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Draft Law on the Ombudsman

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Draft Law on the Ombudsman¹

Article 1

- (1) The Ombudsman promotes respect for human rights² and monitors their observation by all public bodies, including the President, the Saeima and the Courts only insofar as they act administratively, as well as by private bodies and private persons.
- (2) The Ombudsman is empowered to monitor, to investigate, to report, to recommend, to admonish, to publish and to train. The Ombudsman may initiate political, administrative and court proceedings.³
- (3) The President nominates,⁴ and the Saeima, by a majority of no less than 51 votes,⁵ elects the Ombudsman for a term of 12 years.⁶ The Ombudsman shall cease to hold his office⁷ subject to the same conditions as a Judge of the Constitutional Court.⁸

¹ This draft originates from a “Draft Law on the Ombudsman’s Office” which has not yet been approved by Parliament.

² This includes the Ombudsman’s function as the national supervisory authority for personal data protection according to Directive 95/46/EC.

³ Paragraphs 1 and 2 of Article 1 provide duties and powers (*Tiesībsarga pienākumi un tiesības*) of the O. in brief words.

Human rights must be protected against any infringement by public authorities. Therefore, areas may be excepted from the competence of the O. only for compelling constitutional reasons. Specifically, the following areas are outside of the scope of the O’s responsibility: Courts of law (operating in their judiciary function), the *Saeima* (in its legislative, politically deliberative and controlling functions), and the President (in his prescinded, non-administrative role). The legislature is controlled by the constitutional court, by the public and, in itself, by the parliamentary opposition; the judiciary is controlled by itself (courts of higher instances), and, in an informal but nevertheless effective way, by the legal community.

As different from that, the Cabinet of Ministers and the branches of public administration that are under its authority are necessarily subject to the control of the O. Consequently, the O. must on his part be completely free from any kind of influence or supervision by the Cabinet of Ministers; he must be completely independent from the Cabinet of Ministers (acting with complete independence in exercising his functions). It follows from this that, according to Article 58 of the Latvian Constitution, the O. may not issue administrative acts. [Further deliberations on the meaning of the term “pārvalde” in Art. 58 of the Latvian Constitution will follow.]

On the other hand, the above variety of instruments in the O’s hands is more effective than the power to issue administrative orders, with its inevitable procedural restraints.

In this way, the principle of the fundamental uniformity of the administrative institutions of the state, which are endowed with the power to issue administrative acts, is respected. The O. is allotted the distinct role of an admonisher, investigator and stimulator of political discussions (and administrative or judicial controls), in accordance with the principle of separation of powers.

By this, the O. is endowed with the competences and powers of the supervisory authority for personal data protection rights according to Art. 28 of Directive 95/46/EC, as well as with complete independence in exercising his functions, and with investigative powers, effective powers of intervention (such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20 of the Directive, and ensuring appropriate publication of such opinions, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions), and the power to engage in legal proceedings.

As far as the supervision of private data processors is concerned, an institution of the public administration which is subsidiary to the Cabinet of Ministers, such as the Minister for Special Assignment for Electronic Government Affairs, should be authorised (preferably, by way of a provision of the existing Personal Data Protection Law) whenever necessary to issue administrative acts to private parties on the basis of an information or recommendation of the O. In the event that this institution would not follow the recommendations of the O., the latter may formally admonish the matter. Competences with regard to the supervision of data protection provisions by private parties are thus divided. This solution stops short of ruling out any competence of the O. for the private sector, while at the same time leaving the instrument of the administrative act exclusively in the hands of the Cabinet of Ministers and those institutions of public administration that are subordinate to it. Apart from the fact that to put in place this model, no constitutional amendment is required, an additional advantage can be seen in the fact that private parties would perceive the O. as an adviser and advocate of their cause in the first place, rather than as a superintendent. Furthermore, it is expected that this model will reduce the volume of administrative acts with regard to data processing operations in the private sector to an essential minimum.

- (4) Upon assuming his duties, the Ombudsman shall take the following solemn oath or pledge at the Saeima:
“I, , upon assuming the duties of the Ombudsman, am aware of the responsibility that is entrusted to me and swear (solemnly pledge) to be fair and just in defending individuals’ rights and freedoms in compliance with the Constitution and the laws of the Republic of Latvia, as well as with the relevant international agreements that are binding on the Republic of Latvia.”
- (5) The Ombudsman shall have a stamp, which shall comprise the picture of the small supplemented national coat of arms and the title of the Ombudsman.
- (6) The Ombudsman is accompanied by a Deputy who is nominated, elected and released in the same way as the Ombudsman.⁹

Article 2¹⁰

- (1) The Ombudsman shall be¹¹ independent and subject only to the law. Nobody shall have the right to influence the Ombudsman in fulfilling his duties. He is a State control institution, but not a State administrative institution in the sense of Art. 58 of the *Satversme*.
- (2) The Ombudsman shall be under the disciplinary supervision of the President, insofar as his independence remains unaffected.¹²

⁴ In view of the nomination by the President, no listing of personal qualifications is necessary; see further footnote 11.

⁵ This (as well as the duty to report to Parliament, see Art. 4) is to ensure the democratic legitimation of the O. in accordance with the *Satversme* (Arts. 1 and 2).

⁶ The O’s office term should be long enough to warrant continuity, and to promote the office holder’s independence. In case of a significantly shorter office term (e.g. four years), re-election should be possible, to ensure that the office is held by a competent person. The shorter the O’s office term, the more difficult it will be to safeguard his independence (which can only be upheld as long as the O. can work at a certain distance from the centre of power). Yet, these are practical considerations; there are no clear provisions of EU law with regard to the O. office term.

⁷ This provides conditions only for the removal, not for the suspension of the O. Suspension is excluded, for lack of necessity.

⁸ The grounds for the O’s removal from his office must be highly restricted in order to ensure his independence, which is vital for the exercising of the O’s functions.

⁹ The O. is endowed with a broad range of powers and duties. Therefore, the O. will benefit from the possibility to share some of his responsibility with his closest collegial collaborator, a permanent Deputy O. A strong team of two persons mandated by Parliament will introduce an element of co-responsibility, and it will also serve to extend the scope of specialist skills at the avail of the management of the O’s office.

¹⁰ There is no need for an immunity clause. Even minor delicts might be turned into political affairs. As a result, the O. would be weakened, not strengthened by such an immunity clause.

The O. in his personal and public conduct should be subject to the rule of law, as every other citizen, too.

¹¹ Acting independently in one’s official function is only possible if one *is* independent in the first place. There is no complete functional independence without personal independence. As the office will always be held by a natural person, it is crucial to make sure in the first place that only suitable candidates who demonstrate the necessary personal qualifications are nominated for the office. The candidate’s nomination by the President is a procedural means to ensure exactly this. Though the law must foresee certain mechanisms to “control the controller” (see footnote 12), he must, on the other hand, be free. The question must be asked, *quis custodiet ipsos custodes?* On the other hand, he must be free from any fears that he may eventually suffer personal disadvantages from his professional conduct (see Art. 3 Paragraph 1). In any event, only an O. who is also personally independent is capable of running his office in an independent manner. This is evident from all pertinent legal literature and official statements of the EU Commission on this subject, without exception.

¹² Notwithstanding his independence, there have to be some elements of control of the O. (The question has to be asked, *quis custodiet ipsos custodes?*) With regard to balancing the O’s power, the present law foresees precautions in nomination and election (Art. 1 Para 3); the O’s duty to report (Art. 4 Para 2, and Art. 11 Para 1); the fact that he can issue administrative acts only by reverting to other; his duty to take part in the proceedings of the relevant international bodies (Art. 12); the possibility of a legal scrutiny of the O’s statements, especially in the case of Art. 7 Para 1 Subparagraph 1; finally, he is restricted to acting formally or publicly, i.e. he may not revert to ‘secret diplomacy’.

- (3) The Ombudsman may not be a member of any political party or organisation, any trade union or any business. He may not exercise any other occupation except scholarly or artistic.¹³

Article 3

- (1) The Ombudsman is entitled to a decent salary, including social guarantees, and a sufficient personnel, premises and technical equipment. He administers his own budget in accordance with Parliament decisions.
- (2) The Ombudsman's staff are State civil service officials.

Article 4

- (1) The Ombudsman acts on his own accord, or on the basis of complaints. He is entitled to address the President, the Saeima, its Committees and Sub-Committees.
- (2) The aforementioned, or each individual Member of Parliament, are on their part entitled to require the Ombudsman to report in due form on any aspect of his work, without detriment to his duty to observe human rights.¹⁴

Article 5

The Ombudsman is entitled to freely enter any plots of land, buildings or premises and inspect any files or data bases without any special reason, insofar as this is not prohibited by the right to inviolability of one's private life, home and correspondence. He may interrogate any person, also confidentially – face to face. Every person must answer the Ombudsman's questions truthfully and without hesitation. The private person's legal right to remain silent remains unaffected, as well as professional confidentiality rules. Whenever a public official is called upon to disclose any type of information to the Ombudsman, any confidentiality rules otherwise applying to him as a public official shall be disappplied.

Article 6

The Ombudsman must respect State secrets, as far as this is necessary to protect vital interests of the Republic of Latvia. In case of doubt, he consults the parliamentary Committee of the Saeima which is competent for questions of personal data protection.

Article 7

- (1) The Ombudsman is entitled to engage in legal proceedings in all courts of law, in his own name or on behalf of others. He may lodge formal complaints with any institution of the public administration, thus becoming himself a party to the relevant complaint. Court and administration fees are waived for the Ombudsman. All bodies of public administration may invite the Ombudsman to participate in the investigation of a formal complaint, subject to his agreement.

¹³ These personal restrictions serve to ensure the O's independence.

¹⁴ Since the Parliament's supervision of the O. is ultimately intended to protect human rights, it is important that the *Saeima* at all times respects the O's duty to observe the human rights of individuals when reporting to Parliament (e.g. non-disclosure of the names of victims etc.).

- (2) The Ombudsman may refuse to give evidence about matters of his professional knowledge in court, or in administrative proceedings without giving reasons.

Article 8

- (1) All institutions of the public administration must fully co-operate with the Ombudsman, including the provision of administrative aid, as the case may be, also under his auspices, and furnish him any information that he may require to fulfil his official duties.¹⁵
- (2) The Ombudsman may contract external experts.
- (3) All institutions of the public administration shall actively participate in trainings organised by the Ombudsman.

Article 9

The Ombudsman is entitled to sit in and to speak at any session of the Saeima or any of its Committees and other bodies. He is to be appropriately consulted by the Saeima or the Cabinet of Ministers when drawing up laws, administrative measures or regulations relating to the protection of individuals' rights and freedoms; the Ombudsman may publish his views on those issues.

Article 10

- (1) Every person may directly contact the Ombudsman or his staff. This possibility must not be conditioned on giving any special reasons. Furthermore, a person must not suffer any disadvantages for contacting the Ombudsman, except for knowingly providing false or misleading information.
- (2) The Ombudsman, or, with the Ombudsman's authorisation, any member of his staff, has the right to remain silent about his official affairs in court or administrative procedures. In the same situation, the Ombudsman or his staff cannot be compelled to disclose any data which they have acquired in the course of their official conduct. Paragraph 2 of Article 4 remains unaffected.

Article 11

- (1) The Ombudsman publishes an annual report on his activities; he may also publish any views that he may hold on relevant questions within his competence.
- (2) The Ombudsman may address and inform the public in any way, without detriment to his duty to respect and inform the human rights of individuals, and to Article 6 of this law.
- (3) Where the Ombudsman does not address the public or act within his official capacity, he is bound by professional secrecy obligations.¹⁶

¹⁵ The O. is confronted with a multitude of tasks that require different types of specialist knowledge. To hold all of this permanently available in the O's office would be too expensive. Thus, he must have the possibility to avail of experts from other parts of the public administration (free of charge), or from the private sector (on a contractual basis – see Para 2), as the case may be.

¹⁶ The O. has to carry personal responsibility for his public statements. He must not damage his office by "secret diplomacy". One of the functions of publicity is to control the O.

Article 12

The Ombudsman represents the Republic of Latvia in the relevant supranational and international bodies in the areas of human rights.