1 Introduction

First of all, I would like to thank Commissioner Potočnik and the Director General of DG Environment, Mr Falkenberg, for inviting me to participate in the Green Week activities.

I shall begin my presentation this afternoon with a brief explanation of what the European Ombudsman is and does.

Then I shall outline the role that the European Ombudsman plays in relation to environmental issues.

Finally, I shall make a proposal to fill what I see as a gap in the institutional framework for enforcing EU environmental law.

I hasten to reassure the Moderator of this session, Mr Kremlis, and my fellow speakers, that I shall do all this within 15 minutes.

2 About the European Ombudsman

The European Ombudsman is a “classical” ombudsman institution: that is to say, an external and independent mechanism, for carrying out impartial investigations into complaints against public authorities.

In my case, the mandate covers the Union's institutions, bodies, offices and agencies, except for the Court of Justice in its judicial role.

My investigations look for “maladministration”, a concept which includes failure to comply
with the law, with fundamental rights or with principles of good administration.

I would like to emphasise -- because it is not true of all ombudsmen -- that the European Ombudsman deals with issues of *substance* as well as *procedure*.

**The Ombudsman as a complement to the courts**

The Ombudsman complements the work of the courts, by offering citizens an alternative way of resolving disputes with the EU administration, which has characteristics that differ from those of a judicial remedy.

One of the main differences is that the Ombudsman has no power to make legally binding decisions. When I find maladministration, I look for a solution that the complainant and the institution concerned are both willing to accept. If an institution rejects my findings or recommendations, I can criticise it publicly. In cases that raise important issues of principle, I can make a special report to the European Parliament.

You may wonder why someone would bring a case to the Ombudsman rather than the court, given that only the court can give a legally binding decision.

Well, there are two main reasons. First, you don't have to pay a lawyer to bring a case to the Ombudsman and, if the Ombudsman finds against you, you don't have to pay the other side's costs.

Second, access to the Ombudsman is governed by different and less restrictive rules than access to the courts.

For example, you do not have to be adversely affected by maladministration in order to complain to the Ombudsman. In other words, public interest complaints are possible, which is of particular importance for NGOs, including, of course, environmental NGOs.

To avoid any misunderstanding, however, let me make clear that I do not regard citizens' access to the Ombudsman as a legitimate reason for *restricting* access to the courts [1].

**3 The European Ombudsman and the environment**

I shall now focus on the role that the European Ombudsman plays in relation to environmental matters.

This role mostly involves supervising two EU institutions: the European Investment Bank ("the EIB") and the European Commission.

The Ombudsman and the EIB signed a Memorandum of Understanding in 2008. This provides for the EIB to inform the public about the environmental policies and standards
that apply to the projects it finances. It also makes clear that the Ombudsman can review the Bank's judgment as regards environmental issues raised by complaints.

Another key provision of the Memorandum is that the EIB must provide an effective internal complaints procedure for complainants to use before they come to the Ombudsman.

This works well for a number of reasons.

First, the internal complaints procedure has the resources needed to carry out inspections and take evidence on the spot, be it in Serbia, Uganda, or Panama.

Second, the EIB is responsible for the internal complaints procedure and so has a reputational interest in ensuring its credibility.

Finally, if the complainant turns to the Ombudsman, the issues involved are clearly defined by the report of the internal complaints procedure and the complainant's arguments as to why the report, or the EIB's response to its findings and conclusions, are not satisfactory.

The Commission and infringement complaints

Most of the environmental complaints made to the Ombudsman concern the Commission's responsibility for ensuring that Member States fulfil their obligations under EU law.

As the so-called “Guardian of the treaties”, the Commission can investigate possible infringements of EU environmental law and eventually bring cases to the Court of Justice.

The Commission invites citizens, businesses and NGOs to complain to it about infringements by Member States. If such people are dissatisfied by the Commission's handling of their complaint, there is no judicial remedy available. They can, however, complain to the Ombudsman.

Following criticism and suggestions from the Ombudsman, the Commission agreed to certain procedural guarantees for infringement complaints.

In particular, the Commission should register and acknowledge all complaints within fifteen working days of receipt. It should then decide within one year whether to close the complaint, or to open the formal infringement procedure. During this time, it should reply to reasonable requests from the complainant for information. If the Commission needs longer than a year in which to reach a decision, it should explain the reasons why.

Even when the Commission follows the correct procedures, complainants are often dissatisfied if the Commission decides to close the case, rather than to open the formal infringement procedure.

The Ombudsman can and does look at the substance of the Commission's decision. That
does not mean, however, that I will open an inquiry simply because the complainant disagrees with the Commission's decision. My role is to review the decision, not to substitute my judgement for the Commission's.

What I do, therefore, is to insist that the Commission properly explain the reasons for its decision.

If it considers that there is no infringement, the Commission should provide the complainant with clear and understandable information as to why it considers that there is no breach of EU law. It should also give the complainant the opportunity to provide further information and/or arguments before closing the case.

For example, I dealt with a case [2] concerning extensions to Vienna airport, which were carried out without an environmental impact assessment. Most of the projects had already been completed, or were close to completion, so the Commission allowed the Austrian authorities to carry out an *ex post* impact assessment.

My inquiry identified several problems with this, including a potential conflict of interest within the national authorities, and lack of an adequate judicial review procedure.

Since both the impact assessment and the Commission's investigation were ongoing, I asked the Commission to take account of these findings when adopting its final decision on the infringement complaint.

The complainants subsequently made another complaint, in which the main issue is the monitoring mechanism for the impact assessment. My inquiry into that complaint is on-going [3].

Sometimes, the Commission decides not to pursue the matter, even though it believes that there is, or could be, an infringement.

In that case, principles of good administration require the Commission to explain the reasons why it has decided to exercise its discretion to close the case, rather than to pursue it.

For example, I opened an inquiry in January this year into a complaint [4] that the Commission failed to provide a sufficient statement of reasons for closing an infringement complaint concerning the right to access to environmental information under the Aarhus Convention.

**Access to documents**

Many environmental cases that come to me concern access to documents held by the EIB, or more often, the Commission. In dealing with these cases, I apply the basic EU Regulation on public access to documents, as modified, where relevant, by the Regulation that implements
the Aarhus Convention [5].

I am currently dealing with two linked cases [6] about public access to documents concerning nuclear power plants in Bulgaria and Romania.

These cases raise complex legal issues about the relationship between the Euratom Treaty, the legal principles and fundamental rights recognised by the EU legal order, and the Union's international law obligations under the Aarhus Convention. I have just received the complainant's observations on the Commission's reply to further inquiries and I expect to decide on the cases later this year.

4 The need for environmental watchdogs at Member State level

I come now to the final part of my presentation. As mentioned at the outset, I am going to put before you a proposal to fill what I believe is a gap in the institutional framework for enforcing EU environmental law.

Let me start with a point that is obvious, but nonetheless important. The Charter of Fundamental Rights requires that a high level of environmental protection and the improvement of the quality of the environment be integrated into the policies of the Union [7]. But let's be clear (and this is the obvious point): it does not matter how good the Union's policies and laws concerning the environment might be, they will not be effective unless they are properly implemented and enforced.

Proper implementation and enforcement depend above all on what happens at the Member State level. The constitutional architecture of the European Union gives to Member States the preeminent role in the administration of EU laws and policies.

In my view, the natural complement to this administrative subsidiarity is subsidiarity in the remedies that citizens and civil society organisations can invoke to call national authorities to account for their application and enforcement of EU law at national level.

The corollary, in my view, is that we should not expect the Commission, in its role as "Guardian of the treaties", to be a substitute for effective remedies at the national level.

What we need, in my view, is an independent environmental watchdog in each Member State, which can investigate whether the national authorities are properly applying and enforcing EU environmental law, and which can receive complaints from citizens and civil society.

In the present economic climate, Member States are likely to resist proposals to create new public bodies. In most Member States, however, this would be unnecessary. Existing bodies, such as ombudsmen, could be equipped with the appropriate investigatory and inspection powers in the environmental field. Indeed, some ombudsmen are already competent and
active in this field.

I am ready to work with the Commission to develop this idea and to discuss it with my colleagues in the European Network of Ombudsmen at our next meeting in Copenhagen.

Thank you for your attention.

[1] The limited standing for individuals and NGOs to bring judicial proceedings against EU institutions is the subject of a "communication" (complaint) to the Aarhus Compliance Committee:

http://www.unece.org/env/pp/compliance/Compliance%20Committee/32TableEC.htm


