

'The European Ombudsman: the guardian of good administration', Speech by the European Ombudsman, Prof. P. Nikiforos Diamandouros, to the Fulbright Association Conference on 'Celebrating the Fulbright Ethos', Athens, 8 October 2004

Speech

Introduction

I am delighted to have the opportunity to address an audience of fellow alumni on the occasion of the 27th Annual Conference of the Fulbright Association being held here in Athens.

I wish to thank Mrs. Anderson for extending an invitation to me to be here today, and for affording me the opportunity to renew old and to make new friendships within the Fulbright world.

I note that the purpose of the conference is to celebrate the Fulbright ethos. In my mind, such ethos includes, among others, a commitment to international understanding, to public service, and to the empowerment of citizens.

In this sense, I find it perfectly natural that a Fulbright alumnus can hold the post of the European Ombudsman, a post dedicated to promoting the quality of public service in the European Union's dealing with its citizens in the 25 Member States.

I also find it natural that a lecture on the Ombudsman is an appropriate theme for Fulbrighters.

In my lecture I will try to demonstrate how the European Ombudsman can help promote the quality of public service in the EU by be serving as the "Guardian of good administration" in the European Union (*note: in analogy with the European Commission which is the "Guardian of the Treaties"*) .

I will explain the various ways in which the European Ombudsman not only tries to safeguard, but also to promote good administration in the institutions and bodies of the European Union, i.e the re-active and pro-active roles of the Ombudsman.

Let me also add right away that I see the Ombudsman not merely as an independent institution exercising external control over European public administration, but also as a valuable resource for public sector managers. I consider this as the dual role of the European Ombudsman.



Taken together, I believe that these aspects of the Ombudsman institution enable it to make an important contribution to improving the quality of administration and to strengthening the rule of law and democracy in modern societies.

The institution of the European Ombudsman

The European Ombudsman was established by the Treaty of Maastricht, in the section of the EC Treaty concerning the Citizenship of the Union (Article 21).

Complaining to the European Ombudsman is thus one of the basic rights attached by the Treaty to Citizenship of the Union.

This idea has been maintained and even reinforced in the Constitutional Treaty, where the Ombudsman institution is mentioned on four occasions, namely 1) in the Title on Fundamental Rights and Citizenship of the Union, 2) in the Title on the Democratic Life of the Union, 3) in the Charter of Fundamental Rights (Part II of the Treaty), and finally 4) in the provisions governing the Institutions, more particularly in the section on the European Parliament.

The first Ombudsman was elected in July 1995 and started his activities in September 1995, which means that the institution has been operative for 9 years now.

It is important to underline that the EC Treaty empowers the Ombudsman to investigate complaints only against EU institutions and bodies (with the exception of the two courts in their judicial role). The European Ombudsman thus has no competence to deal with complaints against the national authorities of the Member States.

Therefore, and given the huge amount of complaints received against national administrations, I cooperate with my counterparts in all the 25 Member States through the European network of ombudsmen. The Network also includes ombudsmen in the candidate states and the wider Shengen area, embracing more than 90 offices in 30 countries.

The Network ensures that complaints are rapidly directed to the competent ombudsman and that, conversely, complaints filed with national ombudsmen but falling within the EO's competence are forwarded to him. It also facilitates exchange of information about best practice and developments in European law.

This is done via several instruments which have been developed by my office, such as the European Ombudsmen Newsletter, the electronic newspaper "Ombudsman Daily News", a Summit "EU-OMB" where ombudsmen can put questions and get information about how a particular problem is tackled in other ombudsmen offices, as well as the organisation of the biennial European Ombudsmen conferences, the next which will be held in The Hague in 2005.

The re-active role of the European Ombudsman

The main function of the European Ombudsman is to investigate and to report on complaints about alleged instances of maladministration by EU institutions and bodies. This is the re-active role of the Ombudsman.

Since the beginning of the functioning of the institution in September 1995, the Ombudsman



has received more than 16 000 complaints. In 2004, there has been an increase by 67 % of the complaints compared to the year 2003, with an increase in the admissible complaints by 67 %.

Unlike a judgement from a court, the Ombudsman's decisions closing cases are not legally binding. However, this is not an inconvenience, because where the rule of law and democracy are strong, public authorities will usually follow the Ombudsman's recommendations.

On the other hand, in comparison with the strict, complex, lengthy and expensive procedures before courts, the Ombudsman's procedure has the advantage to be flexible, quicker and free of cost for the complainant.

Also, the European Ombudsman has the possibility to reach solutions in which both parties are satisfied, this via the friendly solution mechanism, whereas among the parties confronted to each other in court, there will always be a winner and a loser.

But maybe the most significant difference between an Ombudsman and the court is that the Ombudsman can act in a pro-active way, whereas a court can only intervene in a matter when a case is brought before it. This is probably the main strength of the European Ombudsman's institution.

The pro-active role of the European Ombudsman

In this section I will explain the various ways in which the European Ombudsman has played a pro-active role in promoting good administration in the European Union.

The Ombudsman actively promoted good administration 1) by undertaking several own-initiative inquiries, 2) by making substantive proposals to the drafters of the Charter of Fundamental Rights and 3) to the drafters of the Constitutional Treaty and 4) by organising campaigns to inform citizens about their rights and how to use them.

Own initiative inquiries

The possibility for the European Ombudsman to carry out inquiries on his own initiative is maybe the most important and efficient pro-active instrument at his disposal.

It gives indeed the freedom to the Ombudsman to start an inquiry which goes beyond the scope of one individual complaint, and to try to achieve major changes in recurrent and structural maladministration in the EU institutions and bodies which are brought to his attention, for instance by numerous complaints on the same issue.

This instrument - which is literally tailor-made to "promote" good administration - has wisely been institutionalised by Article 195 of the EC Treaty which provides that the Ombudsman conducts inquiries "*(...) either on his own initiative or on the basis of complaints*". Article III-237 of the Constitutional Treaty reiterates the same provision.

Some of the Ombudsman's main achievements and improvements in the administration of the EU institutions have been obtained thanks to the own initiative inquiry. Below I give some examples of what I consider to be some of most important achievements obtained via this mode:



Access to documents

The Ombudsman's first own initiative inquiry, which was launched after numerous complaints about access to documents were received, had as its objective that all Community institutions and bodies adopt a Code of access to documents, so that citizens know which rules apply when they request access to a document.

All institutions and bodies have adopted Codes upon the Ombudsman's recommendation, and those Codes are still applicable today, except for the Commission, the Council and the Parliament, for which Regulation 1049/2001/EC concerning access to documents now applies.

The European Code of Good Administrative Behaviour

In one of his most important own initiative inquiries, the European Ombudsman recommended that all Community institutions and bodies adopt a Code of Good Administrative Behaviour which set out the principles that the staff of the Community institutions should respect in their dealings with the public.

All Community institutions and bodies followed the Ombudsman's recommendation and adopted such Codes. These Codes assumed different forms and certain among them were drafted more as guidelines than as legally binding documents. In order to have uniform rules for all Community institutions and bodies, the European Ombudsman made a Special Report to the European Parliament calling for a European administrative law equally applicable to all institutions and bodies in their relations with the citizens.

In a Resolution of September 2001, the European Parliament adopted the Code which had been drafted by the Ombudsman, invited the Ombudsman to apply this Code in his daily work and also invited the Commission to submit a proposal for a European administrative law.

The Ombudsman has published the text of the European Code of Good Administrative Behaviour in the form of a brochure and has distributed it to all those interested. A number of ombudsmen in the new Member States and in the candidate countries have translated the Code into their languages and use it as a resource to enhance the quality of public administration in their own countries. Recently also, during my visit to Greece, the Greek Minister of Interior showed a lot of interest for the Code and announced his intention to take it into account when drafting legislation which includes a new Code for Greek public administration.

Other examples of successful own initiative inquiries

The Ombudsman, upon receiving several complaints concerning the matter, asked the Commission to bring more transparency and to better inform the complainants during the administrative stage of the infringement procedure (Article 226 of the EC Treaty) which the Commission initiates when a citizen complains that a Member States infringes Community law. Further to this own initiative inquiry and inquiries into subsequent complaints, the Commission adopted in March 2002 a *"Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law"*. Since my inquiry and the above communication, I have seen a significant improvement in the information citizens who have lodged complaints about infringement of EU law. This also explains why we have received fewer complaints than before about this matter.



The Ombudsman also launched an own initiative inquiry into the problems posed by systematic late payment by the Commission to its creditors. In reaction to the inquiry, the Commission took several measures to avoid delays in payment in the future. Since this inquiry, there has been a significant decline in the number of complaints concerning late payment.

At the end of last year I opened another own initiative inquiry, namely into the measures that the European Commission has taken to integrate people with disabilities. This inquiry is still pending.

The Charter of Fundamental Rights

The European Ombudsman followed very closely the developments of the Charter of Fundamental Rights proclaimed in Nice in December 2000. As an observer at the Convention responsible for drafting the Charter, chaired by Roman Herzog, the Ombudsman played a pro-active role in the drafting of the final text.

This initiative may well be the best example of a case where the promotion of good administration by the Ombudsman has been most effective, since it led to the official recognition of the "right to good administration".

The first European Ombudsman called for the Charter to include, next to the so-called "classical" fundamental rights, also the rights of citizens to an open, accountable and service-minded administration. As a result of this proposal, Article 41 of the Charter contains the fundamental "right to good administration" which provides that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

The Ombudsman was one of the first institutions to make explicit reference to the Charter and to apply it in his decisions. He also indicated that a failure of a Community institution or body to respect the rights contained in the Charter constitutes an instance of maladministration.

I want to mention one important example where the Ombudsman applied the Charter. It concerned the application of age limits in open competitions run by EU institutions. Further to an earlier own initiative inquiry in which the Ombudsman had criticised this practice, Community institutions and bodies had raised the age limits for participating in competitions from 35 to 45 years.

The Ombudsman finally asked the Commission, the Parliament and the Council to abolish age-limits in their competitions, referring to the principle of non-discrimination on the basis of age which is contained not only in Article 13 of the EC Treaty but now also in Article 21 of the Charter of Fundamental Rights. In reaction to the inquiry, both the Commission and Parliament announced in April 2002 that they would ban age limits from all future competitions with immediate effect and would also oppose to the use of age-limits in competitions run by EPSO.

The Constitution

The European Ombudsman has played a pro-active role in the debate on the future of Europe, by focusing the attention of the drafters of the Constitutional Treaty on the citizens, and not only on the major, structural issues relating to the distribution of powers between and among the



various institutions.

Like in the Convention on the Charter, the European Ombudsman participated as an observer in the Convention on the Future of Europe. I would like to describe shortly what his various contributions have been.

Firstly, the European Ombudsman strongly supported the insertion of the Charter of Fundamental Rights in the future Constitutional Treaty. From the very proclamation of this Charter, the Ombudsman has held that it should be legally binding in EU law. This is now a reality as the Charter of Fundamental Rights is inserted as Part II in the Treaty establishing a Constitution for Europe.

The Ombudsman secondly called for the Constitution to provide for a law on good administration (or administrative law) that would apply to all Union institutions and bodies. This call has been answered in Article III-304 of the Constitution, which provides that *"in carrying out their missions, the Institutions, bodies and agencies of the Union shall have the support of an open, efficient and independent European administration"* and that *"(...) European laws shall establish specific provisions to that end"*. The Secretary General of the Commission mentioned 2006 as a possible date for the Commission to come up with a draft proposal for an administrative law.

Finally, both my predecessor and myself have suggested that the Constitutional Treaty should include a Chapter on Remedies. Such a chapter should have clarified to the European citizens the possibilities for both judicial and non-judicial redress when Community law rights are not respected. As well as informing citizens about their right of access to the courts, the Chapter should have mentioned that citizens have the right to complain to an ombudsman or similar body in each Member State about failure to respect individual rights under Community law.

As regards judicial remedies, Article I-28 and Article II-47 answer the Ombudsman's call for the Constitution to inform citizens of their right to go to a national court. Article I-28 requires Member States to provide *"rights of appeal sufficient to ensure effective legal protection in the fields covered by Union law"* and Article II-47 foresees that *"everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal (...)"*.

The role of the European Ombudsman is also strongly enshrined in the Constitutional Treaty where, as pointed out above, he is mentioned on four occasions. Article I-48 particularly makes clear that the Ombudsman is elected by the European Parliament, and not appointed like it was mentioned in a previous draft.

Regrettably, neither the Convention itself nor the Intergovernmental Conference (IGC) found time to act on the other proposal of the Ombudsman to include in the Constitution a reference for the citizens to non-judicial remedies.

I remain however convinced that ombudsmen at all levels have a vital role to play in ensuring



the full and correct implementation of Union law. I will therefore continue to defend this idea.

Informing citizens about their rights

A very important aspect of the pro-active role of the European Ombudsman is spreading information to the citizens about their rights and how they can exercise them.

Since I have taken office in April last year, I have made the information campaign one of the top priorities of my mandate.

The Ombudsman, still being a young institution of 9 years, can of course only be helpful for potential complainants if they are aware of his existence. I have therefore decided to spread the word about the institution in a very intensive information tour between September 2003 and May 2004, so that all citizens, especially from the 10 new Member States, are fully aware of the rights attached to the European citizenship, including the right to complain to the European Ombudsman.

This information tour, which by next month will have made it possible for me to visit all 25 Member States plus two candidate countries, has been quite effective, considering the sharp increase of complaints, particularly since January 2004.

At the same time as informing potential complainants about the institution, I have also further strengthened my collaboration with the national and regional ombudsmen in the Member States.

Other pro-active initiatives

Further to some other pro-active initiatives, some other concrete achievements were obtained which are worth mentioning:

The Commission agreed in principle to pay *ex gratia* compensations in exceptional circumstances, namely when the maladministration can not be rectified anymore.

The Commission agreed to adopt a new procedure for informing unsuccessful bidders in tender procedures and provide for a reasonable delay before the contract is signed, to challenge the decision through legal proceedings.

Both the Commission and Parliament replied positively to my suggestion of shortening the time limit for replies to complaints in access to documents complaints.

The Commission responded positively to the Ombudsman's suggestion to extend the provision of information on the Ombudsman to applicants for, and recipients of, grants and subsidies.

The dual role of the European Ombudsman

The Ombudsman is first of all an instrument of external control over public authorities and, however necessary such controls may be, they have some negative aspects.

The underlying tone of a complaint is by definition negative and can thus create some tensions with the administration, especially when the Ombudsman finally considers that the complainant was right and makes a recommendation designed to rectify the act of maladministration.



However, as well as exercising a control function, ombudsmen are also a valuable resource for public sector managers, especially those who are trying to create or maintain an organisational culture that emphasises service to citizens and focuses on the quality of outputs.

Complaints, for example, can be a useful source of information to management in a large organisation. They enable managers to dig down into their organisations, to focus on the quality of outputs from particular units and to take corrective action where and if necessary.

If any shortcomings do exist, an inquiry by the ombudsman gives the administration the chance to correct them and, not least, to receive the credit for that action.

Furthermore, tackling the underlying causes of maladministration produces a double benefit: not only does it help avoid future complaints, but it also enables institutions to manage themselves more effectively and to achieve better results, in the process directly contributing to the legitimacy.

Finally, quite a high proportion of ombudsman inquiries reveal no maladministration. This does not mean, however, that the inquiry was a waste of time and effort, either for the citizen or for the administration.

An inquiry provides the administration with an opportunity to explain effectively to citizens what it has done and the ombudsman can help in this regard.

For example, one complainant recently sent a letter thanking me for a decision that helped him to understand and to accept the Commission's actions in his case, even though, in one sense, he had "lost" the case, because I found no maladministration.

Conclusion

The European Ombudsman has now been in the European landscape for 9 years.

In the beginning the European Ombudsman was a new and very small institution, with a staff of less than 10 persons, of which a lot of people in the EU had never heard before. This new "microscopic" institution was given the task by the Maastricht Treaty to control the maladministration in large and strongly established institutions such as the European Parliament, the Commission and the Council, which employ thousands of officials.

Of course, the Ombudsman had to struggle to be recognised, especially when his views in certain issues went against the ruling policy or practice. This happened regularly as the first European Ombudsman came from a Member State with a long tradition in transparency and openness in its administration.

However, on the basis of his decisions which are always carefully considered and take into account the case-law of the Community courts, and on the basis of good collaboration which was built up over the years with all the institutions, the European Ombudsman has little by little managed to gain the respect as an EU institution among the others, with a task which is now



enshrined in the Constitutional Treaty.

It is only on the basis of collaboration with the institutions he controls that the Ombudsman can further consolidate the institution and achieve positive results for the citizens who decide to turn to him. In the end, the Ombudsman can bring the citizen closer to the EU and diminish the gap, which too often exists between the institutions and the citizens they serve.

I should like to think these are goals that effortlessly inscribe themselves within the broader universe of values informing, among others, the Fulbright ethos, which is the central theme of this conference.

It is for this reason that I am grateful to the organisers for giving me an opportunity to share my thoughts and reflections with you and

Thank you for your patience and attention!