European Ombudsman

'The role of the European Ombudsman', Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, to the British and Irish Ombudsman Association Conference 2005, Warwick University, Coventry, United Kingdom, 8 April 2005

Speech

1 Introduction

I am delighted that the final plenary session of this Conference is devoted to the role of the European Ombudsman. I am grateful to Ann Abraham and to Gordon Adams for giving me this opportunity to speak to such a large and varied audience of practitioners and students of ombudsmanship from the Republic of Ireland and the United Kingdom.

The UK will hold the presidency of the European Union during the second half of this year and I plan to make an information visit to the UK during its presidency.

Such visits are normally an occasion for me to meet with citizens and potential complainants to explain the role of the ombudsman, to exchange views with public officials to underline the importance of non-judicial remedies and to discuss with my ombudsman colleagues to determine how best to defend and promote citizens' rights. In meetings with government representatives and senior public officials, I am normally accompanied by the national ombudsman of the Member State concerned, so that our respective remits, as well as the importance of our co-operation, can be underlined.

Attending this well-organised conference, where the level of debate has been very high, will be of great value to me in preparing my information visit to the UK.

In this plenary session, I plan to speak for about 20-25 minutes, to leave time for questions and discussion.

I shall begin with a brief outline of what my office is and what it does.

Then I shall explain some key elements of my philosophy of ombudsmanship, focusing on the scope of my inquiries into maladministration and the relationship between the Ombudsman and the European courts.

I shall conclude by looking to the future and especially to the further development of co-operation through the European network of ombudsmen.

2 The European Ombudsman

The office of European Ombudsman was created by the Maastricht Treaty to enhance relations between citizens and the European Union level of governance.

The first Ombudsman was elected by the European Parliament in 1995 and began work in September that year. So we are now in the run-up to our 10th anniversary celebrations.

We are still a relatively small operation. In 2004, we received just over 3,700 complaints, representing a 53% increase compared to 2003. In the first two and a half months of this year there was a further 30% increase compared to the same period in 2004, so complaints are now running at an annual rate of approaching 5000.

The mandate was originally limited to the European Community institutions and bodies, but in 1997 the Treaty of Amsterdam also included the so-called "third pillar" of police and judicial co-operation in criminal matters. At present, therefore, I am able to inquire into complaints against Europol and Eurojust.

The Treaty establishing a Constitution for Europe, on which I understand referenda will be held in both Ireland and the UK, defines the mandate as the "Union, institutions, bodies, offices and agencies". This will bring into the European Ombudsman's mandate the European Defence Agency, which was established under the Common Foreign and Security Policy, as well as - perhaps surprisingly - the European Council, which consists of the heads of State or government.

2.1 The main types of admissible complaints

In practice, about 70% of the admissible complaints 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, who are the people entitled to complain to me.

As you will discover later, 70% seems to be a magical figure for the Ombudsman.

Admissible complaints mainly involve five kinds of subject-matter:

- First there are disputes about tenders and contracts. This category includes all kinds of procurement contracts, as well as contracts under which the Commission provides grants or subsidies;
- A second category concerns the Commission's role as "Guardian of the Treaty", which means enforcing European law against a Member State that fails to comply with the law. We call these "Article 226 complaints", after the number of the Treaty Article that contains the Commission's enforcement powers against Member States.
- Thirdly, there are complaints about personnel matters: recruitment and complaints from existing staff.
- The fourth category concerns lack of openness, especially refusal of access to documents.
- The fifth category, finally, covers complaints falling within the generic notion of maladministration (administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay, etc.)

We are also receiving an increasing number of complaints about the investigatory activities of the EU's Anti-Fraud Office, OLAF. Next month, the EU Borders Agency (or to give it its full title, the European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union) will begin work. I would be surprised if that does not also generate a significant number of complaints in due course.

2.2 Inadmissible complaints

We also receive a high proportion of complaints that we cannot investigate, mostly because they are against, national, regional or local administrations in the Member States. I gave you due warning, so you will not be surprised when I tell you that these inadmissible cases represent about 70% of the total complaints.

In about 70% of the 70% (I told you it was a magical figure) we are able to give advice to the complainant as to the appropriate body to deal with the matter. If possible, we transfer the case directly. For example, the French *Médiateur de la République* has a specific provision in his law empowering him to receive complaints transferred from the European Ombudsman. This is one case in which the Parliamentary filter on complaints submitted to the French Ombudsman is not applicable. Many other national, regional and local ombudsmen in the Union are also able to receive complaints transferred from the European Ombudsman, even without a specific legal provision.

Last year, for example, we advised UK complainants to contact, amongst others, the Parliamentary Ombudsman, the Health Service Ombudsman (- one of Ann Abraham's other hats of course -) the Financial Ombudsman Service and the Local Government Ombudsman. We also advised complainants about complaints procedures of various kinds, such as those of the Legal Services Commission and the Department for Work and Pensions.

3 Maladministration

The review criterion laid down in the Treaty for my inquiries is "maladministration". That is of course only in the English version, which is one out of 21 equally authentic language versions of the Treaty.

"Maladministration" like the equivalent terms in the other 20 languages, is left undefined in the Treaty. I do not need to tell fellow practitioners of ombudsmanship that any definition of maladministration is of limited value and that an explanation of the kinds of matters that maladministration encompasses is much more useful.

Since the first Annual Report in 1995, the European Ombudsman has consistently taken the view that three kinds of failure may give rise to a finding of maladministration: - failure to respect a legal rule or principle - failure to respect the principles of good administration, or - failure to respect human or fundamental rights.

These three categories overlap. For example, the Court of Justice has established that human rights, as guaranteed by the European Convention on Human Rights and the constitutional traditions common to the Member States, are also general principles of Community law.

On the other hand, the Charter of Fundamental Rights is not yet legally binding, but I take the

view that it would not be good administration for the Union institutions that solemnly proclaimed the Charter in December 2000 to fail to respect its provisions.

There is also some overlap between legal rules and principles and the principles of good administration. For example, the Court of Justice and Court of First Instance of the European Communities sometimes include reference in their decisions (which are, of course, legally binding) to a concept of "sound" or "good" administration.

This observation brings me to the general subject of the relationship between the Ombudsman and the courts.

4 The relationship between the Ombudsman and the Courts

The first point to make on this topic is that my mandate does not include the Court of Justice and the Court of First Instance acting in their judicial role. So, for example, I can investigate complaints about recruitment to the Courts, or contracts that they award, but not complaints about their handling of cases.

The Treaty also prevents me from investigating *"where the alleged facts are or have been the subject of legal proceedings"* . The decisive words in this provision are not "could or might have been" but *"are or have been"* . This means that, in many cases, citizens have a choice of remedy: they may go either to the Court, or to the Ombudsman.

4.1 The Ombudsman as an alternative to the courts

In making their choice, citizens will no doubt take into account that there is no cost in going to the Ombudsman and that we are normally quicker than the Court. Despite the constraints imposed by the need for translation, we aim to complete inquiries within a year and we achieve that target in about 95% of cases.

There are also two other factors that help to make the European Ombudsman a genuine alternative to the Court.

First, the criteria for review that I apply overlap with, but are not identical to, those of the Court. As the Court of First Instance has recently recognised, maladministration is not necessarily illegality *(see decision of 28 October 2004, in joined cases T-219/02 and T-337/02, paragraph 101)* . Breaking the law is a form of maladministration, but the principles of good administration demand more of institutions than merely not breaking the law.

Second, our way of working is much more flexible than that of the Courts. As regards admissibility for example, there is no requirement that the complainant be personally affected by the maladministration or that there be an official act to be challenged. This is why I can investigate Article 226 complaints, despite the fact that it would not be possible for a complainant to go to the Court.

I can also use the power to inquire on my own-initiative to deal with complaints from people who are neither citizens nor residents, if I think that there is an issue of maladministration by a Community institution or body that should be investigated.

In addition, whenever I find maladministration, I seek a friendly solution if possible. The move into the friendly solution mode creates room for manoeuvre that I can use to try to ensure a win-win outcome, satisfying both the citizen and the institution concerned.

The fact that my decisions are not legally binding is fundamental to these characteristics of ombudsmanship. I therefore see non-bindingness as a strength, not a weakness. The citizen who wants a legally binding decision about his or her rights and obligations can go to the Court. Non-bindingness enables the Ombudsman to be a genuine alternative to the Court.

The availability of this alternative enhances choice for citizens. The citizen can decide what is the appropriate form of dispute resolution - court or ombudsman - in his or her circumstances.

The availability of choice for citizens enhances the quality of democracy.

4.2 The Ombudsman as a complement *to the courts*

We also complement the Courts, by working proactively to raise the quality of the public administration. For example, my office drafted the European Code of Good Administrative Behaviour and recommended its adoption by all the Union institutions and bodies as a guide for both citizens and officials.

The European network of ombudsmen played an important role in providing information and resources to help draft the Code: for example, the then Irish Ombudsman Kevin Murphy made his *Guide to Standards of Best Practice for Public Servants* available as a source of inspiration, from which my office drew extensively.

Several ombudsmen in the network have also used the Code as a resource to enhance the quality of public administration in their own countries, especially in States that have recently joined the Union, or are negotiating to do so. We plan to publish the Code in 13 new languages before the summer this year, thereby bringing the total to 24 (the 20 official EU languages and the four languages of the candidate countries for EU membership).

5 Looking to the future

I would like to conclude this presentation with a few comments on how I see the future of my office and in particular, the co-operation in the European network of ombudsmen, which is both informal and multi-layered.

Both Ireland and the UK plan to hold a referendum on the Treaty establishing a Constitution for Europe. I personally am very much in favour of the Constitution, as I believe that it could have real benefits for citizens, both in terms of increasing protection of their rights and making it easi er to understand what the Union is and how it functions.

But whatever the fate of the Constitution, I believe that co-operation of national administrations with the EU institutions and co-operation among national administrations through the EU institutions will continue to develop.

5.1 Enhanced co-operation and possibly joint inquiries

If citizens are to be protected against maladministration, co-operation among national administrations needs to be matched by co-operation among ombudsmen.

Let me give you just one example. I received and continue to receive a lot of complaints against the European Commission from Spanish citizens who believe that the Commission is trying to make the Spanish authorities put an end to free lending from public libraries.

I learnt from the Spanish Ombudsman that he is dealing with complaints arguing that the Spanish authorities are choosing to implement an EU Directive through imposing charges on lending from public libraries, rather than adopting other possible solutions.

The Spanish Ombudsman and I agreed to share information about our respective inquiries and I have requested information from other national Ombudsmen in the network about the situation in their countries.

I hope that in this way we will at least be able to shed light on exactly who is responsible for what and, if appropriate, use our powers to ensure that the full range of legally possible solutions is adequately and duly examined.

In future, I would like to explore with national colleagues the feasibility and usefulness of extending this kind of informal co-operation into joint inquiries in some situations.

To give an example: the new EU Borders Agency that I mentioned earlier will work in co-operation with national administrations. If one imagines possible scenarios that could give rise to complaints relating to this EU body, it may well be that only an inquiry could help clarify who is responsible for what has occurred: the Agency, the national authorities, or both.

In such a case, it would surely be in the interests of the complainant for the ombudsmen involved to get on and deal with the matter, possibly through a joint inquiry, rather than waste time debating issues of competence with the Agency and the national authorities concerned.

5.2 A common interest in promoting and protecting the idea of Ombudsmanship

I also believe that in future we will need to consider together how best to promote and protect the idea of ombudsmanship.

I have a strong aversion to using the language of the marketplace when talking about citizenship or the rights of citizens. But we should also recognise that the term “ombudsman” constitutes a kind of brand. It represents an implicit promise to citizens, including citizens who exercise the right of free movement from one Member States to another, about the nature of the institution. The positive connotations of the word “ombudsman” are also an important political and cultural asset for all of us as practitioners.

We therefore have a common interest in defending the integrity of the ombudsman brand.

In this context, there could be a case for seeking to protect the interests of citizens as well as the broader public interest, by regulating the right to use the term “ombudsman” and its equivalent in other languages, as, for example, is already the case in Denmark, in Malta, in my own country Greece and in New Zealand.

We also need to avoid overloading ombudsmen, thereby creating a risk of failure that could have spill-over effects on the credibility of the ombudsman as an institutional formula.

I have two kinds of potential overload in mind.

The first is in some countries where the rule of law and democracy (which of course are not the same) have shallow-roots, or no roots at all. Setting up ombudsman institutions in such countries may well help move them in the right direction and improve the lot of citizens. It is therefore a worthwhile enterprise.

It is important, however, not to create exaggerated expectations of what the institution can achieve. In particular, I doubt whether it is realistic to think that an ombudsman can effectively serve as a remedy for systemic failures in the judicial system.

To put it another way, the ombudsman institution is unlikely to be able to single-handedly establish the rule of law where it does not exist.

The second kind of overload is perhaps more familiar: sheer volume of complaints. I do not think this is only a question of adequate resources, although ombudsmen should indeed have adequate resources to deal with the volume of complaints they receive.

What I have in mind is that whereas the ombudsman should act as a first resort when compared to the courts, citizens should only turn to the ombudsman once they have exhausted all internal dispute-resolution procedures. Seen from this perspective, part of the ombudsman's role is to encourage, both with carrot and stick, the establishment of effective front-line complaints procedures, rather than to serve as such itself.

6 Conclusion

Finally, I would like to emphasise that "Europe" is only to a limited extent about what happens in Brussels or Strasbourg.

Ever since the Maastricht Treaty, which created amongst other things the European Ombudsman, the business of Europe has increasingly involved so-called inter-governmental co-operation, which also means co-operation among national administrations. Even in the area of the traditional Community method, implementation is largely a matter for national authorities.

The contribution of national, regional and specialist ombudsmen, your contribution, is therefore as important as mine in ensuring that citizens enjoy good administration in relation to matters "European". I am ready to work with you in any way that I can to help achieve this.

Thank you for your attention.