

THE EUROPEAN OMBUDSMAN: FACILITATOR OR SUPERVISOR?

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ABSTRACT: *The European Ombudsman is an EU institution set up to investigate complaints about maladministration in the institutions and bodies of the European Union. It is entitled to receive and investigate complaints from EU citizens, businesses and organizations, and from anyone residing or having their registered office in an EU country. The Ombudsman may find maladministration if an institution fails to respect fundamental rights, legal rules or principles, or the principles of good administration. This covers administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, and unnecessary delay, for example. Any citizen or resident of the EU, or business, association, or other body with a registered office in the EU, can lodge a complaint.*

Given the type of activities the Community performs, our main research question— is the institution of ombudsman in fact what the Community needs? Our research will underline the fact that the Community-level issues addressed by the Ombudsman are primarily in the area of control, i.e., directed towards general supervision instead of dispute settlement in individual cases.

The analysis will reveal how an appropriately-designed ombudsman could provide such welcome improvements in Community governance as the following: more adequate external supervision of the Commission's administration; enforced Parliamentary supervision of executive rule-making by the Commission; and more regulation and supervision of the Committees involved in rule-making.

KEY WORDS: *Ombudsman, maladministration, EU legislation.*

JEL CODE: *K 40*

1. INTRODUCTION

The basic function of an Ombudsman is to investigate complaints against public authorities. The courts are the essential institutional guarantors of the rule of law and the possibility to bring judicial proceedings against public authorities is a fundamental right

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(Muraru, 2004). The ombudsman's role is complementary to that of the courts, offering citizens an alternative remedy, with a different balance of advantages and disadvantages.

Unlike a court, an Ombudsman normally has no power to make legally binding decisions. His effectiveness is based on moral authority and, ultimately, on publicity and the ability to persuade public opinion, which, in the pluralist variant of democracy, can provide public authorities with an effective incentive to comply with an Ombudsman's recommendations (Radulescu, 2011).

The non-binding nature of decisions allows an Ombudsman's procedures to be more flexible than those of a court, so that the Ombudsman can act relatively quickly and cheaply, and normally at no cost to the complainant (Gino de Grado, 1986).

Moreover, an Ombudsman takes into account not only the legal rights of the parties, but also broader principles of good administration, which are inherently open-ended.

Maladministration encompasses all kinds of poor or improper administrative behavior, from late payment for EU projects to the unjustified refusal to give out a document or information (Stadlmayer, 2008). The thrust of the European Ombudsman's mandate is the notion of "maladministration", a term that is defined neither by the Treaties nor by the Ombudsman's Statute. In response to a request from the European Parliament, the Ombudsman presented a comprehensive definition in his 1997 Annual Report, according to which, "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it". This definition was later endorsed by the European Parliament.

In the same time, more recently, in 2012, the Ombudsman has defined 'maladministration' in a way that requires respect for the rule of law, for principles of good administration, and for fundamental rights. The Charter of Fundamental Rights includes the right to good administration as a fundamental right of Union citizenship (Article 41).

The Ombudsman is often seen as a link between European citizens and the EU administration. One of his main priorities is to help the EU administration to become more transparent, effective, and citizen friendly. Furthermore, the Ombudsman is keen to inform European citizens about their new rights, introduced by the Lisbon Treaty and the EU Charter of Fundamental Rights (Diamandouros, 2012).

The Charter of Fundamental Rights and the Lisbon Treaty, which made the Charter legally binding, strengthened the role of the European citizens vis-à-vis the EU administration. They provide for a stronger involvement of citizens in the EU's decision-making and introduce the right to good administration, a right which lies at the heart of what the European Ombudsman does (Diamandouros, 2012).

Far from instituting a supreme court or a higher judgement authority, the Ombudsman disposes, however, of enough possibilities for rendering valuable and defending the citizen rights infringed by the administration, by carrying on a constant activity of keeping under control the lawfulness of the administrative action (Muraru, 2004).

2. RECEIPT OF COMPLAINTS

A petition transferred to the Ombudsman by the European Parliament with the consent of the petitioner is treated as a complaint. In appropriate cases and with the

consent of the complainant, the Ombudsman may transfer a complaint to the European Parliament to be dealt with as a petition or the Ombudsman may transfer a complaint to another competent authority.

On the basis of the criteria laid down in the Treaty and the Statute, the Ombudsman determines whether a complaint is within his mandate and if so, whether it is admissible; he may request the complainant to provide further information or documents before making the determination.

If a complaint is outside the mandate, or inadmissible, the Ombudsman closes the file on the complaint. He informs the complainant of his decision and of the reasons for it. The Ombudsman may advise the complainant to apply to another authority.

3. INQUIRIES INTO ADMISSIBLE COMPLAINTS

The Ombudsman decides whether there are sufficient grounds to justify making inquiries into an admissible complaint. If he does not find sufficient grounds to justify making inquiries, the Ombudsman closes the file on the complaint and informs the complainant accordingly. The Ombudsman may also inform the institution concerned.

If the Ombudsman finds sufficient grounds to justify making inquiries, he informs the complainant and the institution concerned. He transmits a copy of the complaint to the institution concerned and invites it to submit an opinion within a specified time that is normally no more than three months. The invitation to the institution concerned may specify particular aspects of the complaint, or specific issues, to which the opinion should be addressed. The opinion shall not include any information or documents which the institution concerned regards as confidential.

The institution concerned may request that certain parts of its opinion be disclosed only to the complainant. It shall clearly identify the parts concerned and shall explain the reason or reasons for its request. The Ombudsman sends the opinion of the institution concerned to the complainant. The complainant has the opportunity to submit observations to the Ombudsman, within a specified time that is normally no more than one month. If he considers it useful to do so, the Ombudsman makes further inquiries. Where he considers it appropriate to do so, the Ombudsman may use a simplified procedure, with a view to achieving a rapid solution. When he has completed his inquiries the Ombudsman closes the case with a reasoned decision and informs the complainant and the institution concerned.

4. POWERS OF INVESTIGATION

The Ombudsman may require Community institutions and bodies and the authorities of Member States to supply, within a reasonable time, information or documents for the purposes of an inquiry. They shall clearly identify any information or documents which they regard as confidential.

The Ombudsman may inspect the file of the institution concerned. The institution concerned shall clearly identify any documents in the file which it regards as confidential. The Ombudsman may take copies of the whole file or of specific documents contained in the file. The Ombudsman informs the complainant that an inspection has taken place.

The Ombudsman may require officials or other servants of Community institutions or bodies to give evidence under the conditions laid down in the Statute. The Ombudsman may decide that the person giving evidence shall do so in confidence. The Ombudsman may request Community institutions and bodies to make arrangements for him to pursue his inquiries on the spot. The Ombudsman may commission such studies or expert reports, as he considers necessary to the success of an inquiry.

5. FRIENDLY SOLUTIONS

If the Ombudsman finds maladministration, as far as possible he co-operates with the institution concerned in seeking a friendly solution to eliminate it and to satisfy the complainant. If the Ombudsman considers that such cooperation has been successful, he closes the case with a reasoned decision and he informs the complainant and the institution concerned of the decision. If the Ombudsman considers that a friendly solution is not possible, or that the search for a friendly solution has been unsuccessful, he either closes the case with a reasoned decision that may include a critical remark or makes a report with draft recommendations.

6. CRITICAL REMARKS

The Ombudsman makes a critical remark if he considers that it is no longer possible for the institution concerned to eliminate the instance of maladministration and that the instance of maladministration has no general implications. When the Ombudsman closes the case with a critical remark, he informs the complainant and the institution concerned. A critical remark does not constitute redress for the complainant. It informs the institution concerned of what it has done wrong, so that it can avoid similar maladministration in the future.

7. REPORTS AND RECOMMENDATIONS

The Ombudsman makes a report with draft recommendations to the institution concerned if he considers either that it is possible for the institution concerned to eliminate the instance of maladministration, or that the instance of maladministration has general implications. The Ombudsman sends a copy of his report and draft recommendations to the institution concerned and to the complainant. The institution concerned sends the Ombudsman a detailed opinion within three months. The detailed opinion could consist of acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendations. If the Ombudsman does not consider that the detailed opinion is satisfactory he may draw up a special report to the European Parliament in relation to the instance of maladministration. The report may contain recommendations.

The possibility to present a special report to Parliament is of inestimable value for the Ombudsman's work. It is the most powerful tool at his disposal. A special report to the European Parliament constitutes the last substantive step which the Ombudsman takes in dealing with a case. This is because the adoption of a resolution and the exercise of Parliament's powers are matters for that institution's political judgment. The Ombudsman

naturally provides whatever information and assistance the Parliament may require when dealing with a special report.

8. OWN-INITIATIVE INQUIRIES

The Ombudsman may decide to undertake inquiries on his own initiative. The Ombudsman's powers of investigation when conducting own initiative inquiries are the same as in inquiries instituted following a complaint. The procedures followed in inquiries instituted following a complaint also apply, by analogy, to own initiative inquiries.

The Ombudsman cannot investigate:

- Complaints against national, regional or local authorities in the Member States, even when the complaints are about EU matters. Examples of such authorities are government departments, state agencies and local councils;
- The activities of national courts or ombudsmen. The European Ombudsman is not an appeal body for decisions taken by these entities;
- Complaints against businesses or private individuals.

The Ombudsman investigates cases of maladministration (poor or failed administration). Maladministration occurs if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights. Some examples, as already we have mention are: administrative irregularities; unfairness; discrimination; abuse of power; failure to reply; refusal of information; unnecessary delay.

The Ombudsman may simply need to inform the institution concerned about a complaint in order for it to resolve the problem. If the case is not resolved satisfactorily during the course of his inquiries, the Ombudsman will try, if possible, to find a friendly solution which puts right the case of maladministration and satisfies the complainant. If the attempt at conciliation fails, the Ombudsman can make recommendations to solve the case. If the institution does not accept his recommendations, he can make a special report to the European Parliament.

During 2013, the Ombudsman received 2420 complaints, compared to 2442 in 2012¹, and the number is decreasing mainly because fewer people are complaining to the Ombudsman for the wrong reason.

Complaints were sent directly by individual citizens in 340 cases and 101 came from associations or companies.

During 2013, the process of examining complaints to see if they are within the mandate, meet the criteria of admissibility and provide grounds to open an inquiry was completed in 341 cases. Of all the complaints examined, around 27,8 % - 654 cases - reply sent to inform the complainant that no further advice could be given and 57,7% were about advice given or case transferred. The Ombudsman also began nine inquiries on his own initiative.

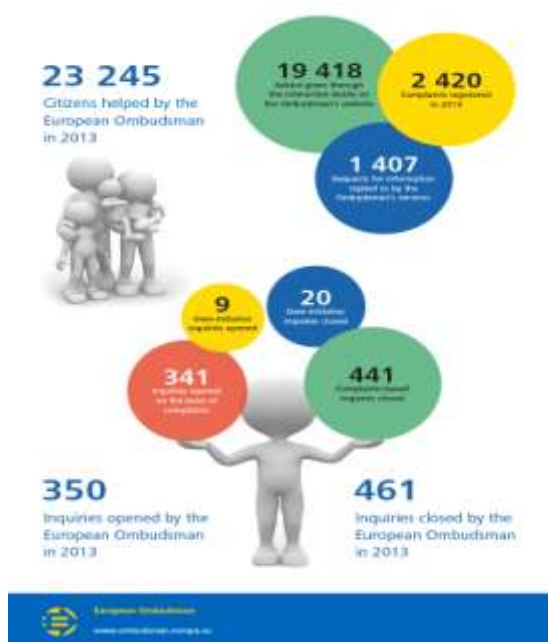
If a complaint is outside the mandate, the Ombudsman tries to advise the complainant of another body that could deal with the complaint, especially if the case involves EU law.

If possible, and provided there appear to be grounds for the complaint, the Ombudsman, with the consent of the complainant, transfers it directly to another

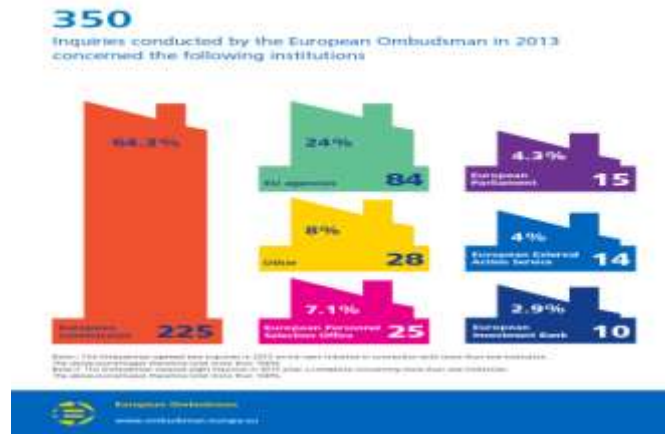
¹Annual Report of the European Ombudsmen for 2012, available at: <http://www.ombudsman.europa.eu/activities/annualreports.faces>

competent body. For example, if it concerns national, regional or local administrations in the Member States – he will still do his best to help solve the problem.

This very often involves transferring the case to a member of the European Network of Ombudsmen or advising you to contact a member of the Network. Established in 1996, the Network comprises all national and regional ombudsmen in the EU Member States, the applicant countries for EU membership, Norway and Iceland, as well as committees on petitions in the EU.



Source: *The Annual Report of the European Ombudsmen, 2013, p. 7*

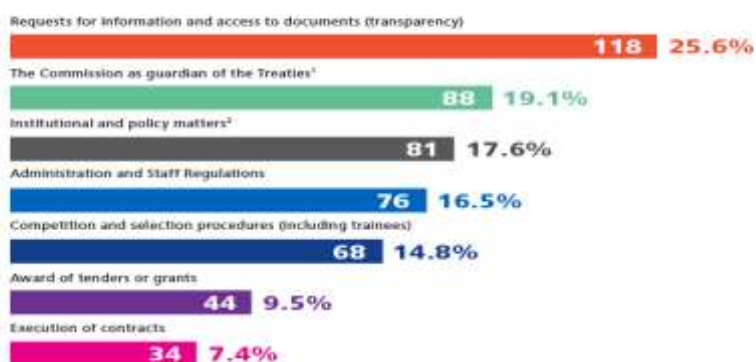


Source: The Annual Report of the European Ombudsmen, 2013, p. 10

In practice, most of the admissible complaints that are received are against the European Commission. This is understandable, since the Commission is the main EU body that has direct relationships with citizens and residents of the Union, where the people are entitled to complain to.

The Ombudsman receives and deals with complaints against the Commission in its role as guardian of the Treaties. When the Ombudsman opens an inquiry into such a complaint, he is careful to make clear that the inquiry will not examine whether there is an infringement. This is because the European Ombudsman has no mandate to investigate the actions of Member State authorities. The Ombudsman's inquiry is only directed at examining the Commission's behavior in analyzing and treating the infringement complaint. The Ombudsman can deal with both procedural and substantive aspects of the Commission's behavior. (Stadlmayer, 2008).

Subject matter of inquiries closed by the European Ombudsman in 2013

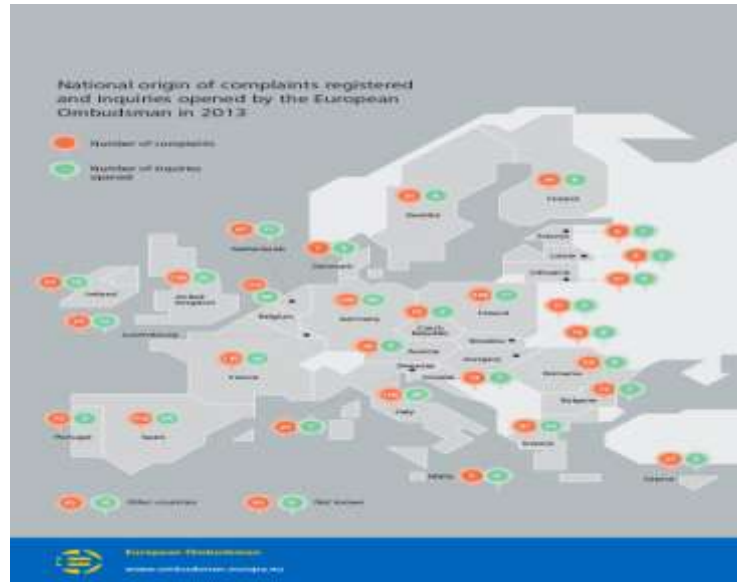


Note: In some cases, the Ombudsman closed inquiries with two or more subject matters. The above percentages therefore total more than 100%.



Source: *The Annual Report of the European Ombudsmen, 2013, p. 11*

As seen in the figure above, complaints relating to lack of transparency within the EU institutions have consistently topped the list of complaints to the European Ombudsman. For several years now, 20% to 30% of the complaints that the Ombudsman's office investigates have concerned transparency. The most common transparency issues raised are the institutions' refusal to grant access to documents and/or information, meetings taking place behind closed doors, and the opaque way in which members of EU expert groups are appointed. Public access to documents is one of the rights guaranteed by the Charter of Fundamental Rights of the EU.



Source: *The Annual Report of the European Ombudsmen, 2013, p. 9.*

The figure above outlines the national origin of complaints registered in 2013. Traditionally, complainants from Germany, the EU's most populous country, have submitted the largest number of complaints, followed by Spain. However, that trend changed in 2011, when Spain moved from second to top position and till then it maintained this position in 2012 and also in 2013. Like in 2011 and 2012, it was followed by Germany, Poland, and Belgium.

The role of the Ombudsman is to investigate complaints and conduct inquiries regarding maladministration in the EU institutions, bodies, offices, and agencies. While there are dozens of these, in practice much of his work is directed towards the European Commission.

The Ombudsman's mandate is limited to the EU level. This ensures that there is no overlap between the work of the European Ombudsman and that of the national and regional ombudsmen throughout the EU. It also means that collaboration between the European office on the one hand, and the national and regional ombudsmen on the other is vital, given that many of the complaints received at European level concern maladministration at the national or regional level (Vlad, 1998).

Every year, the Ombudsmen's office receives around 2000 complaints and opens an average of 500 inquiries based on complaints received or on its own-initiative. This may not sound like a very large number, compared to the numbers received at national level. The reason though is very simple as "the total size of the EU administration is smaller than that of Manchester City Council", for example, as the European Ombudsmen once stated in a speech².

² <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/54405/html.bookmark>

The Ombudsman institution throughout the world is an icon of democracy and of the rule of law. It serves both as an independent check on the power of government and public administration and as a vehicle through which citizens can have their complaints heard and their rights vindicated by an independent, accessible and impartial office outside of the traditional courts system. The Ombudsman further influences the development of good administrative practice in the EU institutions through outreach, through the production of guidelines and codes of good practice, and through Special Reports to the European Parliament.

The Charter of Fundamental Rights enshrines the right of EU citizens to complain to the Ombudsman. Companies, associations, and third country nationals resident in the EU also enjoy this right. The Ombudsman can deal with complaints about breaches of Charter rights, as well as other cases of maladministration. The Ombudsman therefore empowers citizens by helping them to realize their fundamental rights. In addition to the right to good administration citizens have the right to know what the EU institutions are doing (transparency) and the right to participate in their activities. The Ombudsman is therefore central to the task of ensuring that all of those rights are enforced and protected by the EU institutions (Gino de Grado, 1986).

Finally, as supervisor and facilitator, the Ombudsman clearly needs to step up his proactive role vis-à-vis the EU institutions with a view to increasing the citizens' trust in the EU administration. The Ombudsman is best placed to identify shortcomings in the EU administration and proactively to work with the institutions to tackle them. Thus, the Ombudsman will promote good governance and a culture of public service by helping the EU administration to work openly, effectively, and with integrity.

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