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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION ON THE DRAFT OMBUDSMAN ACT OF BULGARIA

prepared by

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I. INTRODUCTORY COMMENT

The draft-ombudsman act tabled in the Bulgarian Parliament is a document complying with all relevant legal standards requested by the Council of Europe, especially those concerning the new born ombudsman institutions in countries in transition.

Therefore, no critical general comment would be appropriate. The remarks *infra* only aim at highlighting specific points of procedural importance that, however, would raise a certain concern in order to prevent eventual future mal functioning of the institution.

As a general stand, the main preoccupation here would be to provide alternatives in order to avoid the creation of a situation of overloading the Ombudsman with unsolvable complains. As correctly asserted "*the ombudsman's best friend and worst enemy is publicity*". Every institution needs publicity, particularly during its first steps, when the need to impose a space of legitimated action and function is fundamental. However, it has been observed that the spontaneous reflect of new institutions to create a more extended space for their action, competence and intervention in a largely hostile administrative environment, can lead to situations where the office cannot offer the minimum of protection to the individuals.

Such concern regarding the Bulgarian ombudsman act can be expressed *vis-à-vis* the:

- *Relatively extended field of jurisdiction*. The exceptions provided in the draft (art. 19) regarding acts of bodies pertaining to their political function (par. 1), judicial function and courts decisions (par. 2) and cases concerning state security (par.3), represent more or less the minimum exceptions in an ombudsman's jurisdiction according to the international standards. It should perhaps be wiser to limit to a certain extend the competence of the office to "safer" areas by adding more exceptions than the ones prescribed in the act. For example, one can name the following: exception of jurisdiction over the acts of other independent administrative authorities, service status of public sector personnel, or administrative acts that have generated a favorable situation for a third party reversible only by a court decision.

- The vague sense of "*rights of informal organizations*" (art.1 and 17 par. 1) which may originate a complaint or a signal. The question arising here is to what extent rights of informal organizations are of different quality of their members rights and how can the office secure the effective existence of such rights since the organization is not registered.

- Absence of the minimum formal elements of the complaint requested, such as name, signature, address, or any other reference of the individual. Additionally, the acceptance of the verbal complaint should be exceptional and not unconditional (art. 27).

Absence of any definition of the signal's concept and its differentiation from the complaint, especially the verbal one (art. 27).

II. ARTICLE BY ARTICLE REMARKS

Article 6

"*A motion to elect an Ombudsman may be made by … twenty thousand citizens of voting age."*

While it is obvious and self-imposing that bodies like the President of the Republic, the President of the Constitutional Court or the Supreme Judiciary Council might make a motion to elect the Ombudsman, the introduction of a twenty thousand citizens vote appears problematic. This element focuses at the importance of direct democracy procedures implying that the legitimization of the Ombudsman can derive from referendum processes. Notwithstanding the fact that in a popular sovereignty regime, public will is expressed *par excellence* by direct procedures, it would be erroneous to consider that the Ombudsman institution is gaining legitimacy through means such as collection of signatures. The introduction of this provision substantially amplifies a populist perception of a Jacobin popular sovereignty stand, according to which independent administrative authorities are not or cannot be legitimated. Let us imagine the very probable situation in which the Parliament elects an Ombudsman against the will of (a minimum of) twenty thousand signatures. It is obvious here that the elected Ombudsman faces a serious problem since he competed a directly proposed opponent.

Article 12

This article refers to article 11, par.1, al.4, according to which "*the ombudsman shall be relieved of duty in case of … recall in due to failure to perform his duties"*. When compared to the other objective reasons of release from duty, it is obvious that the above-mentioned one presupposes a certain judgment by the bodies of persons entitled to the right to make a motion for his election. Par. 2 of article 12 prescribes that "*the decision … shall be taken by simple majority by a single vote after hearing the Ombudsman."* In order to amplify the Ombudsman's position, the article offers him an unlimited time of hearing. However, this is far from being enough. A situation in which a new government might feel threatened by the Ombudsman's intervention, considering him/her as a political party enemy, is not unimaginable. Therefore, the decision on the Ombudsman's recall should be sufficiently justified and subjected to jurisdictional control either by the Constitutional Court or the Supreme Judiciary Council, both judicial bodies entitled to make a motion to elect an ombudsman.

Article 13

According to par. 3, the ombudsman shall be guided by the principle of "*independence from parties and institutions*". The substantial content of the formal concept of independence is impartiality. It would be accurate to replace the last part of the sentence "*from parties and institutions"* (in all cases, parties are constitutional institutions) with "*and impartiality*", since the very concept of impartiality implies - without saying it – effective independence from all bodies.

Article 17

Par. 1: cf. introductory comment on "*informal organizations*" and "*signals*"

Par. 6: According to this par., the ombudsman shall "*be entitled to request and receive timely, complete and precise information from the bodies or persons, exercising public power or function*". However, without any mention to sanctions, such obligation on the behalf of the administration is empty of meaning. It would be, therefore, appropriate to add that: "*The refusal of a public functionary or civil servant to co-operate with the Ombudsman constitutes a disciplinary offense of breach of duty."*

Par. 10: Technically it would be also appropriate to add at the end of the sentence "*draw up and submit an annual report to the National Assembly"*, the exact date, i.e. "*by 31st March"* (article 38, par. 1).

Article 21

Par. 3: this provision reserves complete inviolability for all documents that the citizens address to the ombudsman. Whereas it is absolutely obvious that complaints to the Ombudsman must remain inviolable, the formulation of the par. exposes to a non-proportional level civil servants to dissemination of false information on the behalf of citizens. Additionally, the solution of the majority of cases, presuppose the knowledge of the complainant's identity. Therefore, it would be appropriate to add that the correspondence between the Ombudsman and the complainants shall remain inviolable "*upon citizens request"*. Equally, it should be added that "*the inviolability can be lifted exclusively after a prosecutor's order, since evidence exists of false information therein seriously damaging the civil servant*."

Article 22

The content of this provision is functionally obvious. Therefore, it does not have to be regulated by law. The article can be omitted. Ombudsmen co-operate in all cases.

Article 25

i. The article, as it is, introduces without any visible purpose, the link of nationality ("*regardless their nationality*") as a reason for non-discrimination. However, since "*any Bulgarian or foreign citizen"* can address themselves to the Ombudsman, the reference to nationality is futile.

ii. The reference to the "*operat[ion] into the territory of Bulgaria"* is problematic since it introduces an unjustified distinction for citizens dealing with Bulgarian authorities abroad (mainly consulates and embassies). Therefore it would be appropriate to amend the sentence as a whole by paraphrasing the formulation of article 1 of the European Convention for Human Rights: "*every natural or legal person under the jurisdiction of the Bulgarian Authorities*".