

The European Ombudsman
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Introduction

The European Ombudsman is one of the most important institutional novelties introduced by the Maastricht Treaty. Its origins can be found in the Spanish proposal on European Citizenship, submitted in the framework of the Intergovernmental Conference on Political Union in 1991. According to the Spanish proposal, the adoption of a catalogue on special rights of the citizens of the European Union should have been accompanied by the establishment of special bodies responsible for safeguarding these rights.

It can hardly be denied that the criticisms regarding the bureaucratization and remoteness of the Community institutions, with the exception of the European Parliament, are reasonable and justified. The ongoing process of European integration and the decisions on closer political union adopted in Maastricht led to debates regarding transparency in the functioning of the Council and the Commission. The process of European integration and the further enlargement of the European Union can only succeed if they have the full support of the citizens of the Union. It was in this context that the establishment of the European Ombudsman was decided upon two years ago in Maastricht.

The European Ombudsman, along with the Committee on Petitions of the European Parliament, are non-judicial bodies, competent to safeguard citizens' political, civil and social rights *vis-à-vis* the Community institutions. These non-judicial bodies, together with the judicial system of the Community, constitute a broad spectrum guaranteeing the participation of the citizens in the everyday life of the Union.

The Tradition in the Member States

Non-judicial surveillance of public administration is very well known in the majority of Member States of the European Union. The models already followed comprise the Committees on Petition of the national parliaments as well as the national Ombudsmen.

The functioning of the national Ombudsmen does not exclude, in the framework of certain Member States, the parallel functioning of the Committee on Petitions of the national parliaments. The office of Ombudsman was established for the first time in Scandinavia as a means for people to defend themselves against administrative abuse.

It was as early as 1809 when the Swedish Constitution established a justice Ombudsman responsible for supervising public officials and protecting the citizens from bureaucratic practices. In 1915 an independent military Ombudsman was established in Sweden and in 1919 Finland introduced provisions for the establishment of an Ombudsman into its new Constitution. With the introduction of a military Ombudsman in 1952 by Norway and a general Ombudsman in 1953 by Denmark, Scandinavia confirmed its historical contribution towards the protection of citizens' rights.

The Scandinavian experience was followed by the controversial establishment of a military Ombudsman in the Federal Republic of Germany in 1957 and the establishment of general Ombudsmen in the United Kingdom in 1967, in France in 1973 and, later on, in the other Member States. Sweden, Denmark, the UK and Spain have demonstrated their preference for Parliamentary Ombudsmen. In Germany, the Petitions Committee of the *Bundestag* receives thousands of petitions every year, while in France the *Médiateur de la République* enjoys considerable reputation. Ombudsmen also function in The Netherlands and Ireland. In

Portugal, the Ombudsman coexists with the Committee on Petitions of the Portuguese Parliament. In Belgium, the Ombudsman of the Flemish Community and the Ombudsman of the city of Antwerp function in parallel with the Committee on Petitions of the Belgian Parliament. Luxembourg has demonstrated its preference for a Committee on Petitions of the *Chambre des Députés*, while Italy, following its tradition, has introduced the institution of Regional Ombudsmen. Over the last decade, Ombudsmen have also proved to be the tendency in the framework of corporations. To this extent, General Electric and Belgacom have established their own Ombudsmen.

The Intergovernmental Conference on Political Union

The historical tradition in the Member States of the European Union is such that it can hardly be surprising that proposals for a European Ombudsman were submitted at supranational level. The establishment of a European Ombudsman is closely linked to European Citizenship.

The idea of introducing provisions relating to European Citizenship into the Treaty on European Union was launched by Philippe Gonzales on 4 May 1990, in a letter addressed to the other members of the European Council.

Following this letter, on 24 September 1990 the Spanish Delegation submitted, in the framework of the Intergovernmental Conference on Political Union, a note on citizenship entitled 'The Road to European Union'.

According to the Spanish proposal, the adoption of a catalogue on special rights of the citizens of the European Union should have been accompanied by the establishment of special bodies responsible for safeguarding these rights. To this extent, the Spanish Delegation proposed that European citizens should receive greater protection of their rights within the framework of the Union by submitting petitions or complaints to a European Ombudsman whose function would be:

- firstly, to protect the special rights of the European citizen, and
- secondly, to help safeguard these rights.

Furthermore the Ombudsman for European citizens could either act through individual Ombudsmen or their equivalents in the various Member States.

The Spanish proposal on the European Ombudsman was further endorsed by Denmark, a Member State where the Ombudsman has proved to be a highly successful institution. In the Memorandum which the Danish Government issued on 4 October 1990, it stated that in order to strengthen the democratic basis of Community cooperation, an Ombudsman system should be introduced under the aegis of the European Parliament.

The institution of the European Ombudsman was approved at political level by the European Council in Rome. Meeting on 14 and 15 December 1990, the Heads of State and Government of the Twelve stated that consideration should be given to the possible institution of a mechanism to defend citizens' rights as regards Community matters (Ombudsman). In implementing such provisions, appropriate consideration should be given to particular problems in some Member States.

A few months later, on 21 February 1991, the Spanish Delegation submitted a new and more detailed proposal on European Citizenship. This proposal envisaged European Citizenship as one of the three pillars of the European Union and the foundation of its democratic legitimacy.

The proposal comprised 10 Articles. While Articles 1-8 of the proposal were concerned with the substantive rights of European citizens, Article 9 was concerned with the machinery for safeguarding these rights. It provided that in each Member State a Mediator was to be appointed in order to assist the citizens of the Union in the defence of their Union rights before the administrative authorities of the Union and its Member States and to invoke such rights before judicial bodies, either on his own account or in support of the persons concerned. Furthermore, the mediators would also have the task of making clear and complete information available to the citizens of the Union concerning their rights and the means of enforcing them.

At the same time the Spanish Delegation indicated, in the form of a footnote, that consideration would also be given to two other possibilities:

- firstly, entrusting the above functions to a European Ombudsman as an independent organ of the Union or one answerable to the European Parliament, and
- secondly, reinforcing the actions of the national Mediators with an Ombudsman acting at European level.

The creation of the European Ombudsman had to cope with reality, that is to say, to coexist with the Committee on Petitions of the European Parliament, the national Ombudsmen and the Committees on Petition of the national parliaments; it had to respect the functioning of these bodies and, furthermore, take care not to jeopardize it.

Accordingly the Luxembourg Presidency issued its draft Treaty on European Union which can be characterized as a masterpiece of compromise.

To this extent the draft Treaty provided for the first time a legal basis in Community law for the right to petition the European Parliament, which until just recently had been characterized as a custom.

At the same time it significantly restricted citizens' rights to petition the European Parliament by introducing a condition under which petitions to the European Parliament would not be admissible unless they directly concerned the petitioner as an individual.

On the other hand, while the draft Treaty provided for the creation of the European Ombudsman, it limited his jurisdiction only to examining instances of maladministration in the activities of the Community institutions or bodies. At the same time, it subordinated the Ombudsman to the European Parliament by providing that the latter should elect the European Ombudsman.

It could hardly be argued that this compromise had not satisfied both Community and national actors. However we could question whether this compromise was in the interest of the citizens of the Union for whom, in the final analysis, the European Ombudsman was supposed to have been established.

The Treaty on European Union

The European Ombudsman established by the Maastricht Treaty follows the Parliamentary Ombudsman model.

He or she is appointed by the European Parliament for the duration of the latter's mandate. The Ombudsman is eligible for reappointment and he has to cease to exercise his duties in the event of resignation or dismissal. Should the Ombudsman no longer fulfil the conditions

required for the performance of his duties or be guilty of serious misconduct, the European Parliament may ask the Court of Justice of the European Communities to dismiss him.

Article 6 of the European Parliament's Decision on the Ombudsman's duties provides for the qualifications required for the appointment of a person as Ombudsman. Accordingly the Ombudsman must:

- have Union citizenship;
- have full civil and political rights;
- offer every guarantee of independence;
- meet the conditions required for the exercise of the highest judicial office in his country or have the acknowledged competence and experience to undertake the duties of Ombudsman.

The Ombudsman has the same rank in terms of rights and privileges as a judge at the Court of Justice of the European Communities and must perform his duties with complete independence in the general interest of the Communities and of the citizens of the Union. The Ombudsman has to be completely independent in the performance of his duties and must neither seek nor take instructions from any government or other body. Moreover he is obliged to refrain from any act incompatible with the nature of his duties. During his term of office, he may not engage in any political or administrative duties, whether gainful or not.

Articles 12 to 15 and Article 18 of the Protocol on the Privileges and Immunities of the European Communities are to apply to the Ombudsman.

The right to apply to the European Ombudsman is explicitly provided for in the Treaties establishing the European Communities, as amended by the Treaty on European Union. According to Article 8d of the EEC Treaty, every citizen of the Union may apply to the Ombudsman established in accordance with Article 138e.

Article 138e of the EEC Treaty empowers the European Ombudsman to receive complaints concerning instances of maladministration in the activities of the Community institutions or bodies with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. This means that the Ombudsman is competent to examine cases of maladministration occurring in the framework of:

- The Council, the Commission, the European Parliament and the Court of Auditors;
- The Court of Justice and the Court of First Instance when not acting in their judicial role;
- The Economic and Social Committee and the Committee of the Regions;
- The European Central Bank and the European Investment Bank;
- All other Community bodies.

According to Article 2 of the European Parliament's Decision on the Ombudsman's duties, no action by any other authority or person may be the subject of a complaint to him. The following are eligible to submit complaints:

- Any citizen of the Union;

- Any natural person residing in a Member State;
- Any legal person having his registered office in a Member State.

Complaints are referred to the Ombudsman either directly or through a Member of the European Parliament. The complaint must be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint and must be preceded by the appropriate administrative approaches to the institutions and bodies concerned.

Action to be undertaken by the European Ombudsman could be limited under the following circumstances:

- If the complaint concerns the soundness of a court's ruling;
- If the complaint refers to facts which have been subject to legal proceedings in progress or concluded;
- If the complaint concerns cases relating to labour relations between the Community and its officials and other servants where the possibilities for the submission of internal administrative requests and complaints have not been exhausted by the person concerned and the time-limits for replies by the authority thus petitioned have not expired.

If the complaint has been declared admissible, the European Ombudsman must, without delay, inform the person lodging the complaint in writing of the action he has taken on it. In this framework the European Ombudsman has the right to conduct *inquiries* which he deems necessary to clarify the instance of maladministration constituting the subject of the complaint.

It is worth mentioning at this point that the Ombudsman can also undertake the same action on his own initiative. In this case, action on the European Ombudsman's initiative could be justified if he receives cognizance of certain instances of maladministration due to reports in the press or on the television, or due to a European Parliament Resolution.

We could describe this first stage of action as *a preliminary investigation*. The main purpose of this stage is to gather the information required in order to draft a preliminary conclusion on whether or not the alleged instances of maladministration have taken place.

The Ombudsman is obliged to inform the institution or body concerned, which may submit any useful information to him.

According to Article 3 of the European Parliament's Decision on the Ombudsman's duties, the Community institutions and organs concerned are obliged:

- to supply the European Ombudsman with the requested information;
- to give him or the members of his secretariat access to the files concerned.

It is worth mentioning that in such circumstances Community institutions and bodies have the right to refuse only on duly substantiated grounds of secrecy. Moreover they are obliged to provide access to documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement.

Regarding other documents originating in a Member State, Community institutions or bodies must provide access only after the Member States concerned have been informed.

The Ombudsman may request, via the Permanent Representations of the Member States to the European Communities, the Member States' authorities to provide any information that may help to clarify instances of maladministration by Community institutions or bodies. In such cases the Member States's authorities are obliged to provide the information requested. They can refuse only if such information is covered by laws or regulations on secrecy or by provisions preventing it from being communicated.

Should the assistance which he has requested not be forthcoming, the Ombudsman must inform the European Parliament which will make the appropriate representations.

The main purpose of the European Ombudsman is to seek a solution with the institution concerned in order to eliminate the instance of maladministration and to satisfy the request of the person lodging the complaint.

Should the Ombudsman find that there has been maladministration, he must inform the institution or the body concerned and may suggest ways of remedying the matter. In this case the institution thus informed is obliged to send the Ombudsman a reasoned opinion within three months. For each case of maladministration found the European Ombudsman must send a report to the European Parliament and to the institution concerned. The Ombudsman may propose solutions and measures to be taken in the future. Furthermore, the Ombudsman informs the person lodging the complaint of the outcome of the inquiries, of the opinion expressed by the institution concerned and of any recommendations made by him.

At the end of each annual session, the Ombudsman has to submit to the European Parliament a report on the outcome of his inquiries.

The Ombudsman and his staff are obliged not to divulge information or documents which they may obtain in the course of their inquiries. They are also obliged to treat in confidence any information which could harm the person lodging the complaint or any other person involved. If in the course of inquiries the Ombudsman learns of facts which he considers might relate to criminal law he shall immediately notify the competent national authorities via the Permanent Representation of the Member States to the European Communities.

The European Ombudsman must cooperate with the Ombudsmen of the Member States and with the Committees on Petitions of the national Parliaments.

The relationship of the European Ombudsman with the Committee on Petitions of the European Parliament and the establishment of the boundaries between them is quite crucial for the functioning of the Ombudsman. In this context the European Ombudsman should restrict his activities to regarding only instances of maladministration in the activities of the Community institutions, and should refer any complaint relevant to the political control of the Community institutions to the Committee on Petitions of the European Parliament.

The European Ombudsman is an institution which, if used properly, can provide the citizens of the Union with an important and costless means to defend themselves against Community bureaucracy. This is very important to consolidate the transparency which is an essential element for the development of mutual trust between the Union and its citizens.