

# **Ombudsman institutions in the candidate countries on the road to EU membership: a comparative view**

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## **Abstract**

*The European Union has been attaching great importance to the values of democracy and human rights in its external policy, including to its relationship with candidate countries seeking membership in the Union. In accordance with the significance of the values stipulated by the Copenhagen political criteria, as well, it urges the countries in question, for example, to build or strengthen national oversight mechanisms that are tasked to promote the democratic governance of the state and protect human rights. This paper examines one of those oversight mechanisms – ombudsman institutions – in the candidate states conducting accession negotiations with the EU. It specifically scrutinises a fundamental characteristic for the effective functioning of these institutions – the jurisdiction and powers granted by their statutes. Relying on the findings to be noted, the paper also seeks an answer to the question of which ombudsman institution(s) score(s) better in terms of effectiveness and thus play(s) a more significant role in the improvement and consolidation of democracy and protection of human rights in its or their countries, and as a result, contribute(s) more to the fulfilment of Copenhagen political criteria during the EU accession processes.*

*Keywords: European Union, European Union candidate countries, Ombudsman institutions, jurisdiction and powers*

## **1. Introduction**

The European Union (EU), which originated as a supranational organization targeting economic integration, started to take the path of political integration as well, particularly since the beginning of the 1990s. The Maastricht Treaty, which paved the way for political integration, for instance, clearly reveals that the Community went beyond its original economic goal, and its political passion came to the forefront. The Treaty further illustrates that the human rights and democratic principles were

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integrated into the Union's external policies<sup>1</sup>. As a result, the Union's foreign policy has increasingly turned towards value-based issues such as democracy, governance, and human rights (Landman and Larizza, 2010, p. 3).

The development in question also manifests itself evidently in the Copenhagen summit, where the EU leaders emphasized the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and promotion of minorities as the first criterion to be fulfilled by states pursuing EU membership. The Union, thus, urged those states to consolidate democracy and protect human rights.

One of the key elements for the consolidation of democracy and protection of human rights is the existence of national institutions which are responsible for monitoring and developing the good governance of the state as well as the protection and promotion of human rights. Among those national institutions, the ombudsman institution is a case in point, which can be considered as an essential institution guaranteeing democracy, the rule of law and human rights. This institution designed to monitor illegality, unfairness, and injustice in public administration (Oosting, 1999, p. 1) and to defend citizens from maladministration by the public authority (Beco, 2007, p. 331) may serve as a control mechanism on the exercise of power by state authorities via a system of checks on the realisation of human rights. In short, the institution of ombudsman can play a significant role in the improvement and consolidation of democracy and protection of human rights, hereby contributing to the fulfilment of the aforementioned Copenhagen criterion.

In modern society, the powers of the ombudsman are broad and extended to self-initiation of investigations, supervision of government agencies, conducting research and recommending the revision of the laws relating to administration with a view to bringing about good governance (Abdo, 2002, p. 79). Both the jurisdiction and powers legally granted to these institutions determine the extent to which it prevents maladministration and promotes good governance; contributes to the democratic nature of the state; narrows the gap between the government executing the public administration and the civil society, and implements the international human rights at the national level.

This paper examines the ombudsman institutions in the candidate countries in the negotiation process with the EU: Iceland, Montenegro, Serbia and Turkey.<sup>2</sup>

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<sup>1</sup> The article 130 u/2 of the Treaty (officially; Treaty on European Union) clearly states that community policy in the sphere of development cooperation shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

<sup>2</sup> Even though the Former Yugoslav Republic of Macedonia and Albania are currently two other candidate countries, their accession negotiations with the EU have not started yet. In addition, Bosnia and Herzegovina and Kosovo are just potential candidate countries. Thus, they are all beyond the scope of this study.

It will begin with a brief presentation on the jurisdiction and powers of those institutions in EU member states, which is regarded as one of the crucial indicators for their effectiveness. Then, the paper will scrutinise the effectiveness of those institutions in the EU candidate countries mentioned above. How effectively the institutions in question operate in practice is beyond the scope of this study since it requires another survey. Instead, the paper will explore the effectiveness of those institutions relying on the jurisdiction and powers granted by their statutory provisions. The findings for the effectiveness of the institutions in question also shed light on the question of which country or countries play(s) a more significant role in the improvement and consolidation of democracy and protection of human rights through its or their ombudsman institution(s) and thus further meet(s) the requirements of Copenhagen political criteria.

## **2. Jurisdiction and powers of Ombudsman institutions**

The modern ombudsman institution originates in Sweden, where the first Parliamentary Ombudsman was elected in 1809 (Söderman, 2004, p. 1; Reif, 2004, p. 125; Tai, 2010, p. 1; Ayeni, 2000, p. 2; Modeen, 2000, p. 315; Gammeltoft-Hansen, 2005, p. 13). Over a century later and starting in the neighbouring countries, the institution gradually expanded its boundaries and spread to the other countries towards the end of the 20th century. Today, all EU countries have incorporated the ombudsman institution into their democratic governing structures as an integral part of public administration.

The extent to which the ombudsman institutions will be effective in building good governance and protecting human rights depends on a series of factors. Among all those factors confirmed by both international organizations (United Nations Centre for Human Rights, 1995, pp. 4-6) and scholars (Reif, 2000, p. 15; Reif, 2004, p. 396), an essential indicator is the extent of the jurisdiction and the adequacy of powers granted by their legal foundations.<sup>3</sup> In the literature, the ombudsman institutions are often divided into two models, one whose main task is oversight of government or public authority, and the other,

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<sup>3</sup> The United Nations has put forth six 'effectiveness factors', which are; independence; defined jurisdiction and adequate powers; accessibility; cooperation; operational efficiency, and accountability. Reif, on the other hand, furthers these effectiveness factors and incorporates them in a larger group including the democratic governance structure of the state; the degree of independence of the institution from government; the extent of the institution's jurisdiction; the adequacy of the powers given to the institution, including the power to investigate; the accessibility of the institution to members of the public; the level of cooperation of the institution with other bodies; the operational efficiency of the institution; the accountability of the institution, the personal character of the person(s) appointed to head the institution; the behavior of government in not politicizing the institution and in having a responsive attitude toward its activities; and the credibility of the office in the eyes of the populace.

which primarily undertakes the role of protecting and promoting human rights while monitoring government administration. In general, the former one is called “classical ombudsman” whereas the latter is called “hybrid ombudsman” in the literature (Reif, 2004).

The classical ombudsman is defined as an institution empowered with restricted powers like investigating administrative conduct impartially, making recommendations and issuing annual and special reports (Reif, 2004, pp. 3-4; Kucsko-Stadlmayer, 2008, p. 61). As to the hybrid model, its specific measures of control exceed those restricted powers and serve the observance of human rights (Tigerstrom, 1998, p. 7; Kucsko-Stadlmayer, 2008, p. 64). In contrast with the former model, which has traditionally concentrated on monitoring the legality and fairness of public administration, the hybrid model institutions do not act as mere “administrative watchdogs”, being also given an explicit mandate and specific powers to protect and promote human rights (Pohjolainen, 2006, p. 18).

In order to ensure its effectiveness, it is important to assign the ombudsman institutions broad jurisdiction and powers, which should be defined precisely in its legal framework. The jurisdiction of the institution should be as wide as possible including the police, security forces, defence forces, prisons and other detention centres, which are often the sources of human rights problems and require civilian-oversight mechanisms. Also, whether the institution will have jurisdiction over the courts or not should be considered. This may be possible in a more limited way as in the cases of unreasonable delays in rendering decisions. Last, the institution should also be given adequate powers including investigation, recommendation, education and so on (Reif, 2000, p. 16).

Considering the relevant institutions in the EU member states, it is noted that there is no uniform model with respect to their jurisdiction and powers. However, in general, since the Ombudsman’s main task is the control and oversight of administration, the jurisdiction of the institution covers the executive branch of the state including a wide variety of government departments, agencies, state corporations and their administrative officials, some sensitive places or people such as: prisons, detention centres, customs and immigration centres, military forces, police and so on. In most member states, on the other hand, particular domains of the administrative branch are excluded from the ombudsman’s jurisdiction. These domains primarily include the head of state (e.g. Hungary and Netherlands) and the government (e.g. Cyprus and Romania), the intelligence service (e.g. France and Greece), armed forces (e.g. Malta and Ireland) and the police (e.g. Belgium and Ireland) (Kucsko-Stadlmayer, 2008, pp. 498-499).

The legislature is invariably beyond the ombudsman’s jurisdiction (Reif, 2004, p. 3). Also the judiciary and, as noted above, the policy-making element of the executive branch are usually excluded from the jurisdiction of the ombudsman institutions (Reif, 2000, p. 4). However, the institutions in just few member states (e.g. Finland and Sweden) are granted with an extensive control of the judiciary – even of

the substance of jurisprudence. When compared with the other EU member states, this is regarded as the most intensive control of the judiciary exercised by ombudsmen. Some ombudsman institutions in other member states (e.g. Slovakia and Slovenia) have partial control over the judiciary especially in cases of “undue delay” and “evident abuse of authority” (Kucsko-Stadlmayer, 2008, pp. 26-27).

As for the powers of the institutions in question, almost all ombudsman institutions in the EU countries have traditional powers of investigation, recommendation and reporting, the typical core functions of a classical ombudsman as included in the definition by the International Bar Association (1974).<sup>4</sup>

In general, first of all, the ombudsman is empowered to investigate a case. While the intervention of the ombudsman in most EU countries is triggered either as a result of a complaint or *ex officio* (e.g. Denmark and Malta), in few EU countries, the intervention in question is triggered merely by means of a complaint (e.g. Germany and United Kingdom). The investigatory power of an ombudsman can cover access to related documents (e.g. Belgium and Estonia); interrogating public servants of the examined institution (e.g. Hungary and Spain); contacting specific incumbents (e.g. Slovenia); participating in oral debates of cooperative organs (e.g. Bulgaria) or attending oral hearings of the agency (e.g. Czech Republic and Sweden); having access to official buildings and rooms including prisons and meeting and talking to the inhabitants and inmates (e.g. Latvia and Lithuania); and inviting and examining private persons as witnesses (e.g. Netherlands and Portugal) (Kucsko-Stadlmayer, 2008, pp. 40-43).

Another typical power of the ombudsman is to give recommendation to the administrative bodies, which is considered as a characteristic instrument of the institution. The addressee of the recommendation may be the superior agency like the Minister concerned in the matter under investigation (e.g. Belgium and Greece) as well as the controlled administrative unit (e.g. Croatia and Hungary). After the recommendation given by the Ombudsman, the institution under discussion may be supposed to give reaction. In this case, the ombudsman can, for instance, even demand a written comment from the administrative unit (e.g. Denmark and Finland). Furthermore, the ombudsman can impose sanctions on the related administrative unit in case of lacking in or insufficient reaction to the recommendation. Most commonly, the sanction in question may manifest itself as notification to a superior agency (e.g. Estonia and Slovakia); reports to Parliament (e.g. Cyprus and Ireland) and publishing the case in the media (e.g. Croatia and Slovenia) (Kucsko-Stadlmayer, 2008, pp. 44-47).

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<sup>4</sup> The International Bar Association (IBA) defined the classical ombudsman as an office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports.

The last characteristic power of the ombudsman is reporting, including submitting both annual activity reports on their activities and special reports on specific issues especially to Parliaments. Granting the ombudsman with such a power serves the purpose of rendering account of his activities, grievances transparent to Parliament and imposing a form of soft sanction in case of non-compliance with recommendations and lacking assistance in investigating and clearing up affairs. The power of reporting involves making both the annual and the special reports on specific cases public, as well as thus making its activities and recommendations transparent to the general public (Kucsko-Stadlmayer, 2008, pp. 48-49). The reports are considered as persuasive tools for ombudsmen to use in effecting legal or political reform (Reif, 2011, p. 303).

Beside those traditional powers, many ombudsmen have been endowed with additional powers in order to strengthen their effectiveness. Those extra powers include, for instance, filling an application before the constitutional court to examine the constitutionality of laws, regulations (e.g. Croatia and Portugal); bringing the matter before other courts (in particular, administrative courts) in case of detection of violation of law (e.g. Poland and Romania); initiating criminal (e.g. Finland and Sweden) or disciplinary (e.g. France and Greece) proceedings themselves or at least recommending the initiation of such (e.g. Croatia and Cyprus), and education and awareness raising in the field of human rights (e.g. Latvia and Portugal) (Kucsko-Stadlmayer, 2008, pp. 51-57).

### **3. Candidate countries in the negotiation process with the EU**

Since the foundation of the EU as European Coal and Steel Community in 1952, the Union has gradually expanded its boundaries. By means of past enlargement, it has transformed from six founding members into twenty eight members. Apart from those member countries, there are currently four candidates, which have been conducting accession negotiations with the EU, thus seeking membership in the Union: Iceland, Montenegro, Serbia and Turkey. Below, we will present the investigation of the relevant institutions in those candidate countries relying on their jurisdiction and powers.

#### **3.1. Iceland**

Although the relationship between Iceland and EU dates back to much earlier years, for instance, membership in the European Free Trade Association (EFTA) since 1970, European Economic Area (EEA) since 1994 and Schengen Area since 2001, it applied to join the EU in 2009. It was only a year later when the Council decided to identify Iceland as a candidate country and also open negotiations with it.

Even though its relationship as a candidate country with the EU is very recent, its ombudsman institution is the oldest one among the ones in the candidate

countries in question. The Icelandic Ombudsman (*Umboðsmaður Alþingis* – The Parliamentary Ombudsman) was originally established in 1987 by *Act No. 13/1987*, which was then revoked by the adoption of a completely new *Act No. 85/1997 on the Althing Ombudsman* (henceforth AAO). The latter act, thus, forms the institution's current legal foundation.

The role of the Icelandic Ombudsman is to monitor, on behalf of *Althing*, (Icelandic Parliament), the administration of the state and local authorities and to safeguard the rights of the citizens *vis-a-vis* the authorities. It is also obliged to ensure the maintenance of equality in public administration (AAO; art. 2). The jurisdiction of the Ombudsman covers the state and local administration as well as the activities of private parties insofar as they have been vested by law with public authority to decide on individuals' rights and obligations. However, the proceedings of the Parliament and its bodies as well as the courts of law are excluded from the Ombudsman's jurisdiction (AAO; art. 3).

As for its powers, the Ombudsman is, first of all, empowered to investigate a case. It might take up such cases on its own initiative as well as following a complaint (AAO; art. 4, 5). Similarly, it may subject the activities and procedures of an authority to a general examination (AAO; art. 5). Its investigatory power encompasses demanding from the authorities information and written explanations including reports, documents, minutes and any other items with a bearing on the case; summoning officials of state and local administration for hearings on matters which fall within its jurisdiction as well as giving oral information and explanations regarding individual cases; free access to all premises of the authorities in order to carry out investigations for its work; causing a person to be summoned before a district judge to give evidence on particulars which the Ombudsman considers to be significant and engaging the help of specialists when called for and to secure such specialised data as it needs. On the other hand, on the conduct of an investigation, demanding information which concerns state security, or on secret foreign affairs is exempted from its investigatory power, except with the permission of the relevant cabinet minister (AAO; art. 7).

Following the investigation, if the Ombudsman concludes that an act of a public authority conflicts with the law or is otherwise contrary to good administrative practice, it may issue an opinion. It may also address to such authority a recommendation to make amends. Where a complaint involves a legal dispute which should, in principle, be decided by the courts of law, the Ombudsman may conclude the matter by pointing this out. The Ombudsman may recommend to the Minister of Interior that legal aid be accorded where the former deems appropriate that a case within its scope should be put to the courts of law. Where the Ombudsman becomes aware of a breach in office, punishable by law, he may notify the appropriate authority (AAO; art. 10). The Ombudsman may

even notify the Parliament, the relevant cabinet minister, or the related local authority on the legal flaws in current legislation or public rules (AAO; art. 11).

Last, the Ombudsman is also empowered to submit both annual reports on its work during the preceding calendar year to the Parliament and special reports to the Parliament or the relevant cabinet minister, when it becomes aware of major errors or transgressions on the part of a public authority. In cases involving local authority officials, the Ombudsman may submit a special report to the authority concerned (AAO; art. 12)

### **3.2. Montenegro**

Montenegro applied to join the EU in 2008, just two years after it had declared independence from the State Union of Serbia and Montenegro. Based on the favourable opinion issued by the Commission, it was identified as a candidate country by the Council in 2010 and has been negotiating on full membership with the Union since 2012.

The Ombudsman of Montenegro (*Zaštitnik ljudskih prava i sloboda Crne Gore* - Protector of Human Rights and Freedoms of Montenegro) was originally established in 2003 by *Law No. 41/2003*. This law was then repealed with the adoption of the new *Law on the Protector of Human Rights and Freedoms of Montenegro No. 01-966/2* of 29 July 2011 (henceforth LPHR) which thus constitutes the current legal foundation of the institution.

The Ombudsman's role is to protect human rights and freedoms guaranteed by the Constitution, law, ratified international human rights treaties and generally accepted rules of international law as well as to prevent discrimination, torture and other forms of inhuman or degrading treatment or punishment. This protection and prevention is for the act, action or failure to act of state bodies, state administration bodies, bodies of the local self-administration and local administration, public services and other holders of public powers (LPHR; art. 1, 2). The Ombudsman has, to a certain extent, authority over the judiciary, as well. His authority on the courts is restricted to the cases of delay in the proceedings, abuse of procedural authorizations or failure to execute court decisions (LPHR; art. 17).

As for its powers, the Ombudsman may initiate an investigation following a complaint as well as on its own initiative (LPHR; art. 28). During the investigation, the authorities fallen within the jurisdiction of the Ombudsman are obliged to cooperate and provide assistance (LPHR; art. 38). The head or the person managing the authority is obliged to make available all data from the jurisdiction of the authority he is managing, regardless of the degree of confidentiality, as well as to provide unrestricted access to all premises, in accordance with the regulations governing data confidentiality and protection of personal data, and handling of the official files and documents (LPHR; art. 36). If the head or the person managing the authority fails to comply with the request within a specified period of time, he is obliged to inform the Ombudsman about



the reasons. Failure to comply with the request is considered obstruction of the work of the Ombudsman, who can notify the immediate superior authority or the Parliament or inform the public (LPHR; art. 37).

For the purpose of examining the violation of human rights and freedoms, the Ombudsman may invite any person as a witness or hire an expert from the relevant field. Those persons are required to respond to the invitation and are entitled to remuneration (LPHR; art. 40). Even the President of Montenegro, the President of the Parliament, the President and the members of the Government of Montenegro, the President of the Municipality, the Mayor of the Capital City are to receive the Ombudsman upon its request (LPHR; art. 23)

Upon completion of examining the violation of human rights and freedoms, the Ombudsman is entitled to issue an opinion on whether, how and to what extent the violation of human rights and freedoms occurred. When the Ombudsman finds that the violation of human rights and freedoms occurred, the opinion may also contain a recommendation on what needs to be done to remedy the violation (LPHR; art. 41).

The head or the person managing the authority on whose work refers the recommendation is obliged to submit the report on actions taken to carry out the recommendation. If the head or the person managing the authority fails to comply with the recommendation within a specified deadline, the Ombudsman may inform the immediate superior authority, submit a special report or inform the public (LPHR; art. 42).

The Ombudsman may submit annual reports to the Parliament, which include the evaluation of the situation in the area of human rights and freedoms in Montenegro as well as recommendations and measures proposed by the Ombudsman for the improvement of human rights and elimination of perceived shortcomings. The Ombudsman may also submit to the Parliament a special report, if it deems that to be necessary for the protection of human rights and freedoms. The special report is to be available to the public (LPHR; art. 47, 48).

In addition to the traditional powers of investigation, recommendation and reporting noted above, the Ombudsman also holds some special powers. To give an example, the Ombudsman may initiate the adoption of laws, other regulations and general acts for harmonisation with internationally recognised standards in the area of human rights and freedoms. If the Ombudsman deems it necessary for the protection and promotion of human rights and freedoms, it may give an opinion on the proposal of the law, other regulation or general act (LPHR; art. 18).

The Ombudsman may also initiate a proceeding before the Constitutional Court for the assessment of conformity of laws with the Constitution and confirmed and published international treaties or the conformity of other regulations and general acts with the Constitution and law (LPHR; art. 19).

Additionally, the Ombudsman may submit the initiative for opening a disciplinary or dismissal procedure for the person whose work or failure to act

resulted in violation of human rights and freedoms. For misdemeanours prescribed in the founding law, the Ombudsman may also submit a request for initiation of misdemeanour proceeding (LPHR; art. 44).

The Ombudsman is designated as the institutional mechanism for protection from discrimination. Pursuant to his role, it can, for instance, initiate a court proceeding for the protection from discrimination or join the person who is exposed to discrimination in that proceeding as an intervener (LPHR; art. 27).

Last, the protection of human rights and freedoms is the Ombudsman's main mandate. The institution is charged with taking the required measures to protect human rights and freedoms. As a consequence of this, the powers of the Montenegrin Ombudsman have a direct link to the protection of human rights. How human rights and freedoms are realised in the related authorities underlie the exercise of Ombudsman's powers. The Montenegrin Ombudsman has not submitted an application to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights for accreditation as “a national human rights institution” yet.

### **3.3. Serbia**

Serbia was qualified as a potential candidate country for EU membership during the Council summit in 2003. It applied for membership in 2009 and was eventually granted the EU candidate status in 2012. It has been negotiating with the EU since January 2014.

The Serbian Ombudsman (*Заштитника грађана* – Protector of Citizens) was created in 2005 by the *Law on the Protector of Citizens No. 79/2005 and 54/2007* (henceforth LPC) making up the legal foundation of the institution.

The mission of the Serbian Ombudsman is to protect the rights of citizens and control the work of the state administration, the authority responsible for the legal protection of property rights and interests of the Republic of Serbia, as well as other agencies and organizations, enterprises and institutions entrusted with public authority (LPC; art. 1). However, the work of the National Assembly, President of the Republic, Government, Constitutional Court, courts and Public Prosecutor's Offices are outside the jurisdiction of the Serbian Ombudsman (LPC; art. 17).

As to the powers of the institution, the Ombudsman may, first of all, initiate an investigation following citizen complaints or on its own initiative (LPC; art. 24). The authorities under control have an obligation to cooperate with the Ombudsman and to provide access to the premises and make all the data available, which are of importance for the process that leads to an end of its preventive action, regardless of the degree of confidentiality, except when it is contrary to law. The administrative authority is obliged to respond to the demands of the Ombudsman, as well as to provide all requested information and documents within the time designated (LPC; art. 29). The Ombudsman has the right to interview any employee of the administrative authority, as well (LPC; art. 21).

Even the President of the Republic, the President and members of the Government, the President of the Assembly, the President of the Constitutional Court and officials in government are obliged to accept the Ombudsman's request (LPC; art. 23).

In addition to the right to conduct proceedings, the Ombudsman has the right to the provision of good offices, mediation and giving advice and opinions on matters within its competence, act preventively in order to improve the work of the administration and promotion of human rights and freedoms (LPC; art. 24).

If the Ombudsman finds that there are shortcomings in the work of administration, it can make a recommendation to the authority on how the perceived lack should be removed. The authority is obliged to inform the Ombudsman that it acted on the recommendation and eliminate the lack in question or to inform it on the reasons for not acting on the recommendation. If the authority fails to comply with the recommendation, the Ombudsman may notify the public, Parliament and the Government, and may recommend proceedings to determine the accountability of the official in charge of the administrative authority (LPC; art. 31).

The Ombudsman also has the power to regularly submit to the Parliament an annual report including information about the activities in the previous year, data on perceived shortcomings in the work of government as well as suggestions for the improvement of the status of citizens in relation to government authorities. The reports are to be made public through the website of the Ombudsman, the official gazette of the state and media. During the year, the Ombudsman may submit separate reports, as well, if necessary (LPC; art. 33).

As for the further powers granted to the Serbian Ombudsman, it is noted, first of all, that it is empowered to propose laws. If it considers that a violation of citizens' rights is due to the lack of regulations or believes that it is important for the protection of the rights of citizens, it can initiate the adoption of new laws or amendment of the existing laws. The Government or the competent committee of the Assembly are obliged to consider the initiatives of the Ombudsman. In the process of preparing legislation involving the issues important for the protection of citizens' rights, the Ombudsman is also entitled to give its opinions to the Government and Parliament (LPC; art. 18).

The Ombudsman is also authorised to initiate proceedings before the constitutional court to review the constitutionality and legality of laws, regulations and by-laws (LPC; art. 19). Next, the Ombudsman is also endowed with the authority to initiate disciplinary proceedings against an official or employee of the government or even recommend his dismissal if directly responsible for the violation of the rights of citizens, or when recurring behaviour of the official reveals the intent to refuse to co-operate with the Ombudsman or when the injury made to the person caused material or other serious damage. Last, if the Ombudsman finds that the actions of an official or employee of the government

has the elements of a criminal act, it can submit a request to the competent authority or an application for initiating a criminal offense or other appropriate proceedings (LPC; art. 20).

Finally, the protection of human rights occupies a crucial position within the scope of Serbian Ombudsman's mandate. The Ombudsman is explicitly assigned to ensure that human and minority freedoms and rights are protected and promoted (LPC; art. 1). In parallel with this obligation, the Ombudsman is empowered to control the respect of the rights of citizens (LPC; art. 17). The violation of the rights of citizens forms a significant criterion for the Ombudsman to activate its powers. Also, the Serbian Ombudsman institution was accredited by the International Coordinating Committee as “a national human rights institution” in 2010.

### **3.4. Turkey**

Turkey, whose relationship with the EU goes a long way back *vis-a-vis* the other candidate countries in question, submitted formal application to the Union for full membership in 1987. After a long time, it was eventually qualified as a candidate country in 1999 and has been negotiating on full membership with the EU since 2005.

Even though its relationship with the EU as a candidate country is the oldest one among the countries in question, its ombudsman institution (*Kamu Denetçiliği Kurumu* – The Ombudsman Institution) is the youngest one. It was created by the *Law on the Ombudsman Institution No. 6328* of 14 June 2012 (henceforth LO).

The Turkish Ombudsman serves as a complaint mechanism concerning the public services. The jurisdiction of the Ombudsman comprehends all sorts of acts and actions as well as attitudes and behaviour of the administration within the framework of an understanding of human rights-based justice and legality and conformity with the principles of fairness (LO; art. 1). Its jurisdiction even extends to private legal entities providing public services (LO; art. 3). However, the acts of the President on his own competence and the decisions and orders signed by the President *ex officio*, the acts concerning the execution of the legislative power, the acts concerning the execution of the judicial power and the acts of the Turkish armed forces, which are purely of military nature are exempted from its jurisdiction (LO; art. 5).

As clearly shown in the related provision stated above, the jurisdiction of the Ombudsman is confined to the activities of the administration, other than all transactions of the legislature, judiciary and certain transactions of military, which can be considered narrow-scoped as opposed to many European equivalent institutions. Moreover, it is difficult to reconcile, in particular, the exclusion of the military transactions, acts and behaviour of the armed forces from the Ombudsman's control with the rule of law (Aktel, Kerman, Altan, Lamba and Burhan, 2013, p. 29). This,

independently, constitutes a matter of criticism in the EU's 2012 Progress Report on Turkey, as well (European Commission, 2012, p. 11).

The Turkish Ombudsman is empowered to examine and investigate the complaints lodged to the institution (LO; art. 7). Nevertheless, it cannot investigate a case on its own motion. This means the Ombudsman can only take an action depending upon a complaint. However, since it is not always possible for everyone to lodge a complaint about the poor functioning of the administration, the Ombudsman's incompetence to act *ex-officio* is an important deficiency for the institution to function properly and provide the expected benefits (Efe and Demirci, 2013, p. 62). This deficiency is again notable in the EU's 2012 Progress Report on Turkey (European Commission, 2012, p. 11).

The lack of Ombudsman's power to act *ex-officio* is highlighted by many experts, including the present Commissioner for Human Rights of the Council of Europe, Nils Muiznieks, who supports all calls for the necessity of investing the Ombudsman with the power of *ex-officio* investigation. In this way, the Ombudsman has the chance to intervene in the crux of the problems before they become more serious (Muiznieks, 2014)<sup>5</sup>. As a result, within the context of the power in question, the practice in Turkey differs from the general description attributed to most Ombudsman institutions (Sayan, 2014, p. 339).

In the course of conducting investigations upon complaints, it may demand the required information and documents from the related authorities. Those authorities are obliged to submit the information and documents requested by the Ombudsman within a given period. If they refuse to submit the information and documents in question within the given period without any justifiable reasons, the relevant authorities are obliged to launch an investigation upon request of the Ombudsman. The Ombudsman's power in question is regarded as significant since it prevents the related administration from acting arbitrarily and not submitting the necessary information and documents on time. This regulation is supposed to help the institution perform its tasks on time and completely (Efe and Demirci, 2013, p. 61).

It is solely the information or documents which are state or trade secrets that may not be submitted to the institution by the highest ranking post or board of the competent authorities, on condition that they provide the institution with justification. Even in such cases, the Ombudsman is entitled to examine the related information and documents on-site (LO; art. 18).

During the investigation, the Turkish Ombudsman may also assign referees and hear witnesses or relevant people in connection with the matter under

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<sup>5</sup> Speech delivered at a press conference held at the second International Ombudsman Symposium in Ankara, "Avrupa Konseyi Temsilcisi Muiznieks'in Basın Toplantısı" reported by *haberler.com*, 21 October 2014.

examination and investigation (LO; art. 19). Thus, it will be possible to clear up the grievance, to ensure transparency and to obviate public authorities to exhibit unlawful acts (Aktel et al., 2013, p. 32).

Upon completion of the investigation and depending on the outcome of its examination and investigation, the Ombudsman is also empowered to submit recommendations to the administration (LO; art. 7). If the relevant authority does not deem the solution proposed by the institution enforceable, it is obliged to notify the reasons to the institution in a determined period of time (LO; art. 20).

Last, Turkish Ombudsman is provided with the authority to prepare special reports on matters requiring attention as well as annual reports including its activities and recommendations, which are to be discussed by the General Assembly and made public upon publication in the Official Journal (LO, art. 7,22).

As the findings above clearly demonstrate, the authority entrusted to the Turkish Ombudsman is limited, which can directly influence the effective functioning of the institution. This fact is underlined even by the Turkish current Ombudsman Chief, Mehmet Nihat Ömeroğlu, who admits that their proposals are not taken into consideration and they are not able to handle many issues due to the insufficient authority of the institution (Ömeroğlu, 2014).<sup>6</sup>

#### **4. Conclusions**

The present study, whose core is the investigation of the effectiveness of the ombudsman institutions in the current EU candidate countries in the negotiation process on the basis of their jurisdiction and powers, demonstrates that no ombudsman institution is identical to another. However, it is noted that the Icelandic and Turkish Ombudsmen form a separate group, sharing the characteristics of a classical ombudsman with limited powers and primary concern on monitoring the legality and fairness of public administration. By the same token, the Montenegrin and Serbian Ombudsmen constitute another distinct group bearing the characteristics of a hybrid ombudsman with additional powers, other than the traditional ones, as well as primary concern on human rights protection, with explicit and specific mandate and powers in this field.

To start with the first group, the Icelandic and Turkish Ombudsmen's major object of control is administration. Furthermore, the ombudsman's sphere of competence in both countries extends to non-public legal entities, as well, under certain conditions. They are, for example, entitled to have control over private legal entities as far as they have public authority or provide public services. However, the two institutions specifically differ from one another in terms of the

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<sup>6</sup> Speech delivered at a press conference held at the Turkish Parliament on the occasion of the first anniversary of the delivery of applications to the Ombudsman's office, "Turkish Ombudsman Complains of Insufficient Authority" reported by *Hürriyet Daily News*, 17 April 2014.

authorities excluded from their jurisdiction. Certain domains of Turkish administration – the Head of the State and the acts of the armed forces, which are purely of military nature – are outside the jurisdiction of the Turkish Ombudsman. Nevertheless, there is no such exclusion in the case of the Icelandic Ombudsman, which is entitled to control all the mentioned domains of administration, as well. As to the legislature and judiciary, they are excluded from the jurisdiction of both ombudsmen.

As for their powers, they are both exclusively granted with traditional powers of investigation, recommendation and reporting. Despite the slight differences, the content of each power is almost identical for both institutions. The most striking difference between those two institutions is that while the Icelandic Ombudsman can investigate a case upon a complaint as well as *ex officio*, the Turkish Ombudsman can only initiate an investigation upon a complaint. This is considered a serious barrier against the effective functioning of the Turkish Ombudsman.

Regarding the second group, the Montenegrin and Serbian Ombudsmen's the main object of control is administration, too. What is more, the ombudsmen's sphere of competence in Serbia extends to non-public legal entities, as well, on condition that they are entrusted with public authority. Within the administration, certain domains are excluded from the jurisdiction of the Serbian ombudsman. The Head of the State and the Government do not fall within the jurisdiction of the Serbian Ombudsman. On the contrary, no area of administration is excluded from the jurisdiction of the Montenegrin Ombudsman. Regarding the legislature, it is exempt from the control of these two Ombudsmen. As for the judiciary, it is completely beyond the jurisdiction of the Serbian Ombudsman. On the other hand, the Montenegrin Ombudsman has partial control over the judiciary. Their jurisdiction covers only the cases of delay in the proceedings and abuse of procedural authorizations.

Concerning their powers, like the ones in the first group, both are granted with the powers of investigation, recommendation and reporting. Moreover, they are also granted with certain extra powers such as; submitting legislation proposals, appealing before the constitutional court for the evaluation of the constitutionality of laws and other regulations, and starting or recommending disciplinary or criminal proceedings. In the process of preparing legislation involving the issues important for the protection of citizens' rights, the Serbian Ombudsman is also entitled to give its opinions to the Government and Parliament. Moreover, both Ombudsmen are empowered to recommend the initiation of criminal proceedings against the responsible official. The Serbian Ombudsman may initiate and the Montenegrin Ombudsman may recommend opening disciplinary proceedings, as well. The Serbian Ombudsman may further recommend the dismissal of the official or employee of the government responsible for the violation of the rights of citizens in certain cases. Designated

as the institutional mechanism for protection against discrimination, the Montenegrin Ombudsman may additionally initiate a court proceeding for the protection against discrimination or join the person who is subject to discrimination in that proceeding as an intervener.

All in all, the Montenegrin and Serbian Ombudsmen score better on the effectiveness factor in question than the Icelandic and Turkish Ombudsmen. The discussion between the ones in the latter group leads us to the conclusion that while they are both vested with the common traditional powers, the jurisdiction of the Icelandic Ombudsman is broader than that of the Turkish Ombudsman, which makes the Icelandic Ombudsman score better than the Turkish Ombudsman with respect to its effectiveness. As to the ones in the former group, both are entrusted with almost identical powers: traditional powers as well as certain additional powers. However, the jurisdiction of the Montenegrin Ombudsmen is broader than the jurisdiction of the Serbian Ombudsman, which makes it score better than the other Ombudsman with regard to its effectiveness. All these findings lead us to conclude that, among all ombudsman institutions in question, the Montenegrin Ombudsman, along with its broader jurisdiction, powers and human rights mandate, plays a more significant role in the improvement and consolidation of democracy and protection of human rights and thus contributes more to the fulfilment of the Copenhagen political criteria during the EU accession process.

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