THE ROLE OF THE EUROPEAN OMBUDSMAN

Speech

Mr Chairman!

The Maastricht Treaty on European Union, which came into effect in 1993, introduced into the European Community Treaty provisions concerning Union citizenship. Any person who holds the nationality of a Member State is a citizen of the Union. The rights of European citizens are the right to move and reside freely within the territory of the Union as well as the right to vote and stand as a candidate in the municipal and European Parliament elections. Citizens shall also be given diplomatic assistance by the authorities of any Member State whenever they are outside the Union and the home country does not have diplomatic representation in the place concerned.

Furthermore, the right to petition the European Parliament, which had already developed in practice, was incorporated into the Treaty. Finally, the Maastricht Treaty conferred upon any citizen of the Union, or any natural or legal person residing or having its registered office in a Member State, the right to apply to the European Ombudsman.


1. The mandate of the Ombudsman

The task of the European Ombudsman is to deal with instances of maladministration in the activities of the Community institutions and bodies with the exception of the Court of Justice and the Court of First instance acting in their judicial role. According to Article 8d, every citizen of the Union may apply to the European Ombudsman. He is also entitled to begin an inquiry on his own initiative.

In some early articles about the European Ombudsman, it was argued that European citizens could only complain to the Ombudsman if they were personally involved in the instance of maladministration. No such requirement is mentioned in the Treaty Articles concerning the Ombudsman, nor in the Statute of the Ombudsman, but it is prescribed as a requirement for the right to petition. Therefore the commentators thought that it should also be required for complaints to the Ombudsman. It was also mentioned that it would only be natural for there to be such a requirement. For me, it is difficult to understand how a limitation of a citizen's
right could be applied when it is clearly not demanded. That it is explicitly demanded in another case of a similar nature should make this even clearer.

In this context, it must be underlined that the right to complain to an ombudsman in its classical version in the Nordic constitutional landscape has always been an "actio popularis", in which there is no need to be a party to the issue in order to complain. In fact, one can complain successfully even if the parties involved in the case oppose a complaint to the Ombudsman.

2. What is administrative activity?

The Treaty wisely excludes the Court of Justice and the Court of First Instance acting in their judicial role from the remit of the Ombudsman. But it does not mention anything about the European Commission or European Council acting in their legislative role, nor about the European Parliament acting in its political role. On the other hand, it is quite clear that a legislative act is not an administrative act. Thus legislative acts seem to fall outside of the remit of the Ombudsman. The difficulty in the Community context is that the same types of measure - regulations and decisions - may be used for what are clearly administrative as well as for what are clearly legislative purposes. There is also, of course, a large grey area between the two. Borderline cases, as far as the interpretation is concerned, might be situations when it is argued that there is an abuse of power or an infringement of fundamental or human rights.

At the national level, the classical Ombudsman's office is set up to supervise administrative authorities on behalf of the Parliament, not to supervise the legislative work or other political activities of the Parliament itself. Although the situation is not quite comparable on the European level, the political work of the European Parliament cannot be considered as an administrative activity. This question had to be dealt with in practice because, early on, the Ombudsman's office received a number of complaints about possible maladministration by the Committee on Petitions in dealing with petitions. One of the complaints was even presented by a member of the Committee. Since the Committee is a political body dealing with petitions as a political task of the Parliament, these complaints were not considered admissible. In dealing with petitions, the Committee is to be supervised by the Parliament itself. An own initiative inquiry by the Ombudsman concerned with the establishment of rules on public access to documents was explicitly restricted to administrative documents of the Parliament.

3. What is maladministration?

In the first Annual Report (1995), it was stated that there is maladministration if a Community institution or body fails to act in accordance with the Treaty and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and the Court of First Instance. The Ombudsman must also take into account the requirement of Article F of the Maastricht Treaty that the Community institutions and bodies are to respect fundamental and human rights. Many other things may also amount to maladministration, including: administrative irregularities, administrative
omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunctions or incompetence, discrimination, avoidable delay or refusal of information.

As was stated in the same Annual Report, the experience of national ombudsmen shows that it is better not to attempt to give a rigid definition of what may constitute maladministration, at least not in the very beginning of the activity. I presume that the jurisprudence of the Courts in Luxembourg and the literature on European administrative law as well as on the national level will safely guide the Ombudsman's ship on the bulky sea of good and bad administration.

As proposed in the report [1] of the Committee on Petitions of the European Parliament on the Ombudsman's Annual report for 1996, the Parliament adopted a resolution calling for a clear definition of the term "maladministration". As there is no possibility to have the European Community Treaty amended for this purpose, I have promised that I will define the term more explicitly in my Annual Report for 1997 to give the Parliament and its responsible Committee the possibility to make observations on it.

An important initiative to establish a code of conduct for good administrative practice has been taken by Mr Roy PERRY MEP, rapporteur in June 1997 for the report of the Committee on Petitions on its own activity during 1996-97. [2] I have had a possibility to discuss this issue with the Commissioner responsible for relations with the Ombudsman, Mrs Anita GRADIN, who is in favour of the idea. It would be of great help for me if the national Ombudsmen could provide me with good national examples of such codes.

4. Can discretionary power be supervised?

Article 155 of the European Community Treaty gives the Commission responsibility for ensuring that Community law is put into practice. In relation to Member States, the main instrument through which the Commission carries out its duty as 'guardian of the treaties' is the procedure under Article 169. This involves an administrative investigation by the Commission, which can eventually decide to bring the matter before the Court of Justice.

In its very first replies to the European Ombudsman in the so-called "Article 169 cases", the Commission stated that the subject matter of the complaints involved the exercise by the Commission of its discretion with regard to proceedings under Article 169. And it added: "in deciding not to open infringement proceedings, the Commission exercised its discretion as fully recognised by the Court." [3]

Furthermore, the Commission remarked that it had "proceeded vis-à-vis the complaints in accordance with the principles of good administrative behaviour". That means that it recognises that the administrative procedure leading to the decision is within the remit of the Ombudsman as his mandate is to look for possible instances of maladministration.

In observations on the Commission's opinion, complainants in the Newbury Bypass case reacted by claiming that "the Commission's remarks about its discretion amount to an assertion that it can act arbitrarily."
Anyhow, the opinion expressed by the Commission raises the question of whether the exercise of discretionary power can be supervised by the Ombudsman. The basic line is, of course, that discretionary power granted to a public authority cannot be challenged as long as the discretion is properly exercised. In the choice among a number of alternative solutions, the supervising body should not intervene. Such choices are for the public authority itself to make, in accordance with its goals and priorities.

It must however be remembered that discretionary power is not the same as dictatorial power. In the exercise of discretionary power the general principles of law must be observed carefully.

There must be no abuse of power, no discriminatory or arbitrary solutions, no procedural irregularities, nor manifest failures to observe the rule of law. To me it is clear that the question of whether or not discretionary power has been exercised within the limits established by general legal principles is a matter for judicial review, as well as a matter for the Ombudsman to supervise. In fact, a great part of the daily work of an Ombudsman is about checking whether the discretionary powers of the administration have been properly exercised. It is also logical that discretionary power may be more or less limited, depending upon the purpose for which it has been given. In the case of the decision whether or not to initiate a case before the Court of Justice, it seems appropriate that there should be a rather broad margin of appreciation, still keeping in mind that the discretion must be exercised in a proper way and for a proper purpose.

5. How about third pillar Documents?

In the academic literature, there have been voices arguing on both sides of the question of whether the European Ombudsman has a mandate in relation to second and third pillar matters as well as the first pillar. I have not been tempted to deal with that issue for the very practical reason that, for the time being, there is no activity by Community institutions or bodies in the substance of those pillars to supervise. It must be remembered that the wording of my remit in the Treaty is "activities of the Community institutions or bodies".

This question was, surprisingly, raised by the European Council in a case about public access to documents. In this case, the complainant requested Council documents relating to the third pillar. His request was dealt with by the Council under its Decision on public access to documents and was, in part, refused. The letter containing the partial refusal informed the complainant of his right to complain to the Ombudsman. When he acted on this suggestion, however, the Council responded by contesting the Ombudsman’s jurisdiction to deal with third pillar matters.

The Ombudsman’s response to the Council emphasised that this was not the relevant question. The Decision on public access to documents was made under Article 151 of the European Community Treaty. The Court of Justice confirmed in its judgement in *Netherlands v Council* that the Decision has legal effects vis-à-vis third parties as a matter of Community law.
Furthermore, the Decision was interpreted and applied by the Court of First Instance in *Carvel and Guardian Newspapers v Council*. [7] This case involved access to, *inter alia*, Council documents relating to the third pillar. Given the limitations on the jurisdiction of the Court of Justice imposed by Article L of the Treaty on European Union, the Court of First Instance would have had no jurisdiction to deal with this aspect of the *Carvel* case if access to Council documents concerning the third pillar was itself a third pillar matter. In fact, however, the Court did accept jurisdiction in the case.

The correct interpretation and application of the Council decision on public access to documents is therefore a matter of Community law and within the Ombudsman’s mandate. The Council has now sent its opinion on the complaints, giving detailed arguments to support its case that it has dealt with the journalist’s request under its Decision on public access to Council documents. Thus the Council admitted that dealing with requests on access to documents is a question of interpretation of Community law and not a third pillar issue.

6. When to take initiatives?

Most of the national ombudsmen have the right to conduct own initiative enquiries. In my first Annual report, the philosophy for using this important tool was explained. The idea was to give priority to the complaints and only take initiatives where they seemed to be clearly inspired by many complaints on the same issue and where an initiative could make it easier to look for possible solutions and actions in a more efficient and coherent way. This position was slightly criticised in the Committee on Petitions’ report on the first Annual Report and considered too passive. [8]

It has anyhow lead to some initiatives of principle.

6.1 Rules on public access to documents

The first initiative was on transparency in the activities of Community institutions and bodies. The reason for the inquiry was that the Ombudsman’s office had received a number of complaints which seemed to suggest that the staff of Community institutions and bodies are not always adequately instructed on how to deal with requests for documents and that documents are sometimes disclosed after a considerable delay. Because an important part of the Ombudsman’s mission is to enhance relations between Community institutions and bodies and European citizens, a more transparent European administration is quite clearly a condition for achievements in this field.

At present there is no Treaty provision or general Community legislation about public access to documents. Declaration 17 attached to the Final Act of the Maastricht Treaty stresses that transparency strengthens the democratic nature of the institutions and the public’s confidence in the administration.

Following a recommendation in the Declaration, the Commission and the Council adopted their own, publicly available, rules about access to documents that they hold. [9] As the
other institutions and bodies had not adopted such rules the Ombudsman wrote to them to ask them about the matter.

This own initiative enquiry included: the Community institutions in the sense of Article 4 of the Treaty (other than the Council and the Commission which had already established rules); four bodies established by the Treaty; and the eight (out of ten) decentralised Community agencies which were already operational. [10]

After an exchange of views with the institutions and bodies in question, during which they all showed a positive attitude to the initiative, the Ombudsman formally recommended to 14 of them in December 1996 that they should adopt rules on public access to documents. The recommendation recalled the requirements of Community law as declared by the Court of Justice:

"So long as the Community legislature has not adopted general rules on the right to public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration." [11]

Most of the institutions and bodies have adopted such rules. Some of them had to ask for more time because of the complexity of the task; it is now foreseen that they will adopt the rules soon.

The European Parliament and the Court of Justice had difficulties in dealing with the issue as they had to try to separate the documents concerning their substantive work - political in one case, judicial in the other - from the administrative ones. The Parliament succeeded and adopted its rules. The Court informed me that there was not really any point in separating them because the case-related documents where anyhow more important in this respect. At the moment, it seems that the Court of Justice will consider drafting rules concerning access to all relevant documents in the near future. I will soon be informed better about this. The initiative on transparency will be the first one to constitute a special report to the European Parliament. It will be launched before the end of the year.

6.2 The secrets of the "guardian of the Treaties"

Another matter that has caused a lot of complaints is the lengthy and closed procedure that the Commission follows when a citizen complains about a Member State's failure to fulfil its obligations under Community law. The Commission has invited European citizens to complain by publishing a standard complaint form in the Official Journal in 1989. [12]

The inquiries of the Ombudsman in the "Article 169 cases", mentioned in section 4 above, led to the conclusion that a more general examination of the procedural position of the individual complainant in the Article 169 procedure was appropriate. It appeared from the complaints that the procedure used by the Commission causes considerable dissatisfaction among European citizens, some of whom regard the Commission in dealing with their
complaint as high-handed and arrogant. The procedure did not seem to promote the degree of transparency which European citizens increasingly expect from Community institutions and bodies.

The initiative, launched on 15 April 1997, did not raise the possible question of whether Community law might require more developed procedural rights for private complainants in the Article 169 procedure, but it stressed that the Commission itself could create such rights as a matter of good administrative behaviour. In particular, the Commission might, before making its final decision, invite registered complainants to submit comments on its findings within a defined period.

The Commission has given a positive response to this initiative and submitted itself to some significant changes in the procedure in favour of the complainant. It does not yet seem to be ready to open the process fully, accepting the complainant as a party with full rights. The reason for this is the traditional background for the Article 169 process as being an affair between the Community and the Member State.

Recently, I also took an initiative to look into the legal basis and the use of age-limits in Community recruitment procedures. This has been a reason for a lot of complaints especially from the new Member States. The legal traditions differ on this issue in the Member States. In some, they are prohibited by the constitution as age discrimination. In others, they are accepted and frequently used in the public sector. It seems however that the attitude is changing slowly in favour of restricting or prohibiting the use of age limits. It is important to note that the discrimination article in the proposed Amsterdam Treaty mentions age as a possible cause for discrimination.

7. What does the Amsterdam Treaty give?

The proposed Treaty of Amsterdam contains a number of provisions which affect the competences of the European Ombudsman. Under the Maastricht Treaty, the so-called third pillar of inter-governmental cooperation covered the fields of justice and home affairs. Under the Amsterdam Treaty, asylum and immigration matters will eventually be brought into the European Community Treaty and within the jurisdiction both of the Court of Justice and of the European Ombudsman.

The new third pillar will be limited to police and judicial cooperation in relation to criminal matters. Article K 13 of the Maastricht Treaty is to be replaced by a new Article K8 which will remove any doubts about the competence of the Ombudsman to deal with activities of the Community institutions and bodies in the third pillar.

Finally, a new Article 191A will be inserted into the EC Treaty. It will create a right of access for citizens to documents of the European Parliament, the Council and the Commission subject to general principles and limits to protect private and public interests. These principles and limits will be established by the Council through a regulation to be made in accordance with the co-decision procedure with the Parliament (Article 189b) within two years of the entry into force of the Treaty. Each institution will adopt internal rules containing specific
provisions about access to its documents.

The inclusion of this article is greatly to be welcomed, although it is regrettable that its provisions apply only to the three institutions mentioned and not to the other Community institutions and bodies.

8. Are the Ombudsman’s powers sufficient?

In many comments on the European Ombudsman’s office doubt has been expressed about the adequacy of the powers of the Ombudsman to really undo an instance of maladministration. It was repeatedly asked if the Ombudsman should not need powers to order an institution to change its behaviour or its decision in a particular case, or to have the possibility to bring judicial proceedings or to prosecute an official when needed. From these comments, one could believe that the powers of the European Ombudsman are exceptionally weak compared to those of an ombudsman on the national level.

The European Ombudsman’s powers to investigate were not too much debated, the criticism was concentrated on the powers to react when an instance of maladministration is revealed. According to the Statute of the Ombudsman, there are three steps that the Ombudsman can take in this context. Firstly, he should try to look for a friendly solution between the institution or the body concerned and the complainant to eliminate the maladministration and satisfy the complainant. Secondly, if no friendly solution can be reached, he shall inform the institution or body concerned and, when appropriate, make draft recommendations. The institution or body must then reply within three months. If the recommendations are not accepted and no other solution to eliminate the maladministration can be found, the Ombudsman may as a third step send a special report with possible recommendations to the European Parliament and to the institution or body concerned. This gives the Parliament a possibility to look for a way to solve the matter. Furthermore, the Ombudsman has the obligation to inform the appropriate national police if his inquiries reveal criminal activity, or to inform the institution or body concerned about the need to initiate a disciplinary process.

So far, not all of the three steps have been taken. The Ombudsman’s office has made two formal draft recommendations and both have been successful. No special report to the European Parliament has yet been needed. This is mostly because of the positive attitude shown by the institutions, especially the Commission. A lot of friendly settlements have been reached directly by the institution with the complainant after receiving the complaint for an opinion. Of course there may be clashes in the future which would lead to special reports to the European Parliament.

The procedural provisions in the Statute of the European Ombudsman have made it possible to set up a normal two part administrative procedure with a right for the complainant to express his or her views on any opinion presented by the institution or body concerned. The only significant addition to the procedure described in the Statute has been the introduction of a practice of closing some cases with a “critical remark”. This is a traditional practice in most of the national ombudsmen’s offices that I know of. It is used when there is no longer any possibility to put right the administrative behaviour in a particular case, but it is useful
for the future to make clear what good administrative behaviour is in a certain situation. Naturally, the infringement that has occurred must not be grave or raise questions of principle.

On the European level, one should of course add that a friendly solution is sometimes not possible because the situation in which it might have been possible has passed. The introduction of a critical remark also means that the European Ombudsman is not forced to use the formal draft recommendation procedure too often. An excessive use of this alternative, that after all has slightly the character of a sanction, could mean that it might lose much of its real effect.

To me, it seems that it is a misunderstanding to believe that national ombudsmen usually have stronger powers than the European Ombudsman now has. For example the powers of the Danish ombudsman, which has been the model for many of the national ombudsman offices as well as for the office of the European Ombudsman, are substantially the same as those of the European Ombudsman, that is: the right to argue, to recommend and to report.

In a democratic society with a commitment to an open and accountable public administration, this has proved to be enough. Of all the ombudsman systems that I know, only the ones in Sweden and Finland have clearly stronger powers, including the right to decide on prosecutions or to prosecute civil servants. But even there, these powers are very seldom used because the Ombudsman idea has slowly become more a conciliator than a repressive figure. Why turn this development backwards on the European level?

My experience, up to now at least, is that there is a commitment within the Community institutions and bodies to a more open and accountable administration with a readiness to change. If the future proves me wrong, I do not think that more disciplinary or repressive powers for the Ombudsman could change the situation profoundly. I think the problem in the Community's relation with European citizens would then be much too grave to be solved by disciplinary measures.

9. Is the Ombudsman’s remit too limited?

In the original Spanish proposal that was presented as part of the negotiations leading to the Maastricht Treaty, the European Ombudsman was also meant to supervise the application of the European citizens' rights on the national level. In the compromise adopted at Maastricht, based on a Danish proposal [13], the Ombudsman's remit was limited to possible maladministration in the activities of the Community institutions and bodies.

Of the complaints received so far, more than 60 % seem to be clearly outside the mandate, mostly because they concern activities of the national authorities. This problem has been tackled in two ways. The Office has launched a targeted information campaign to find those citizens and companies that may have a reason to complain about the activities of the Community institutions and bodies. The other action taken has been to initiate a close and flexible co-operation with the national ombudsmen and similar bodies to guarantee that there is always a competent body to deal with any complaint dealing with Community law be
it on the European or national level.

Today, there are ombudsman offices in 12 Member States. The latest offices on the national level are in Belgium, where two federal ombudsmen were recently elected, and Greece, where the law establishing an ombudsman was adopted by the Parliament in April. Germany and Luxembourg have Committees on petitions at the national level. In Italy, there are only regional and municipal ombudsmen. A legislative proposal to establish a national office is pending in Rome so far without success.

As you remember, the national ombudsmen and similar bodies met at a seminar in Strasbourg last September with representatives of Community institutions to discuss cooperation in the supervision of Community law on the national level. During this seminar, it was decided to appoint liaison officers in each office to carry forward the practical cooperation. The establishment of this liaison network was concluded in 1996.

On 23 and 24 June 1997, a seminar for the liaison officers was held in Brussels to discuss questions of Community law and further cooperation. The positive attitude you have shown in this cooperation has been very encouraging for me and for the Community institutions concerned. I hope that this cooperation will make the rights of European citizens a living reality in the Member States.

[1] A4-0211/97, Rapporteur Nikolaos Papakyriazis

[2] A4-0190/97


[10] The full list of institutions and bodies covered by the inquiry is:

The European Parliament
The Court of Justice
The Court of Auditors
The European Investment Bank
The Economic and Social Committee
The Committee of the Regions
The European Monetary Institute
The Office for Harmonization in the Internal Market
The European Training Foundation
The European Centre for the Development of Vocational Training (Cedefop)
The European Foundation for the Improvement of Living and Working Conditions
The European Environment Agency
The Translation Centre for Bodies of the European Union
The European Monitoring Centre for Drugs and Drug Addiction
The European Agency for the Evaluation of Medicinal Products

