits, inter alia, for the sake of transparency, the use of portable cameras integrated into the uniforms of police officers, yet still remains inactive.

Moreover, a combined reading of the above conclusions indicates that the complaints do not essentially concern public or open spaces; instead, the reported police misconduct may continue when the complainants are brought in by police cars and/or during their detention in police stations **(F. 282183, F. 274521)**. A common finding in each case is the poor evaluation of the video footage, which sometimes even comprises discrepancies between the facts recorded and those stated **(F. 290226, F. 282183, F. 285259, F. 289101)**. Sometimes the officers concerned invoke hypothetical, general and vague online audiovisual material, without stating explicitly its source and, most importantly, without including it in the case file, thus making it impossible to the investigators to establish the true facts **(F. 305524)**.

However, even in cases of convergence, where the validity of the complaints is established, the deficiencies in the evaluation of the evidence may be reduced, but not eliminated. In these cases, the deficiencies do not consist in an effort to deny the true facts, but rather, in an effort to downgrade the disciplinary liability involved. As a result, the case facts are deemed to constitute misconduct of lesser gravity or severity and therefore bring lesser disciplinary penalties. In one such case, there was video footage taken during a rally of student associations in Thessaloniki, in which three men of the Public Order Restoration Unit (Y.A.T) appear to leave their groups and unprovokedly beat three civilians using kicks and batons. The first victim was hit with a police

baton on the back of his shoulder, the second was hit on the head with an officer's elbow and instantly fell on the ground, while the third, who was already lying on the ground, was kicked in the body by a passing officer. Although the investigator does not fully accept the officers' allegations that they were in legal defence and that this was merely a reflexive reaction, the characterisation of this conduct as inappropriate towards the civilians leaves out of scope issues of malicious intention in causing physical harm and triggering generalised violent incidents - which is inconsistent with the institutional role of the police and the legitimate objectives of police operations. Similarly, the responsibility of the heads of the police teams that comprised the officers concerned was not examined **(F. 293295)**.

Despite the fact that the ECtHR has no power to determine the degree of the offender's responsibility or the sentence to be imposed, Article 19 ECHR and the principle that the Convention must safeguard the rights of individuals not at a purely theoretical level, but rather, in a real and practical manner, the Court notes, in a judgment convicting Greece, that it maintains its supervisory role and has a power to intervene in cases of complaints for police misconduct against civilians, if there is clear disparity between the gravity of the act and the sentence imposed. Otherwise, the duty of States to conduct effective investigations would be more or less meaningless.[116] In this context, once again in a judgment convicting Greece, the ECtHR ruled as follows: "*the penal and disciplinary system, as applied in this case, proved to be far from being adequately strict and has not been able to exert the appropriate deterrent effect to ensure the effective prevention of unlawful acts, such as those complained of by the applicants*".[117]

At this point, it is also worth noting the cases where video footage of violent incidents taken in the context of public gatherings by citizens or journalists becomes the basis of complaints for unlawful violation of their personal freedom and/or physical integrity, being often accompanied by police allegations of unlawful videotaping **(F. 250375, F. 295448)**. The Ombudsman's view in this regard is that, videotaping police actions to prove allegations of excessive force is not an unlawful act that would justify the use of force by police officers or a trial against the alleged perpetrator. This is because, filming in such a context is not an act that violates the privacy or personal data of the officers involved,

116. ECtHR judgment, *N.Z. v. Greece*, 17.01.2012.
117. ECtHR judgment, *Sidiropoulos and apakostas v. Greece*, 25.01.2018.

but rather, an act concerning the exercise of public authority by the police.[118] In this regard it should be noted that, according to the Supreme Court case-law,[119] evidence collected unlawfully can be used in criminal proceedings, if it relates to acts and conduct of individuals lying outside the sphere of their personal life and privacy, occurring in the context of their official duties and during the performance of such duties, as these duties are by nature subject to public scrutiny and criticism. In fact, a recent opinion of the Pubic Prosecutor at the Supreme Court[120] argues that the use of illegal evidence is permissible also in disciplinary procedures, under the same conditions as in criminal proceedings, provided that this is consistent with the nature and purpose of the disciplinary procedure.

Similarities, both in terms of the conclusions set out above and in terms of the identified deficiencies, can be found also in the evaluation of audiovisual material relating to complaints for police misconduct in situations other than public gatherings **(F. 290632, F. 290929, F. 276291, F. 254783, F. 276294)**. We typically mention a case where a group of police officers comprising three vehicles and several motorbikes tried to arrest a member of the Central Committee of the Socialist - Labourers Party ("SEK") at the entrance of the party's office. Following protests by fellow members, the officers eventually carried out a body search and a check of his backpack, forced the director of "Workers' Solidarity" newspaper to the ground and threatened one of the journalists of the same newspaper with a gun. According to police allegations, the incident was triggered by a check for non-use of a mask by a member of the SEK Central Committee. Although there was video footage available containing snapshots of the reported incident and the officers involved, which showed that the SEK member concerned was actually wearing a mask throughout the incident, no assessment was made of this footage as part of the disciplinary investigation **(F. 290929)**.

The same practice is applied in respect of photographs that are included in the disciplinary case file. Failure to evaluate these photographs means they are excluded from the evidence. At the same time, no identification actions are taken in the context of the disciplinary investigation to establish that the images capture or concern specific victims, so as to establish the validity (or not) of

118. EMIDIPA special report for the year 2019, p. 39.
119. See, for instance SC 171/2017, 277/2014, 653/2013 and 1202/2011.
120. SC Prosecutor Opinion no. 14/2020.

their allegations **(F. 282183, F. 259978, F. 278647, F. 289101)**. In another case, photographic evidence showing a trace of a police boot print on the complainant's shirt was not given any consideration, despite the complainant's allegations that excessive force was used against him as he was *"hit by the officer with his knees and boots, even on his head and neck"* (**F. 273254)**.

The validity and accuracy of the complainants' allegations could also be established by photographs of arrested civilians complaining about physical abuse, taken by the Police Fingerprinting Service, which, however, are regularly disregarded and not even included in the disciplinary case file **(F. 250375, F. 307705, F. 299498, F. 297199, F. 268772, F. 274521)**. The evidentiary value of these photographs is implicitly underlined by Greek case law, which holds that the period between the bringing and the arrest *"s particularly dangerous for the occurrence of such barbaric behavior, being in close time proximity to the presumed illegal or insubordinate conduct".*[121] However, even is those cases where the relevant photographs are indeed sought as a result of the Authority's persistent recommendations, they are rarely, if ever, evaluated **(F. 259978)**.

5.1.3. Medical certificates, opinions and forensic reports

Repeated reference to the absolute nature of the prohibition of Art. 3 ECHR and to its content, through references to ECtHR case-law, has largely illustrated the arguments as to the importance of the investigation process and of the evidence collected through it, i.e. forensic reports and medical opinions. However, the Court considers imperative to further highlight their importance, by emphasising the obligation to seek such evidence in cases involving allegations of misconduct of the enforcement authorities against civilians and clarifying that the existence of such evidence puts additional burden on the authorities to refute the victims' allegations beyond reasonable doubt.[122]

Moreover, such additional burden is clearly based on the scientific presumption that is inherent to such evidence; however, the absence of such evidence does not howsoever impair the gravity of the victims' allegations[123] nor its content

121. Court of Appeal of Thessaloniki 947/2018.
122. ECtHR judgment, *Emin Huseynov v. Azerbaijan*, 07.05.2015.
123. ECtHR judgments, *Serifis v. Greece,* 02.11.2006, *Koutsaftis v. Greece*, 12.06.2008.

is considered *ipso jure solid and complete.*[124] In the cases of discrepancies or incompatibilities between the allegations of the victim and the medical findings, the ECtHR emphasizes the need to obtain an additional expert opinion by a medical expert in order to explain how the injuries were caused and thus to resolve the discrepancies between the differing allegations.[125] This requirement is also found in the Greek national legislation, in particular in Art. 2 of Law 3772/2009 in conjunction with opinions 4/2011 and 3/2017 of the Supreme Court Prosecutor concerning its application. EMIDIPA holds the same view, pointing out from the outset to the persons conducting the administrative investigation the need for sworn examination of the physicians/forensic experts involved, as to the severity of the injuries in relation to the allegations, noting at the same time the serious chances of conviction arising if this requirements is not met, with special reference to Greek cases.[126]

Nevertheless, according to the EMIDIPA findings for year 2022, as regards the search and use of this type of evidence, disciplinary investigations seem to disregard both the relevant legislative requirements and the relevant recommendations. The main conclusion drawn from the disciplinary cases that were processed by the National Mechanism for the period concerned is that the evaluation of forensic reports and medical opinions is largely equated with a discretionary interpretation of such evidence by the person conducting the administrative investigation, who makes no reconciliation against the other evidence and provides no useful clarifications or assessments, as the forensic experts and medical examiners would provide if they were called to make a statement. Thus, instead of scientific explanations, police experience, personal sophistry, interpretative manipulations or poorly substantiated internet searches are being used, often accompanied by vague assumptions as to the malicious intention of the alleged victims, their general reactive behaviour or the peculiarity of their physical condition, which often refers to their age or weight. **(F. 259978, F. 253320, F. 247702, F. 290632, F. 299498, F. 290226, F. 284468, F. 297568, F. 268405, F. 292982, F. 302214, F. 269381, F. 286869, F. 289101).**

A characteristic incident has been reported, involving a 33-year-old civilian. During a protest march on Panepistimiou Street, he tried to cross the street

124. ECtHR judgment, *Akkoc v. Turkey,* 18.12.1996.
125. ECtHR judgment, *TARJANI v. Hungary,* 10.10.2017.
126. ECtHR judgments, *Sarwari v. Greece,* 11.04.2019, *Andersen v. Greece*, 06.04.2018.

and head to Korai Square. That moment, a member the "DRASI" police squad, who was in a police car following another civilian that was being taken in, pulled out his baton and hit him on the head. Passers-by, including a female doctor, managed to move the victim and take him to hospital. The following day, he was taken to hospital again because he felt dizziness at work. At the hospital he was advised to rest and recover. According to the forensic report obtained in the course of the pre-trial investigation, the injuries he sustained *were caused by a sharp object around the time the incident described above occurred'*. Without prior assessment of the entire medical file - much less of the available video footage -, the investigating officer adopted the views of the police officers as to the causes of the injury, and concluded that the injury was probably caused by a sharp object thrown by the demonstrators. However, apart from any eyewitnesses, the investigator also failed to examine the forensic expert who signed the forensic report, in order to clarify whether a stone or a detached piece of marble qualifies as a "sharp object" and whether these objects can cause the injuries mentioned in the report, if thrown from a distance **(F. 284468)**.

In another case, in the context of the investigation of allegations for physical abuse of a lawyer at the Thessaloniki Courthouse, the investigator failed to take a sworn statement from the four doctors who were directly involved in the incident, i.e. carried out a clinical examination of the victim, each in his own medical capacity, and even summoned another doctor / medical expert to give a scientific opinion as to the existence of a causal link between the reported violence and the medical findings. It is also worth noting that the medical expert provided a reserved opinion, noting that she has not examined the patient herself **(F. 259616)**.

There are also cases where, although the forensic experts or attending physicians are eventually summoned, following recommendations from EMIDIPA, the content of their testimonies is either disregarded (therefore not used) or segmentally examined, which poses a risk of distorted interpretations **(F. 282183, F. 267188, F. 250375, F. 288732, F. 273254)**. As an example, we note a case concerning an incident that took place in Lefkimmi, Corfu. Once again, there was a public gathering of civilians, during which the police officer accused allegedly hit a civilian in the head, after taking him hand-bound into the police transportation vehicle. The victim sustained perforation of his tympanic membrane and hospitalised for three days. The fact that the attending physician

who was examined defines merely the time period, rather than the exact day, the injury was caused - although such period includes the time the injury was allegedly caused- is considered by the investigator as an indication that the complainant is lying. In support of this indication, the investigator points out that there are no injuries in the victim's face or the external ear, but fails to ask the attending physician as to the validity of his own assessments or the complainant as to how he was hit by the officer (F. 250375).

In other cases, instead of a personal, poorly substantiated assessment of forensic reports and/or medical opinions, investigators completely disregard such evidence without justification when evaluating the general evidence of the case file **(F. 274521, F. 268405, F. 241904, F. 297199, F. 244866, F. 276294, F. 276045).** In these cases, despite the great evidentiary value attributed to medical certificates by the courts,[127] those end up being considered irrelevant, they are merely recorded in the contents of the disciplinary case file and only briefly mentioned in the factual background of the relevant disciplinary reports. Yet apart from simply listing or mentioning this evidence, no other effort is made to establish the causes of their findings, which is the purpose of all disciplinary investigations. This practice ends up depriving these certificates of their quality as evidence and reducing them to technical medical reports. In cases where the medical certificates relate to the complainant's mental health, this appears to be a slippery slope **(F. 288732, F. 283199, F. 259616)**, despite the fact that case-law clarifies that *"physical harm is any external action directed against the human body, such as wounds, abrasions, swellings, deformities, etc.. Health impairment is any disturbance of the mental human functions. Physical harm may also qualify as health impairment, but health impairment may occur without physical harm. Each may occur either independently or as a result of the other, and no contradiction arises from the cumulative occurrence of both".*[128]

This effect is even greater and more obvious in cases where the evidence in question is neither sought nor included in the disciplinary file, although its existence is presumed on the basis of other evidence **(F. 288914, F. 297202, F. 307097, F. 269755)**. A similar effect arises when such evidence is untimely sought. This mathematically eliminates all possibility to collect the evidence - which only confirms that the time medical and other evidence is sought is critical for the effectiveness of the investigation **(F. 264452, F. 246381)**.

127. ECtHR judgment, H.A. v. Greece, 28.02.2019.

128. See, inter alia, Supreme Court judgments 1796/2009, 2055/2019, www.areiospagos.gr.

Irrespective, however, of the nature or degrees of the deficiencies in question, the ECtHR constantly reiterates that *"Any omission in the investigation, which undermines the possibility of finding the cause of the injuries or the identity of the persons responsible, jeopardizes the compliance with this obligation for a comprehensive and effective investigation]".*[129]

5.2. As to the investigation procedure

5.2.1. Independence of the disciplinary trial from the criminal one

The practice of disregarding the rule of independence of the disciplinary procedure from criminal proceedings is one of the most critical irregularities in the conduct of administrative investigations for a number of reasons, related to impairment of the prestige of the police force and of the policing quality, undermining official accountability and, by extension, state responsibility, fostering a mentality of opacity and authoritarianism, instrumentalisation of institutions and elimination of public trust in the state authorities. In light of the above, from its very first report, EMIDIPA has repeatedly stressed the necessity to comply with the applicable legal framework, which establishes the autonomy and independence of the two procedures,[130] effectively reinforcing such framework through the legislative amendments it has recommended and were enacted in the past, thus leaving lesser room for practical "suspension" of disciplinary proceedings while criminal investigations are under way.[131]

In addition, EMIDIPA has repeatedly referred to the different purpose served by the two procedures, despite the dialectical relationship between them, which is confirmed by both[132] theory and case law.[133] The different, but also broader, scope of the disciplinary investigation compared to that of criminal investigation is determined by the functional purpose of the official or officer involved.[134] The particularities relating to the establishment and mission of the

129. ECtHR judgment, *Emin Huseynov v. Azerbaijan*, 07.05.2015.
130. Art. 48 para. 1 of PD 120/2008.
131. Art. 1 para. 3 of PD 111/2019.
132. Papadamakis A., 2016, op.cit.
133. Council of State plenary session 4662/2012, Piraeus Administrative Court of Appeal 10/2014.
134. Papadamakis A., 2016, op. cit. p. 530.

police force dictate that the task of ensuring internal discipline - which, among others, includes noble conduct on the part of the police officers towards civilians and respect for the rights of the civilians -,[135] forms part of their official duties, which must be adhered to by the officers at all times, both on and off duty.[136] Any culpable and imputable breach of such duty, whether committed by act or omission, constitutes a disciplinary offence.[137] On this account, after all, the legislator makes an indicative and not accurate or exhaustive ex-ante listing of disciplinary misconduct *"since the employee's conduct which contravenes his or her duty and is detrimental to the service can manifest itself in many and varied forms"*[138] *besides, the person upon whom disciplinary penalties are imposed is not deplored as a citizen, but as an employee or official, because he or she has violated an obligation in the context of a specific activity.*[139]

Similarly, the ECHR, with its established case-law, advocates the independence between the disciplinary and criminal proceedings, which can be conducted in parallel, without the slightest obligation for one of them to await the completion of the other one and without raising any issue of violation of the presumption of innocence.[140] As the Court characteristically notes: *In disciplinary or administrative proceedings which are related to previous criminal proceedings, the presumption of innocence is not necessarily violated if the disciplinary or administrative court reaches a different conclusion from that of the criminal court. This may be the result of seeking a different kind of liability, which arises from the same facts, given that the requirement of Article 6 par. 2 of the Convention is not intended to prevent the competent disciplinary bodies from imposing sanctions on public officers, if such bodies are limited to evaluating the impact of the reported actions of the officers concerned on their duties and their obligation to act with integrity".*[141] At the same time, it emphasizes that even if there are obstacles in the development of the disciplinary investigation in a particular case, the immediate response of the authorities to investigate the use of deadly force or means or to investigate allegations regarding ill-treatment is considered essential so as to maintain public confidence in the authorities' respect for the

135. Article 2 para. 1 case e of the PD 120/2008.
136. Article 4 para. 2 of the PD 120/2008.
137. Article 4 para. 1 of the PD 120/2008.
138. Pikrammenos M, 2013, op. cit. p. 252.
139. Ibid.
140. ECtHR judgments, *Kemal Coskun v. Turkey,* 23.03.2017, *Mullet v. France,* 13.09.2007.
141. ECtHR judgment, *Moullet v. France* , 13.09.2007.

rule of law and to avoid any form of tolerance or concealment of illegal acts.[142]

In this regard, it is also worth noting that the Resolution of the Committee of Ministers of the Council of Europe passed at the meeting of 14 – 16 September 2021, not only welcomes changes to disciplinary law that reinforce the independence of disciplinary investigations, but further underlines the need to implement EMIDIPA recommendations to ensure the integrity of disciplinary controls, as well as the need to brief the Committee again by September 2022, by means of updated empirical and qualitative data on disciplinary investigations of allegations concerning police misconduct, in order to record the impact of the measures as a whole, whether they relate to legislative regulations or recommendations made by the Ombudsman.[143]

The main conclusion drawn by the Mechanism for year 2022 based on the number of cases processed throughout the year, is hardly any different from those of the previous years. On the contrary, one could argue that the deficit in autonomy and independence between the two procedures appears to be invariable, as the relevant recommendation concerns a plethora of disciplinary cases **(F. 288914, F. 267188, F. 241904, F. 238822, F. 254610, F. 266795, F.261397, F. 274743, F. 259978, F. 244866, F. 247702, F. 250692, F. 282183, F. 288732, F. 306009, F. 290927, F. 268405, F. 299498, F. 266790, F. 290632, F. 267199, F. 259616, F. 273254, F. 289101, F. 269381, F. 239685, F. 286869, F. 272705, F. 303041)**. Considering the legislative additions adopted to eliminate this deficit and the lengths to which the Mechanism has gone to underscore its unacceptable nature, such deficit, is not only invariable but further appears to be solidly established - if not fully functional.

Its functional role is further highlighted by the various forms it takes from time to time, rising reasonable suspicions that the procedural autonomy of the disciplinary investigation is only randomly observed and that disciplinary investigations are flexible and adaptable, often incorporated in criminal proceedings and criminal court judgments, although there are different rules of law governing the relationship between disciplinary and criminal procedures and, by extension, different substantive conditions applying to criminal and disciplinary offences **(F. 254610, F. 299498, F. 238822, F. 306009, F.**

142. ECtHR judgment, *MOCANU and Others vs Romania,* 17.09.2014.

143. https://rm.coe.int/0900001680a3c11fΑπόφαση%20της%20Επιτροπής%20Υπουργών%20του%20Συμβουλίου%20της%20Ευρώπης%20της%20συνεδρίασης%2014ης%20–%2016ης%20Σεπτεμβρίου%202021

268405, F. 261397, F. 28218, F. 266790, F. 273254, F. 259616), and other times suspended while the criminal proceedings are pending, despite the fact that such suspension is only allowed in exceptional and imperative situations[144] **(F. 241904, F. 238822, F. 267188, F. 239685, F. 303041).** The disciplinary procedure resumes when the criminal prosecution and/or proceedings have an unfavourable or adverse outcome for the police officers concerned **(F. 290632, F. 267199).**

The consistent application of these practices over time inevitably renders significant certain earlier findings of the UN Special Rapporteur, who stressed in his report on torture and other cruel, inhuman or degrading treatment or punishment in Greece, that the way Sworn Administrative Inquiries are conducted in Greece is irrational and primarily aimed at protecting the rights of the police officers under investigation.[145] In this regard, apart from the fact that criminal and disciplinary law is instrumentalised, this implies that, alongside the stated function of disciplinary controls, there is a second, latent function, which releases the enforcement forces from all liability - instead of promoting accountability and the protection of institutional prestige of the police force -, thus concealing all procedural irregularities.

This conclusion is also upheld by the ECtHR, which repeats, in its two latest convictions of Greece for violations of the procedural requirements of Art. 3 ECHR, that the applicants did not benefit from an effective investigation, both at the criminal and disciplinary level, thus extending an - already long - list of similar judgments. A quick review of the last ten years shows that Greece is convicted for violations of Art. 3 ECHR (with regard to the procedural requirements alone) once every year and a half or so. As manifestations of the deficiency of controls, the Court designates, *inter alia*, that the prosecutor's order to set the case aside *"the prosecutor at the court of appeal merely repeated the majority of the findings of the administrative investigation and the criminal proceedings that were initiated against the applicant"*,[146] that *that "the senior police officer and the prosecutor failed to carry out an in-depth investigation, although they were faced with contradictory statements"*, that *"the authorities*

144. At. 48 para. 3 of PD 120/2008.

145. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Manfred Nowak on his mission to Greece*, 21 April 2011, UN doc. A/HRC/16/52/Add.4 , para. 15, p 6: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/129/68/PDF/G1112968.pdf?OpenElement

146. ECtHR judgment, *Andersen v. Greece,* 26.04.2018.

failed to act as soon as the matter was brought to their attention",[147] that *"despite this deterioration in the applicant's medical condition, the national courts failed to carry out an in-depth examination of the case facts"*[148] and that *"no investigation was carried out into the persons allegedly involved"*.[149]

As a result of the above, Circular No. 1/2023 (Ref. 10828/22/03.01.2023) was issued by the Deputy Prosecutor of the Supreme Court, dictating, among other things, that, in cases involving allegations of abuse that constitute violations of Art. 3 ECHR, *"where the complaint is directed against penitentiary employees and police officers, the preliminary criminal investigation will not be conducted by a police investigating officer, but rather, by the Prosecutor of the Court of First Instance himself [Section 30(1) of the Code of Penal Procedure]. If the supervising prosecution officer appears to be 'involved' in the investigated incident, according to Section 567 of the Code of Penal Procedure and Section 85 of the Correctional Code (Law 2776/1999 op. cit.), the competent prosecutor of the Court of Appeal will be informed accordingly so that he/she can carry out the investigation in accordance with Section 32 of the Code of Penal Procedure and ensure the independence of the investigator from the investigated persons".*

However, the alignment of the two procedures appears to be practically inevitable, as the disciplinary bodies indirectly determine that no disciplinary offence has been committed, after having decided that no criminal offence has been committed. The victim's decision not to press charges normally forms the basis of this conclusion, which leads to an essentially two-fold decision, even when an *ex officio* criminal prosecution has been brought against the police officers concerned **(F. 288914, F. 267188, F. 288732, F. 289101, F. 269381)**. Thus, the disciplinary investigation into police misconduct against family members of an arrested person, who participated in a public gathering in the area of Sepolia, has concluded that *"it cannot be solidly established that the objective and subjective conditions of a criminal offence and of the disciplinary misconduct arising from it are met in relation to the police officers concerned; therefore, the officers may not be held responsible"*. The fact that the victim did not press charges against the officers *'as any ordinary citizen would normally do'* was the main argument raised in favour of releasing the officers from all liability. It is also worth noting that this conclusion is drawn by the Service as

147. ECtHR judgment,*Konstantinopoulos et al. v. Greece,* 22.11.2018.
148. ECtHR judgment, *Torosian v. Greece,* 07.07.2022.
149. ECtHR judgment, B.Y. v. Greece, 26.01.2023.

part of its special and general power to carry out administrative investigations, namely Sworn Administrative Inquiries. **(F. 288914)**. A criminal complaint filed near the end of the applicable deadline is also viewed as grounds for release of the officers concerned from liability, as it is considered to be an indication that the complainant's assertions are untrue (**F. 272705**).

Furthermore, the reasoning of identification ignores the purely disciplinary offenses provided by PD 120/2008, i.e., those that do not constitute crimes according to the PC or a special law, as it implicitly acknowledges that purely disciplinary offenses do not relate to reported police conduct against citizens but are limited to official offenses. The extension of this reasoning argues that if a a criminal case is not filed (for the crimes being prosecuted only after the victim's complaint it is quite common, due to non-submission or the existence of a specific deadline for the complaint's submission) disciplinary control and even the attribution of disciplinary liability is excluded from the outset, regardless of the type and the police officer's possibly offensive conduct against a citizen. Furthermore, the practice applied by the investigator exceeds his/her powers, as he/she ignores the provisions of Art. 96 of the Constitution as well as the relevant provisions of the Code of Penal Procedure, according to which the tasks of establishing criminal acts committed, examining the legal conditions applicable in this regard, prosecution and sentencing all lie within the competence of the judicial authorities. In addition, the disciplinary investigation is rendered a secondary process that merely follows the criminal procedure, i.e. a pretextual, rather than substantive, process.

The same considerations apply in any cases where disciplinary cases are set aside as a result of a change in the alleged victim's intention to file a complaint or his/her subsequent withdrawal from the complaint filed. We should add that these changes of intention are usually noted in relation to persons belonging to vulnerable groups of the population, in terms of racial origin or ethnicity, social status (e.g. drug addiction), gender or sexual orientation **(F. 274743, F. 244886, F. 250692, F. 288732, F. 288772)**. A typical case is that of a young woman who was arrested in Karditsa, who reported that she was unlawful deprived of her liberty and abused by the police officers who carried out a check of her legal status and that she sustained substantial psychologically pressure not to press charges, as she originally intended, and accept the charge of defiance that was pressed against her. According to her allegations - which were in fact confirmed by the disciplinary investigation - she sustained even

greater pressure when, at the police station where she was taken, she had access to a video transmission device from an auxiliary space where persons placed in protective custody were held, where she saw a person that appeared to be out of control **(F. 288732)**.

In this regard, the Ombudsman further notes that the provisions regulating the crimes that are only prosecuted on the basis of a criminal complaint under the criminal law, do not apply *mutatis mutandis* to disciplinary law. By extension, the victim's intention to press charges is not revocable. This is because, unlike criminal law, which aims to prevent and suppress crime for the sake of public peace and civil stability, the core of disciplinary misconduct consists in the breach of an official duty, as dictated by Article 4 of Presidential Decree 120/2008, and aims to maintain the prestige of the service. Taking this into account, the LCS in its opinion No. 372/2009 clarifies that: *"The disciplinary procedure is obligatorily initiated by the administration in the cases provided by law and aims at the smooth operation of services, the observance of the principle of legality and the defense of Public Interest. Therefore, in the context of the disciplinary procedure, it is inconceivable that there should be a dispute between the person who complained of an unlawful act and the administrative body against which administrative control is exercised..."*. In this light, both the conduct and the outcome of the disciplinary procedure do not depend on the will of the alleged victim.

The same conclusion (there being no disciplinary liability) arises however as a result of disciplinary investigations, even when the alleged victim's intention to press charges action against the officers concerned has been officially recorded. Several of these cases are set aside on the condition that they will be re-opened and reviewed in case there is a criminal conviction **(F. 299498, F. 266795)**, or in case criminal prosecution is terminated either due to non-payment of the statutory fee, which is a condition of admissibility of the complaint, **(F. 261397)** or for procedural reasons that eliminate the criminal nature of the reported act **(F. 267199)**. Lastly, there are also cases where these reports are never sought in the context of a disciplinary investigation, neither in terms of content nor in terms of their outcome **(F. 266795, F. 307097)**. Alternatively, to the above, the disciplinary investigation is often fully replaced by a preliminary investigation procedure, where the investigator relies exclusively on the witness statements that were taken when the criminal case file was opened. As a result, the deficiencies of the criminal procedure are carried to the administrative investigation in their entirety **(F. 286869).**

When and how a criminal complaint is filed - which are linked to the time period during which crimes are considered to be "in progress") are two other points of intersection between disciplinary and criminal investigations, where criminal law is regularly instrumentalised. As a general rule, the alleged victims testify or state before the police that they wish to press charges for police misconduct and they are arrested right after this, as the officer concerned has normally pressed charges against them **(F. 247702)**. A slightly diversified version of this practice consists in ineffective review of the period in which crimes are considered to be in progress, either because such period has provably elapsed or because it never applied **(F. 306009, F. 290927, F. 277946)**. Retaliation, unnecessary discomfort, preventing victims from exercising the right to report misconduct and limiting the statutory criminal safeguards are the immediate effects of these practices.

A typical case is that of a driver who was reportedly insulted and beaten by police officers during a traffic police check, and accused of defiance, insults and threats. Ruling on the complaint against the police officers among others for dangerous physical harm, violation of Article 137A par. 3 of the Penal Code and false representations, the competent Public Prosecutor suspended all further actions until the criminal proceedings initiated against the victim were completed, as per Section 59 par. 2 of the Code of Penal Procedure. Misinterpreting the provision of Article 48(3) of Presidential Decree 120/2008 on the independence of the two procedures and relying on the fact that the officer pressed charges and the victim was referred to trial, the person conducting the Preliminary Administrative Inquiry suggested, accordingly, that the disciplinary procedure should be suspended. The National Mechanism pointed out that the service of a summons or writ of summons, as a condition for exceptional suspension of the disciplinary procedure, concerns the person reported, rather than the complainant **(F. 239685)**.

The greater the institutional instrumentalisation, the greater the effects caused. Such effects often affect the very scope of the criminal prosecution and/or the court's judgment. An interesting aspect of this ratio is the gravity of the incidents reported, which only intensifies such trend. Thus, in the case of an incident that underwent disciplinary investigation on grounds of physical abuse of a foreigner who was entitled to international protection, in the centre of Athens, the person conducting the disciplinary investigation initially accepted the allegation of the police officers concerned, affecting accordingly the content

of the accusations against the complainant (defiance) and the contents of the relevant conviction against him. Later on, however, when further disciplinary investigation was ordered, although this allegation was refuted by the testimonies of the vast majority of the eyewitnesses, the investigator insisted on his original conclusion, relying exclusively on the contents of the relevant criminal court judgment **(F. 259978)**.

A case concerning a complaint for torture and degrading behaviour against a young person in the city of Volos is similar in this regard. In that case, the fact that the disciplinary investigation was limited to specific disciplinary offences from the beginning not only defined directly the scope of the applicable sentences, but also rendered the administrative procedure a "self-fulfilling prophecy", by confirming what was sought from the outset. To the extent the limited disciplinary investigation was the only pre-trial material contained in the criminal file that was opened *ex officio*, apart from the alignment of the two investigations, one reasonably concludes that the criminal prosecution eventually initiated relied on a presumably incomplete disciplinary file, in respect of which further investigation was ordered. Another paradox arising in this case is that, although the disciplinary procedure was resumed and completed, the new evidence collected has not been forwarded to the prosecution authorities nor reconciled against the contents of the criminal case file and therefore not included in the criminal file. This practice, however, contributes not only to the instrumentalisation of criminal investigation but also to establishing self-reporting as a method of conducting disciplinary investigations. The fact that the police officers concerned invoke the public prosecutor's instructions that were issued in the context of the aforementioned criminal proceedings - which, as already mentioned, relied entirely on the disciplinary procedure that was initially conducted, which was poorly substantiated, as it mainly relied on the police officers' allegations - clearly leads to a repetitive and ineffective administrative investigation **(F. 282183)**.

5.2.2. Investigation of racist motive

The manifestation of racist motive and/or other discriminatory treatment by police officers in the performance of their duties or in supererogation, is another category of misconduct that falls within the competence of EMIDIPA. In this context, the general conclusions drawn on the basis of the disciplinary files processed by the Mechanism in 2022 are: (i) incidents involving racist conduct

are substantially under-investigated and (ii) certain groups of the population are being targeted. It is quite striking that out of the total number of these files, racist motive was actually investigated in only four (4) cases **(F. 307706, F. 266792, F. 273572, F. 265531).** In one (1) of those cases, investigation as to the existence of racist motive was conducted as a result of a recommendation of the Authority for further investigation of the case **(F. 265531)**.

5.2.2.a. Racist and discriminatory treatment control practices

On the contrary, in a number of cases no investigation whatsoever was conducted to identify any racist motive in connection with complaints that mainly concerned physical abuse and/or violations of personal freedom, even though in many of those cases racist/discriminatory treatment was reported (**F. 244866, F. 287630, F. 259269, F. 266790, F. 306009, F. 276291, F. 267188, F. 269220, F. 295874, F. 297202, F. 298754, F. 300278, F. 293309, F. 281504)**. This deficit seems to increase as a result of the fact that, in several cases, the racist motive was never investigated, even though the disciplinary investigation was furthered following a referral of the case by the Ombudsman. This highlights how critical this deficiency is, given the investigatory obligations assumed under national and supranational commitments **(F. 282183, F. 259269, F. 267188, F. 261397)**.

A combined reading of a series of Orders / Circulars that were issued by the Chief of the Hellenic Police[150] in the context of Greece's compliance with ECtHR rulings,[151] illustrates the requirement for investigation of the racist motive, both in criminal and disciplinary procedures relating to police misconduct against persons belonging to vulnerable, ethnic, religious or social groups or foreigners. It is noted that the persons conducting disciplinary investigation are liable to take all steps necessary to identify and disclose the existence of a racist motive, either independently or as part of multiple motives. In fact, this requirement is consistently pointed out in every disciplinary control order where the alleged victim belongs to one of the above-mentioned groups. The official views of the Hellenic Police, at the level of the Ministry, point to the same direction. The Ministry is committed to placing particular emphasis on the protection and assistance of all vulnerable groups of the population,

150. See the reply under prot. no. 7100/4/3/24.05.2006, under prot. no. 4803/22/210-κ ; /26.06.2006 and under prot. no. 6004/12/35/27.12.2007, 7100/25/14-δ /08.11.2014.

151. ECtHR judgment, *Bekos & Koutropoulos v. Greece,* 13.12.2005.

through effective investigation of the existence of racist motives: *"To this end, systematic efforts are being made to prevent incidents of racist violence against vulnerable social groups, to thoroughly investigate every complaint and to strictly implement the applicable legislation." It is noted "that neither the physical, nor the political leadership of the Ministry, are willing to tolerate phenomena of excessive violence, racism and segregation of citizens and the population on the part of the police".*[152]

In the same direction, the ECtHR dictates as follows: *"When investigating violent incidents, the authorities have the additional duty to take all reasonable steps to 'uncover' any racist motive and establish whether ethnic hatred or prejudice has played a role. Of course, proving a racist motive is often very difficult in practice. The obligation of the authorities means that they must do everything in their power under the circumstances to collect evidence, seeking to identify the true facts by all practical means at their disposal, and that they will deliver thoroughly reasoned, objective and impartial decisions, leaving out no evidence that may be an indication of a racist motive".*[153] At this point it should be noted that the European Directives[154] dictating reversal of the burden of proof, when the party harmed claims that the principle of equal treatment has not been respected and proves before a court of law or a competent administrative authority facts from which direct or indirect discrimination can be inferred, with the exception of criminal proceedings, were transposed in Greece by virtue of Article 9 of Law 4443/2016.

In light of the above, the Court has ruled that the investigation of a racist motive in disciplinary proceedings is deficient, unless thorough investigation is conducted into incidents that are similar to those reported or into complaints contained in the service records of the persons involved, etc.[155] A typical example is a complaint regarding an incident that took place outside the Athens Court of Appeal while the complainant, who is a foreigner, was driven to the Korydallos Detainment Centre II in a Police van, after a criminal hearing of her case was concluded. More specifically, the complainant, who was holding her then ten-month-old daughter in her arms, refused to enter the van and sit with the other detainees and asked to sit with the police officers instead, for reasons

152. See the reply under prot. no. 7017/4/18435/22.04.2015 of the Deputy Minister of Interior and Administrative Reconstruction, Mr. I. Panousis to the Greek Parliament.

153. ECtHR judgment, *Nachova et al. v. Bulgaria*, 26.01.2004.

154. Article 8 of Directive 2000/43/EC and article 10 of Directive 2000/78/EC.

155. ECtHR judgment, *Bekos & Koutropoulos v. Greece,* 13.12.2005.

concerning the security of her infant child, as there were no safety belts at the back of the van and also smoking was allowed. At that point, the driver at first became verbally and then physically abusive. He kicked her in the back while she was holding her infant child in her arms, despite the protests of the other detainees. The complainant states that after this she invoked her legal rights only to receive the answer "I am the law". The officer then grabbed her by the shoulder to lift her up and caused here a cut on the neck with a metal key he held in his hands. Eventually, with the assistance of two other officers, he locked her in a small cell in the van with her child, who was crying all along, as she was in shock.

Among the major deficiencies identified by EMIDIPA in the administrative procedure that followed (e.g. failure to summon eyewitnesses and other key witnesses, questioning the alleged victim's allegations as inconsistent with those raised by the officer concerned, failure to investigate the rights of the other detainees and the legal conditions of the transfer, failure to carry out checks to secure the best interests of the child, concealing the responsibility of the driver and of the person in charge of the transfer) is that no action was taken to investigate a racist motive, although this was stated both in the complaint and in the disciplinary investigation order **(F. 266790)**.

The same practice is also identified in an incident that took place in Salamina, where two foreign workers of Pakistani origin repeatedly tried to report physical assaults - in which one of them was injured - by known members of the "Golden Dawn", of whom they even presented photographs. However, as their efforts turned out fruitless - the first time they were taunted by the officers and instructed to come back with the full residential details of the offenders, whereas the second time, they were constantly referred from the Police Department to the Security Police Station and vice versa, for reasons that remain unclear, and asked to pay a fee, which they were neither liable nor able to pay. Thus, they left again and eventually contacted the chairman of the Pakistani community and reported the assault to the Department for Combating Racist Violence of the Hellenic Police Headquarters. This event triggered a new assault by the accused officers against one of them, which took place the very next day after the complaint. The victim, however, managed to escape without injury. He then went back to the police and within a few minutes the offenders arrived, as they had been notified that he was there and that he intended to report them. They were also aware of the contents of his complaint,

as they threatened to sue him for libel, without any prior verbal interaction.

About a month and a half after the incident, the complainant left his house to throw away the garbage and was subjected to an identity check by two officers with a motorbike. He was then taken in, although he complied with the officers' request to show his legal documents. According to the officers involved in the incident - whose allegations were fully adopted by the disciplinary investigators, the complainant had been taken in mainly because *"he and his fellow worker had often drawn police attention as suspected offenders, as several of their compatriots have been arrested in the past for illegal sale of contraband cigarettes. Of course, one may not preclude the possibility of [...] retaliation'.* As he was leaving the police station, the complainant was approached by a police car and was verbally insulted by the co-driver. According to his complaint, the insults related to the fact that he had lodged a complaint with the Police Headquarters. **(F. 259267)**.

But even in any cases where an investigation on racist motive is carried out as part of the disciplinary investigation, even if this consists merely in a review of the service records of the officers concerned, it is worth noting that such investigation often disregards the Ombudsman's recommendations, as the investigators misinterpret both the legislative framework governing the operation of the Ombudsman as an EMIDIPA, as well as the aforementioned legislative and regulatory commitments that define the limits of legality. Thus, the argument put forward in this regard: (that the investigation of racist motive is not essentially required, even if such motive is indeed reported and such investigation is ordered, because no racist comments were made or racist expressions said and that, in these situations, no matter of racist conduct arises and any research in the disciplinary background of the officers concerned is deemed arbitrary, as inconsistent with Articles 4 and 9 of Presidential Decree 120/2008, because the officers' conviction would rely on disciplinary offences that were previously assessed) is refuted not only because it relies on a wrongful reading of the specific provisions but mainly because the case facts are assessed in a transcendent manner, in any case in a manner different from prior court interpretation. Moreover, since the service records of the police officers concerned are reviewed as part of the further investigation ordered, despite any objections, and past disciplinary actions or preliminary investigations are identified, the reasons that caused such actions and investigations must be stated, so that they can be assessed and repeated misconduct can be

prevented, as per the requirements of Art. 9 of P.D. 120/2008, and the officers' actual background can be established, even in case the officers concerned are not held responsible **(F. 259978)**. In this light, it is worth noting that in 2022, in two disciplinary cases where the alleged victims were particularly young persons, in one case minors, the Mechanism identified the name of a specific officer in both cases. No disciplinary responsibility was imputed in either case, yet further investigation was requested **(F. 274521, F. 294876)**.

In other cases, where racial motive investigation is not completely omitted, the investigators merely argue that no such motive was identified - a laconic assertion that is practically impossible to verify. In these cases this allegation is also raised without further substantiation, even if additional administrative investigation is ordered. The main argument supporting the allegation that no racist conduct or discriminatory treatment was identified is the fact that there no characterisations or verbal interactions took place to that effect **(F. 282183, F. 278647, F. 278647, F. 288732, F. 290632, F. 290617, F. 259616, F. 264452, F. 285259, F. 283183)**.

According to a complaint that was lodged by an Albanian citizen against police officers in the city of Arta, one day, as she was going home, she received a phone call from a worker of Pakistani origin - whom she had trouble understanding - whom she saw a few minutes later being checked by the police on the street. As she said, she stood nearby for a while, to see what was going on but was aggressively confronted by the officers. She was then asked to show her circulation documents and eventually fined her for unnecessary circulation, despite the fact that she was a producer, because she had no documents in her possession to prove it. After that, she presented documents attesting her capacity as a producer to the Police Department and lodged an objection, which, however, was rejected. She reported that she had been targeted by the officer who requested the documents and that she had been systematically subjected to unnecessary checks for over a decade. The disciplinary investigation that was conducted concluded that there was no disciplinary misconduct and, by extension, no other discriminatory treatment on the part of the police officers, because none of them had ever said anything offensive about her origin. What is quite surprising is that, in order to reach this conclusion, the investigator considered it necessary to summon the complainant to provide a sworn statement four (4) times, but failed to investigate the dates, the frequency and the legitimacy of the checks that were conducted by the reported officer **(F. 290617)**.

Additionally, as already stated in an earlier report, the evidence of discriminatory treatment or racist conduct is not limited to the use of offensive or derogatory remarks or expressions.[156] Besides, the concept of harassment, pursuant to Art. 2 case 3 generally corresponds to the unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, de-grading, humiliating or offensive environment. At the same time, the Council of Europe's European Commission against Racism and Intolerance clarifies that it is sufficient for the relevant incident to be perceived as racist by the victim or any other person.

In the same direction, the ECtHR additionally states that hate crimes do not only refer to acts that are triggered solely by the victim's characteristics, but that their perpetrators may have mixed motives, which are sometimes defined by the circumstances, either to a lesser or to a greater extent, as well as by their prejudiced attitude against the group to which the victim belongs. On these grounds, the Court indicates that the authorities must thoroughly investigate the expression of any racist remarks and, if confirmed, conduct a comprehensive investigation into all the facts in the context of which they were made, in order to expose any possible racist motives. In addition, the overall context of the attack needs to be taken into consideration.[157]

5.2.2.b. Targeting of specific groups of the population

The same perspective should be extended to cases involving allegations of insults to personal freedom committed in the context of abusive controls and arrests. What is quite interesting, yet comes as no surprise, is that the majority of the complaints that were examined by the Authority in 2022 - which were usually combined with complaints for misconduct and/or humiliation - were filed by specific groups of the population, i.e. young people, women, foreigners and Roma people - which confirms the trend identified in the previous years **(F. 261397, F. 263199, F. 253320, F. 295874, F. 268405, F. 290617, F. 276291, F. 307706, F. 278647, F. 289415, F. 241904, F. 274521, F. 268772, F. 305139, F. 259616, F. 298754, F. 300278, F. 285259, F. 265531, F. 303425, F. 272705, F. 258546)**. Similar complaints have also been filed by people of certain convictions **(F. 290929, F. 282183)**, or sexual orientation (F. 267188), and by people with mental illnesses **(F. 263199)**. The fact that these groups are

156. EMIDIPA special reports for the years 2020, 2021.
157. ECtHR judgment, *Škorjanec v. Croatia*, 28.03.2017.

targeted not only increases the unknown number of people who are victimised for reasons largely related to their poor social status, while triggering a multiple victimisation circle, but also contributes to the recycling of social stereotypes, by fostering or intensifying social exclusion and social rivalry. Thus, as it is aptly noted, *"children in danger easily become dangerous children".*[158]

The document control, personal effects control, arrest and body search of two minor persons, who were forced to remove all of their clothing one afternoon in the area of Vrilissia, without any regard to the statutory requirements for their protection as minors, were initially justified by the police with the claim that the alleged victims were considered suspicious because they were standing near a park that had been vandalised a month before by a group of young people and because they resembled the offenders, without further clarification. Later on, the officers under investigation claimed that the reason for the check was that the alleged victims were not wearing masks, as they should, in the context of the pandemic prevention measures effective at the time. This assertion, too, however, was quickly refuted because, instead of checking whether the required text messages had been sent to the victims' mobile phones, the officers opted to check their personal belongings. As a result, they found cigarette filters and smoking papers in the backpack of one of the two boys. These items were characterised as *"marijuana items"*, although no trace of such substance was found. The alleged victims were therefore taken in to the police department, as drug use suspects. Later on, the four officers under investigation claimed that, while the alleged victims were restrained, one of them approached an officer in a threatening manner and insulted him. This allegedly justified the officer's decision to use physical force and have that person handcuffed and taken in.

It is worth noting that an official disciplinary investigation of the case was only carried out after a report was filed to EMIDIPA by the mother of one of the minors, as a follow-up to informal investigations, which resulted in the case being set aside. Without commenting on the legitimacy of these investigations, without substantiating the legitimacy of the police controls or the taking in, the handcuffing and the force that was used against the victims, without checking the contradictions and generalisations of the police allegations, the person conducting the preliminary administrative inquiry fully adopted the operative

158. Panousis G., 2002, "Crimes of the Poor and Poverty as a Crime in the globalised world", in *Eglimato-Logika,* Ant. Sakkoulas ed., vol. 21, p. 31.

part of the informal investigations that preceded, where the complainant (mother) was accused of lack of composure and offensive conduct **(F. 289415)**!

As the ECtHR further clarifies: "*even when a conduct is not of the required violence or gravity, in order to be considered inhuman and degrading, pursuant to Art. 3 of the ECHR when this is directed towards an individual because they are of a particular ethnic origin/minority, this constitutes a violation of the respect of private life according to Art. 8 of ECHR in the sense of ethnic identity, because negative stereotypes can affect a person's self-esteem and self-confidence as a member of a national community. Hence, in case of complaints regarding harassment with a racist motive, state authorities are obligated to investigate whether there was a similar motive and whether any national hatred or prejudice played a role in the events".*[159]

The Ombudsman recalls that such an investigation must be conducted in all the cases which are included in the scope of discriminatory treatment and are provided in detail in art. 188 par. 1 subparagraph d of L4662/2020.[160] Accordingly, such investigation should cover all forms of coercive power exercised by the enforcement authorities as well as steps taken by the authorities to ensure special and/or extended procedural safeguards for particular groups of the population that are acknowledged as vulnerable.[161] This is because, in every state governed by the rule of law, the legitimacy of police intervention is usually founded on the exact opposite basis and finds its legal and political limitation in its safeguarding function.

In light of the above, reference should be made once again to the protective nature of certain repressive actions that are commonly reported, apart from the use of physical force already mentioned, relating to document checks, bring-ins, handcuffing and body searches. Based on the clarifications provided in the Circular / Order of the Chief of the Hellenic Police (Circular No. 7100/22/4a/17.06.2005), the coercive and forceful nature of the bring-in requires that this measure is applied carefully and with respect for human beings and human rights. This is why it is further required that *"the practice of bringing citizens in for an identity check or for the purpose of collecting evidence on committed crimes or for preventing crimes is established in Article 75 par.*

159. ECtHR judgment, *R.B v. Hungary*, 12.04.2016.

160. EMIDIPA special report for the year 2021, p. 129.

161. Kosmatos K. (2021), 'Investigation of the Rights of Juvenile Suspects or Defendants in Criminal Proceedings, after Law 4689/2020", in *The Art of Crime,* vol. 11.

15(i) of Presidential Decree 141/1991, which stipulates that officers "will bring in for examination persons lacking evidence of their identity or persons raising suspicions of criminal activity given the place or time, the circumstances or their behaviour". Although *"suspicion"* as a concept may not be precisely defined, it is generally accepted that suspicion arises when a competent person logically infers that a specific - rather than general, not defined - crime has been committed, on the basis, among others, if specific evidence.[162] As it is repeatedly noted, the mere presence or movement of civilians at a specific location does not render such persons *a priori suspects, as civilians are 'under no obligation to link their physical presence at a public place to a certain "legitimate" purpose*".[163]

In light of the above, Order/Circular no. 7100/25/14-d'/08.11.2014 of the Chief of the Hellenic Police further mentions that the suspicions on the basis of which a person is brought in to a police station must be *"linked exclusively to specific indications arising from the behaviour of the individuals concerned, rendering them suspects of criminal acts; under no circumstances should these suspicions be linked to prejudiced opinions of the police officers against vulnerable groups of the population, such as refugees, Roma people and people with different religious beliefs from those prevailing in the country".*

Accordingly, the ECtHR has ruled that the power afforded to enforcement bodies under the law to use force in order to carry out identity checks and thorough information/ clothing / personal belongings checks, constitutes interference with the right to privacy, in accordance with Art. 8 ECHR. Such interference is subject to the conditions of par. 2 of the aforementioned Article of the Convention, provided that it is *"consistent with the law"*, it pursues one or more of the legitimate purposes specified in the above provision and it is "*necessary in a democratic society'* to achieve those purposes. According to the Court's interpretation, 'consistent with the law' means that the legal basis of such intervention must be 'clear' and 'explicit'. Moreover, the national law must provide legal protection measures against arbitrary interference by the public authorities with the rights protected under the Convention.

It would be contrary to the rule of law if the legal discretion afforded to the enforcement authorities in areas affecting fundamental rights was expressed as an unlimited power. The law must therefore clearly define the scope of

162. Livos N., 1995, 'The procedural position of persons suspected of crimes*", Poinika Chronika*, vol. ME, p. 1103.

163. EMIDIPA special report for the year 2019, p. 37.

any such discretionary power of the competent authorities and how it is to be exercised to ensure legality, offering at the same time adequate protection to individuals against arbitrary interference. In this light, the Court considers it necessary for police officers to prove reasonable suspicion against the person that is subject to control measures. Failing this, in the Court's view, the national law fails to provide adequate safeguards which ensure effective protection of the individuals against arbitrary interference and the reported measures may therefore not be consistent with the law within the meaning of Art. 8 ECHR.[164] At the same time, it is made clear that the legitimate purpose of the investigation may not consist in establishing general allegations, as this would constitute instrumentalisation of the institutions.[165]

Based on the above, as regards personal detention as a coercive measure, Order/Circular no. 7100/22/4a/17.06.2005 of the Chief of Police refers to Art. 119 (d) of Presidential Decree 141/1991, as well as to the principles of necessity and proportionality that generally govern police action, specifying that *"civilians may only be handcuffed if their prior conduct or behaviour raises suspicion of flight".* Unless this condition is met, the ECtHR has ruled that handcuffing and/or publicly exposing the arrestee beyond the extent that is reasonably necessary to prevent escape on the basis of the available evidence is an offence against human dignity. In determining whether the application of that measure constitutes degrading treatment, in breach of Art. 3 ECHR, the Court considers the following to be critical evidence: whether the detention was justified on the basis of the above indications; whether the detainee was guarded by a small number of third parties for a short period of time, and whether he/she felt humiliated.[166]

With regard to body search, the same Order/Circular of the Chief of Police again dictates that *"in principle, as far as body search is concerned, an essential prerequisite is that there is 'serious suspicion of a criminal offence or absolute necessity'. The fulfilment of these conditions must be based on specific objective or subjective elements, which are sufficient and capable of justifying a search in accordance with the law'.* Another point underlines that *"police force is not understood as independent or autonomous, whereas the doctrine "the end justifies*

164. ECtHR judgment, *Vig vs Hungary,* 14.04.2021.

165. Koukloumperis N., 2020, "BVerfG 2 BvR 2992/14, 31.01.2020, Conditions for the legitimacy of domiciliary visitations- Money laundering - Suspicion of committing a serious crime, remarks", in *Criminal Justice* . v. 7.

166. ECtHR judgement, *Raninen* v. Finland, 16.02.1997.

the means" is not applicable in this case. Every democratic state governed by the rule of law defines the rules by which its institutions operate. An essential prerequisite of the existence and functioning of a democratic state is, inter alia, the recognition of individual and social rights for the benefit of the citizens.

In this regard, the Ombudsman points out once again that compliance with the procedural conditions laid down in P.D. 141/1991 with regard to body search is not left to the free discretion of the parties concerned and failure to comply with the statutory requirements constitutes a violation of personal liberty - to say the least. Protecting the integrity and dignity of the persons subjected to a body search is a basic obligation of the police authorities and it is not in itself sufficient to legitimise a body search that is not compliant with the applicable regulations. ECtHR has ruled that body search involving forced removal of clothes is a powerful measure, which implies a certain level of distress, and should therefore be carried out "in an appropriate manner, with due respect for human dignity and for legitimate purpose".[167] Otherwise, forced removal of clothes may constitute degrading treatment, and therefore fall within the scope of art. 3 of the ECHR. Among the criteria set by the Court in this regard is a citizen's forced removal of clothes that fulfilled "by touching the private parts of the body" and «in public view» ή "being paraded in public".[168]

The same conclusion, regarding the violation of article 3 ECHR, is also adopted by the ECtHR when the forced removal of clothes has no investigative value and does not howsoever contribute to the legitimate purposes of police control, as in these cases it is presumed that it is only imposed for the purpose of humiliating and degrading the persons concerned. Degrading remarks, swearing and threats that may accompany the physical search, accompanied by forced removal of clothes, are considered as additional evidence of abuse. Further on, the Court notes that police actions or treatment of citizens having no investigative value and being humiliating or degrading for the persons concerned, by disrespecting their personality or offending/diminishing their human dignity or causing feelings of fear, anxiety or inferiority capable of breaking down moral and physical resistance of these persons, may constitute violations of Art. 3 ECHR and may therefore be considered as abusive conduct, even if no physical harm is involved.[169]

167. ECtHR judgment, *Roth v. Germany,* 22.10.2020.
168. ECtHR judgment, *Zherdev v. Ukraine* 27.04.2017.
169. Judgment, *Bouyid v. Belgium,* 28.09.2015.

In fact, the ECtHR goes even further and underlines that, even when such purpose is missing or not established, this does not automatically preclude a violation of Art. 3 ECHR and, by extension, dismissal of the allegations of abuse; in these situations, the general context in which such action / behaviour occurred, e.g. potential intensity and emotional distress, must also be taken into account.[170] Given that the substantive purpose of Art. 3 ECHR is to protect human dignity and physical integrity, the violation of this provision and the associated victimisation of the individuals concerned consist, according to the Court, in the fact that the alleged victim becomes an object that is treated by the authorities at their free discretion.[171]

5.2.3. Ensuring impartiality

The importance of respecting and safeguarding the guarantees of impartiality and objectivity has been strongly emphasised by both the national[172] and international law,[173] and repeatedly highlighted in the Mechanism's annual special reports.[174] At the same time, it is a fundamental element of Order / Circular No. 6004//1/22-xiii/14.10.2008 of the Chief of the Hellenic Police identified throughout its contents, which is in turn the basic manual on how disciplinary investigations should be conducted and how disciplinary reports should be structured. Diligence, consistency, clarity, accuracy, impartiality of the investigation and its findings and specific and thoroughly substantiated subjection of the facts to the applicable disciplinary provisions, are explicitly dictated as basic foundations of the integrity, completeness and, therefore, effectiveness of disciplinary investigations.

The legislator has moved in this direction with the recent amendment of Art. 1 par. 1 of P.D. 111/2019, which was enacted following a recommendation by E.M.I.D.I.P.A. Following such amendment, preliminary disciplinary investigations - which still represent the majority of the disciplinary investigations ordered -

170. Judgment, *Bourkourou v. France,* 16.11.2017.

171. Judgment, *Tyrer v. United Kingdom,* 25.04.1978.

172. Section 14 et seq. of the Code of Penal Procedure. See also Circular Ref. 6004/1/22-xiii/14.10.2008.

173. Art. 6 of the ECHR: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".* See also ECtHR judgment, *Sramek v. Austria* 22.10.1984.

174. EMIDIPA special report for the years 2019, 2020, 2021.

shall be assigned to officers of a different Directorate or Service, ranging equal to the one comprising the officer under investigation, where the investigation concerns disciplinary offences involving torture or other degrading or brutal behaviour. Ensuring officially a safe distance between the investigator and the person under investigation is much more than a requirement of accountability and a safeguard of impartiality and fair judgment. It is a sign of institutional transparency and soundness.

However, it is not in itself sufficient to ensure real impartiality. In their annual report for the previous year, EMIDIPA highlighted the "empty shell" risk through satisfaction of formal criteria over - or even at the expense of - the substantive ones. In the vast majority of disciplinary cases that were processed by the Mechanism in 2022, a hierarchical distance between the disciplinary bodies and their immediate colleagues was indeed ensured. This finding is further solidified by the finding that such distance was disregarded in only eight (8) cases **(F. 306393, F. 301695, F. 244537, F. 246381, F. 290617, F. 282183, F. 307097, F. 324104)**. In the first of these cases **(F. 306393)** the relevant deficiency was not remedied, whereas in three cases **(F. 301695, F. 244537, F. 246381)** the deficiency was rectified in the course of the disciplinary investigation. This happened in one more case **(F. 290617)**, where, however, the distancing rule was violated when an officer serving in the same department as the investigated officers was called to make a statement. The same practice was also applied in another case, but was partially restored during the supplementary investigation **(F. 282183)**. In two cases, the violation of the hierarchical distance was pointed out by the Authority in its referral and it remains to be seen whether this deficiency will be rectified as part of the supplementary administrative inquiry **(F. 307097, F. 324104)**. Lastly, in one case, the failure to identify the police officers involved and the resulting failure to identify the Directorate they were administratively subjected to left no room for investigating whether the necessary distance was maintained between the investigator and the persons under investigation **(F. 293309)**.

What's mostly interesting about this particular deficiency is that it is not revealed at a first reading, which is mainly intended to identify compliance with procedural requirements. Instead, the existence of such deficiency and its scope requires a second, substantive and comparable reading, in conjunction with any other deficiencies and shortcomings identified by the Mechanism. In this light, it is quite clear that the safeguards of impartiality are not effectively observed

due to deficient witness statements, violations of the rule of equidistance in relation to the witness testimonies, reliance upon hypothetical arguments containing logical leaps and instrumental entanglement of disciplinary and criminal law. What's quite striking, though, these safeguards are disregarded in the context of disciplinary investigations, where allegations on racial motive, discriminatory treatment and targeting remain essentially unaddressed.

Similarly, these safeguards are also disregarded in disciplinary reports that are poor in quality, as they are drafted on the basis of information that leaves out important documents, either by error or refusal, where disciplinary evidence is randomly prioritised - particularly in the case of voluminous disciplinary files -, case facts are deficiently and vaguely presented and the findings produced are extremely brief and deficient **(F. 259269, F. 282183, F. 283199, F. 250375, F. 241904, F. 276291, F. 273254, F. 259616, F. 305524, F. 276045, F. 260670, F. 292982, F. 293309, F. 307097, F. 302214, F. 297117, F. 285259, F. 289101)**. The fact that, in 2022, the Mechanism issued repeated referrals in several disciplinary cases, underlining repeatedly the same deficiencies **(F. 250375, F. 253320, F. 250692, F. 259978, F. 261397, F. 247702, F. 307705, F. 254610, F. 267188, F. 272705, F. 297117)**, and filed four (4) reports to the Minister of Citizen Protection, leads to the same conclusion **(Φ. 282183, F. 267199, F. 259616, F. 273254)**. The absence of specific and thorough reasoning, identified in all disciplinary cases that were returned to the authorities by EMIDIPA, also undermines the independence, impartiality and thoroughness of the investigations.

Without underestimating the procedural basis of impartiality, reference is made to the need for effective impartiality to be reached through the excellence, integrity and effectiveness of disciplinary controls. As settled ECtHR case-law illustrates, the need to comply with the individual criteria designated by the Court with regard to the effectiveness of disciplinary controls is a prerequisite of the effective operation of the rule of law, as it eliminates all suspicions of concealment or impartiality.[175]

5.2.4. Violation of the obligation to suspend a decision until the Ombudsman's report of findings

The purpose of the Ombudsman's operation as EMIDIPA constitutes that of

175. ECtHR judgment, *Opuz v. Turkey,* 09.06.2009.

the guarantor of completeness and effectiveness of disciplinary control. As a mechanism that safeguards the disciplinary procedure, the Ombudsman's role as institutional mediator is expanded, as he acquires supervisory and controlling powers with regard to the observance and application of the applicable national and international criteria. At the same time, the Ombudsman is responsible for improving and upgrading procedures, by proposing changes or new regulations to that effect. A fundamental prerequisite for the fulfillment of this purpose is the suspension of the issuance of decisions by the competent disciplinary bodies until a final findings report is issued by the Authority. Otherwise, the operation of EMIDIPA would be effectively nullified due to the ne bis in idem principle, which also applies to disciplinary law. For this reason, the legislator has armed the Mechanism with a relevant provision from the beginning of its operation.[176]

To that end, the issuance of a disciplinary decision without prior assessment of the completeness of the internal administrative examination by the Authority and its compliance or justified deviation from the recommendations of the Authority, constitutes non-observance of the essential procedural requirements, thereby establishing grounds for annulment of the decision in question. In addition, the de facto circumvention of the National Mechanism for the Investigation of Arbitrary Incidents simultaneously negates the very purpose of the legislator, as stated in the explanatory statements of the relevant draft laws[177] which is to establish an external and independent mechanism, parallel to the disciplinary bodies, for investigating arbitrary incidents. In fact, the establishment and further strengthening of the National Mechanism was proposed by the bodies of the Council of Europe to serve as an institutional safeguard of the disciplinary procedure and the reliability of the administrative inquiries, so as to ensure the necessary transparency and accountability in the action of the security forces, including the Hellenic Police.

The Ombudsman has repeatedly noted that this violation of the law is not nullified by invoking no. 1647/20/429314 / 26.02.2020 Order of the Headquarters of the Hellenic Police, firstly because to the extent that he has not been notified he cannot take it into account, and secondly due to the primacy of the law, in this

176. By virtue of Article 56 of L. 4443/2016 the specific competence for investigating incidents of arbitrariness was assigned to the Ombudsman, by amendment of Article 1 of L. 3938/2011. Para. 4 of Article 1 provided for the suspension of the decision of the disciplinary bodies until the issuance of a report of findings by the Ombudsman.

177. Art. 56-57 of L. 4443/2016 combined with Art. 188 L 4662/2020.

case L. 4662/2020, against service orders or circular notices. Nevertheless, this approach is still followed, as it has been observed in some of the cases handled by the Mechanism during 2022 **(F 253320, F. 287630, F. 267199, F. 268405, F. 264452, F. 246381, F. 258546)**.

Inconsistent with the applicable regulations is also the order that was issued in certain cases by the competent Directorate of the Hellenic Police Headquarters, calling the subordinated services to evaluate the Ombudsman's referral and order further administrative investigation, as per the Authority's recommendations, otherwise the immediate termination of the disciplinary proceedings **(F. 276294, F. 290927, F. 258546)**. Based on the content of these orders, if no substantial deficiencies are found in the collected evidence, the required reasoning of the report can be supplemented, or even new reasoning may be added *"in the decision - adjudication act as per Article 38 of Presidential Decree 120/2008, which is usually noted on it (i.e. on the report of the Preliminary Administrative Inquiry), in which case the Inquiry is not referred for further investigation as per Article 31 par. 5 of the same Decree'.*

The Ombudsman pointed out that, irrespective of whether the deficiencies and shortcomings identified by the National Mechanism in the disciplinary procedure are material or not in the Administration's view, they must be supplemented in line with the Authority's recommendations, and any departures from the operative part of the Authority's report are only permitted by the legislator if thoroughly and specifically documented. The fact that the above options are afforded as alternate solutions, leaves it up to the competent service to choose between furthering the investigation or issuing a decision without any prior action to remedy the deficiencies identified by the Ombudsman. This, however, practically circumvents the National Mechanism and impedes its function as an institutional guarantor of the disciplinary procedure.

Besides, to add supplementary reasoning to the report of findings means that the report is rephrased and reformed in its entirety. This may not occur through a brief justification of the disciplinary body's decision, as these are two different documents drafted at different stages of the disciplinary procedure. The drafting of a report precedes the adoption of a decision and is a significant aspect of the administration of disciplinary justice, given that the report sets out the facts of the case in thorough detail, providing geographical and time information and gives full, specific and detailed reasons for the decision of the investigating officer and his proposal to acquit or sentence the officers concerned. Moreover,

as the Courts have ruled in this regard, the disciplinary body's decision is considered to be lawful and sufficiently reasoned if it relies on specific contents of the disciplinary file, in particular on the detailed and thoroughly reasoned findings of the administrative inquiry.[178] Conversely, an inadequate statement of reasons in the report of the findings may render invalid the disciplinary decision that relies on it, on grounds of deficient reasoning.

178. See, for instance Administrative Court of Appeal of Athens 2635/2001.

6. Execution of ECtHR Judgements

The role of the Ombudsman as National Mechanism for the Investigation of Arbitrary Incidents, involves a versatile action, functioning at the same time as a national mechanism for the execution of judgments of the European Court of Human Rights (ECtHR), in which shortcomings in disciplinary procedures or new evidence that was not assessed in the disciplinary investigation are identified. This highlights even more the safeguarding functionality of the Authority towards ensuring the rule of law, as, in addition to transparency, completeness and efficiency of the internal administrative procedure, it is responsible for enforcing ECtHR judgments convicting Greece of ECHR violations. This is further confirmed by the explicit reference of the Committee of Ministers of the Council of Europe to both the positive role of EMIDIPA and the institutional need for its reinforcement.[179]

By extension of the latter function, the Ombudsman constitutes a decision-making body, deciding on whether the competent disciplinary bodies shall review a case so as to exercise or supplement the disciplinary proceedings and to impose the appropriate disciplinary penalty, regardless of the initial hearing of the case. These are individual measures of compliance in the specific field only, namely that of disciplinary investigation of the specific conduct judged by the Court, while any general measures of compliance with the ECtHR decision fall under the decisive competence of the Government.

In addition, a component of the aforementioned competence of EMIDIPA is the possibility of bending the principle of non-prosecution for a second time for the same disciplinary misconduct (ne bis in idem), in cases of new evidence or facts revealed afterwards, as well as in the event that there was a substantial defect in the disciplinary procedure. In the same context it is explicitly dictated that the legal description of the act under investigation as held by the ECtHR, is binding for the Administration, for reasons of uniform application of case-

179. Decision of the Committee of Ministers of the Council of Europe, on 14 - 16.09.2021

law in the legal order, which coincides with an earlier proposal made by the Ombudsman.[180]

It is reminded that in the case of enforcement of ECtHR judgments, the Ombudsman cannot act ex officio, unlike in cases of complaints about arbitrary incidents concerning the same law. In order for the Ombudsman's competence to decide on the resumption of the disciplinary procedure to be triggered, the Administration, specifically the Personnel Directorates of the relevant bodies, must forward the conviction judgment of the ECtHR and the relevant disciplinary file to the Ombudsman, highlighting the specific suspension periods of the statute of limitations.

In 2022, the Authority also received the report on the review of the disciplinary procedure which it had requested concerning the case **F. 273608**, which was related to the ECtHR judgment *Konstantinopoulos et al. v. Greece* of 22.11.2018 (appeals no. 29543/15, 30984/15). It should be noted that, in his two previous special reports, in respect of years 2020 and 2021, the Mechanism referred extensively to the shortcomings identified in the disciplinary investigation, that rendered further investigation imperative. Similarly, it should be noted that, in this particular case, the country's strict surveillance by the Council of Europe's Committee of Ministers continues, now as part of the "Sidiropoulos - Papakostas" sub-file, which concerns convictions against Greece for incidents of violence by law enforcement officers.

The same year, in particular on 07.07.2022, the ECtHR ruled on the case *Torosian v. Greece* (case 48195/17), convicting Greece for violations of the procedural requirements of Art. 3 ECHR. The Court's judgment was forwarded to the Authority on 13.12.2022 by the Legal Council of the State. On 19.12.2022 the Authority requested that the disciplinary file be referred to the authorities. On 28.02.2023 the case file was forwarded to the Hellenic Police. The case was assigned case number **F. 329083** by the Independent Authority.

180. For the Ombudsman's proposals based on the implementation of the relevant provision of L. 4443/2016 on the *Zontul v. Greece* judgments and all the *Makaratzis Group* judgments, see the EMIDIPA special report for the years 2017 - 2018, p. 46 et seq. and for the judgment on *Sarwari et al. v. Greece,* see EMIDIPA special report for the year 2019, p. 122 et seq.

A. Case file 273608

1. More specifically, it is noted that case **F. 273608** concerned a complaint by detainees at the Grevena Penitentiary Facility for torture and abuse they suffered during an unannounced inspection of their cells on 13.04.2013, carried out by penitentiary officials and police officers of the special anti-terrorist unit (EKAM). In particular, in their complaint they alleged that they were subjected to use of an electric discharge apparatus, i.e., tasers, beatings and verbal abuse, they were forced to kneel and crawl naked to the gym of the sports hall of the penitentiary facility, where they stood facing the wall.
The Ombudsman's initial decision to reinvestigate the case, following receipt of the relevant conviction order and a review of the disciplinary file, was followed by the Authority's finding that the additional disciplinary control was also found to be deficient. In this context, the disciplinary file was referred back to the competent authority along with a request for further administrative investigation, including, among others, thorough reference of the Authority to the overriding effect of ECtHR judgments in particular vis-à-vis the convicted States. The disciplinary report that resulted from such additional administrative inquiry suggested for the third time that the case should be set aside, because no disciplinary liability was established, fully aligned with the conclusions of the two previous reports. At the same time, the only addition that was recorded in terms of evidence between the last two additions of the disciplinary investigation consists in a sworn statement of the current Director of the Detention Centre of Grevena, who was a prison officer at that Centre at the time the reported incident occurred.

However, the last report abandoned the practice of questioning the ECtHR's conclusions in that particular case, as per the Authority's recommendations, and departed from the views of the immediate previous report, trying to evaluate all evidence available and justify its operative part, in accordance with what was upheld by the Court as to the legal characterization of the investigated action, as per the explicit requirements of Art. 188 par. 6 of Law 4662/2020. In that case, Greece's conviction derived from the Court's finding that Greece has violated both the procedural and the substantive requirements of Art. 3 ECHR. In this light, the supplementary report concludes, aligned with the contents of the Prosecutor's Instructions issued in relation to the criminal investigation of the case and the Court's assessment of the facts, that the violation in question does not relate to torture or other serious violations of the human dignity, as per Art. 137^{A} par. 4.

Although the subjection of the above conduct to the provisions of Section 308 PC on physical injury is considered to be consistent with the factual and subjective conditions of the crime in question, a decision was eventually made that the criminal aspect of the act was lifted by cause of legal defence, as per Section 22 PC, on the basis that the officers concerned were unable to prevent the unjust assault that was under way against them by other (milder or less coercive) means. In the same context, the lawfulness, necessity and effectiveness of the means applied, namely the use of an electric evacuation device (taser), is investigated and justified. It is argued that, since the criminal nature of the act laid down in Section 308 PC is lifted, the crime of dangerous physical harm (Section 309 PC), which constitutes an aggravating circumstance of the former crime, is not substantiated either.

At the same time, adopting EMIDIPA's observation that the non-subjection of the officers' acts to a rule of criminal law does not imply *ad hoc* that no independent disciplinary offence was committed, the last supplementary report examines whether the violation in question falls under the provisions of P.D. 120/2008. Thus, it is recognised also at the disciplinary level that the act does not meet the criteria of the disciplinary misconduct described in Article 10 par. 1(c) of PD 120/2008 on torture. The disciplinary offence laid down in Article 11 par. 1(k) of the same Decree on brutal conduct is then investigated, with reference to national case-law on the interpretation of Section 308(3) of the Penal Code. However, the report of findings argues that the physical abuse sustained by the complainants according to the Court, does not constitute brutal conduct. With regard to disciplinary offences relating to the general conduct of police officers and bringing milder disciplinary penalties, it is upheld that they were subject to the two-year limitation period provided for in Article 7 of Presidential Decree 120/2008. Apart from that, however, it is established that the officers' conduct constitutes no criminal or disciplinary offence. Lastly, it was argued that the shortfall related to the video footage was outweighed by the examination of all police officers and prison officers involved.

Following the above, EMIDIPA concluded that its power to monitor and supervise internal administrative procedures, as described above, was exhausted, as it cannot substitute the responsible bodies in the interpretative subjection of the case facts to the applicable legal provisions nor dictate the contents of disciplinary decisions. In this context, considering that there was no further room for intervention and further disciplinary investigation, EMIDIPA decided to set the case aside with the decision in question.

2. The Authority, however, repeated the observations it had made in its previous special report as to how this case should be handled from a disciplinary perspective[181], and noted once again that the last additional disciplinary investigation, too, failed to eliminate or balance the paradox that Greece's conviction for violations of both the substantive and the procedural requirements of Art. 3 ECHR is irrelevant and independent of disciplinary responsibilities. Despite the fact that the ECtHR checks a country's compliance with its contractual obligations, thus referring to State obligations, rather than obligations of individuals, the identified (substantive) violation of Art. 3 ECHR in parallel with or as a result of the recognition of this particular contractual infringement, renders the applicants victims of the investigated act. As a result, the Court awards the applicants pecuniary compensation for the damage sustained. In this context, although ECtHR judgments may not directly impute disciplinary or criminal liability, such liability is inherent in its convicting judgments. This explains the possibility to disregard the principle *ne bis in idem* in cases where the ECtHR has rendered a convicting judgment, both at the disciplinary and at the criminal level - a principle established in Art. 46 ECHR.

In this light, with regard to the choices made and the documentation included in the last supplementary disciplinary investigation of the case concerned, the Ombudsman pointed out once again the autonomy and independence that should govern disciplinary and criminal proceedings, as thoroughly described in the relevant chapter of this report, and notes once again that the process and the outcome of criminal investigations is not howsoever binding on the process and the outcome of disciplinary investigations. The only commitment produced by the criminal court for the disciplinary body is drawn from the judgment of the former only as to the existence or absence of the actual incidents which substantiate the constitutive elements of a disciplinary misconduct, and provided that this judgment is equivalent to an irrevocable judgment of a criminal court or an irrevocable acquittal order. It is further noted that such binding effect does not extend to the operative part of the criminal judgment. Under no circumstances, therefore, is the content of a prosecutor's order binding on the disciplinary body or may form the basis of its reasoning as to whether certain disciplinary offences were committed or not. All the more so since the convicting judgment of the ECtHR states explicitly that *"the prosecutor*

181. EMIDIPA special report for the year 2021, p. 153.

conducting the investigation was biased against the applicants" and that *"no national court has ruled on the facts of the case"*.

The independence and autonomy of each procedure also forms the basis for the Ombudsman's position that, although the disciplinary offence of "brutal conduct" described in Article 11 par. 1(k) of P.D. 120/2008 could be established by reference to the interpretation of Section 308(3) PC by the Courts, this would be ineffective. This is because the relevant Penal Code provision establishes a potential personal ground for exemption from the sentence,[182] i.e. the power afforded to the Courts under the law to not impose the applicable sentence. Despite the similarity between criminal and disciplinary proceedings in the investigative - evidentiary field and despite the analogous application of criminal provisions in disciplinary procedures as per Art. 8 of P.D. 120/2008, the autonomy and different purpose of the two procedures dictates that disciplinary offences be established in conjunction with administrative court judgments ruling on the applicability of disciplinary law.[183]

On the other hand, the practice of delimiting and assessing disciplinary concepts narrowly has rendered practically ineffective the provision of Section 134[A] PC, resulting in another conviction of Greece.[184] It is therefore necessary, for the analysis and interpretation of disciplinary terms, to make use of the national case law as a whole, as well as that of the ECtHR, which the national courts often refer to in order to define the concepts of Section 137A PC.[185] As mentioned from the outset, the same need is further dictated by the provision of Article 188(6) of Law 4662/2020, which establishes the binding effect of the legal characterisation of an act by the ECtHR.

Similarly, such need is further intensified by the regulatory and technical structure of the effective disciplinary law (Presidential Decree 120/2008). In

182. Margaritis L. & Paraskevopoulos N., 2000, *Poinologia, Sections 50 – 133 PC*, 6th ed., Sakkoulas publications 2000, pp. 167 – 168.

183. Thus, it has been ruled, for example, that a Disciplinary Board decision establishing the disciplinary offence of "*brutal conduct*" as per Article 11 par. 1 (a) of Presidential Decree 22/1996 in conjunction with Article 3 par. 3 and Article 58 par. 2 of Presidential Decree 120/2008 was lawfully, adequately and specifically reasoned, as a police officer ordered his inferior to collect garbage and, when the latter refused, he *"moved threateningly towards him. The complainant ran and the officer went after him, but slipped and fell on the ground, without being injured.[...] He then insulted him for his conduct and the other officer reacted by grabbing him instantly from the neck"*.

184. ECtHR judgment, *Zontul v. Greece,* 17.01.2012.

185. Court of Appeal of Thessaloniki 947/2018.

particular, based on the interpretation that was adopted in this case, acts of police officers that are harmful to physical integrity and lie outside the scope of Section 137[A] PC on torture, yet within the scope of Sections 308 (physical harm) and 309 (dangerous physical harm) of the Penal Code, do not constitute "brutal conduct" nor the disciplinary offence described in Art. 11 par. 1(k) of P.D. 120/2008. At the same time, since the specific Penal Code provisions on physical harm and dangerous physical harm are not explicitly included in the list of misdemeanours set out in Article 10 par. 1 (h) of P.D. 120/2008 (which only includes the crime of unlawful force, however the act may bring a lighter sentence on the basis of Article 10(3) of Presidential Decree 120/2008), these acts may only constitute the disciplinary offence described in Article 11 par. 1) of P.D. 120/2008 to the exclusion of all non-purely disciplinary offences that are not identified as criminal offences. In this case, however, the minimum custodial sentence provided for in this disciplinary provision, in conjunction with the provisions of Sections 53 and 308, 309 of the Penal Code, eventually excludes the crimes in question from its regulatory scope. As a result, these crimes are either subjected to other purely disciplinary offences of lesser gravity that bring a lesser penalties, at the discretion of the competent body, being often equated with misconduct towards civilians as per Article 13 par. 1 (n) of P.D. 120/2008, or remain unpunished.

At this point we should note once again that, another ECtHR judgment convincing Greece for use of a taser by a police officer, points out the following: "*the penal and disciplinary system, as applied in this case, proved to be far from being adequately strict and has not been able to exert the appropriate deterrent effect to ensure the effective prevention of unlawful acts, such as those complained of by the applicants. In the particular circumstances of the case, the Court also concludes that the outcome of the proceedings against the police officer did not provide adequate remedies for the harm caused in violation of Article 3 of the Convention*".[186] Furthermore, the Court accepts, as a prerequisite for the effective investigation of complaints for conduct infringing upon Article 3 ECHR, that the State concerned has criminal laws in place preventing practices that are infringing upon Article 3 ECHR, and at the same time reviews the sentence imposed.[187]

In the same direction, it is noted that, any interpretation should not hamper the

186. ECtHR judgment, *Sidiropoulos and Papakostas v. Greece*, 25.04.2018.
187. ECtHR judgment, *N.Z. v. Greece*, 17.01.2012.

obligation to investigate. On the contrary, the ECtHR clarifies that the conduct of an effective official investigation, where an individual argues defensibly that he/she has been subjected by the enforcement authorities to conduct that infringes upon Article 3 ECHR, is an obligation that relates to the means applied, rather than the effects caused.[188] In this context, the Authority once again invokes Strasbourg case-law to point out that an investigation conducted by the police into the conduct of police officers and limited primarily to statements made by police officers, inherently lacks independence, due to of the hierarchical structure and the collegial relationship among officers, and is therefore ineffective.[189] This is even more so in cases where witness statements are used to compensate for the absence of audiovisual material. In these cases, all persons having knowledge of the events, in particular the victims, must be examined.

3. Furthermore, reviewing the legitimacy of the use of tasers, the last supplementary report upholds that such device could fall within the concept of *"other special means"* mentioned in Article 3 par. 2(a) of Law 3169/2003 as well as within the concept of *"any technical means"* mentioned in Article 5 par. 4 of Regulatory Order no 23/2010, and could be considered as relevant to the concept of *"any technical means"* referred to in Article 3 par. 3 of Decision No. 7001/2/157-xvii dated 08.07.1994 of the Minister of Public Order, whose content, however, is classified. Although none of the regulatory instruments mentioned above provides an explicit definition of a teaser, they do refer to *"fully armed, state-of-the-art weapons and technical equipment"*. Based on a grammatical interpretation of these provisions and also based on common sense, one infers from the findings report that tasers qualify as modern technical equipment, and that, according to the relevant clearance of use, they are lawfully in the possession of the police officers, who are certified and trained in their use.

In the context of another conviction of Greece,[190] and in accordance with settled ECtHR case-law on the interpretation of Article 2 ECHR, it is argued that police operations should not only be provided for by national legislation, but also effectively regulated by it, within a system that provides adequate and effective safeguards against misconduct and abuse of force. Defining the principle of strict proportionality laid down in Article 2, the Court holds that national laws regulating police operations should establish adequate and

188. ECtHR judgments *Torosian v. Greece,* 07.07.2022, *Andersen v. Greece,* 26.04.2018.
189. ECtHR judgment, *Emin Huseynov v. Azerbaijan,* 07.05 2015.
190. ECtHR judgment, *X.M. v. Greece*, 20.12.2004.

effective safeguards against misconduct and abuse of force, even against avoidable accidents.[191] To that end, police officers must undergo proper training and hold proper certification in this regard. In the case concerned, the officer held this type of certification for the use of a taser, as it emerges from both the findings report and the documents contained in the additional Preliminary Administrative Inquiry file.

It is noted, however, that the general principles on the use of tasers issued by the Council of Europe's Committee for the Prevention of Torture (CPT),[192] require the conduct of thorough discussions between the enforcement and the legislature bodies before any decision is made to allocate such weapons to the law enforcement authorities. At the same time, the same Committee pointed out that the conditions governing the use of such weapons should be clearly defined and laid down in special regulations, and that the use of such weapons should be governed by the principles of necessity, subsidiarity, proportionality, warning (where possible) and precaution. This means that the civil servants given such weapons must undergo adequate training in their use. In particular, as regards electrical discharge weapons capable of firing projectiles, it was argued that the conditions governing their use should be directly linked to those applicable to firearms.

CPT further sets out technical specifications for the use of electrical discharge weapons. In particular, it considers imperative that such weapons be subject to technical approval which ensures that the number, duration and intensity of the electrical discharges are limited to a safe level. CPT further considers that electrical discharge weapons should incorporate devices (memory chips) which can ensure that various information can be recorded and checks are carried out on the use of the weapon (e.g. exact time of use, number, duration and intensity of discharges, etc.). The information stored on these chips must be systematically reviewed and analysed by the competent authorities at appropriate intervals (at least every three months). In addition, the weapons should have integrated laser and video aiming devices to ensure accurate aiming and recording the circumstances that necessitate their use.

Taking into account the content of the competent ECtHR convicting judgment, the fact that this is the second conviction against Greece in relation to the use

191. ECtHR judgment, *Karandia v. Bulgaria*, 07.10.2010.
192. 20th General Report on its activities (years 2009 - 2010) https://rm.coe.int/1680696a87.

of electrical discharge weapons by police officers and the vagueness largely identified in the national legislation governing the possession and use of these devices in the context of the disciplinary control, the Authority considers a review of the relevant legislative framework as a general measure of compliance with the Court's judgment. Clear conditions of use of electrical discharge weapons, inclusion of these weapons in a specific category of equipment, clear regulations allowing their use only in certain exceptional circumstances and compliance with specific principles, similar to those applicable to the use of firearms, as described in the CPT report mentioned above, form the minimum basis of ensuring their safe use, but also legal certainty. In the same direction, the adoption and observance of technical specifications relating to the use of these weapons, which are also set out in the above report and relate in particular to the recording of information relating to their use, such as the exact time of use, the number, duration and intensity of discharges, etc., would also be a step in the same direction.

Moreover, under the effective legislation, in particular under the provisions of Article 14 of Law 3917/2011 and those of Presidential Decree 25/2020 on the installation and operation of portable surveillance systems by the Greek Police Authorities,[193] the use of these weapons should be allowed, provided that the trained officers permitted to carry these weapons carry a portable surveillance system adapted to their uniforms (body warn cameras), which is activated. This requirement becomes even more imperative when these weapons are allocated to officers in the context of police operations or interventions within Detention Facilities, where the video surveillance system footage must be secured pursuant to Directive 1/2011 of the Hellenic Data Protection Authority. With regard to the need to install closed video surveillance systems and the need to preserve the video footage, EMIDIPA has made recommendations in all four of its published special reports[194.] Circular No. 6/2020 of the Supreme Court Prosecutor,[195] which gives instructions on how to avoid similar ECHR

193. http://www.astynomia.gr/index.php?option=ozo_content&lang=%27..%27&perform=view&id=99092&Itemid=0&lang=

194. EMIDIPA Special Report for the years 2017 – 2018, p. 68: https://old.synigoros.gr/resources/docs/emhdipa_2017_2018_gr.pdf EMIDIPA Special Report for the year 2019, p. 137: https://old.synigoros.gr/resources/docs/emhdipa_2019.pdf EMIDIPA Special Report for the year 2020, p. 84: https://old.synigoros.gr/resources/docs/240521-ekthesh-emhdipa_-2020_gr.pdf EMIDIPA Special Report for the year 2021, p. 166 – 167: https://www.synigoros.gr/el/category/ekdoseis-ek8eseis/post/emhdipa-%22eidikh-ek8esh-toy-synhgoroy-toy-polith-ws-e8nikoy-mhxanismoy-diereynhshs-peristatikwn-ay8airesias-gia-to-2021%22

195. https://eisap.gr/egkyklioi/%ce%b5%ce%b3%ce%ba%cf%8d%ce%ba%ce%bb%

violations, following this ECtHR judgment, should - apart from emphasising the need to utilise the testimonies of all persons, without exception, who have knowledge of the case facts, and in particular of any co-detainees and penitentiary employees, to ensure thorough investigation - point out that any existing video footage must be essentially secured. The same applies to the content of the three other relevant circulars that were issued in the same year, i.e. Circulars nos. 1, 9 and 12/2020. Lastly, it should be born in mind that the ECtHR has established a violation of the substantive requirements of Article 2 ECHR on grounds that the State concerned failed to comply by introducing appropriate legal and administrative measures on the use of force and firearms by military guards, upholding that the regulation on the use of firearms was rather lenient and tolerated the use of lethal force.[196]

B. Case file 329083

1. Case **F. 329083** concerned a citizen's complaint of abuse, torture and humiliating behaviour during a police preliminary investigation that followed his arrest late in the evening of 16.02.2015 in Thessaloniki, which caused the complainant to confess, early next morning, to having committed armed robbery with excessive cruelty, which resulted in the death of one of the victims. On 20.02.2015, the applicant, being temporarily detained in the Prison of Diavata, pressed charges against the police officers concerned and a request for a forensic examination, which was immediately granted. On 24.02.2015, the forensic expert submitted her findings to the Prosecutor's Office at the Thessaloniki Court of First Instance along with the results of the medical tests that were conducted at the general hospital, which confirmed a *"slight injury caused by a blunt and sharp object. As a result of this injury [the complainant] will be ill for 5-7 days, provided that no complications occur'.* However, on 27.02.2015, the complainant was admitted to the hospital and diagnosed with gastric perforation. According to the report of the second forensic expert, which was drawn up in April 2015 and produced by the applicant, the gastric perforation he had suffered *"seems not to have been caused by a complication of an asymptomatic gastroduodenal ulcer ... but by a fracture ... From the foregoing it is clear that Mr. Torosian suffered serious physical injury as a result of his alleged injury to his abdomen"*

ce%b9%ce%bf%ce%b9-2020/

196. ECtHR judgment *Putintseva v. Russia*, 10.05.2012.

On the contrary, in her sworn statement, , the first forensic expert argued that this development in the applicant's medical condition was not consistent with the results of the previous medical examinations he had undergone and that, as a result, his clinical picture had changed significantly during the seven-day period that intervened. By order of the competent Prosecutor at the Court of First Instance that was issued in June 2016, the applicant's complaint against the police officers was dismissed as unfounded on the merits. Similarly, the appeal against the dismissal of the prosecutor's order by the Prosecutor of the Court of Appeal in November 2016 was also dismissed as inadmissible, on grounds that it had been brought before an incompetent body, i.e. the Deputy Director of the Thessaloniki Detention Centre, rather than before the Secretary of the Public Prosecutor's Office who had issued the contested decision (Section 48 of the Code of Penal Procedure).

The ECtHR ruled that the applicant had not benefited from an effective criminal investigation for a number of reasons, which are summarised as follows: (a) despite the deterioration in the applicant's medical condition and the fact that it occurred while he was detained, i.e. under the absolute control of the State, the prosecution authorities failed to carry out a comparative and in-depth assessment of the medical examinations and forensic opinions produced, as well as the document drawn up by the Director of the Prison of Diavata, which confirmed that no other confrontation or incident had occurred between the time he arrived at the prison and the time he was admitted to hospital, before deciding that no causal link was identified between the gastric perforation and the alleged beating; (b) the applicant underwent no medical examination prior to his detention, as the Court consistently dictates; and (c) by ordering the applicant to pay the costs of the proceedings and dismissing his complaint as unfounded, the Prosecutor at the Court of First Instance acted in a punitive manner against the applicant for having reported the officers involved in the case; and (d) although the reason why the appeal against the dismissal of the prosecutor's order was lodged by the deputy director of the prison remains unknown, the procedure that was applied resulted in that quasi-appeal being forwarded to the appellate prosecutor, giving the applicant the impression that his appeal was admissible. In this light, the Court concluded that there had been a procedural violation of Art. 3 ECHR.

As regards the administrative investigation of the case, the ECtHR refers to Order dated 31 December 2015 of the Deputy Prosecutor of the Thessaloniki

Court of First Instance addressed to the Deputy Director of the Sub-Directorate of Internal Affairs of Northern Greece for a preliminary examination, so that it includes the findings of the administrative investigation, but concludes that the entire case file that was eventually submitted to the Court *"includes no evidence that the administrative investigation was furthered"* (par. 45). The same finding is repeated in Forwarding Document No. 170447/763812/13.12.2022 of the Legal Council of the State, which states among others the following: *"On 23 October 2015, the applicant testified before the officers of the Sub-Directorate of Internal Affairs of Northern Greece, which undertook to carry out a disciplinary investigation of the case [...] On 16 May 2016, police officers T.A., B. N. and V. I. were summoned to testify before the Sub-Directorate of Internal Affairs. In their (unsworn) statements dated 20 May 2016, they denied having engaged in physical or psychological abuse against the applicant, who was not called to testify in those proceedings. At the time the case was brought before the ECtHR, no further evidence had been provided about the course of the administrative investigation."*

From the above it derives clearly that the investigative actions of the Sub-Directorate of Internal Affairs of Northern Greece are perceived as relating to the administrative procedure, which is not true, firstly because the prosecutor's order for a preliminary inquiry relates to the criminal pre-trial procedure, and secondly because, as the Authority is assured by the relevant Sub-Directorate in its document No. 3021/8/293-m/07.03.2023, it has no power to carry out administrative investigation, but rather: a) carries out preliminary investigations, in accordance with the provisions of Law 4613/2019 and Presidential Decree 65/2019; and b) forwards copies of the relevant preliminary investigation reports to the department responsible for staff matters, for investigation of the disciplinary aspects of the cases. The confusion arising in this regard once again derives from the fact that criminal and disciplinary proceedings are somewhat entangled, despite the opposite requirements of Art. 48 of Presidential Decree 120/2008, which are supported both by the international[197] and national[198] courts and the legal theory.[199]

More specifically, based on the contents of the disciplinary file of the case, which was duly forwarded to the Mechanism, it appears that, following the complaint filed by the applicant against police officers for violations of Article

197. ECtHR judgments, *Kemal Coskun v. Turkey* 23.03.2017, *Mullet v. France* 13.09.2007.
198. Council of State plenary session 4662/2012.
199. Papadamakis A., 2016, op. cit.

137A par. 3 of the Penal Code, the Prosecutor of the Thessaloniki Court of First Instance issued order dated 28.04.2015 addressed to the Sub-Directorate of Internal Affairs of Northern Greece, instructing a preliminary inquiry in accordance with the provisions of the Code of Penal Procedure. On 24.12.2015, the Staff Division of the Hellenic Police Headquarters issued Order no. 241201/6-a instructing the Public Security Directorate of Thessaloniki to take all steps necessary in their discretion for the administrative investigation of the case. On 31.12.2015, the Prosecutor's Office at the Court of First Instance of Thessaloniki issued a second order addressed to the Sub-Directorate of Internal Affairs of Northern Greece, instructing a preliminary criminal investigation of the case, requiring, among others, a Sworn Administrative Inquiry, so that the relevant disciplinary conclusion be included in the criminal case file. In this regard, following an exchange of correspondence between the relevant Hellenic Police departments, on 20.02.2016, the Thessaloniki Security Directorate replied to the Staff Department of the Hellenic Police Headquarters that, as regards the administrative investigation of the case, they would await the completion of the preliminary criminal investigation of the Sub-Directorate of Internal Affairs of Northern Greece, in order to determine whether a disciplinary investigation should be conducted. Eventually, on 16.07.2016 the above Directorate eventually ordered a Preliminary Administrative Investigation into the case after the criminal preliminary proceedings had been completed and after the criminal complaint had been dismissed as unfounded by prosecution order dated 02.06.2016. The disciplinary report that was issued on 31.12.2016 invoked, among others, the above order of the Prosecutor, in support of the conclusion that no disciplinary offence was established and that the case should therefore be set aside.

As illustrated above, the issues arising from the way the disciplinary control was manipulated, go far beyond a mere entanglement of the criminal and disciplinary proceedings, by derogation from the applicable legislative and jurisprudential requirements, and lead to random overlaps between the two procedures, as a result of which the disciplinary file was not eventually forwarded to the ECtHR at the time the case was brought before it. Deficiencies relating to how quickly the disciplinary control is conducted, the independence and hierarchical distance between the investigators and the persons investigated, the adequacy of the evidence collected and, by extension, the impartiality in the evaluation of such evidence, were further identified with regard to the disciplinary proceedings conducted and the procedural requirements of Art. 3 ECHR.

2. In light of the above, as regards the measures that can be taken to enforce the relevant ECtHR judgment and conduct a second investigation of the case, it is noted, firstly, that the Ombudsman has no power over the deficiencies identified by the ECtHR with regard to criminal investigations conducted by the national judicial authorities. As regards the Ombudsman's power to request a new disciplinary investigation by the competent administrative bodies in compliance with the ECtHR judgment[200], two main issues arise, which the Authority wishes to clarify. The first one relates to the allegation raised by the Staff Directorate of the Hellenic Police in document no. 1647/23/346859/18.02.2023, whereby the disciplinary file of the case was forwarded to EMIDIPA, according to which the Authority is considered to have no jurisdiction over this case or over any other incidents that took place before the Mechanism was established, i.e. before Law 4443/2016 was enacted. The second issue relates to the ECtHR finding that, at the time the case was brought before it, the case file was deficient in terms that it lacked any evidence as to the continuation and completion of the disciplinary investigation. This was also confirmed by the Legal Council of the State in their forwarding document dated 13.12.2022 addressed to the Authority.

As regards the first issue, i.e. that EMIDIPA has no power over any incidents of misconduct that occurred prior to the enactment of the above law, in the Authority's opinion, this view of the Department of Officers of the concerned Directorate disregards the following:

The law states that the Ombudsman, as the National Mechanism for Investigating Arbitrary Incidents, "*also handles cases for which a convicting judgment has been issued by the ECtHR, identifying deficiencies in the disciplinary procedure or new evidence that was not assessed during the disciplinary investigation or the hearing of the case*". In this context, the Ombudsman may decide to re-investigate and request a disciplinary investigation by the competent administrative bodies in compliance with the ECtHR judgment. This power is triggered when the relevant Staff Directorates forward the ECtHR judgment and the disciplinary file of the case[201]. To estimate the limitation period applicable under the disciplinary provisions, the law stipulates that the period of time between the date a decision was rendered by the competent disciplinary body and the date the

200. Art. 1 para. 5 L 3938/2011, as in force

201. Art. 5 of Law 3938/2011, as replaced by Art. 56 of Law 4443/2016 and subsequently by Art. 188 par. 1 of Law 4662/2020.

ECtHR judgment is delivered to the Ombudsman, is not taken into account.[202] It is further noted that the law provides for the suspension but not the retroactive abolition of the statute of limitations. It is therefore extremely important that disciplinary cases that are statute-barred as a result of the statutory limitation of the criminal offence concerned[203] - which is 20 or 5 years, depending on whether it is a felony or a misdemeanour[204] - are not forwarded, so that the decision of the new disciplinary investigation is not irrelevant.

The above are intended to ensure the imposition of appropriate sentences and to bring a supplementary prosecution, within the meaning of Article 1 par. 6(B) of Law 3938/11 as in force, in accordance with Article 4 of the 7th Protocol to ECHR, which is ratified by Greece. More specifically, according to this provision, *"In the context of the review of the disciplinary case, it is possible to initiate or further the disciplinary proceedings and impose the appropriate disciplinary sanction regardless of the outcome of the initial hearing of the case, provided that the officer concerned is not prosecuted for the second time for the same disciplinary offence, unless new facts or evidence has come up subsequently or there was a material defect in the procedure".*

Given that the law makes no distinction between the time the forwarded judgments were issued, and that it also refers to cases *"for which a convicting judgment has been rendered by the ECtHR"*, it is generally upheld that the Ombudsman's power can be activated when earlier judgments are forwarded to him, namely prior to entry into force of Art. 56 - 58 of Law 4443/2016, on the basis of Article 77 of the same law. This includes judgments that were issued prior to 09.06.2017 and were not enforced as regards individual compliance measures, relating to the disciplinary aspect of the case, for disciplinary offences that were committed prior to the date the said law was enacted. This applies even more to ECtHR judgments that were issued after the entry into force of Law 4443/2016. It is also clear from the explanatory memorandum

202. Art. 188 par. 6 of Law 4662/2020.

203. Purely disciplinary offences committed by police officers as per Art. 7 of P.D. 120/2008 are statute-barred, depending on the severity of the sentence involved, after two (2) or five (5) years, unless they also constitute criminal offences, in which case they are subject to the longer limitation period applicable to the criminal offence.

204. Except for felonies bringing a sentence of death or life imprisonment, Section 11 of the Penal Code, and Section 113, as regards the maximum suspension period of the statute of limitations, five (5) years for felonies and 3 years for misdemeanours.

of this law, which refers to judgments of the Strasbourg Court,[205] that the legislator sought to intervene with a provision that modified the procedure in the context of the country's international obligations to comply with ECtHR judgments also by applying person-specific measures, irrespective of when such judgments were issued, which are often issued over five years after the event, since the objective was and still is to remedy material deficiencies in the disciplinary procedure and to conduct effective and impartial investigations.

Typical in this regard is that, in implementation of that law, in December 2017 the Legal Council of State forwarded to the National Investigation Mechanism unenforced ECtHR judgments concerning the Makaratzis Group, issued between 2001 and 2010,[206] and that the operation of the National Mechanism was taken into account by the Council of Ministers of the Council of Europe, in order to end the increased surveillance of Greece in terms of compliance with those judgments.[207] As regards the particular ECtHR judgment, in their forwarding document dated 13.12.2022 addressed to the Authority the Legal Council of State noted that the Committee of Ministers of the Council of Europe had characterised this case as a repeated practice of excessive force by police officers, integrating in the «Sidiropoulos - Papakostas» set of judgments, which are still monitored by the Committee of Ministers as part of the increased surveillance procedure.

3. With regard to the second issue, i.e. the activation of the Ombudsman's power to request a new disciplinary investigation in this case, the Authority notes the following:

As clarified above and in accordance with the clarifications provided in letter No. 164/23/346859/18.02.2023 of the Police Staff Department, in conjunction with letter No. 3021/8/293-m'/07.03. 2023 document of the Sub-Directorate of Internal Affairs of Northern Greece, the Sub-Directorate's staff acted as preliminary investigative bodies, on the basis of a prosecutor's order **,** given the Sub-Directorate's power to investigate the effectiveness of criminal investigations, under the supervision of a Prosecutor, to whom they report, in

205. Explanatory Memorandum of Law 4443/2016, p. 19.

206. EMIDIPA Special Report for the years 2017 – 2018 p. 49 et seq.

207. Final Resolution CM/ResDH (2021) 190 https://hudoc.exec.coe.int/FRE?i=001-212435, with reference to the EMIDIPA, and Ombudsman's Press Release 09/2021 https://www.synigoros.gr/el/category/nea/post/to-symboylio-ths-eyrwphs-gia-thn-apotelesmatikothta-toy-e8nikoy-mhxanismoy-diereynhshs-peristatikwn-ay8airesias.

order to determine how each case should be further handled and whether the offenders must be prosecuted. Based on the contents of Presidential Decree 65/2019, which was issued on the basis of the authorising provision of Article 21 par. 6 of Law 4613/2019, the director of the Internal Affairs Service of the Police Security Units, submits the criminal case file to the Public Prosecutor and at the same time forwards copies of the reports of the preliminary investigation or preliminary inquiry conducted for police misconduct *"to the Staff Department of the relevant Unit, so that these reports are included as evidence also in the administrative file as part of the disciplinary investigation process"*.

In addition to these provisions, however, the Mechanism considers it is necessary to also refer to the legal framework that was effective in the years 2015 - 2016, i.e. At the time the Sub-Directorate of Internal Affairs of Northern Greece dealt with the case that was assessed by the ECtHR, as it derives from the case background. The Ombudsman notes that, during that period the provisions of Law 2713/1999 were in force, which in fact remain effective as at this date with respect to Article 3, given that Article 3 was not subsequently repealed by Article 21 of Law 4613/2019, which provided explicitly that preliminary inquiries and investigations conducted by the Directorate and the Sub-Directorate of Internal Affairs are subject to supervision by the Public Prosecutor. In line with the aforementioned Presidential Decree, the previous Decree (Presidential Decree 179/1999) stipulated that the Director of the Internal Affairs Service *"shall report in writing to the Police Staff Directorate of the Ministry of Public Order on the outcome of any preliminary inquiries and preliminary investigations conducted by the Service on cases lying within his/her powers, and will further submit copies of the relevant documents for disciplinary control purposes"*. [208]

The deficiencies identified by the ECtHR in its judgment in relation to actions and omissions of the Sub-Directorate of Internal Affairs of Northern Greece therefore also lie within the criminal pre-trial procedure, rather than within any preliminary or sworn internal administrative inquiries conducted by the Hellenic Police. Given that the Ombudsman's power, as the National Mechanism for Investigation of Arbitrary Incidents, to request further investigation of the case relates to convicting ECtHR judgments identifying deficiencies in the disciplinary procedure[209], in the case at hand the Ombudsman has no power, in

208. Art. 6 (xi) of PD 179/1999.

209. Art. 1 para. 6 L 3938/2011, as in force

the aforementioned capacity, to decide that the disciplinary procedure should be furthered, given that the procedure conducted by the Sub-Directorate for Internal Affairs relates to the criminal proceedings and the pre-trial phase of those proceedings, whereas the disciplinary procedure conducted by the Hellenic Police into the same case lay outside the scope of the relevant ECtHR judgment. In fact, there are no indications that it was brought to the attention of the ECtHR. This raises reasonable concerns, because, although an internal administrative inquiry was indeed conducted, nothing indicates that it was brought to the attention of the ECtHR. In fact, it was brought to the attention of the Ombudsman seven (7) years after the disciplinary decision was issued, on the occasion of the enforcement of the ECtHR judgment on that case.

4. In this report, the Authority makes multiple references to specific cases it processed in year 2022 and makes an equal number of observations as to the self-reporting, pretextual, instrumental and secondary nature of internal controls arising from the fact that the rules of autonomy and independence of criminal and disciplinary procedures is disregarded. The ineffectiveness of investigations is the direct and tangible result of these practices, which are often reflected in the ECtHR's convicting judgments against Greece. An indirect, yet even more critical, result of this practice is that institutional safeguards are also circumvented, which poses greater risks to the rule of law. In this particular case, both effects are identified. The confusion that was created in relation to the two procedures, as described above, which is also reflected in the relevant ECtHR judgment, had the side effect of depriving the Mechanism of its interventional and safeguarding role.

In this context, the Ombudsman, as the National Mechanism for the Investigation of Arbitrary Incidents, may not determine whether the disciplinary procedure should be furthered in this particular case, since the deficiencies identified by the ECtHR in the case *Torosian v Greece* relate to the criminal pre-trial procedure. He does, however, consider that it is appropriate to make certain general observations to the police authorities, based on the findings of the ECtHR judgment, as to what a credible and effective administrative investigation should include, in order to prevent the same administrative irregularities and similar convictions against Greece in the future. More specifically:

a. The ECtHR questions the impartiality of the police officers who conducted the investigation vis-a-vis their fellow officers: "*they were colleagues of the*

police officers potentially involved" (par. 79 of the judgment[210]), *"In general, the investigation may only be considered conclusive if the institutional bodies and the persons conducting it are independent of the reported persons. This requires the absence of any hierarchical or institutional relationship between them but also actual independence"* (paragraph 70 of the judgment).

Based on the information contained in the disciplinary file, the Ombudsman notes that a Preliminary Administrative Inquiry into the case was ordered on 16.07.2016 by the Police Security Directorate of Thessaloniki, which comprised among its staff the police officers who were involved in the case and reported by the complainant, while the conduct of the investigation was assigned to a Deputy Director of the same Directorate. The essential distance between the parties concerned, which has been highlighted by the Ombudsman as an essential safeguard of procedural impartiality, in line with ECtHR case-law, ever since the National Mechanism for the Investigation of Arbitrary Incidents was assigned these special powers, seems to be missing[211]. The Ombudsman's recommendation was adopted by the Administration and Art. 1 par. 1 of P.D. 111/2019 has now introduced as a rule that Preliminary Administrative Inquiries are assigned to officers serving at different Services from those involved in the investigation, where the case involves torture or serious offences against human dignity, in accordance with Article 137^{A} PC, or brutal conduct against civilians.

b. *"The applicant was not subjected to a medical examination during his detention by the police authorities. The Court, however, has repeatedly stressed the importance of such an examination, which relieves the authorities of the need to prove the origin of any injuries, in cases allegations of misconduct are subsequently raised"* (par. 83 of the judgment).

210. In paragraph 79 of its judgment, the ECtHR notes the following: *"First of all, it notes that the persons in charge of the administrative investigation were colleagues of the police officers who may have been involved in the case and that they were not supervised by an independent authority..."*. However, see above reference to the supervision of investigation by Directorate of Internal Affairs. As regards the relevant administrative investigation that was conducted in 2016, it's true that this investigation was not supervised by an independent authority at the time. This deficiency, however, was later remedied by Art. 56 of Law 4443/2016 (now Art. 188 Law 4662/2020), which dictates that all internal administrative investigations conducted by the Hellenic Police into police misconduct are forwarded to the Ombudsman as the National Mechanism for the Investigation of Arbitrary Incidents.

211. EMIDIPA Special Report for the years 2017 – 2018, p. 63.

Timely and proper medical examination is the invariable position of the Court[212] that was also expressed in various Greek cases.[213] The Ombudsman points out that, in order to effectively investigate allegations of misconduct raised by detainees being in a vulnerable position vis-à-vis state institutions, the Council of Europe's Committee has recommended, in a previous visit to our country in 2015, that a proactive approach be adopted to collect evidence from detainees and that "*the procedure be conducted in a manner which ensures that the persons concerned are given a real opportunity to make a statement about how they have been treated*".[214]

c. Assessing the reasoning of the order issued by the Public Prosecutor at the Court of First Instance, the ECtHR concludes that *"the available medical certificates should have at least been carefully reviewed by the authorities that were in charge of the investigation"* (par. 83 of the judgment).

This observation is useful (i) because careful and comparative assessment of all medical evidence is a consistent requirement of the ECtHR,[215] and (ii) because the report dated 31.12.2016 of the findings of the Preliminary Administrative Inquiry that was recently forwarded to the Mechanism follows to the letter the reasoning of the prosecutor's order (as regards the photographs, the expert report, the abrasions caused by the handcuffs, the report of the second forensic expert, etc.), by derogation from the rule of autonomy between disciplinary and criminal procedures,[216] and despite the fact that the prosecutor's order to set the case aside generates no precedent.

d. According to the ECtHR: *"the victim must be able to become effectively involved in the investigation"* (par. 78 of the judgment).

212. ECtHR judgments, *Mehmet Emin Yuksel v. Turkey,* 20.07.2004, *Musa Yilmaz v. Turkey,* 30.11.2010, *Davitidze v. Russia,* 30.05.2013.

213. ECtHR judgment, *Andersen v. Greece*, 26.04.2018.

214. CPT Recommendation following a visit to Greece from 14 to 23 April 2015 (see. CPT/Inf (2016) 4 part, https://rm.coe.int/-14-/1680931ad4, paras. 40, 41, 42).

215. In the absence of an assessment of the medical findings set out in a general hospital certificate in relation to allegations of misconduct, the ECtHR notes the following: *"this document clearly indicates that the applicant went to hospital ... on ... i.e. immediately after ... as soon as he was able to take action in order to gather evidence. Under these circumstances, the Court holds that the medical certificate should have essentially been carefully assessed by the authorities conducting the investigation"* (see ECtHR judgment, *Andersen v. Greece,* 26.04.2018).

216. EMIDIPA Special Report for the year 2020, p. 68 – 69 and for the year 2021, p. 121 et seq.

In the case at hand, the Preliminary Administrative Inquiry that was forwarded to the Authority concluded, in report dated 31.12.2016, that the accused officers bear no disciplinary responsibility. The investigators called the officers to provide written explanations but also obtained a sworn statement from the complainant on 09.12.2016, which confirmed the accuracy of the contents of his initial and supplementary complaint. To underline the importance of the Court's requirement for effective involvement of the victims in the investigation, we note that this requirement was introduced after the ECtHR judgment "Fountas v. Greece" was rendered on 03.10.2019, whereby Greece was convicted for violation of the procedural requirements of Art. 2 ECHR (right to life) precisely on grounds of failure to secure the victim's timely and effective involvement in the investigation.[217] It is noted that this judgment also belongs to the "Sidiropoulos - Papakostas" group of judgments, in respect of which it is once again noted that Greece is under increased surveillance as regards compliance with the ECtHR judgments in cases involving police misconduct.

217. EMIDIPA Special Report for the year 2021, p. 144 – 151.

7. Collaboration of EMIDIPA with International Bodies

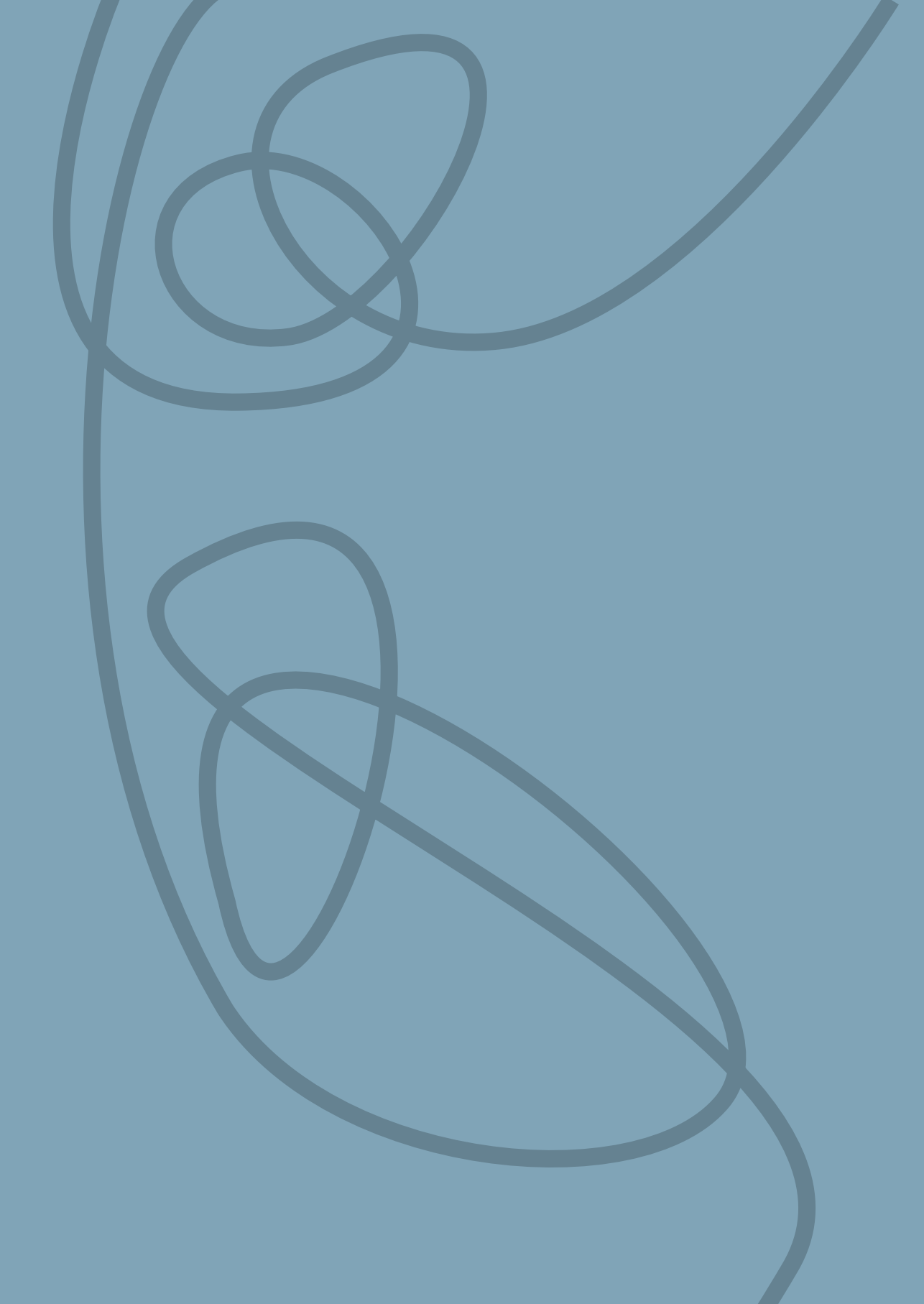
The Greek Ombudsman is a member of the Steering Committee which is the new Governing Body of the Independent Police Complaints Authorities Network (IPCAN),[218] in which bodies from twenty-two (22) countries participate. It is an informal network that allows for exchange of information and cooperation between independent institutions in charge of the external control of security forces. The Network was set up with a view to enabling these bodies to exchange views on issues of common interest, promote best practices and to adopt common high standards. As of this year, IPCAN is an official member / observer of the newly-established Council of Europe's Network of National Correspondents of Police Authorities. This network is an initiative that was supported by the Committee of Ministers and is intended to promote cooperation between the police forces of the Member States and the Council of Europe.

As part of the constructive cooperation of the National Mechanism with other police surveillance bodies participating in IPCAN, on 06 - 09.06.2022 members of EMIDIPA staff made a working visit to the headquarters of the Police Ombudsman for Northern Ireland in Belfast During their visit, the National Mechanism's experts were briefed on the powers held by the Police Ombudsman and his acting methodology and were trained through case studies on investigational issues concerning cases of abuse of power, discriminatory treatment, etc., as well as on issues relating to access and management of sensitive information.

218. The Independent Police Complaints Authorities' Network (IPCAN) is a network of independent structures mainly from EU member states, which are empowered to receive and process violence complaints against public security forces. For further information, see https://ipcan.org/.

Next year's objective is to reinforce EMIDIPA's partnership with international institutions on exchange of know-how and best practices, while the foundations for similar training activities have already been laid, in cooperation with the relevant institutions of Norway, Sweden, France, Denmark and the United Kingdom.

Lastly, on 02.05.2023 the Ombudsman organised an event entitled *"Police misconduct and racist motive"* in Thessaloniki, with the online participation of a representative of the Justice, Digital Policy and Migration Unit of the European Union Agency for Fundamental Rights (FRA), highlighting the main deficiencies identified in disciplinary investigations in year 2022 and the Mechanism's specific findings in relation to the investigation of racist motive and the targeting of specific groups of the population.



8. Legislative Proposals - Developments

1. Reinforcement of the National Mechanism in terms of human and material resources.

The increasing flow of the National Mechanism for the Investigation of Arbitrary Incidents on a yearly basis, without its simultaneous reinforcement in terms of human and material resources, is a constant and consistent parameter jeopardizing its effectiveness, or at least limiting the full utilization of the entirety of its institutional instruments.

For this reason, the need for staffing the Mechanism with the necessary personnel, which was recently pointed out by the Council of Europe, during the positive evaluation of the operation of the National Mechanism for the Investigation of Arbitrary Incidents,[219] should be harmonized with the safeguards of independence for the institution of the Ombudsman, provided for by the Venice Commission[220] and unanimously adopted by the Committee of Ministers of its Council. Among these safeguards is the establishment of a staff selection process by the Independent Authority itself, which does not constitute an innovation, but rather the standard procedure stipulated in the founding law of the Ombudsman (L 2477/1997) regarding the staffing of the Authority. Taking into account the experience of the previous, as well as the current staff selection process,[221] this change is rendered absolutely imperative.

219. https://www.synigoros.gr/?i=kdet.el.news.857808.
220. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e.
221. Quite characteristically, the process of filling the five (5) positions which, in recognition of the absolute need for staff reinforcement of the Mechanism, the legislator has already foreseen in 2020 (Art. 28 para. 2 L 4760/2020 (A '247) has not even started yet.

2. Suspension of limitation period pending the issuance of the Ombudsman's report of findings

The Ombudsman has also proposed the addition of a provision to the third subparagraph of para. 4, Article 1 L 3938/2011, as replaced by Article 188 of L 4662/2020, so that in any case of investigation of a complaint or an incident by the Ombudsman, the period of duration of the suspension of the issuance of a disciplinary decision by the competent disciplinary body after the issuance of the findings report of an administrative investigation, i.e., until the issuance of the Ombudsman's findings report, is not counted in the limitation period of the relevant disciplinary offense. This provision would be particularly useful in cases where no criminal prosecution has been initiated against the police officer involved, which would de facto result in the suspension of the statute of limitations of the offense, as well as in cases where, at the discretion of the competent authorities, there is a risk that any disciplinary misconduct could be barred by statutory limitations. It is also noted that in the light of the pro¬visions of Art. 188 para. 5 and 6 of L 4662/2020, through which the legislator has already ensured the relevant statute of limitations on cases handled by the Ombudsman and for which a conviction has been issued by the ECHR, thus insisting on the condemnation of the conduct, the proposed provision is consistent with the legislature's intention.

3. Assignment of the administrative investigations to specialized executives of the Sub-Directorates of Administrative Inquiries

The problems identified by the Ombudsman during the conducted administrative inquiries of the Hellenic Police display a number of consistent features that are repeated every year, despite the fact that the National Mechanism constantly directs attention to the principles of effective and diligent investigation arising from law and case-law. Hence, there is a need in 2022 for further specialization of people conducting the investigations, the vast majority of which are preliminary investigations, so that they familiarize themselves with the findings of the National Mechanism and the case-law, as well as with the horizontal implementation of fundamental principles for the completeness of any internal investigation regarding cases of arbitrariness under Art. 1 par. 1 L 3938/2011, as in force.

Instead of heavily relying on the conduct of preliminary inquiries (PDE) against officers of all police directorates of the country regarding cases of arbitrariness, the National Mechanism proposes that the amendment of PD 120/2008 should be considered, in order for all the administrative inquiries into these incidents, including the PDE, to be assigned to specialized executives of the Sub-Directorate of Administrative Inquiries of the relevant General Regional Police Directorate (GEPAD). Of course, this centralization of administrative inquiries, from a prefectural level to a regional one, presupposes the reinforcement of staffing of the Sub-Directorates of Administrative Inquiries of GEPAD across the country.

Additionally, returning to legislative proposals which have been put forward in EMIDIPA reports of previous years and have not been institutionalized yet, the Ombudsman restates and once again proposes the following:

4. Obtaining and preserving video footage from detention facilities

The evidentiary value that video footage has due to its objectivity makes its preservation necessary, especially in cases where there are indications of in¬jury and / or use of force against a person who is within the sphere of responsibility of the authorities. Considering that according to the established case-law of the ECtHR, detainees are in a vulnerable position[222], which additionally requires that the burden of proof is reversed and, consequently, the obligation to provide evidence as to the causes of the injury and the reasonable extent of the force used is shifted to the authorities[223]. EMIDIPA reiterates its proposal: a) to install cameras in all detention areas of the security services (including police detention rooms or detention centers in LS - ELAKT, Fire Brigade), at a camera angle that ensures the privacy of detainees (coverage of corridors, common areas and entrance to custody cells), b) to obtain and compulsorily retain the relevant video footage on a storage medium for a period of at least three months until the completion of the disciplinary investigation, in cases involving a complaint for use of force and c) to forward the video footage

222. ECtHR judgment, *Tomasi v. France*, 27.08.1992

223. *"Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the ECHR"*, ECtHR judgments *Aksoy v. Turkey* , 18.12.1996, *Bekos & Koutropoulos v. Greece*, 13.12.2005, *Zelilov v. Greece*, 24.05.2007.

to the bodies responsible for criminal preliminary interrogation as well as the body responsible for the administrative investigation of the case, so that it forms part of the disciplinary control, as well. The storage of the material on a specific external storage medium should be followed by a relevant report and the material should be stored in a place inaccessible to staff. This option will ensure its preservation, the restriction of access to it, but also its forwarding to the bodies responsible for administrative investigation.

5. Reporting in the EDE findings of the evidence on which the judgment of the disciplinary body is founded

In addition to attaching the list of evidence collected, it is essential that the findings report of the internal administrative inquiry make specific mention of the evidence utilized in shaping the judgment of the body conducting the inquiry. Their mention is necessary for the completeness of the investigation, as well as the reasoning of the decision, without it being required to make a more specific reference to which means of evidence corresponds to each conclusion in the findings report. In fact, given that during the disciplinary procedure there is a proportional application of the institutions and practices of criminal law, the Ombudsman has proposed the utilization of the established case-law of the Supreme Court [224], which dictates that all the means of evidence be taken into consideration and included in the formation of the judgment. However, in order to satisfy the obligation of specific and thorough reasoning, the consideration of all the evidence which was introduced in the disciplinary proceedings and support the two conflicting sides must not simply be made with a reference "by type", but with a specific reference and assessment of the evidence taken into account when drawing and establishing conclusions.

6.Cross-examination of witnesses in the disciplinary procedure

By virtue of Article 33 para. 1 of PD 120/2008, the provisions concerning the summoning and examination of witnesses as well as the manner of examination of the accused, shall apply mutatis mutandis to the disciplinary procedure. Given that the ECtHR has noted that witnesses shall not be subjected to a non-cross-

224. SC 659/2015.

examination, despite the relevant request of the applicant, which applies mainly to criminal procedure, it would be appropriate for this type of examination to be applied to the disciplinary procedure, subject to certain safeguards. To this end, in cases falling within the competence of the Mechanism, provision could be made for a cross-examination of persons in the context of the administrative inquiry, in the presence of representatives of the EMIDIPA. In this way, the observance of all the provided safeguards will be monitored and the secondary victimization of the complainants will be prevented, while the impartiality of the investigation will be ensured. However, given the capabilities and potential of the Mechanism, approval should be sought to carry out this examination. The body conducting the inquiry will have the competence to put questions and he or she will also ask the questions that the representative of the Mechanism has indicated.

7. Issuance of pending regulatory acts on the disciplinary law of employees subject to the Mechanism - Modernization and improvement of old provisions

In compliance with the principles of good legislation and the legitimate expectations of the persons governed and disciplined. It is imperative that outstanding issues as to the adoption of regulatory acts and the exercise of the relevant legislative mandate should be resolved and the relevant acts should be issued. It is specifically noted that the provided for in the Article 51 of L 4504/2007 P.D. regarding the Discipline Regulation of LS - ELAKT, despite the existence of a relevant deadline in the enabling provision, has yet to be issued. In addition, in the same context, legislation in the field of disciplinary law whose obsolescence gives rise to implementation issues should be updated and improved and the legislation regarding the personnel of the bodies subject to the Mechanism should be codified. For instance, Article 96 of L 4249/2014 provides for the issuance of a Presidential Decree on the codification of the provisions concerning the Fire Brigade, which, however, has not been issued yet.

8. Issues related 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 international law in force for the use of firearms and the principles governing it. In this context, the relevant legislation on the use of arms by other security forces and the external guard personnel, must also comply with the same principles regarding 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 emerging needs and safeguard the protection of human rights. The possession and the use of arms by the Fire Brigade is regulated by Royal Decree 656 of 14.10.1972 and it might be advisable to update it. The use of firearms by a police officer gives rise to an obligatory report to the judicial authorities and to the competent police authority and by extension any use of firearms is investigated by the inquiry of an EDE[225].

The non-monetary recognition given to police officers in the form of the police prize of bravery, pursuant to Article 4 of PD 622/1998, can be awarded *"for an exquisite act of bravery, which took place in a clash with gangs or armed insurgents or armed persons who are dangerous to Public Order and Security or foreign propaganda instruments, acting either in groups or individually, in which he has proven to expose his life to direct and imminent danger and which objectively far exceeds the execution of the well-meaning duty"*.. The attestation of the act of bravery is made upon the conduct of an EDE, pursuant to Article 1 para. 2 of PD 144/1991. Undoubtedly, its legal basis and the procedure followed differ, but the findings of the EDE conducted for the use of a firearm, should unquestionably be part of the EDE file regarding the award of the police prize for bravery or any other moral reward. In fact, it should be provided that the EDE findings report on the use of arms is necessary in order to ascertain the act of bravery and that the relevant moral reward cannot be awarded if the findings of the EDE on the use of a firearm point to its misuse.

9. Protection of employees - witnesses of arbitrary incidents

Articles 26, 110 and 125 of the Code of Status of Civil Servants and NPDD Employees include provisions that dictate the administrative protection of civil servants, which are part of the protection of public-interest witnesses and in general of persons who contribute to the disclosure of acts of corruption in the public sector. These particular provisions seek to avoid the unfavorable treatment of the persons concerned during the period of time required for the judicial investigation of the case.

Besides the fact that these specific provisions concern only the reporting of

225. Art. 4 para. 10 L 3169/2003 and the provisions of Art. 2 para. 8

acts of corruption, the specific provisions regarding the personnel of security forces on relevant issues, such as L 2713/1999 for the Internal Affairs Service, do not include relevant provisions for the personnel of security forces and therefore only by virtue of the general provision of Article 2 of the Code of Status of Civil Servants and NPDD Employeescould the personnel of security forces be subjected to them. Therefore, the witnesses of acts provided for in L 4443/2016 and fall into the competence of the National Mechanism for the Investigation of Arbitrary Incidents, when they are colleagues of the accused or perpetrator of such acts, are not encouraged to report such acts, nor are they protected.

Consequently, if the legislator's intention continues to be the confrontation , of incidents of arbitrariness by the personnel of security forces and detention facilities and if the assumption that the monitoring and investigation of criminal activity of officials *"by their colleagues exhibits serious peculiarities for the sake of emotional connection, misconceived collegial solidarity, interventions by hierarchical superiors for lenient treatment, pressure by common acquaintances, threats against them, their family members and their property, etc.",* is true, legislative initiatives must be taken immediately, at least to protect officials - witnesses in cases of arbitrary incidents by their colleagues. In this context, the following should be provided for officials - witnesses of arbitrary incidents by their colleagues:

a) the self-evident provisions for their protection, and in particular:

• the prohibition of any unfavorable official treatment of the employees who testify or complain in writing to the competent (disciplinary or non-disciplinary) bodies or to the Mechanism in disciplinary or non-disciplinary procedures on acts of arbitrariness committed by their colleagues, as provided for in Article 56 of L 4443/2016 and, thus, the reversal of the burden of proof in disciplinary proceedings in favor of officials who contributed substantially to the disclosure and prosecution of acts or incidents of arbitrariness

• the observance of the anonymity of the employees in the disciplinary procedure and the access of the complainant to their data solely during the disciplinary proceedings or by order of the prosecutor, in order to use their data in a pending trial

b) the possibility to request for exceptional movement or transfer to a Service of their selection in case they have testified or filed a complaint in

writing to the competent (disciplinary or non disciplinary) bodies or the Mechanism, and the mandatory satisfaction of their request by the competent bodies.

10. Provision for financial sanctions against retired officials-pensioners

The National Mechanism has proposed the amendment with a corresponding addition to Article 6 para. 3 of PD 120/2008, so that, in case of issuance of a ECtHR judgment which convicts our Country ordering it to pay compensation due to deficiencies of the disciplinary or criminal procedure, financial sanctions are provided for against the retired officials-pensioners, who committed the investigated illegal acts.

In addition, EMIDIPA has proposed the amendment of PD 120/2008, so that in case of criminal prosecution for committing crimes under Article 137A (corresponding disciplinary misconduct under Article 10 para. 1 case c of the PD 120/2008), the measure of suspension is explicitly imposed and in case of an ongoing EDE (regardless of the exercise of criminal prosecution or lack thereof) the measure of temporary transfer is imposed, by transferring the personnel to a service, where they will not perform the duties provided for in Article 137A PD and in particular *"prosecution or interrogation or investigation on criminal offenses or misdemeanors or execution of sentences or guarding or custody of detainees"*, including persons brought in for questioning.

Abbreviations

SC	Supreme Court
PDPA	Personal Data Protection Authority
Art.	Article
No.	Number
PD	Police Department
VAS	Book of Offences and Incidents
See	See
GADA	Attica Police Headquarters
GEPAD	General Regional Police Directorate
Op.	Opinion
D.E.Ath	Administrative Court of Appeal of Athens
Adm.C.P	Administrative Court of Piraeus
I.e.	Id est
DIAS	Motorcycle Police
Address	Department
Director	Director
sub-para.	subparagraph
ECtHR	European Court of Human Rights
EDE	Administrative Inquiry Under Oath
PB	Public Prosecutor
EKAB	National Emergency Services

EKAM	Special Suppressive Anti-Terrorist Unit
ELAS	Hellenic Police
EMIDIPA	National Mechanism for the Investigation of Arbitrary Incidents
N.	Next
ECHR	European Convention on Human Rights
CoA	Court of Appeal
EfimDD	Administrative Law Journal
Thess/niki	Thessaloniki
eff.	effective
etc.	et cetera
C.C.	Central Committee
PF	Penitentiary Facility
CCP	Code of Criminal Procedure
LS – ELAKT	Port Authority – Hellenic Coast Guard
L	Law
LCS	Legal Council of the State
UN	United Nations Organization
Pl	Plenum
ibid.	ibidem
Op. cit.	As above
OPKE	Crime Prevention and Suppression Unit
Para.	Paragraph
PD	Presidential Decree

PDE	Preliminary Administrative Inquiry
section	section
PC	Penal Code
Crim.	Criminal
PROKEKA	Pre-Removal Detention Centre
App	Appeal
Prot.	Protocol
P.	Page
SEK	Socialist - Labourers Party
Rec.	Recital
CoS	Council of State
Iss.	Issue
SP Depart.	Security Police Department
ORD	Order Restoration Division
F.	File
GG	Government Gazette
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – European Council's Committee for the Prevention of Torture
FRA	Fundamential Rights Agency – European Union Agency for Fundamental Rights
FRONTEX	European Border And Coast Guard Agency
Ibid	Ibidem
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
op. cit.	Opus citatum

17 Halkokondyli
Street, 104 32 Athens

(+30) 213 1306 600

www.synigoros.gr

ISSN: 2945-1744

THE GREEK
OMBUDSMAN
INDEPENDENT AUTHORITY