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SPECIAL OMBUDSMEN WITH REFERENCE TO THE POSITION OF THE COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PROTECTION OF PERSONAL DATA

ABSTRACT: In addition to the expansion of general-type ombudsmen, it has been recognized that, for the protection of citizens' rights, it is necessary to have the so-called specialized ombudsmen, who focus their activities on administrative oversight and the protection of citizens' rights in specific areas of social life. Thus, there are public law ombudsmen of an external type, internal ombudsmen, and private law ombudsmen. This paper pays particular attention to the position of the Commissioner for Information of Public Importance and Protection of Personal Data in the Republic of Serbia, who is, in fact, a special public law ombudsman of an external type. The paper discusses this special ombudsman's complex jurisdiction, which is defined by the Law on Free Access to Information of Public Importance and the Law on Personal Data Protection. The authors analyze the competences of this special type of ombudsmen.

Keywords: *ombudsman, special ombudsmen, Commissioner for Information of Public Importance and Protection of Personal Data.*

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1. Introduction

In addition to the expansion of the institute of ombudsman (particularly of general type) which “has become the part of legal and political system in more than one hundred countries all over the world, either at the middle level of government or at federal, regional, municipal, even supranational level of government (European Union ombudsman) (Blagojević, 2008, p. 77), which in majority of countries represents “an important institution for strengthening democracy, rule of law, good administration and protection and promotion of human rights” (Radojević, 2021, p. 155), there is also a particular type of ombudsmen, so called, special ombudsmen who are in charge of administrative supervision and protection of citizens’ rights in specific fields of social life. In Anglo-Saxon literature they are called *single purpose ombudsmen*. The competences of these special, single purpose ombudsmen, may be, therefore, limited to a certain domain, or an activity, or a particular topic, such as environment, health services, armed forces, police and prison administration, or they can be focused on the needs of particular groups, such as ethnic minorities, indigenous peoples, persons with disabilities and children. Among many examples of ombudsmen with “special tasks” or ombudsman-type agencies (some of them does not even include the word “ombudsman” in their name) are military ombudsmen in Sweden, Norway, Germany, Israel and Canada, the Royal Canadian Mounted Police Commissioner, the Commissioner of Correctional Service in Canada, Department of Correction Commissioners in Connecticut, Michigan and Oregon, “England and Wales” (Aćimovska Maletić, 2007, p. 109), Police Complaint Commissioner in Canada and United Kingdom and the Police Ombudsman for Northern Ireland (Roy & Giddings, 2000, p. 8). “Police ombudsmen resolve complaints of the citizens about the police work and police documents, but they also handle the complaints of police staff which is of particular importance for the realization and protection of human rights of police force. The effectiveness of the protection of human rights of police officers by police ombudsman is greater if he/she is appointed by a parliament compared to his/her appointment by the ministry of internal affairs, as it is the case in Peru, for example” (Marković & Jugović, 2012, p. 144). There is an opinion that “this institute of specialized ombudsman should be *de lege ferenda* introduced in our country as well” (Marković Dapčević, 2005, p. 71).

2. Position of special ombudsman

Special ombudsmen can be classified into two types: special ombudsmen of external type and special ombudsmen of internal type. Both types of special ombudsmen are public law ombudsmen. The ombudsmen of external type are, in fact, state bodies and are chosen according to the procedure which is, more or less, the same as the procedure for choosing regular ombudsmen of general type, i.e. they are chosen and revoked by the parliament, and they have all the characteristics of the ombudsman institution. However, special ombudsmen can be other various which are not created according to general rules that apply to ombudsman institution and, even if they are officially called ombudsmen, their legal nature does not qualify them as such. Here we are speaking about the ombudsman of internal character, as it has already been mentioned above. They are established by state administration bodies or public departments and their role is to handle complaints of the citizens who use the services of these departments. In order to improve the work of certain state administration bodies and public departments, specialized institutions are created with the aim to protect service users' rights. In Serbia, this group of ombudsmen include: Protector of patients' rights, established according to the decision of the Ministry of Health, who is now called, based on the Law on patients' rights (The Law on patients' rights of 2013), the Counselor for the protection of patients' rights. We have to keep in mind that in the true sense of the word, the ombudsman is a body established by the parliament in order to investigate fraudulent and unlawful work of other subjects, before all the work of state administration bodies, and to protect and strengthen citizens' rights which may be infringed by administrative bodies' malpractice. The major deficiency of the internal type of ombudsmen is that they belong to the same body they are supposed to control. They are not sufficiently independent in their work, which is one of the main principles on which the institution of ombudsman is based. As previously mentioned, these ombudsmen are special public law ombudsmen of internal type. There are institutions which bear the name ombudsman, but according to their legal nature they cannot qualify as such and can be counted only as quasi ombudsmen. These type of ombudsmen just represent the organizational units in their institutions or departments whose job is to handle the petitions and complaints. Only in theory do they bear the name of private sector ombudsman.

It seems that just one, a general type of ombudsman, has proven to be inefficient in protecting citizens' rights from administrative malpractice in various fields of social life since he/she did not possess a broad scope of

general knowledge for performing this task. Namely, the need arose for a special type of ombudsman which can protect citizens' rights in a particular field of administrative services.

Sweden is not only famous for being the cradle of the general type of ombudsmen institutions, but it is also the first country which introduced a specialized ombudsman in the form of a military ombudsman. It existed in the period from 1915 to 1968 when it was formally terminated, but actually still kept going since the institution of ombudsman consisted of four members out of which one was in charge of military affairs. The main role of military ombudsman was to control the work of military bodies and protect the rights of military personnel. Similar to the work of general ombudsman, military ombudsman receives the complaints, but, in this case, from a narrow circle of individuals, the military personnel, whose complaints refer to the malpractice of military bodies. The main difference between military ombudsman and the ombudsman of general type lies in the field of their work, since the former is specialized only to handle military issues. Following the Swedish model, but with certain exceptions, military ombudsman was first officially established in Norway and FR Germany and, then, it spread to some other countries, such as Australia, New Zealand, Canada, the Netherlands, Ireland, Lithuania, Israel and South Africa. Another type of special public law ombudsmen is, so called, the prison ombudsman. Some countries, such as the United States of America, do not have an ombudsman of general type at the federal or state level, but do have specialized prison ombudsmen. Also, the legislations of its neighboring country, Canada, as well as England, Ireland and South Africa foresee the existence of prison ombudsmen whose purpose is similar to the goal of military ombudsmen – to secure the protection of the rights of a particular category of citizens. Compared to military staff, prisoners and detainees are in a worse position in relation to having free and open access to ombudsman. Both military and prison ombudsmen conduct the controls at their own initiative, which does not mean that military staff and prisoners are not allowed to address them with the complaints. The Republic of Serbia, “is among the last European countries that officially introduced the institution of ombudsman” (Milkov, 2022, p. 2) in the Law on the Protector of Citizens (who is, by the way, a general type of ombudsman) which stipulates that imprisoned individuals may submit their complaints in sealed envelopes. Thus, all the institutions which hold imprisoned individuals must provide adequate envelopes and keep them on public and visible spots and the management of these institutions and the Ministry of Internal Affairs are responsible to ensure the compliance with this rule. In this way, we believe, better protection of the rights of imprisoned

individuals is obtained. In Northern Ireland, for example, there is a special public law ombudsman in charge of supervising the work of police. Same as in the aforementioned case, it is police ombudsman. His/her role is similar to the role of the military ombudsman since he/she controls the police work and protects the citizens' rights in their relations with police bodies which is, by rule, a sensitive matter. The topic on specialized ombudsmen cannot be exhausted since, for example, in the United Kingdom there is also a financial ombudsman of external type, chosen and revoked by the Parliament. The basic role of the financial ombudsman is to resolve the conflicts between the citizens and various financial institutions and organizations (banks, insurance companies, pension funds, savings and investment funds, loan providers, stock exchanges....)" (Milkov, 2007, p. 115).

3. Special public law ombudsman of internal type

This type of ombudsman is not appointed according to the procedure used for the selection of the ombudsman of general type, who is appointed by the parliament, or possibly by the head of the state. Special public law ombudsman of internal type is appointed and revoked by the public administration itself or its specific body. They are the part of the ministries and their goal is to protect the rights of the persons who use the services of certain state administration bodies and public organizations. They are called "internal" because they are established by the same body or organization whose work they are supposed to control. They are created with the aim to resolve the conflicts that may arise between the citizens who use the services of state administration bodies or public organizations in a peaceful and efficient way. This type of ombudsmen have less independence which means that, given the fact that they are elected by the same body whose work they should control, they cannot be as impartial as the ombudsmen of general type. There are many examples of this kind of ombudsmen around the world, such as consumers' ombudsman, pension's ombudsman, patients' rights protector, i.e. public defender. The consumers' ombudsman was first established in Norway in 1972 and, then, it spread to other Scandinavian countries: Denmark, Finland and Sweden. The Consumer Ombudsman in Finland is, according to the official definition, an independent administrative body in charge of supervising marketing conditions and compliance with the laws protecting consumers. He/she also provides advice to traders including supervising the lawfulness of the marketing activities, contractual terms and payment collection of traders in business operations aimed at consumers.

“Bringing into focus the pensioners and their problems has led to the establishment of pensions ombudsmen in some countries (for example, in the United Kingdom where it is appointed by the Secretary of State for Work and Pension, or in Belgium). It is interesting to note that the Pensions Ombudsman in the United Kingdom has an authority atypical for an ombudsman, i.e. his/her decisions must be executed. Thus the Pensions Ombudsman in UK can order certain subjects to undertake particular measures and his/her decisions are of the same force as court judgements. In this way the ombudsman has been turned into an institution which is not only of advisory nature, but which assumes quasi judicial functions” (Milkov, 2007, p. 117). The ombudsman in charge of patients’ rights was first introduced in Austria, exactly in Vienna District 32 years ago, in 1992. Other Austrian districts also introduced this type of specialized ombudsmen. Thus, the patients’ rights public defender in Austria is appointed by the regional government. Two years later, in 1994, this type of ombudsman was introduced in Finland by the Law on patients’ rights which regulated this institution as an internal medical unit set up within medical centers with the aim to protect patients’ rights. This model, with certain distinctions, was chosen by the Republic of Serbia Ministry of Health which decided that medical institutions should establish the offices of the protectors of patients’ rights within their premises. Thus, the Austrian model of patients’ public defender represents a special ombudsman of external type, while the Finnish and Serbian models of patients’ public defenders are of internal type. Compared to the internal type of ombudsmen, it could be said that external ombudsmen have achieved a higher degree of independence in relation to their work and unbiased decision making.

4. Position of the Commissioner for information of public importance and protection of personal data

Based on the Law on free access to information of public importance, a special public law ombudsman of external type was introduced in the legal system of the Republic of Serbia bearing the name the Commissioner for information of public importance and protection of personal data. This occurred in 1994, “in time of the development of the institutions in charge of the access to public information. At first, the protection of the right to free access to information was in domain of the ombudsman, while later on this task was transferred to the specialized official appointed to safeguard free access to public information. Different nations have different institutional framework for this kind of special commissioner. It can be organized as a body in charge

of data protection, or it can be even a collective body. In Germany, the former type prevails but, in addition to a federal body, there are also commissioners at regional level. In Austria this task was granted to the Commission for the protection of information, while in Belgium it is performed by the Privacy and Data Protection Authority. In France, this role was awarded to an independent public body – National Commission for informatics and liberties whose role is to inform, educate, protect citizens' rights, regulate, advise, control and impose sanctions. In Croatia, the Law on applying EU Directive on personal data protection of 2018 foresees the establishment of the Agency for personal data protection, as an independent state body which answers for its work to Croatian Parliament. Slovenia, on the other hand, has chosen the model of a single person body and this competence is awarded to the Commissioner for information (*Informacijski pooblaščenec*)” (Nastić, 2021, p. 197).

With the adoption of the Law on personal data protection, the Commissioner for information of public importance assumed a new authority in the field of personal data protection and, therefore, the name of this body changed into the Commissioner for information of public importance and protection of personal data. Based on the Law on free access to information of public importance, the Commissioner is defined as an autonomous state body independent in fulfilling its authority. This means that this body neither requests nor receives orders and instructions from state bodies and other officials. The Commissioner's independence is secured from the financial point of view as well. Thus, this Law regulates that the Commissioner shall have the same salary as the Supreme Court judge and other labor rights according to law, as well as the right to reimbursement of costs incurred while performing his/her duties. The Commissioner enjoys the immunity and may not be held liable for an opinion he/she expressed or a recommendation he/she made while performing his/her duties; in the event of a legal proceeding initiated over an act of crime committed in the exercise of his/her functions, he/she may not be detained without the consent of the National Assembly. Article 30 of this Law states: The National Assembly shall appoint the Commissioner by a majority of votes of the MPs at the proposal of the Board of the National Assembly competent for state administration. In the former provision of this Law, the Commissioner was appointed to a seven-year term of office, with the possibility to be appointed twice the most, while the new provision foresees that the Commissioner shall be appointed to an eight -year term of office, without the possibility to be re-appointed. Nevertheless, based on both past and current provision, the length of the Commissioner's office is longer than MP's, Government's, even the President's term of office, which, according

to our opinion, represents an additional guarantee of its independence. The President of the National Assembly initiates the election of the Commissioner by passing a decision for publishing a call inviting all interested individuals to apply for this position. Public call is published on the same day on the National Assembly's official web page and at least in one daily newspaper whose copies are distributed on the entire territory of the Republic of Serbia, at least 180 days before the expiration of the Commissioner's term of office, i.e. at least 30 days after passing the decision terminating the Commissioner's term of office.¹ The Board in charge of administration invites the parliamentary groups in the National Assembly to propose the candidates which meet the selection conditions from the list of applied candidates. Each parliamentary group in the National Assembly is entitled to propose a candidate for the Commissioner's position to the Board after the expiration of 15 days from the date when the list of eligible candidates was published. There is a possibility that several parliamentary groups will decide to propose a joint candidate for the Commissioner. Then, the Board conducts a public interview with all proposed candidates allowing them to present their opinion related to the role and the method of executing the Commissioner's duty. The candidate who will be proposed for the appointment to the position of the Commissioner shall be selected by majority of the Board members' votes. Then the Board submits the reasoned proposal of the candidate to the National Assembly at least 60 days before the expiration of the previous Commissioner's term of office, i.e. at least 90 days from the date of passing the decision on the termination of his/her term of office. The Law states that a person of renowned reputation and expertise in the field of protecting and promoting human rights shall be appointed Commissioner. Also, a person, who fulfills the requirements for employment in state bodies and has a Bachelor's degree in Law and at least ten years of working experience, may be appointed Commissioner. It is obvious that the Law kept the requirement of high education degree in the field of law for the appointment of the Commissioner, while the appointment of the Protector of Citizens no longer foresees this requirement. Also, a person

¹ The application to this public call shall be submitted in a written form and must include name, address of the place of residence, contact phone number, e-mail address and the signature of the candidate. The enclosed documents should include CV and other documents proving that the prescribed conditions for the Commissioner's position are met. The deadline for submitting the application to the public call is 30 days from the date when the call was published. Within 15 days from the date when the call was closed, the Board of administration of the National Assembly shall prepare and publish the list of eligible candidates with their CVs on the official web page of the National Assembly.

holding a post or being employed by a state body or a political party or holding any other position that may affect his/her independence may not be appointed Commissioner. If the proposed candidate does not receive the majority of votes of all MPs, a new procedure for the election of the Commissioner is initiated within 15 days from the date when the National Assembly failed to make the appointment. By the way, the Commissioner's seat is in Belgrade, while the Law allows the possibility of establishing the Commissioner's offices outside its seat.² The following seven reasons are stipulated for terminating the Commissioner's term of office: 1) expiration of his/her term of office, 2) death, 3) at his/her personal request, 4) if he/she loses the citizenship, 5) in the event of working incapacity ruled by the final court decision, 6) if he/she has been convicted of a crime with a sentence of imprisonment ruled by a final court decision, 7) in case of a dismissal. If during his/her term of office the Commissioner reaches the retirement age, the term of office shall not cease. Namely, her/his term of office can cease only by expiration. This provision was different in the previous law. Except in case of the expiration of term of office, in all other cases it is the National Assembly that passes a decision by majority of votes of all MPs determining the date when the Commissioner's term of office ceases. The Commissioner can be dismissed 1) if he/she performs his duties unprofessionally and unconscientiously, 2) if he is selected or appointed to another public post, 3) if he starts to perform another duty or is employed elsewhere without the approval of the state body in charge of deciding what constitutes conflict of interest in performing public duties, 4) if he/she becomes a member of a political party. The proposal for the dismissal of the Commissioner is initiated by at least one third of all MPs. The Board for administration determines whether there is a reason for his/her dismissal and if it concludes that there is not, it then informs the National Assembly about it. If it determines that there is a reason for the dismissal, the Board then issues a proposal for the dismissal to the National Assembly. The Commissioner has an opportunity to address the MPs at the session of the Board when they are deliberating the proposal for his/her dismissal.

The Commissioner has the cabinet consisting of the experts who assist him/her in the exercise of his/her powers and he/she passes the general act on the organization and description of the job positions in his/her office in accordance with the budget allocated for its work. The Commissioner shall inform the National Assembly about the adoption of the general act on the

² The Rulebook on the organization and description of job positions in the Commissioner's office defines the activities of these offices.

organization and description of the job positions in his/her office within 15 days from the date of its adoption. The Commissioner shall independently decide on the admission of staff to the expert service in accordance with law, bearing in mind the need to ensure competent, diligent and responsible discharge of his/her duties. The rights and obligations of the staff employed in the Commissioner's offices are regulated by the laws governing the rights and duties of state employees. The required funding for the work of the Commissioner and his/her office shall be allocated from the budget of the Republic of Serbia. The Commissioner has the following competences: 1) Monitor compliance of public authorities with the duties provided for in this Law and report to the public and the National Assembly thereof; 2) Make motions to draft or amend regulations for the purpose of implementation and promotion of the right to free access to information of public importance; 3) Propose to public authorities measures to be taken to improve their work governed by this Law; 4) Take necessary measures to train employees of government bodies and to advise them on their duties regarding the rights to free access to information of public importance, with a view to ensuring effective implementation of this Law; 5) Deliberate complaints against the decisions of public authorities that violate the rights provided for in by this Law (*This is probaly one of the Commissioner's most important competences under this Law, to act as the body of second instance in an administrative proceeding*); 6) Disseminate to the public the content of this Law and the rights regulated by this Law, provides opinion on the drafts of laws and regulations, as well as on the drafts of public policies if they regulate the issues which are significant for the realization of the right to free access to information of public importance; 7) Perform other duties pursuant to this Law and other laws. The Commissioner may make motions to assess the constitutionality and legality of laws and other general acts which regulate the issues that are significant for the realization of the right to free access to information of public importance. One of the most important tools for influencing the public opinion, but also for reflecting his/her accountability are the reports which he/she submits to the National Assembly. Thus, there are three distinctive types of reports: regular, annual and special reports. Namely, within three months from the end of a fiscal year, the Commissioner shall submit to the National Assembly an annual report on the activities undertaken by the public authorities in the implementation of this Law and his/her own activities and expenses. The Commissioner shall submit to the National Assembly also any other reports he/she deems appropriate. The Commissioner undertakes measures to improve transparency of work of public authorities. Thus, the

Commissioner shall, without delay, publish and update a guidebook with practical instructions on the effective exercise of rights provided for the Law on free access to information of public importance, which shall be published in the Serbian language and in other languages considered to be official in accordance with the law. The guidebook shall explain the content and scope of rights to free access to information of public importance and the manner of exercise of those rights. The Commissioner shall have a duty to inform the public of the content of this guidebook through the press, the electronic media, the Internet, public panel discussions and in other ways. Analyzing the provisions of the Law on free access to information of public importance and the Law on personal data protection, we can see that the Commissioner for free access to information of public importance and protection of personal data should have two deputies, one in charge to free access to information of public importance and the other in charge of personal data protection. The Deputy Commissioner shall be appointed by the National Assembly by a majority of votes of all members of parliament, on the recommendation from the Commissioner. The Commissioner shall nominate for the post of Deputy Commissioner a person who meets the requirements of the the Law on free access to information of public importance and the Law on personal data protection. Same as the Commissioner, the Deputy Commissioner shall be appointed to the eight-year term of office, without the possibility to be re-appointed. A Deputy Commissioner shall perform the duties of the Commissioner if the latter is absent or incapacitated, or his term of office is terminated. The procedure for termination of office of the Commissioner shall apply according to the of termination of a Deputy Commissioner. The procedure for termination of a Deputy Commissioner shall be initiated by the Commissioner. Deputy Commissioner is entitled to the salary which is 90% of the Commissioner's salary.

In addition to the aforementioned powers prescribed by the Law on free access to public information, the Commissioner also has the authorities stemming from the Law on personal data protection. Thus, the Commissioner exercises his/her authorities pursuant to the Law on personal data protection and in exercising these authorities, he/she acts pursuant to the Law which regulates general administrative procedure and the Law which regulates inspection supervision, unless otherwise regulated by the Law on personal data protection. The Commissioner does not have the authority to perform the supervision of how courts handle the data in the course of exercising their judicial duties. Pursuant to the Law on personal data protection, the Commissioner may perform the following activities: 1) supervises the

enforcement of the this Law; 2) works on raising public awareness on risks, rules, protective measures and rights related to data processing, particularly when processing data of minor; 3) provide opinion to the National Assembly, Government and other government bodies and organization related to laws and bylaws and other regulations governing the protection of personal rights and liberties pertaining to data processing; 4) works on raising awareness of data controllers and processors in relation to their obligations from the Law on personal data protection; 5) upon the request of the persons whose personal data are (mis)handled, provides advise on their rights foreseen by the Law and handles their complaints; 6) determines whether there was breach of law and informs complainants on the progress and results of the procedure that was initiated as a result of the complaint filed by the person who believes that his personal data were not processed according to this Law; 7) cooperates with inspection authorities from other countries in relation to personal data protection, particularly by mutual exchange of information and offering legal aid; 8) performs inspection supervision of the compliance with the Law on personal data protection by applying the provisions of the Law on inspection supervision; 9) submits the request for initiating the infringement procedure if he/she determines that there was the breach of law in accordance to the law on misdemeanors; 10) follows development of information and communication technologies, as well as of business practices of importance for personal data protection; 11) drafts standard agreement provisions; 12) provides written opinion when he/she believes that intended activities on data processing might violate the Law on personal data protection, particularly if data controller has not undertaken adequate protective or risk diminishing measures. The commissioner shall provide this written opinion within 60 days from the date of receiving the request by a data controller or processor; 13) keeps the register of data protection personal files; 14) encourages the creation of the code of conduct of the associations or groups of subjects which handle and process data and provides opinion whether the draft codes comply with the provisions of the Law on personal data protection and, if not, what corrections should be made. If the Commissioner determines that the draft code provides sufficient guarantees in relation to personal data protection, he/she should make sure that this code of conduct or its amendments are registered and publicly displayed on its official web page; 15) encourages the award of data privacy certificates and logos and prescribes the certification criteria; 16) undertakes periodical re-evaluation of the certificates which can be revoked if the Commissioner determines that its holder, i.e. data controller, no longer fulfills the prescribed certification criteria; 17) prescribes and publishes the

criteria for the accreditation of certification bodies and performs its activities; 18) endorses binding business practices which must meet the prescribed criteria; 19) keeps internal records on the violations of the provisions of the Law on personal data protection and the measures that have been undertaken during the exercise of inspection supervision.

Based on the Law on personal data protection (ZZPL), the Commissioner has certain inspection and other authorities. Thus, he/she has the following inspection competencies: 1) to order the data controller and processor, and, if necessary, their representatives to provide all the information he/she requests for the purpose of exercising his/her authorities; 2) to control and examine the compliance with the Law and to conduct other forms of supervision of personal data protection by using his/her inspection authorities; 3) to control the compliance with certification requirements; 4) to inform the data controller and processor on possible non-compliance with the Law; 5) to request from the controller and the processor the access to all personal data and information necessary for exercising his/her authorities; 6) to request the access to all premises where data are handled and processed, including the access to all resources and equipment (Article 72, paragraph 1). The Commissioner shall undertake the following corrective measures: 1) to issue a warning to data controller and processor by sending them a written opinion that their intended actions may infringe the provision of this Law; 2) to issue reprimands to a controller and/or to a processor where processing operations have infringed provisions of this Law; 3) to order the controller and the processor to comply with the data subject's requests to exercise his or her rights, in compliance with this Law; 4) to order the controller and the processor to bring processing operations into compliance with the provisions of this Law, in a precisely specified manner and within a precisely specified time limit; 5) to order the controller to inform the data subject of a breach of personal data; 6) to impose a temporary or definitive limitation of performance of a processing operation, including a ban on processing; 7) to order rectification and/or erasure of personal data or to limit performance of processing operations in compliance with this Law, as well as to order the controller to notify another controller, the data subject and the recipients to which the personal data has been disclosed or transmitted; 8) to withdraw a certificate or to order the certification body to withdraw an issued certificate, as well as to order the certification body to refuse to issue certificate if the requirements for issuing thereof are not met; 9) to impose a fine on the basis of a misdemeanour order, where it is determined in the course of an inspection supervision that a misdemeanour has been committed for which a fine of a fixed amount is prescribed by this Law,

instead of other measures prescribed by this paragraph or in addition thereto, depending on the circumstances of each individual case; 10) to suspend transfer of personal data to a recipient in another country or to an international organisation (Article 79, paragraph 2). The Commissioner shall additionally have the powers to: 1) draw up the standard contractual clauses; 2) provide opinion to the controller in the procedures of prior obtaining of opinions from the Commissioner; 3) provide opinion to the National Assembly, Government, other public authorities and organisations, on his/her own initiative or at their request, as well as to the public, on all the issues relating to the protection of personal data; 4) register and publish codes of conduct, which he/she has previously approved 5) issue certificates and prescribe criteria for certificate issuing 6) prescribe criteria for accreditation; 7) authorize contractual provisions and/or provisions to be entered in an agreement; 8) authorise the binding corporate rules (Article 79 paragraph 3).

As one of the most important Commissioner's competences is his/her authority to act as the body of second instance in administrative proceedings. The control which the Commissioner performs is the external legal review of the administration given the fact that the body of second instance is an independent body and not the state administration body. The applicant may lodge the complaint with the Commissioner if his/her request for information was rejected or the response was not received within the deadline, or in situation when the free access to information of public importance was hindered or prevented. Before passing the decision, the authority shall allow the Commissioner insight in the document containing the information for the purpose of determining the facts of the case. The decision shall be issued within 10 days from the date of receiving the complaint, allowing the authority to issue a prior statement. If the complaint is irrelevant or unduly submitted by unauthorized person, the Commissioner shall reject it based on the provisions of the Law on administrative procedure. If the complaint is not technically rejected, then its merit is evaluated, i.e. the complaint is either accepted or rejected. When the Commissioner determines that a complaint is justified, he/she shall order the public authority to allow free access to information of public importance. The complaint procedure shall be completed when the authority allows the applicant free access to sought information before the issuance of the decision, or when it responds to the Commissioner's request. The procedure may be terminated if the applicant revokes the complaint in which case a decision on complaint revocation shall be issued (same as the decision on complaint rejection). The Commissioner may issue, upon notification or *ex officio*, a decision stating that the public authority did not fulfill its obligations

under this Law and order measures to be taken, allowing the public authority to issue a prior statement. This Commissioner's competence is used in cases which are not subject to complaint. The same competence does not apply to the highest state authorities when citizens, seeking remedy for their actions and non-actions, must lodge complaints directly with administrative court. An administrative dispute may be lodged against a Commissioner's decision. An administrative dispute lodged in relation to the right to free access to information of public importance is urgent for arbitration (Article 27 of the Law on free access to information of public importance). The Commissioner's decisions shall be binding, final and enforceable. Administrative enforcement of Commissioner's decisions is conducted by the Commissioner by an enforcement measure, i.e. monetary fine, based on the Law on general administrative procedure, except if otherwise prescribed by this Law. An administrative enforcement of the Commissioner's decision is not subject to a complaint. If the Commissioner cannot enforce his/her decision, this enforcement shall be procured by the Government, upon Commissioner's request, by applying the measures from the scope of its competences, i.e. by procuring the enforcement of Commissioner's decisions using direct enforcement measures.

5. Concluding remarks

Today, a great majority of countries worldwide have an institution of ombudsman. In addition to the ombudsman of general type, there is an increasing number of special ombudsmen established to control a narrow segment of social life. It has been noted in theory that the existence of only one, general type of ombudsman, who is appointed to protect citizens' rights against state administration and public bodies' malpractice in all spheres of social life, is not sufficiently effective solution. The role of specialized ombudsman is to protect just one category of citizens in a certain field of social life, for example, the children, paying a closer attention to their needs and securing better protection of their rights. Some specialized ombudsmen are selected in the same way as the general type of ombudsmen, but some are selected in another way. The ombudsmen who are appointed by certain public administration bodies or even by public departments, are in charge of resolving complaints of the citizens who use the services offered by the same bodies who appointed them and in this case we are speaking about special public law ombudsmen of internal type. In the legal system of the Republic of Serbia there is a number of special ombudsmen of internal type including

the Protector of Patients' Rights, which, for example, also exists in Austria and Finland. However, an internal type of ombudsman has one weakness, or a flaw, which lies in his/her limited independence compared to public law ombudsmen of external type, since they are supposed to control the body which appointed them. In this paper, the authors have placed the focus on the position of one special public law ombudsman of external type in the Republic of Serbia which in this country bears the name: Commissioner. It is the Commissioner for information of public importance and personal data protection. We would like to note that in Serbia there is also a Commissioner for protection of equality. Although the Commissioner's work is independent, same in the case of the Protector of Citizens, this Commissioner, as an inspection body, answers for his work to the National Assembly which is in charge of their appointment and revoking. The work of this Commissioner is governed by the rules of the Law on general administrative procedure in all the situations which are not regulated by specific laws. By the way, in theory, independent inspection bodies in the Republic of Serbia, in addition to two Commissioners, also include: the Protector of Citizens, Republic Commission for the protection of rights in public procurement procedures and the Agency for preventing corruption. The differences between these independent control bodies lie in their different competences and authorities. In this paper the authors have pointed out to various legal acts and documents issued by the Commissioner for information of public importance and personal protection data, as well on the legal effects and obligations they may entail. Since in the aforementioned group of independent control bodies, the Protector of Citizens is characterized as an ombudsman of general type, i.e., a public law ombudsman of external character, then this Commissioner is an example of a special ombudsman of internal type. As for the legal acts and documents they issue, we should here point to their difference of procedural nature. Namely, the Commissioner for information of public importance and personal data protection has the authority to act as a body of second instance in administrative proceedings and his/her decisions are final and binding. The Protector of Citizens also issues recommendations, but they are not legally binding and cannot be appealed or be subject to control in an administrative dispute. The difference between analyzed ombudsmen also lie in the number of subjects they investigate and control. The Protector of Citizens has the power to control the legality and regularity of the work of administrative authorities and to establish violations resulting from acts, actions or failure to act by administrative authorities, if they are violations of the state laws, regulations and other general acts. However, the Protector of Citizens does not have the

authority to control the work of the National Assembly, the President, the Government, the Constitutional Court, other courts and public prosecutors' offices. If we analyze the competences of the Commissioner for information of public importance and personal data protection, they have a broader scope in comparison to the scope of authorities of the Protector of Citizens, in terms of the number of subjects they control. Namely, based on the Law on free access to information of public importance, the public authorities the Commissioner has the competence to control, are also those which the Protector of Citizens cannot control, as well as the autonomous provincial and local government bodies, the organizations tasked to perform public affairs and legal entities which are in terms of ownership, predominantly state-owned entities since they are established by the state and, to a larger extent, are financed by the state. Bearing in mind that the work of the Commissioner for information of public importance and personal data protection is also governed by the Law on personal data protection, his/her competences, based on this Law, are even more exclusive, since the circle of subjects which the Commissioner controls under this Law includes data controllers and processors, which can be both natural and legal persons, or a public body which processes personal data.

In the country in which the influence of political parties, i.e. the ruling coalition of parties, on all segments of social life is very large, in the present institutional framework it is difficult to preserve the factual independence of specialized ombudsmen. Namely, the election of all control bodies depends on the parliamentary majority including the proposal of candidates for the body members or leaders. In theory, professor Marko Davinic has already suggested that the proposal of candidates for the members of independent bodies should be removed from the parliament and that, same as in case of the High Judicial Council and the State Prosecutorial Council, we should form a high council of control bodies that would ensure and guarantee their independence and autonomy. "In this way the candidates would be proposed by an independent body while their interviewing and appointment could remain in the parliament. As for the election of the members of such council, we believe that the authority to propose these candidates should be given to the aforementioned independent bodies (the High Judicial Council and the State Prosecutorial Council), while their election should be performed in the parliament. In this way, the appointment of the control bodies' leaders would not be under political influence which would prevent the appointment of "suitable" candidates and leave the posts for the most capable professionals. It is obvious that setting up a high council of control bodies would mean the change of the Republic of Serbia Constitution. Also, all the independent

bodies would continue to answer for the quality of their work to the National Assembly by submitting regular and special reports. However, the systemic laws should regulate the obligation of the National Assembly to discuss these reports at its plenary sessions and issue periodical reports how public administration bodies have responded to the recommendations listed in these reports” (Davinić, 2018, p. 298).

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POSEBNI OMBUDSMANI SA OSVRTOM NA POLOŽAJ POVERENIKA ZA INFORMACIJE OD JAVNOG ZNAČAJA I ZAŠTITU PODATAKA O LIČNOSTI

APSTRAKT: Pored širenja ombudsmana opšteg tipa, došlo se do shvatanja da je za zaštitu prava građana potrebno postojanje i tzv. specijalizovanih ombudsmana, koji svoju aktivnost na kontroli uprave i zaštiti prava građana fokusiraju na pojedine oblasti društvenog života. Tako postoje javno-pravni ombudsmeni eksternog tipa, interni ombudsmeni i privatno-pravni ombudsmeni. U radu je posebna pažnja posvećena povereniku za informacije od javnog značaja i zaštitu podataka o ličnosti u Republici Srbiji koji, u stvari, predstavlja jedan poseban ombudsman javno-pravnog karaktera i eksternog tipa. Reč je o posebnom ombudsmanu, koji ima veoma kompleksnu nadležnost, koja je utvrđena Zakonom o slobodnom pristupu informacijama od javnog značaja i Zakonom o zaštiti podataka o ličnosti. Autori analiziraju nadležnosti ovog posebnog ombudsmana.

Ključne reči: ombudsman, posebni ombudsmeni, poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti.

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