The European Ombudsman

Origins, Establishment, Evolution

Commemorative volume published
on the occasion of the 10th anniversary of the institution

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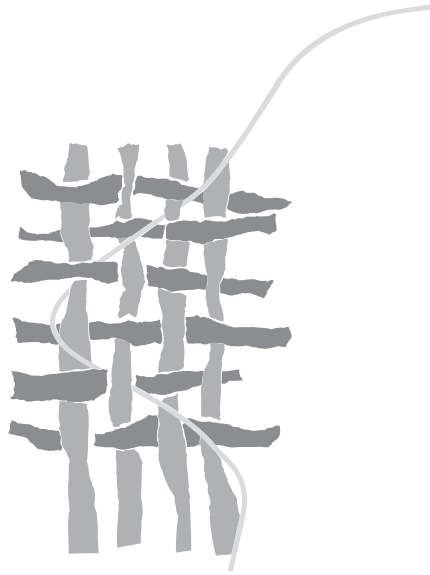

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Introduction

P. Nikiforos Diamandouros [1]

"...[t]he work of the Ombudsman should focus on helping European citizens and others entitled to apply to the Ombudsman, to exercise their rights fully and, in so doing, to give the European administration a more human face". (Jacob Söderman, the first European Ombudsman, during his solemn undertaking before the Court of Justice of the European Communities, 27 September 1995.)

When the first European Ombudsman, Jacob Söderman, was elected by the European Parliament on 12 July 1995, a new era in the history of the European Union began to unfold. The Maastricht Treaty on European Union, adopted three years previously, had created the institution of Ombudsman and had empowered it "...to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies". On 27 September 1995, assisted by two members of staff, Mr Söderman took up his duties.

While Mr Söderman's solemn undertaking before the Court of Justice that day can be seen as the birth of the European Ombudsman institution, and while its conception can be dated to the signing of the Maastricht Treaty on 7 February 1992, the idea of creating an ombudsman at the European level had already been discussed for over a decade before the Maastricht Treaty was drafted. In fact, the first proposal, by the Legal Affairs Committee of the European Parliament, was voted in May 1979.

[1] In preparing this introduction, I collaborated closely with Ben Hagard, Joint Head of the European Ombudsman's Communications Sector. I am grateful for his invaluable assistance and for the time and energy he devoted to this task.

In order to understand the evolution of the European Ombudsman into the institution that I have the privilege of leading today, it is necessary to study not only the first decade of its existence, but also the decade and a half that preceded the institution's creation. It is only in its historical context, and in terms of the many and conflicting options that presented themselves throughout the last quarter century, that the genesis and subsequent development of the institution can be fully understood.

Mindful of the relatively small number of attempts that had hitherto been made to record the steps leading up to the creation of the European Ombudsman and of the institution's early years, and equally aware that much of the detailed knowledge needed to attempt such an exercise was limited to those actors who had been centrally involved in the project at the time, I decided to host a workshop in Strasbourg to focus on the origins and establishment of the European Ombudsman institution and to evaluate its development. The "Founders' Workshop", as it became known, was held on 25 and 26 June 2004 and brought together a dozen key individuals involved at the various stages of the institution's history and pre-history, as well as two academics who had both extensively studied the institution during the last decade. The Founders' Workshop aimed to build up a complete picture of events, to uncover as many of the central documents involved as possible, and thus to assemble a repository of knowledge that could not only be of historical value to researchers in the future, but could also potentially be of benefit to policy makers and those more directly involved in leading the institution forward.

The Workshop was divided into three thematic sessions, covering the origins of the Maastricht Treaty provisions on citizenship in general and the European Ombudsman in particular, the drafting of the European Ombudsman's Statute and the establishment of the Ombudsman's office.

For the first session, on the origins of the Treaty provisions, the Workshop benefited greatly from the presence of Carlos Moreiro González, Professor of European Community law at the Carlos III University in Madrid, and of Peter Biering, a diplomat involved in the negotiations leading to the Danish Treaty proposal, who were able to shed light respectively on the steps leading up to, and the thinking behind, the Spanish and Danish government proposals for the establishment of an ombudsman at the European level. As the great French political thinker and historian Alexis de Tocqueville so

accurately observed, "History is a gallery of pictures in which there are few originals and many copies" [2]. The presence of the National Ombudsman of Denmark, Hans Gammeltoft-Hansen, who had been a key participant in the negotiations leading to the creation of the European Ombudsman, and whose institution has served as a model for ombudsman offices the world over, was therefore of great benefit.

In the second session, on the drafting of the European Ombudsman's Statute, the detailed recollections of Ezio Perillo, the European Parliament official responsible for the work on the Statute of the European Ombudsman within the legal service of the European Parliament, together with the European Commission perspective provided by Jean-Claude Eeckhout, former Director at the European Commission responsible for relations with the European Parliament and the European Ombudsman between 1985 and 2001, enabled us all to better understand the detailed, complex and sensitive negotiations and compromises that preceded the establishment of the European Ombudsman and shaped its scope and working methods.

Gregorio Garzón Clariana, the Head of the European Parliament's Legal Service since 1994, provided a useful framework for the third session, on the establishment of the Ombudsman's office, by identifying two key themes for discussion - the appointment of the Ombudsman and the establishment of his office, on the one hand, and the procedures for dealing with complaints and the review criteria on the other. The appointment of the first Ombudsman turned out to be a rather long and drawn-out affair, with over a year elapsing between the formal adoption of the Ombudsman's Statute by the European Parliament in March 1994 and the election of the first Ombudsman in July 1995. The Head of Secretariat of the European Parliament's Committee on Petitions between 1989 and 1998, Saverio Baviera, and the Chairman of the Committee on Petitions of the European Parliament from 1994 to 1997, Eddy Newman, were ideally placed to present, from both a procedural and a political point of view, the circumstances related to the appointment of the first Ombudsman. In terms of the establishment of the office, Juan Manuel Fabra Vallès, Member of the European Parliament between 1994 and 2000 and President of the European Court of Auditors

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[2] Alexis de Tocqueville, *L'Ancien régime et la Révolution*, Paris, 1856, Chapter VI.

between 2002 and 2005, addressed the issue from a budgetary perspective.

Once the institution had been established and the first Ombudsman had taken office, the primary task of the Ombudsman, to deal with complaints, began immediately. The interinstitutional co-operation required to enable the Ombudsman to work effectively in this respect was addressed by several of the Workshop participants, including Anita Gradin, Member of the European Commission between 1995 and 1999 and Commissioner responsible for relations with the European Parliament and the European Ombudsman during that time. The Ombudsman's procedures for dealing with complaints were strengthened by his decision to draw up a Code of Good Administrative Behaviour clearly laying down the principles that EU officials should follow in their relations with the public. The initiator of the idea of a Code, in a report for the Committee on Petitions, was Roy Perry, a Member of the European Parliament between 1994 and 2004, and Vice Chairman of its Committee on Petitions between 1999 and 2004. The presence of Paul Magnette, Professor of political science at the *Institut d'études européennes* of the *Université Libre de Bruxelles*, enabled the work of the Ombudsman to be viewed from an external perspective during the third session.

Throughout the three thematic sessions of the Workshop, the expert recollections of the first European Ombudsman, Jacob Söderman, proved invaluable. As the European Parliament and European Commission perspectives were presented, Mr Söderman was able to clarify the reasoning behind the Ombudsman's choices and standpoints and thus to ensure that issues addressed throughout the Workshop were placed in their proper temporal and institutional context.

As a political scientist, and as a relatively new player on the European scene, I found the Founders' Workshop both fascinating and extremely enriching in terms of the historical perspective that it equipped me with and the many thoughts that it inspired for the possible future direction of the institution. An idea that I had already been developing before the Workshop took place confirmed itself in my thinking: to mark the occasion of the 10th anniversary of the European Ombudsman institution by publishing a commemorative volume that would cover the steps leading up to the creation of the institution and its first years of existence.

Given the quality of the contributions made by each and every participant at the Founders' Workshop, I decided to ask the participants to each pen a chapter for the commemorative volume. The chapter themes were carefully selected to provide as complete a picture as possible, while capitalising on the areas of expertise of each of the authors. In some cases, the authors chose to work with their close collaborators from the period in question. The participation of the co-authors is acknowledged in the relevant chapters, and information about them is contained in the section providing short biographical information on each of the contributors.

The chapters of the commemorative volume are presented in a chronological order for the period leading up to the creation of the Ombudsman's office and then in a thematic order for the period following the election of the first European Ombudsman - with the chapters covering broader themes presented first.

The volume begins with four chapters covering the developments leading up to the establishment of the European Ombudsman. In the opening chapter, entitled "Trends Leading to the Establishment of a European Ombudsman", Hans Gammeltoft-Hansen and his Deputy Permanent Secretary, Jon Andersen, trace the worldwide development of the ombudsman concept, and its spread across the Member States of the European Union. They identify and assess six different trends or rules that influenced both the decision to establish a European Ombudsman and the form that this new institution eventually took. Of particular interest in this regard is the authors' assertion that "...the EU Ombudsman was not established to meet a general increasing need among the citizens for access to complain. Rather, the purpose of the institution is to meet the Member States' and the Union's own need for strengthening the rights of the citizens" [3].

The contribution of the Spanish delegation to the Intergovernmental Conference that led to the Maastricht Treaty is analysed in the second chapter by Carlos Moreiro González. By presenting both the political and historical context of the Spanish contribution, as well as its content, the chapter provides a clear explanation not only of the first major, though ultimately unsuccessful, attempt to create an ombudsman at the European level, but also of

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[3] See p. 19 below.

an alternative model for such an institution that, but for the lack of sufficient political support, could easily have become a reality. The author concludes that the "...significance of the Spanish contribution to the creation of the European Ombudsman in the Treaty on European Union lay, above all, in the fact that it revitalised the idea that the Danes had put forward during the last phase of the negotiations on the 1986 Single European Act" [4].

The ultimately successful proposal for the establishment of a European Ombudsman emanated from the Danish delegation to the Intergovernmental Conference (IGC) and is considered by Peter Biering in the third chapter. While the first country to establish a parliamentary ombudsman was Sweden in 1809, and while "ombudsman" is one of perhaps only two Swedish words to have obtained international recognition, it is generally acknowledged that the ombudsman model that has taken over the world is that of Denmark. The author's first-hand experience of the IGC negotiations enables him to place the Danish proposal in its broader political context, both in terms of the negotiations and compromises struck within the Conference and the need for the Danish Government to be able to sell the new Treaty to its citizens. On this latter point, he concludes that the "...introduction of a European Ombudsman was one of the meaningful and visible means of building bridges to the new EU and making the Union more open, present and citizen-friendly" [5].

The signatures on the Maastricht Treaty had barely had time to dry before the work began on drafting the Statute of the European Ombudsman. As Ezio Perillo describes in the fourth chapter, entitled "The Process of Drafting the European Ombudsman's Statute", the European Parliament set about the task with vigour and enthusiasm, despite its initial wariness as to the potential for rivalry in defending citizens' interests which the creation of this new institution could represent. The Ombudsman's Statute constituted, according to the author, "...the first instance that the European Parliament truly became aware of its new prerogative as a co-legislator..." [6] and it set out to prove its capability of assuming such a role. The chapter carefully describes each stage of the procedure that eventually led to the official adoption of the Statute on 9 March 1994.

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[4] See p. 36 below.

[5] See p. 51 below.

[6] See p. 61 below.

There can be no doubt that the task facing the newly-elected European Ombudsman was a daunting one when he took office on 27 September 1995. In his chapter on "The Early Years of the European Ombudsman", Jacob Söderman, does not seek to explain the administrative problems that had to be overcome in establishing the institution, but outlines instead the main issues involved in allowing the Ombudsman to become "a meaningful and respected actor on the European scene" [7]. From concepts of good and bad administration to dealing with contractual disputes, and from issues of openness and transparency to the promotion of fundamental rights, the reader is able to follow the path that led to the European Ombudsman institution as we know it today. Mr Söderman concludes that "...a lot was achieved during the first years of the European Ombudsman institution..." and "...a lot of work for the European citizens remains to be done before they can feel that the Union is theirs" [8].

In his chapter entitled "The European Ombudsman: Protecting Citizens' Rights and Strengthening Parliamentary Scrutiny", Paul Magnette analyses the legacy of the first Ombudsman and examines how the profile of the institution was shaped by Jacob Söderman. The way that the Ombudsman was able to draw out issues of potential systemic maladministration from the complaints received and to use these as a basis for "a more ambitious strategy of reform" [9] is described in the first part of the chapter. The author goes on to analyse the extensive use made by the Ombudsman of the possibility to investigate the European Commission's actions or omissions in its role as "Guardian of the Treaties", and the emphasis that he placed on increasing the transparency and accountability of the institutions. He concludes that "...by combining quasi-judicial actions and reasoning with parliamentary inquiries and political proposals, [the European Ombudsman] has at least demonstrated that the two classical paths of accountability can be reconciled" [10].

Several of the authors highlight the potential rivalry that could have developed between the Ombudsman and the European Parliament's Committee on Petitions. That such a potentially negative situation

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[7] See p. 84 below.

[8] See p. 104 below.

[9] See p. 113 below.

[10] See p. 123 below.

was avoided is a testament to the way in which the Ombudsman and the Committee developed their relationship and to the ability demonstrated by each to respect the mandate and working methods of the other. Saverio Baviera's chapter on "Parallel Functions and Co-operation: the European Parliament's Committee on Petitions and the European Ombudsman" compares the respective remits, procedures and results of these two dispute-resolution bodies and establishes why they should be regarded as complementary rather than mutually-exclusive. As the author states, "...[s]mooth co-operation between the two bodies is one of the cornerstones of the system, whose aim is essentially to provide citizens and residents, as effectively as possible and free of charge, with an extra-judicial means of drawing the attention of European institutions to their desires and concerns" [11].

This theme is further pursued in Eddy Newman's chapter on "The Policy-Relationship between the European Ombudsman and the European Parliament's Committee on Petitions", in which he presents several concrete examples of the way in which this collaboration worked in practice. From the definition of maladministration to the development of a Code of Good Administrative Behaviour, and from access to documents issues to the limits of the Ombudsman's powers, the author examines the way in which the Committee was able not only to react to the work of the Ombudsman, but also to help and support him in developing initiatives of a more proactive nature. This constructive relationship proved so successful that "...[t]owards the close of the Parliamentary five year term...the Committee on Petitions expressed 'its satisfaction at the irreproachable and creative co-operation between the European Ombudsman and the Committee on Petitions'" [12].

The ensuing two chapters assess the interinstitutional co-operation with the Ombudsman from another perspective - that of the European Commission. Anita Gradin, the Member of the Commission responsible for relations with the Ombudsman between 1995 and 1999, found her role facilitated by the fact that both she and the Ombudsman came from the two countries with the longest tradition of ombudsmanship in the world. In her chapter on "Safeguarding the Rights of European Citizens: the European

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[11] See p. 142 below.

[12] See p. 160 below.

Commission Working with the European Ombudsman", co-authored with Ranveig Jacobsson, she describes how some of those in the administration had "quite astonishing" initial reactions to the Ombudsman's requests, but that "...[l]ittle by little, the light entered the basement". She concludes that "...[l]ooking back, it is obvious that there has been real progress in the area of transparency" [13].

In their contribution to the volume, entitled "The European Commission's Internal Procedure for Dealing with the European Ombudsman's Inquiries", Jean-Claude Eeckhout and Philippe Godts, describe the procedures put into place at the Commission to handle relations with the Ombudsman, clearly demonstrate how seriously the Commission took the work of the Ombudsman from the very start, and how measures were taken to ensure that the Commission's responses to inquiries by the Ombudsman would be dealt with in as efficient, coherent and "Ombudsman friendly" a way as possible. As the authors point out, "...[i]t is striking that the general conception of the internal procedure for processing Ombudsman files was defined at the end of 1993, well before the first European Ombudsman began work" [14]. The fact that the procedure, based on the twin concepts of authorisation and subdelegation, has, in all major aspects, stood the test of time with no need for modification, is testimony to the prescience of those who devised it.

It was always unlikely that the institutions complained against would agree with the Ombudsman's findings in every instance that he opened an inquiry into. Nevertheless, the rate of compliance with the Ombudsman's proposals and recommendations has been extremely high over the last decade. As Roy Perry explains in his chapter on "Special Reports Submitted by the European Ombudsman to the European Parliament", the Ombudsman deemed it necessary to resort to his ultimate weapon on only nine occasions between 1995 and the end of 2004. The author explains that in most of these cases, the Committee on Petitions was satisfied with the reaction of the institution involved. Nevertheless, he concludes that "...[r]ather than expressing a plea or a pious hope that a recalcitrant institution might mend its way by some date in the

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[13] See, respectively, pp. 163, 164 and 166 below.

[14] See p. 184 below.

future, the Parliament would do well to consider establishing deadlines for compliance" [15].

The following chapter, authored by Gregorio Garzón Clariana, deals with the issue of "Holding the Administration Accountable in Respect of its Discretionary Powers: the Roles and Approaches of the Court, the Parliament and the European Ombudsman". The chapter contains a thorough analysis of the way in which the Ombudsman institution has approached this issue during its first decade, and concludes that "...although the courts, the European Parliament and the European Ombudsman have been assigned different roles and have different tools available, they complement each other in making the administration accountable" [16].

In the final retrospective chapter of the volume, entitled "The European Ombudsman's Resources - the Budget and Related Issues", Juan Manuel Fabra Vallès traces the evolution of the Ombudsman's budget from a procedural and structural perspective. His analysis enables the evolving financial needs of the institution to be understood in terms of the steady growth in complaints received each year, the move towards greater autonomy through an independent budget, and, more recently, the impact of the accession of ten new Member States to the European Union in 2004. The author raises some important issues as regards the institution's single biggest source of expenditure, that relating to staff costs. Given the increasing complexity of European administrative procedures, he contends that a "...balance between staff qualified to deal with complaints irrespective of the area concerned, and experts specialised in those areas attracting a higher number of complaints might be needed" [17].

The volume concludes with a chapter containing my initial thoughts on what the future might hold for the European Ombudsman. Entitled "Reflections on the Future Role of the Ombudsman in a Changing Europe", the chapter attempts to draw inspiration from the past as the focus switches from the retrospective to the prospective.

I remain persuaded that the work, collectively undertaken over the last twelve months, to record the origins and early years of the

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[15] See p. 190 below.

[16] See p. 208 below.

[17] See p. 216 below.

European Ombudsman institution has surpassed our initial hopes and expectations. The breadth and depth of the contributions in this volume will, I am certain, provide all those wishing to study the institution with a firm grounding from which to develop their analyses. Given the open-endedness of the democratic process and indeed of administrative development, no one can say with certainty what the next decade will bring for the European Union in general or its Ombudsman in particular. But I am convinced that the work of the Ombudsman over the last ten years has laid firm foundations for the future and has thus played its part both in helping to refocus the European Union's priorities towards that of serving its citizens and in giving "the European administration a more human face".

As I state in the final chapter, "...the goal of effectively promoting and protecting citizens' rights under EU law - in an ever changing environment - can only be realised through close co-operation with the EU institutions and bodies, and particularly with national and regional ombudsmen and similar bodies" [18]. I am struck by the fact that such an analysis suggests that the trajectory travelled by the European Ombudsman during its first decade may well be coming full circle and linking up with the Spanish proposal for the establishment of the institution, which placed a great emphasis on ombudsman institutions at the national level at the Member State level. Although the proposal eventually adopted did not emphasise this aspect of the Ombudsman's role, experience to date has highlighted both the need for such close and proactive co-operation and the benefits to be derived from it. It is therefore a task to which I will give top priority over the coming years.

The fourteen chapters contained in this volume provide an excellent blend of description, information and analysis, as well as multiple perspectives on the defining moments and key issues pertaining to the creation and development of the European Ombudsman.

In order to provide a starting point for those wishing to further study the origins, establishment and evolution of the European Ombudsman institution, Annex I provides full references to certain key documents mentioned in the various chapters of this volume, together with certain other documents that have been added for the sake of completeness, or because of their potential interest to those

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[18] See p. 239 below.

wishing to research the European Ombudsman. The texts of four documents (the Spanish and Danish proposals to the Intergovernmental Conference on Political Union [1990-1], Article 195 [formerly 138e] of the Treaty establishing the European Community, and the Statute of the European Ombudsman) are set out in annexes II to V. Many other useful documents can be found in the 'Resources' section of the European Ombudsman's website (see: http://www.euro-ombudsman.eu.int).

This commemorative volume could not have seen the light of day without the enthusiastic support that the idea of a "Founders' Workshop" received from its initial participants and without the dedication and perseverance of these individuals and their eventual co-authors in subsequently producing rich, written chapters under unusually tight time constraints. I am grateful to them as I am to the members of my staff who worked tirelessly and invested heavily their time and energy to meet very tight deadlines and to make certain that the final outcome of this entire undertaking would be successful. I particularly wish to thank Peter Bonnor, Legal Officer, for carefully reading the whole manuscript and for undertaking with great care and meticulousness the editorial work necessary to ensure the coherence of the volume, Rosita Agnew and Ben Hagard, Joint Heads of the Ombudsman's Communications Sector, for the thoroughness of their linguistic control of the text, as well as for the expert formatting of the manuscript, Ian Harden, Head of the Legal Department, for his critical reading of the whole manuscript and Alessandro Del Bon, Head of the Administration Sector, for seeing to it that the organisation of the Founders' Workshop was flawless. I finally wish to acknowledge the professional collaboration of the European Parliament's documentation and translation services and, especially, of the Publications Office of the European Communities in the production of a handsome volume.

Chapter 1

Trends Leading to the Establishment of a European Ombudsman

Hans Gammeltoft-Hansen [1]

1 Introduction

As early as 1979, the European Parliament passed a resolution to establish an ombudsman. The resolution was opposed by both the European Commission and the subsequently-elected Parliament, and provisions to establish such an institution were not agreed upon until the Maastricht Treaty of 1992. In 1995, 16 years after the original resolution, the institution was established. That it happened then, and not in connection with the original decision, and that the institution took the form that it has, can be explained factually by reviewing documents and obtaining statements from the decision-makers regarding the decision-making process that led to the result. Naturally, this would shed light on the discussions preceding the resolution, uncover political disagreements and conflicts of interest, and show who voted for and against. However, the birth of the institution can also be seen in a more general perspective. As this essay will endeavour to do, one can focus on general trends in and around the Union which must be assumed to have shaped the attitudes of the decision-makers and acted as a political midwife. This chapter thus takes a very general view of the background to the birth of the institution.

2 The Development of an Ombudsman Concept

The European Ombudsman is clearly a part of the development which started when the world's first ombudsman institution was

[1] In collaboration with Jon Andersen, Deputy Permanent Secretary at the Danish Ombudsman's Office.

established in Sweden in 1809. This special trend, which can be designated as the ombudsman concept, is thus the first trend which can be said to have definitely contributed to the current existence of a European Ombudsman.

It is well known that the Swedish parent organisation was established as a prosecution office, in order to strengthen the legislative power's control over Sweden's relatively independent public servants and their compliance with legislation. The institution was copied in Finland in 1919 and also served as a model for the similar institution established in Denmark in 1955. From the start however, the Danish institution differed slightly from the original model and it soon developed in an independent direction. Notably, the personal responsibility of the individual public servant was not as strongly emphasised in the Danish Ombudsman's activities as in the Swedish model.

The export of the ombudsman concept to the rest of the world, which began in the early 1960s, initially started from Denmark. In the first instance, the concept was adopted by Norway, New Zealand and Tanzania, before spreading to the United Kingdom (1967) and a number of other Commonwealth countries. In the 1970s, France (1973) and countries influenced by France adopted the idea of a more flexible and less authoritarian form of control than the traditional control bodies which the ombudsman concept represents. In the French model, mediation played a key role just as the institution, to a greater extent than before, was seen as exercising control that was supplementary to that exercised by other bodies, especially the administrative courts.

During the 1980s, ombudsmen were established in very many different countries and were influenced both by the Scandinavian countries and the other countries that by then had experiences of this form of institution. At some point in the 1980s, the ombudsman concept became closely associated with the protection of human rights in general, which acquired high salience in almost all cases. By the end of the century, ombudsmen had been established in every continent, and virtually all European countries had such an institution.

During the process, the original concept has undergone innumerable changes and the idea of a fast-acting, informal and flexibly-working control body has been adapted to many different administrative systems. Great variety can be observed with regard to the way the ombudsman is appointed, to the powers of the ombudsman institu-

tions, to the scope of the ombudsman's investigations and sanctions, to the legal basis of the institution and to its position in society.

The classic national ombudsman, who monitors the public administration on behalf of Parliament, has been supplemented with local and regional ombudsman arrangements. Not all institutions are associated with Parliament - some have instead been established as government bodies. The idea has even been adopted by private companies or associations, which have established ombudsmen to ensure that customers or users are treated correctly.

Ombudsmen with limited and specialised jurisdictions, such as consumer ombudsmen, discrimination ombudsmen and children's ombudsmen, have been established. Elsewhere, ombudsmen have been introduced to undertake special constitutional functions, such as promoting and protecting human rights or acting as guardians of freedom of information.

Most ombudsmen only have jurisdiction over the public administration. In a few countries, ombudsmen monitor the entire public sector - both the administration and the courts. Other institutions have jurisdiction over both private and public organisations. There also exist, however, variants of the institution, whose control is exclusively targeted at private companies.

The institution has often been given wide-ranging powers to investigate cases, but its authority to react against infringements of the law that are uncovered by the investigations is limited to issuing statements that are not legally binding. However, some ombudsmen have the authority to make legally binding decisions in relation to those monitored or to bring cases before the courts. This, for instance, applies to the Swedish and Finnish Ombudsmen, who still, from time to time, institute criminal proceedings against public servants who have failed to respect the law.

There are major differences with regard to the basis of assessment for an ombudsman's statements. Some ombudsmen function on the basis of a single Act, others on the basis of the entire national legal system. Some ombudsmen can make statements without being bound by the legislation on the basis of general considerations of reasonableness, whereas others, including those in Denmark and Norway, base their assessments on existing law as well as on a special ombudsman principle, that of good administrative practice.

In countries with administrative courts, the ombudsman concept has been adapted to take this into account. In countries with other

traditions of control of the administration, the ombudsman has partly taken over the role played by administrative courts elsewhere. Altogether, national, regional or local conditions have greatly influenced the way the ombudsman institution has developed.

When what was then called the Common Market was established in 1958, the international dissemination of the ombudsman concept was in its infancy. It was therefore natural that this kind of control was not considered relevant at that time. When the European Community was expanded to include Denmark, the United Kingdom and Ireland in 1972, none of the original Member States had ombudsmen and among the three new members, only the UK and Denmark had such an institution. When the European Parliament discussed a proposal to create a European Ombudsman in the mid 1970s, only three of the then nine Member States had a national ombudsman. As the general international implementation of the concept did not really take off until the mid and late 1980s, it is remarkable that the European Parliament passed a resolution to establish an ombudsman institution as early as 1979.

In the late 1980s, nine of the now twelve Member States had national or regional ombudsmen. During the drafting of the Maastricht Treaty, the idea of this type of control was thus firmly established in most Member States and the climate for an agreement on it was much more favourable than in 1979.

3 The Main Trends in European Law

It is common to refer somewhat simplistically to two general trends in the legal development in Europe. The one - the civil code tradition - is associated mainly with Germany and France. The other main trend has occurred under English influence and is designated the Anglo-American or the common law tradition. In terms of constitutional law, the difference between these two trends has mainly manifested itself in the absence of administrative courts in the English-influenced countries and detailed legal regulation of the administrative system in the civil code countries. The Nordic countries are influenced by both traditions. However, the influence has not been the same in the various Scandinavian countries and, in terms of constitutional law, there is no common Scandinavian tradition. Thus, Sweden and Finland have administrative courts, while Norway,

Denmark and Iceland do not. The tradition of protecting the citizens through ombudsmen and free access to public records dates far back in Eastern Scandinavia, but is relatively recent in Western Scandinavia. Generally, German and French law has probably influenced the development of constitutional and administrative law in Scandinavia more than English law.

The ombudsman concept, which in the 1960s was exported from Scandinavia to the rest of the world, is not a product of one of the two main trends in European law. Some writers claim that the idea was borrowed from the Ottoman Empire by the Swedish King Charles XII and that the tradition of such a control body can be traced back to Islamic law. It may be an original Swedish invention, possibly an invention inspired by a non-European system.

There is no need to consider this historically interesting issue in order to establish that, just like the other ombudsman institutions, the European Ombudsman is not directly rooted in the main trends in European law. While other EU judicial institutions are clearly based on French models - for instance the preliminary presentation of legal issues to the European Court of Justice, the Solicitor General, the detailed regulation of the European Courts' powers and proceedings - the cultural origin of the ombudsman's law is more uncertain.

The global range and adaptability of the concept may be due to the very fact that it is not anchored in a long, formal, judicial tradition. This may also explain why it has proved possible to slot it into the Union's otherwise very classically-structured control system. It thus proved simpler to introduce an ombudsman among the Courts, Commission, Parliament and Court of Auditors than to bring the Union within the direct jurisdiction of the European Court of Human Rights.

4 The Social Construction of Increased Protection of the Citizens

A major reason for the establishment of an ombudsman institution in Denmark was that society during the first half of the 20th century had undergone changes which had necessitated a massive upgrading of the legal regulation of citizens' daily lives. Concurrently with this development, the administrative system, in terms of regulation as well as organisation, grew rapidly. The relationship between citizen

and administration thus changed both quantitatively and qualitatively. It became difficult for the citizens to get their bearings in the system of rules, the political control of the administration was reduced and the established judicial control mechanisms - control by the courts and administrative recourse - proved to be inadequate. When the Danish Constitution was being amended after the Second World War, there was therefore a clear need for both increased and different protection of the citizens.

To meet this need, the new Constitution of 1953 included provisions for both the introduction of administrative courts and the establishment of an ombudsman. The administrative courts were never introduced. Instead a confusing system of tribunals and boards developed. On the other hand, the Ombudsman institution was established. From the start of the institution in 1955, the intention was that the Ombudsman would meet the need of ordinary and under-resourced citizens for quick and easy access to a procedure allowing him or her to complain against the administration. The Ombudsman was said to be the counsel for the defence of the common man.

During the fifty years since the opening of the office, society has not become deregulated and the administration has not been reduced. Quite the contrary. As a result, the need for a control body of this type has become even greater. The number of approaches to the Ombudsman has increased, the institution has been given additional powers and specialist institutions with ombudsman-like functions have been established.

In virtually all other European countries, society has developed along the same lines as in Denmark. It has not happened at the same time, at the same speed or to the same extent in every country. Nonetheless, the trend has been the same everywhere. The relationship between citizen and administration includes more contact than before, while the capacity of citizens and of the legislative power to get the better of the administration has generally been weakened. This is presumably the main reason why the ombudsman concept has become generally recognised as a necessary control body in a modern state.

The question is whether the establishment of the European Ombudsman is also the product of a socially created need for complaint and control. As is well known, the administration of citizen-related EU tasks is mainly handled by the Member States. The EU administration does not take a large number of decisions in relation

to individual Union citizens. It is therefore rarely relevant or possible for individuals to bring cases before Community courts. Conflicts involving EU law primarily take the form of disagreements between the authorities of the Member States and their own citizens. The resolution of these conflicts is a matter for the national courts, complaint bodies and Ombudsman, with the option of involving the European Court in cases raising issues of interpretation concerning EU law.

Thus, the European Ombudsman is not the result of a socially created need for a new and different way of protecting the rights of the citizens in the same way as the national ombudsmen. At least, this observation applies to the European Ombudsman institution as we know it today. The long decision-making process relating to the establishment of this institution included consideration of whether it should be given powers to monitor the national administrations either directly or indirectly through complaints about, or supervision of, the national ombudsmen. Such an institution could more properly be said to meet a requirement for stronger protection of individual rights.

It will be recalled that the European Ombudsman only has jurisdiction over Community institutions and bodies. Thus, the institution only has limited power to consider cases where Union citizens find themselves in dispute with national authorities regarding the application of EU law.

In this specific aspect, the European Ombudsman can perhaps be compared to one of the many specialist ombudsmen. These institutions exercise supervisory functions to a greater extent than ordinary national ombudsmen. Although the overall purpose is often increased protection of the citizens, the system's wish to ensure compliance with rules and to control developments within the organisation has greater influence on the form of these control bodies. These institutions act on their own initiative to a greater extent than the national ombudsmen, but at the same time have more limited jurisdiction than the national ombudsmen.

Thus, the EU Ombudsman was not established to meet a general increasing need among the citizens for access to complain. Rather, the purpose of the institution is to meet the Member States' and the Union's own need for strengthening the rights of the citizens.

From the citizens' point of view, the EEC and the European Court in the 1970s and early 1980s did not exercise a significant influence on their daily lives. Any dispute between citizens and public authori-

ties relating to Community law occurred between the national authorities and the citizens, and did not really become visible until after the passing of the Single European Act of 1986, which galvanised the process of market integration. This created a fertile soil for the development within the EU of an interest in influencing the way that disputes involving citizens were resolved at the national level, in cases with an EU law dimension.

5 The Dissemination of Human Rights

The concept of human rights or fundamental rights was developed by the philosophers and sociologists of the Enlightenment. The French Declaration of the Rights of Man (1798) and the American Declaration of Independence (1776) started a long and tortuous development. In 1950, the legal concept of the citizens' inalienable legal rights was reinforced by the European Convention on Human Rights. The international enforcement of the rights was made more effective through the establishment of the European Court of Human Rights in Strasbourg in 1959. Through a large number of judgements, the Court has specified the contents of these rights. Thus, the rights have been clarified, refined and made operational.

During the last 30 years, the number of cases at the Court has steadily increased - recently almost explosively. In the period 1959 to 1985, the Court pronounced 76 judgements. In 1990 and 1994, it pronounced 30 and 50 judgements respectively. At the same time, the Court embarked on an activist course of interpretation. These facts had a major influence on the extremely strong position of human rights in the EU Member States during the 1980s.

Partly in connection with the bicentenary of the American Declaration of Independence, the USA became strongly oriented towards human rights. During the Cold War, this movement primarily resulted in demands that human rights be introduced and respected in the Soviet Union and its satellite states. More specifically, the new trend manifested itself in the form of a requirement that human rights and the establishment of institutions such as an ombudsman be accepted as conditions of economic aid. This is, for instance, how the Polish Ombudsman institution came into existence. A more concrete, and successful, implementation of these requirements took place in conjunction with the Eastern European

countries' applications for membership in the Council of Europe. By the end of the 1980s, this human rights movement probably covered all EU Member States.

Human rights also influenced EU law. In response to pressure from especially the German Constitutional Court, the European Court of Justice recognised that fundamental rights in Member States' constitutions were also part of EU law (Case 29/69 *Stauder* [2]). Subsequently, the European Court of Justice explicitly recognised the principles of the European Convention on Human Rights as part of EU law (Case 4/73 *Nold II* [3] and Case 44/79 *Hauer* [4]). This recognition also resulted in several Council of Europe and European Parliament resolutions and was included in the preamble to the Single European Act of 1986.

Thus, the Maastricht Treaty was drafted during a period when human rights, and especially the European Convention on Human Rights, were in a strong position throughout the Union.

Even though the ombudsman concept is not everywhere formally linked to human rights, the two are closely associated. Like the human rights principles, ombudsmen safeguard the rights of the individual citizen in relation to the authorities.

The higher priority given to human rights generally thus helped pave the way for a European Ombudsman. The preoccupation with the protection of citizens at the time made it harder for the European Commission and Parliament to persist in their opposition to a European Ombudsman and easier for its advocates to get the resolution passed.

6 The Development of EU Law

As is well-known, the Union developed from the European Coal and Steel Community established in 1952 by six countries (Belgium, France, Germany, Italy, Luxembourg and The Netherlands). In 1958, this Community was supplemented by the European Economic Community and the European Atomic Energy Community, which as of 1967 had common institutions. The current basis of the Union was

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[2] *European Court Reports* 1969, p. 419.

[3] *European Court Reports* 1974, p. 491.

[4] *European Court Reports* 1979, p. 3727.

established at that time in the form of a Council, Parliament and Commission as well as the European Court of Justice. With effect from 1 January 1973, the Community was expanded to nine Member States. In 1979, direct elections to the European Parliament were introduced. Until then, its Members had been elected indirectly through the Parliaments of the Member States. In 1981, Greece was admitted as a new member and in 1986 Spain and Portugal joined the Community. In 1986, the Treaty was amended by the Single European Act, which marked the start of the establishment of an effective internal market. With the Maastricht Treaty of 1992, the Community became the European Union, the European Parliament's influence on the legislative procedure was increased, an ombudsman provision was introduced, a new Court was established and the European Parliament's Committee on Petitions was given a Treaty basis. In 1995, Sweden, Finland and Austria were admitted as members. The Treaty was amended in 1997 by the entry into force of the Amsterdam Treaty and, in 2003, by the entry into force of the Nice Treaty, which allowed for the admission of a further ten members (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia).

In the meantime, collaboration had been extended to cover many new areas, included more and more Member States and had taken on a more intensive nature. This was only possible because of the development of an independent legal system within the Union. This development has been implemented both through Treaty amendments and secondary legislation and through the practice of the Courts. It is generally acknowledged that EU law is currently regarded neither as part of international law nor of national law, but forms its own legal system. The crucial precondition for this development is primarily the powers the Member States have given to the Union, especially powers to legislate.

A number of important issues concerning the legal relationship between the Member States and the Union authorities and between the Union and the Union's citizens were not clarified in the Treaties, but have had to be clarified through the case law of the European Court of Justice. In the first place, this applies to the principle of supremacy which was formulated by the Court as early as 1964 (Case 6/64 *Costa* v *ENEL* [5]). In 1977, it was extended to being applicable in

[5] *European Court Reports* 1964, English special edition, p. 614.

relation to national constitutions (Case 106/77 *Simmenthal* [6]). In 1991, it may have been further extended (Case C-159/90 *SPUC* [7]). In the Constitutional Treaty of 29 October 2004, it was expressly formulated in Article I-6. This legal development is indicative of the maturing of the European Court as an independent system.

Another example of this maturing process is found in the practice relating to the direct effect of Treaty provisions and directives in the Member States. The Treaty did not lay down whether directives and the individual Treaty provisions - as opposed to regulations and resolutions - can be invoked by the citizens directly without intervening implementation through national rules or through regulations and resolutions. Through several judgements, the European Court has established that directives and Treaty provisions may have direct effect and has defined and developed the specific conditions for this. The first judgement from 1962 (Case 26/62 *van Gend en Loos* [8]) established that Treaty provisions may have direct effect. This principle was subsequently extended to cover directives (Case 41/74 *Van Duyn* [9]).

The effect of EU law on relations between private individuals is a third general issue which has been clarified through court practice. The first judgement dates from the mid 1970s (Case 43/75 *Defrenne* [10]) and it has been followed up and elaborated by several later decisions (Case 152/84 *Marshall* [11] and Case C-91/92 *Faccini Dori* [12]).

As already mentioned, the status of human rights in EU law was initially resolved by the Court. The issue has now been codified in the Nice Treaty.

As shown above, the European Court has had to consider and find a solution to a series of fundamental legal issues associated with a supranational association like the EU in the same way as national courts. This judicial clarification has *ipso facto* taken some time.

There was broad agreement that, by 1980, EU law had not yet reached such a developed stage that it constituted an independent

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6 *European Court Reports* 1978, p. 629.

7 *European Court Reports* 1991, p. I-04685.

8 *European Court Reports* 1963, English special edition, p. 1.

9 *European Court Reports* 1974, p. 1337.

10 *European Court Reports* 1976, p. 455.

11 *European Court Reports* 1986, p. 723.

12 *European Court Reports* 1994, p. I-03325.

legal system. During the 1980s, the European Court changed its style and embarked on the well-known dynamic or activist course which led to the legal status familiar today. By 2000, the results of this development could be formulated in the Charter of Fundamental Rights as a description of already-established rights for Union citizens.

Thus, when the European Ombudsman started his activities, he had a fairly well-developed EU legal basis for his assessment function. An ombudsman, such as the one proposed in 1979, would have had a more difficult and uncertain task, as the institution would most probably have been called upon to cope with some of the fundamental legal issues that were clarified by the Court during the ensuing decade.

Almost from the start, the institution was planned as an ombudsman elected by Parliament. It is therefore not possible to avoid considering the changes marking the European Parliament's influence in the evolving EU system. It is well known that the Parliament's political influence has constantly increased. A major contributing reason was the change to direct elections, a fact which, nonetheless, seems initially to have been the direct cause for shelving the ombudsman idea. When the decision to establish a European Ombudsman was eventually taken, the conditions for the institution's receiving substantive support from the taskmaster were considerably better than when Parliament passed the first resolution on the matter in 1979. Parliament's later view concerning the need for an ombudsman was apparently due to the relative success of the Committee on Petitions in the meantime and to the fact that the ombudsman concept was still not known in all Member States.

Whether these features in the development of EU law actually played a part in the decision to establish a European Ombudsman is not apparent from the historical material consulted. However, it can safely be asserted that the conditions for the successful establishment of such an institution were far better in 1992 than in 1979.

7 Internal Opposition

A final general aspect to be mentioned in this essay is in a way not a trend, but rather a rule that applies wherever administrative changes are being considered. It is a universal experience that administrative reforms are always met with scepticism and resistance by those who

are to be reformed. If the reforms moreover contain elements of increased control and restrictions of authority, the resistance is particularly strong.

The phenomenon can be illustrated by some examples:

The first attempt to introduce general legislation concerning access to public files in Denmark was made in the mid 19th century. The bill was in fact passed by the Danish Parliament, but blocked by a veto from the King. An Access to Public Administration Files Act was not introduced until 1970, and not without continued resistance from the administration itself.

When the Danish Ombudsman institution was negotiated in connection with the amendment of the Constitution in 1953, the two largest political parties expressed concerns about the idea and the public servant organisations lobbied energetically against the proposal. The opposition was not sufficiently strong to prevent an ombudsman, but influenced the powers and authority given to the new institution.

In 1814, Norway adopted the Constitution which, with regular amendments, remains in force today. The Constitution was drawn up soon after the neighbouring country of Sweden had introduced a new Constitution in 1809. It will be recalled that one of the elements of the Swedish Constitution was the establishment of an ombudsman. The content of the Norwegian Constitution was to some extent influenced by the Swedish experiences and it would not have been unnatural for an ombudsman to have been established in Norway already at that time. The idea was considered, but rejected, allegedly partly because a Swedish baron living in exile in Denmark advised the Founding Fathers against copying this new censorship system. That was apparently all it took for the constitutional assemblies, which were completely dominated by public servants, to reject the idea. Norway did, however, get an ombudsman 149 years later.

As the eventual decision process in the European Union context demonstrates, the proposal for a European Ombudsman was subject to the same phenomenon. The most obvious resistance came from the Parliament's Committee on Petitions, i.e., from a rival, and not from those who would be monitored. This may be a consequence of the fact that neither the European Commission nor the Council had many individual cases involving Union citizens, and therefore expected the Ombudsman's control efforts to be modest. Nonetheless, the opponents succeeded in having an already passed

ombudsman resolution postponed for 15 years. Compared to the Norwegian example, however, this is a small delay, indeed.

8 Conclusion

The present essay outlines six different trends or rules which, at a more general level, must be assumed to have influenced the decision to establish a European Ombudsman, briefly describes the detailed form which this control system assumed, and seeks to establish a general framework for understanding the decision actually made.

Relating the development of the ombudsman concept to the development of human rights and the development of EU law as an independent legal system shows that 1992 was a more propitious time for establishing a European Ombudsman than 1979. At that particular point in time, the importance of human rights was especially prominent in the Member States and the ombudsman concept had achieved broad recognition in almost all parts of the Union. EU collaboration was on the increase, both quantitatively and qualitatively, and EU legal regulation had got to a point where it could be regarded as a coherent and independent legal system.

The other three trends described - the general growth of public regulation and administration, the main trends in European law and the internal resistance - are less significant as a basis of explanation. Nevertheless, the presentation above shows that these trends had by 1992 developed in such a way that they did not present an obstacle to the establishment of a new control body. Indeed, they even partly supported such a decision. The concept did not originate in one of the two main European schools of law and is thus not associated with a particular tradition. An internal need had arisen in the EU for both increased control of the institutions' compliance with EU law and extended protection of the citizens. The desire to bring the EU out of a minor political crisis was so strong that the ever-present internal resistance to change was overcome.

Many factors were in favour and only a few against the establishment of an ombudsman in 1992. In 1979, the conditions had not been as favourable to such a decision.

Chapter 2

The Spanish Proposal to the Intergovernmental Conference on Political Union

Carlos Moreiro González

1 Introduction

This study analyses the background, content and legal effect of the Spanish contribution to the Intergovernmental Conference on Political Union (IGC-PU), which adopted the creation of the European Ombudsman in the Treaty on European Union (TEU, 1992).

A favourable climate came about for the creation of this supranational body when two different ideas concerning the process of Community integration came together in the last decade of the 20th century: the federalist perspective of the Belgian, Greek and Spanish governments, and the euro-scepticism of the Danish government.

The task of defining the legal model succeeded in this exceptional political climate, despite the strong reservations of the more supranational institutions, the European Parliament and the European Commission, which were unwilling or unable to see at the time how useful the new body would be in galvanising efficiency and democracy within the context of the European Union's unfolding institutional dynamic.

While the Spanish Government contributed to the eventual success of the creation of the Ombudsman, this was more due to the existence of political will favouring creation of the institution rather than to the legal feasibility of the model set out in the Spanish proposals to the Intergovernmental Conference.

2 The Context of the Spanish Contribution

The proposal was originally influenced by two elements: the political approach to the integration process of Felipe González, the Spanish Prime Minister at the time, and the legal form of the Ombudsman in the 1978 Spanish Constitution.

The Madrid European Council, which called the IGC for the signing of the Maastricht Treaty, set objectives concerning only the economic and monetary integration of the Member States of the European Economic Community [1].

It was soon realised, however, that it was risky to deepen Community institutional action in the economic sphere without a firm political anchorage among the citizens of the Member States. The creation of a "European public space" to transcend the mere notion of the citizen as the one to whom supranational law is addressed assumed its own specific importance during the debate leading up to the beginning of the Intergovernmental Conference [2].

In a letter dated 4 May 1990, addressed to the Irish Prime Minister (President-in-Office of the Council), Felipe González advocated the creation of a "common citizenship" which would make citizens the protagonists in the integration process, even though the rights to be attached to the new Community legal status had not yet been defined [3].

The political climate had already been prepared by the "*aide-memoire*" of 26 March 1990 from the Belgian Government, addressed to the Council, which referred to 'the citizens' Europe' as one of the issues that should be included on the Agenda for the IGC. In general terms, the Belgian Government was referring to free movement, drawing up a declaration on human rights, and exercising the right to vote in local and European Parliament elections [4].

In any case, the very political notion that was essential to the creation of the status of European citizenship constituted, for at least

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1 26-27 June 1989, *EC Bulletin*, 6-1989, pp. 8-17, Point I.1.11, p. 12.

2 P. Solbes Mira, "La citoyenneté européenne", *Revue du marché commun et de l'Union européenne*, 345, 1991, pp. 168 ff.

3 Text published in *Revista de Instituciones Europeas*, 1990-3, pp. 780-781. The Greek Government issued a memorandum supporting Prime Minister González's letter on 18 May 1990, in which it gave its own proposals regarding the notion of European citizenship and citizens' rights in the future 'European Community'; SI (90), p. 393.

4 SI (90), p. 232.

two reasons, the basis that would later support, if not justify, the creation of the European Ombudsman. Firstly, because much in the same way as this institution is regarded as one of the essential ingredients of contemporary constitutionalism, its acceptance at the supranational level formed part of the constitutionalisation of Europe. Secondly, because, once it was in operation, it would strengthen citizens' confidence in the European Union's institutional mechanisms, by giving them a new channel for monitoring those mechanisms.

Underlying the Spanish proposal was also the legal concept of the Ombudsman coined in Article 54 of the 1978 Spanish Constitution and Organic Law 3/1981 (6 April) on the *Defensor del Pueblo* (LODP), amended by Organic Law 2/1992 (5 March) (*Boletín Oficial del Estado*, 6 March 1992), which, in summary, establish a constitutional body [5] that is independent and exercises monitoring on two fronts (administrative activities and fundamental rights). Since it served as background for what eventually emerged as the Spanish proposal to the IGC, a brief description of its salient features and powers within the Spanish legal order is warranted.

In this sense, Article 9 of the LODP allows subsidiary monitoring of acts of "maladministration", except for the judicial function of the administration of justice (Article 117 of the 1978 Spanish Constitution, and Articles 13 and 17 of the LODP), and acts of the Head of State.

The active legal standing of the Ombudsman therefore enables him to act via claims of unconstitutionality and actions for infringement of fundamental rights and bring civil liability actions (Article 162.1 of the 1978 Spanish Constitution and Article 26 of the LODP respectively).

In addition to the extensive legal capacity recognised in the Spanish legal order, the Ombudsman also has a considerable degree of operational autonomy expressly recognised in Article 6.1 of the LODP. Therefore, although he is appointed by Parliament, he may only be dismissed by the same body for "clearly neglecting to fulfil the obligations and duties of the position" (Article 5.4 of the LODP).

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[5] Although the Spanish Ombudsman does not have a constitutional function of creating law, the institution is expressly provided for in the Constitution and, through its functions, has an important position in the constitutional system.

However, both in his appearances before the Spanish Joint Congress-Senate Committee and in the annual report to the plenary session of Parliament, his actions are not put to the vote, adopted or rejected, nor are any opinions issued on them.

The Spanish legal order establishes a generous framework for providing subjective and objective access to the Ombudsman. Based on some minimum requirements for legitimacy laid down in Article 15.1 of the LODP, "...any claim made to the Ombudsman by an individual or group of people requesting his intervention in order to obtain clarification of an act or decision of a Public Authority, his agents and administrative authorities" [6] is accepted as a complaint. The complaint or claim must, however, "directly concern" the plaintiff (Article 10 of the LODP), a requirement that does not prevent claims from being made in order to protect so-called "diffuse rights".

This legal framework designed to ensure the strength and effectiveness of the Ombudsman is certainly partly due to the fact that contemporary Spanish constitutionalism places little emphasis on exercising the right of petition in a decentralised State [7].

There was specific internal legislative action with regard to the decentralisation of government administration in order to specify the extent of the Ombudsman's powers [8]. Article 2 of Law 36/1985 (6 November) establishes a system of powers that are "exclusive" and "concurrent" with its counterparts in the Autonomous Communities [9].

It is not difficult to imagine that the transposition of this constitutional system into the Spanish proposal submitted to the IGC was more an act of political will than one of legal realism. The proposal was scarcely viable for several reasons. The first was that the Community institutional system does not exactly reflect the tradi-

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[6] Ombudsman's Management Report to the plenary session of the Spanish Parliament, 27 September 1984, p. 24.

[7] The bulk of monitoring of the executive by Parliament is done through formal questions in Parliament, appearances, investigation committees and debates on budgets.

[8] According to Article 54 of the Constitution and Article 12.2 of the LODP, the Ombudsman's powers cover "all the activities of the Administration".

[9] The Spanish Ombudsman has the sole authority to monitor the activities of the State Public Administration Bodies that act within the Autonomous Communities. A co-operation system was established enabling these bodies to assist the Ombudsman when asked to do so, and to receive complaints that may subsequently be referred to the Spanish Ombudsman, if they fall within his remit.

tional division of powers in a democratic State, which is the ombudsman's "natural habitat".

The second reason was that the lack of a list of the fundamental and administrative rights of Community citizens meant that there was no objective basis to justify the creation of a "constitutional body" at the supranational level.

Finally, a third reason lies in the decentralised nature of the Community administration, which, as a result, does not have a powerful administrative apparatus that directly and specifically affects the subjective situations of the majority of the citizens in the Member States.

3 The Content of the Contribution

The contribution of the Spanish delegation to the IGC consisted of two main documents: the Note on citizenship submitted just before the start of the IGC, on 24 September 1990 ("The road to European citizenship") [10], and the proposal for a text on European citizenship presented to the Intergovernmental Conference on Political Union on 20 February 1991 [11].

3.1 The Note on citizenship

The Note on citizenship considered complaints to a "European Ombudsman" to be among the mechanisms for guaranteeing the new concept of 'European citizenship' [12] (Point II(e)).

Although it established that citizens should have their specific rights protected through "petitions or complaints" to the Ombudsman [13], this right was not included among the "special basic (or fundamental)" rights of citizens, that is, free movement, free choice of place of establishment and political participation in that place.

The content of the Note sent a clear federal constitutional message that the inclusion of freedom of movement and establishment in the

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[10] SN 3940/90.

[11] *Revista de Instituciones Europeas*, 1991-1, pp. 405-409.

[12] Defined in point I, paragraph four, as "the individual and inseparable status of nationals of the Member States, who by their membership of the Union are subject to special rights and duties concerning the Union..."

[13] It also establishes that the European Ombudsman may act through the 'Ombudsmen' or equivalent figures in the various Member States.

Treaties was to serve as the cornerstone for the future model of political integration. Consequently, both the creation of an ombudsman and granting citizens access to him were only incidental (or additional) elements, which could well have been lost during the negotiations at the IGC on Political Union, if serious difficulties were encountered in arriving at an agreement among the delegations.

In principle, the Spanish Note received lukewarm acceptance. In its mandatory Opinion of 21 October 1990 [14], the Commission openly supported it (Point III.2), although the list of the fundamental elements that would make up the future Statute of European citizenship made no reference to the right of access to the Ombudsman.

In the same way, in its resolution on the Martin report [15], the European Parliament asked for the political notion of citizenship to be incorporated into the Treaty, without advocating a specific legal articulation of rights and freedoms.

The only record of explicit support for the creation of the Ombudsman was in the Danish memorandum on Political Union of 10 October 1990 [16].

More importantly, the Presidency Conclusions of the Rome European Council (14/15 December 1990), prior to the IGC, set the mood for the future negotiations by taking on board the notion of citizenship and inviting the Conference to look at creating a European Ombudsman [17].

3.2 The proposal for a text on European citizenship

The proposal for a text on European citizenship presented to the Intergovernmental Conference on Political Union (IGC-PU), on 20 February 1991, set out in more detail the legal and operational aspects of the European Ombudsman.

The content of Article 2 of the Proposal was in principle particularly striking, as paragraph 1 stated, firstly, that the Union and its Member States shall respect the fundamental rights recognised by their constitutional traditions and by the European Convention for

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[14] COM (90) 600 final.

[15] Doc. A3-281/90.

[16] SI (90) 751. Also in the Non-Paper of the Friends of the Presidency Group, SI (90) 963.

[17] *EC Bulletin*, 12-1990; p. 17.

the Protection of Human Rights and, secondly, that the Union takes on (in terms of inclusion in the *acquis*) this Convention [18]. In addition to these statements was the ambitious innovation in paragraph 2 which gave the Union the task of establishing the system whereby citizens of the Union and those who did not have that status "may avail themselves of the rights guaranteed" in Article 2.1 [19].

This provision links with the powers (or scope of competence) given to the European Ombudsman in Article 9 of the Spanish Proposal, which implied an extension or implicit recognition of the capacity of the Ombudsman to monitor the respect for fundamental rights in Community administrative acts. It also extended the subjective scope by granting non-citizens access to the Ombudsman.

However, its general wording (since it does not propose a precise relationship with fundamental rights for citizens of the Union) contrasts with the recognition of specific citizenship rights in Articles 4 to 9 of the same Proposal.

There are various evaluations that can be made of the content of Article 9. The proposed body is defined using three alternatives, one main and two subsidiary ones. Firstly, the text of Article 9 refers to the "appointment" in each Member State of a "Mediator"that would be politically accountable to the European Parliament through "soft law" monitoring, that is, the submission of an annual report. Alternatively, two other possibilities could be considered: the creation of a "European Ombudsman" which could be an independent body of the Union or be accountable to the European Parliament; or the creation of a European "Ombudsman" to reinforce the action of the national "mediators".

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[18] These statements were certainly difficult to fit in with the Community's legal situation at that time. Firstly, the statement that each Member State would respect the constitutional traditions of the other Member States was ambiguous. Secondly, the statement that the Union "took on" (or adopted) the European Convention was also vague, as this could take place through a classic 'international succession' from the Union to its Member States, or by the Union signing the Convention.

Finally, Article 2 of the TEU included respect by the Union for fundamental rights in very similar terms to those in the Spanish proposal, although it reproduces the content of the Preamble of the Single European Act, in any case excluding Article B of the TEU and Articles 8 - 8E of the TEC from the Statute on citizenship. This provision proved to be more appropriate and was therefore included in the EU's principles and objectives.

[19] It should be pointed out that this wording was subsequently endorsed by the Proposal of the European Parliament to the IGC: Recital G of the Resolution of 14 June 1991 (DOC. PE A3-139/91, *Official Journal* 1991, C 183 p. 362), and document CON-UP-UEM 2010/91, R/LIMITE.

The first model would generally give the national "mediators" appointed in each Member State the broadest capacity to monitor compliance with Community law at the domestic level. Such an ambitious proposal was difficult to implement, particularly considering that not all the Member States have a mediator with national jurisdiction, or that they may not all be aware of the concept of a mediator. Consequently it would have been difficult to reconcile the introduction of this type of body into the constitutional systems of the Member States with the requirement to respect their national identities (Article 6.3 TEU).

This is why the two other alternatives were then produced, without, however, clearly setting out the model, since creating an independent European Ombudsman (with the level of autonomy enjoyed, for example, by the Governing Council of the European Central Bank), and making him accountable to the European Parliament (turning him "*de facto*" into a committee of Parliament) are two quite different things. What would be even more difficult would be to create a residual body whose function would be to "perfect" the work of the national mediators.

The lack of precision characteristic of the model contained in the Spanish proposal is even more paradoxical, if one analyses the actual scope of action of the "Mediator" in each Member State. By stating that "its mission will be to help citizens of the Union to defend their rights under the Treaty", the proposal provides direct authorisation not only to deal with the rights granted specifically in the various Treaty provisions, but also to safeguard the fundamental rights generally granted under Article 2 of the Proposal.

Article 9 also gives the Ombudsman powers to oversee the administration of all the bodies responsible for implementing Community law (..."before the administrative authorities of the Union and its Member States"...), and fully entitles him to take legal action at the national and supranational levels (..."[and] to invoke such rights before judicial bodies, on his own account or in support of the persons concerned"...) [20].

Finally, Article 9 also allows the Ombudsman to deal immediately and specifically with citizens of the Union in order to provide them

[20] See p. 250 below.

with concise and comprehensive information regarding their rights and how to implement them.

The Spanish proposal was rejected by the European Parliament and the Commission, while receiving some support from certain government delegations at the IGC. The European Parliament's opposition derived mainly from the perceived erosion of its powers based on two grounds: the absence of the right of petition from the specific citizenship rights contained in Articles 4-9 of the Spanish proposal, and the possible diminution of the role of the Committee on Petitions following the creation of a European "Mediator" or "Ombudsman".

In this respect, some of the points contained in the European Parliament's Resolution on the operation of the Committee on Petitions in the parliamentary year 1990-1991 [21] are particularly enlightening. Having, in Point 1, affirmed the importance of petitions in the life of the Communities in providing an individual link with citizens, Points 11, 12 and 13 clearly state Parliament's opposition to the creation of a "European Ombudsman" and object, without being specific, to "certain proposals" submitted in this respect to the Intergovernmental Conference on Political Union [22]. Point 10 also highlights the increase in co-operation between the Committee on Petitions and the "ombudsmen and committees on petitions" of the national parliaments, and adds that such co-operation provides "an adequate structure for defending citizens in their relations with the authorities at national, local and Community level". Parliament's position thus entirely discredits both the need to create an "ombudsman" and all three alternatives for doing so contained in the Spanish Proposal.

A degree of support for the European Parliament's apocalyptic view was also to be found in the European Commission. In its proposal of 28 February 1991 [23] for a text on Political Union, the Commission avoided taking a position on the creation of the European Ombudsman. However, as a reaction to the Danish Proposal in

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[21] Resolution of 14 June 1991 on Report A3-0122/91, *Official Journal* 1991 C 183, p. 448.

[22] For example, Point 11 states that a "European Ombudsman" will reduce the power of Parliament and its committees to oversee the Commission, creating a new structure that would overlap with the Committee on Petitions. And Point 13 states that it would serve only "to undermine the functioning of the institutions".

[23] SEC (91) 412.

March 1991, it advocated establishing a co-operation mechanism among the "ombudsmen" in the Member States regarding the emerging subsidiarity principle (thereby avoiding the creation of a European Ombudsman). Given the more immediate contact which existed between citizens and their national "ombudsmen" and their greater familiarity with the intricacies of their respective public authorities, such a mechanism of co-operation would, in the Commission's view, help increase efficiency in monitoring Community law.

Finally, the draft Treaty presented by the Luxembourg Presidency to the European Council on 28-29 June 1991 and eventually accepted, included the basic features of the Spanish proposal on citizenship but not the model for the *Defensor* (Mediator, Ombudsman) contained in Article 9 of the text [24]. Neither the Dutch Presidency's draft Treaty of 24 September 1991 nor the final text of the Treaty on European Union (signed at Maastricht on 7 February 1992) made substantial modifications in this respect.

In summary, the Spanish proposal had the significant merit of anticipating a model of ombudsman which would have been ideal if implemented at a more advanced stage in the process of political integration. It was a maximalist, but not very pragmatic, proposal in terms of clarifying the Ombudsman's powers and the political context in which it was formulated. This was perhaps the reason for opting for the minimalist proposal advocated by the Danish delegation, which only gave the Ombudsman competence to inquire into possible instances of maladministration in the activities of Community institutions and bodies [25].

4 Conclusion

The significance of the Spanish contribution to the creation of the European Ombudsman in the Treaty on European Union lay, above all, in the fact that it revitalised the idea that the Danes had put for-

[24] Text of the Conclusions of the Luxembourg European Council in *Europe Documents*, Nos. 1722-1723 (5 July 1991).

[25] The proposal to introduce a new Article 140A into the Treaty gave it power "[to] receive communications from physical and legal persons residing in a Member State about deficiencies in the institutions' administration".

ward during the last phase of the negotiations on the 1986 Single European Act, but which was not taken on board at the time because the Danish proposal was made very late in the negotiations at the Intergovernmental Conference.

Consequently, it also had the merit of launching the debate regarding the need to create this new body, with more support from Parliament and the European Commission than from the majority of the delegations representing the governments of the Member States.

While it is true that the February 1991 Spanish proposal for a text on European citizenship gave the greatest possible powers to the "Mediator" (or mediators), it is equally certain that it failed to address questions relating to the delicate institutional balance at the Community level. No reference was made to its Statute, to how it would be appointed or elected, to its functional autonomy and to how it would operate as an institution.

All these are highly important details, which were eventually addressed in the Danish proposal. The technical and legal skill underpinning the latter proposal undoubtedly helped ensure the smooth progress of the political negotiations and, in my view, was the necessary catalyst for including in the text of the Treaty the model and specific form of the European Ombudsman that are still in force.

CHAPTER 3

The Danish Proposal to the Intergovernmental Conference on Political Union

Peter Biering

The idea of establishing the institution of European Ombudsman was first introduced in the mid-1970s by a number of Danish Members of the European Parliament who, with support from their British counterparts, requested comments on the subject from the European Commission and the Council.

From the start, the idea was sustained by the wish to supplement the European Parliament's powers of scrutiny in relation to the other institutions and, specifically, to increase scrutiny of the Commission.

Both the Commission and the Council reacted negatively towards the idea from the outset, because the institution of a European Ombudsman was seen as superfluous. The Commission stressed that the citizens of the European Community had, in any case, the right to complain about the Community's activities either directly to the Commission, or through the Commission's offices in the Member States. Moreover, each individual citizen had the opportunity to submit complaints to a Member of the European Parliament, by exercising his or her right of petition. The Commission therefore saw no justification for establishing an ombudsman within its departments [1]. The Council stated that its respect for fundamental rights was sufficient to safeguard the citizens of the Community. Nonetheless, the issue was taken up by the Council and discussed at a meeting in Paris from 18 to 24 April 1974, although nothing more came of it at that stage.

[1] Cf. Response to question from Lord O'Hagan, No 562/74 and 663/74, *Official Journal* 1975 C 55, p. 13 and *Official Journal* 1975 C 86, p. 54.

On 11 May 1979, the European Parliament launched the idea of a European Ombudsman and asked the Committee on Petitions to draw up a proposal covering its practical implementation. The Committee failed to take the task seriously, and it proved impossible to generate sufficient support for the idea ahead of the first direct elections to the European Parliament in June 1979.

The Walker-Smith Report, published on 6 April 1979, contained a concrete proposal for establishing the institution of European Ombudsman and recommended that the European Parliament adopt a resolution to this effect. The proposal was acted upon that same year, when Parliament adopted the resolution contained in the report *On the appointment of a Community Ombudsman by the European Parliament* [2], which advocated the establishment of a European Ombudsman. But once again the process came to nothing, and the European Parliament failed to follow up on the resolution.

It was another five years before the Committee on Petitions was, in 1984, asked to take a further look at the matter. This time the Committee recommended that the European Parliament reject the idea and instead strengthen the Committee on Petitions - a recommendation acted upon by the European Parliament on 11 June 1985. During the discussions in the European Parliament, the possibility of using the Nordic ombudsman model for a European Ombudsman came under consideration for the first time.

In June 1984, the proposal appeared on the agenda at the Fontainebleau summit, while 1985 saw the publication of the Chanterie Report, which stated that the establishment of a European Ombudsman was unnecessary, because an institution of this type would create a structure that would overlap with the work of the Committee on Petitions.

At Denmark's request, the proposal was discussed during the 1985 negotiations in the *ad hoc* committee on the "Europe of the Citizen" initiative, and the idea was briefly touched upon in the Adonnino Report to the Council *On a People's Europe* on 28 to 29 June 1985.

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In October 1985, during the Intergovernmental Conference which, in 1986, led to the Single European Act, the Danish Government first

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[2] *Official Journal* 1979 C 140, p. 153.

submitted, in treaty form, a concrete proposal concerning the establishment of a European Ombudsman. The proposal contained no material regulations but was based on the idea of establishing a simple legal basis in the Treaty for the introduction of an ombudsman linked to the European Parliament.

The background to Denmark's submission of the proposal at that point in time stemmed from the fact that Denmark, like the UK, had already suffered a setback when the Intergovernmental Conference was convened at the Milan summit in June 1985 and, like the UK, Denmark now had to try to make the best of it. Since Denmark's room for manoeuvre at the Intergovernmental Conference was severely limited for reasons of history and domestic policy, the deliberations concerned whether the Danish government should simply comment on others' proposals or whether it should submit viewpoints of its own. The deciding factor here was the wish to provide a counterweight to the agenda common to most of the Member States at the Intergovernmental Conference, which was characterised by heavy, classic institutional issues.

The Danish government wanted to change the direction of the discussions, partly to deflect attention from points which would be viewed as sensitive, and partly to submit proposals from which others would certainly be obliged to disassociate themselves and ultimately prevent any discussion of delegation of sovereignty pursuant to Article 20 of the Danish Constitution.

The Danish proposals included a number of minor institutional changes of a practical nature, which maintained the existing institutional balance, including the proposal for a European Ombudsman. However, the Danish proposal proved to be at cross-purposes with the desire of many Member States for more far-reaching institutional reforms, particularly in terms of the decision-making process in the Council with regard to the internal market and the powers of the European Parliament. As already noted, the Danish proposals were submitted relatively late in the process, in October 1985. As a result, there was only time for them to be discussed at a single meeting, before the Intergovernmental Conference was closed six weeks later in December 1985. This meant that it was not possible to obtain sufficient support for the proposal.

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As the foregoing brief account makes plain, the period from the mid-1970s to the end of the 1980s was marked by a lack of substantial support for the establishment of a European Ombudsman. Although the European Parliament discussed the issue on several occasions over the years and adopted a resolution on the subject, Parliament's Committee on Petitions in particular was against the idea and the initiatives fizzled out each time because they were not followed up.

Denmark was the only Member State to submit a concrete proposal on this matter. In addition to the special circumstances concerning the Intergovernmental Conference on the Single European Act, there are several other reasons why the other Member States failed to take up the baton.

At the time, Denmark was the only Nordic member of the EC, and there was no prospect of the other countries joining within the foreseeable future. It was precisely the Nordic countries which had a long tradition of national ombudsman systems and would therefore be natural advocates for the introduction of a European Ombudsman. In other words, Denmark was out on a limb, also failing to gain support from Spain and Portugal, which became members of the EC in 1986. As new members, they were not considered to have the same level of influence as the more established Member States, when it came to institutional issues, such as the establishment of an ombudsman.

Another possible explanation is that, following the introduction of direct elections to the European Parliament, there was pressure on individual MEPs to raise the profile of the Parliament. The institution of a European Ombudsman might divert the public's interest away from the MEPs' own political work, and many were therefore against the move.

Not until the end of the 1980s and the start of the 1990s, when the idea of establishing a European Union embracing EC co-operation and collaboration in the areas of foreign policy, justice and home affairs began to take root, was there a genuine shift in attitude, with moves starting to gather pace. This development coincided with Spain achieving a stronger position in the scheme of things, and the imminent accession of Finland and Sweden (and, as expected at the time, Norway) to the EU on 1 January 1995.

An alternative explanation is the new trend which emerged at the end of the 1980s and the start of the 1990s towards a change in how the rules of the EC were applied. Until that time, the overriding rule of thumb had been that EC rules were applied by the civil services of

the Member States, while the Commission's direct competence vis-à-vis citizens was restricted to the area of competition. This new trend was the result of the fact that the administration of certain legal areas came to be divided between the Member States and the Commission [3].

This new development coincided with the establishment of a number of agencies, most notably the first European Agency for the Evaluation of Medicinal Products, created by virtue of Council Regulation (EEC) No. 2309/93 of 22 July 1993. The Medicinal Products Agency introduced a new principle for the administration of EU rules, whereby Member States were obliged to co-ordinate their processing of applications for approval of medicinal products through one agency, where representatives of the Member States would be able to comment on draft decisions proposed by the authorities in the individual Member States.

As a result of this, part of the process of administrative law would fall between two stools: the Medicinal Products Agency would scarcely take any concrete formal decisions which could be referred to the Court of First Instance but, on the other hand, the authorities in the Member States would be bound by a number of considerations linked to practice in the other Member States, which would mean that a complaint to a national ombudsman or a national court regarding a Member State's authorities could cover only part of the decision-making process. For example, if there were to be an individual hearing process, with the Medicinal Products Agency having responsibility for handling the file or, in any case, ensuring that it took place, it would be difficult to identify which remedies the company in question could employ with respect to this element of the process.

The institution of an ombudsman failed to serve a genuine purpose during the 1980s, since there was no European administrative function over which such an institution could really keep an eye. The 1990s, however, witnessed a gradual change, which no doubt helped pave the way for the Danish proposal.

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[3] See, e.g., Council Regulation (EEC) No. 880/92 of 23 March 1992 on a Community eco-label award scheme, *Official Journal* 1992 L 99, p. 1.

Denmark submitted its wishes concerning the content of Political Union during the preparations for the Intergovernmental Conference in the autumn of 1990. This submission took the form of the Danish memorandum of 4 October 1990, which in Chapter IV Article 6, contained a concrete proposal concerning the establishment of the institution of a European Ombudsman linked to the European Parliament.

The Danish memorandum constituted an expression of a pronounced shift in attitude relating to Danish policy on Europe. In 1985, Denmark had opposed the Intergovernmental Conference on the Single European Act. In 1990, there was talk of a clear "yes" to continuing where the Single European Act had left off and moving towards closer economic and political integration.

The Danish memorandum was later converted into a concrete proposal for treaty texts. Learning from its experiences in 1985, the Government this time introduced the proposed text at a much earlier stage during the negotiations at the Intergovernmental Conference, namely as early as 21 March 1991.

The proposal to establish the institution of ombudsman at the EU level was part of an overall set of 33 different proposals [4]. This was seen as an important contribution to the conference on Political Union, not least because it underlined the pronounced change in Danish policy on Europe.

The provisions concerning a European Ombudsman were worded as follows:

> **Ombudsman**
> **New Article 140 A**
> The European Parliament shall appoint an Ombudsman empowered to receive submissions from

[4] Document 1777/91. The proposal contained treaty texts in the following areas: subsidiarity, sound public administration, the principles, the right to vote in local elections, state aid, fiscal provisions, information on and control of payment of taxes and duties, Article 100a paragraph 3, social provisions, research and technological development, the environment, consumer policy, telecommunications, energy policy, health, culture, development aid, education, a common election date, the Ombudsman, fulfilment of EC obligations, inactivity of the Commission, transparency, the regions, compilation of legal acts, publication, number of commissioners, compliance with judgements, control, domicile of the institutions, co-operation with democratic third countries, co-operation procedure, common foreign and security policy.

physical or legal persons domiciled in a Member State concerning deficiencies in the administration of the institutions.

Pursuant to the instructions, the Ombudsman shall conduct inquiries for which he finds grounds, either on the basis of submissions or on his own initiative.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

New Article 140 B

The Ombudsman shall be appointed after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

New Article 140 C

The Ombudsman shall be completely independent in the performance of his duties. In the performance of his duties he shall neither seek nor take instructions from anybody. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

New Article 140 D

The European Parliament shall lay down instructions for the Ombudsman after obtaining the opinion of the Commission and with the unanimous approval of the Council.

These instructions shall also contain more detailed guidelines for the relationship between the Ombudsman and the European Parliament's Committee on Petitions.

New Article 140 E

The Ombudsman shall appoint a secretariat to assist him in his work.

The Danish proposal for an amendment to the Treaty was made in March 1991, immediately before the Luxembourg Presidency. In an attempt to identify the central positions of the Member States in relation to individual topics, the Danes submitted a combined document containing draft amendments to the Treaty. The Danish proposal regarding the Ombudsman was included unchanged in the general treaty text of the Luxembourg Presidency.

* * *

The proposal this time contained a more elaborate system of regulation based on the Danish Ombudsman Act, the intention being to copy the Danish Ombudsman system, according to which the Ombudsman is appointed by the Parliament.

With regard to the choice of wording both in the Treaty and later in the statute concerning the appointment of a European Ombudsman, the formulation in Article 140 A was a conscious choice on Denmark's part, again reflecting the original Danish proposal. Denmark wished to avoid the eventuality that the position of the European Ombudsman would be occupied by a politician. Emphasis was therefore instead placed on the position being held by a person with experience in the Member States' national ombudsman schemes, since a person with this background could bring greater legitimacy to the position. The proposal therefore did not contain the word "elected" *[valgt]* but rather the word "appointed" *[udpeget]*, specifically to avoid sending out a signal that the post could be occupied by a politician.

This problem arose when the EU's first Ombudsman was to be appointed in 1995. Denmark argued actively, through its Members of the European Parliament, against the appointment of the German Member Siegbert Alber (CDU), not on the grounds of his personal qualifications but because he was a politician. It is therefore wholly in line with the ideas expressed in the Danish proposal that the EU's first Ombudsman, Jacob Söderman from Finland, and the present Ombudsman, P. Nikiforos Diamandouros from Greece, have both been national ombudsmen.

As is clear from Article 140 D, paragraph 2, the Danish proposal envisaged that the Statute would contain detailed guidelines for the relationship between the Ombudsman and the Committee on Petitions. This point was not confirmed in the Treaty during the course of the negotiations at the Intergovernmental Conference,

since it was decided that it should not be regulated in the Treaty but left to the guidelines in the statute.

The Danish proposal did not require a "complaint" *[klage]* to the Ombudsman; a "submission" *[henvendelse]* was sufficient. And the submission was to relate to "deficiencies" *[mangler]* in the administration of the institutions. However, the word "deficiencies" used in the English translation was considered by a number of Member States to have too wide a scope. The wording was therefore modified during the negotiations based on the concept of "maladministration", which is not possible to translate into Danish with a single word.

This resulted in the wording "complaints... concerning... maladministration" *[klager .... over .... fejl eller forsømmelse]* [5]. The original proposal and its final wording differ slightly, but the end result was close to the Scandinavian tradition.

Both terms ("deficiencies" *[mangler]* and "maladministration" *[fejl eller forsømmelser]*) are deliberately imprecise. In both cases, the idea was for the term to have a broad application, and for the detailed content to be complemented by the practice of the Ombudsman. As is clear from the annual reports [6] of the Ombudsman, this has indeed been the case [7].

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Two Member States in particular, Spain and the United Kingdom, responded positively and actively supported the proposal during the Intergovernmental Conference. For Spain, the primary motivation was that the Spanish Government itself had included a proposal to establish a "mediator" in its 21 February 1991 initiative on citizenship of the Union.

Spain considered it necessary to establish a number of mechanisms to protect the rights relating to citizenship of the Union. Article 9 of the Spanish initiative therefore contained a proposal concerning the establishment and strengthening of co-operation between national "mediators" in the Member States, but also opened the way for the possibility of appointing a European Ombudsman.

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5 In French: '*Plaintes ... relatives à des cas de mauvaise administration*'.
In English: 'Complaints .... concerning instances of maladministration'.

6 Throughout this volume, the term "Annual Report" is italicised in footnotes. In the body of the text, however, the term is rendered without italics.

7 See, for example, the European Ombudsman's *Annual Report* for 1997, p. 22.

The Spanish proposal was less precise, however, and did not, for example, deal with the issue of complaints against the institutions in the same way as the Danish proposal. This was one of the reasons why it was ultimately the Danish proposal, with the support of Spain, which formed the basis for the negotiations and which was subsequently adopted.

For its part, the UK wanted to see a restriction of the Commission's power and supported any proposal which served this purpose. To give an example, the UK had itself submitted a proposal concerning individual economic responsibility for the Commission's Directorates-General, and the Danish proposal was seen as a welcome opportunity to establish an additional body to exercise control over the Commission.

The Commission was critical of the proposal for exactly the same reason. It feared that the establishment of a European Ombudsman would impose additional resource-intensive duties on the Commission, particularly in terms of producing answers and obtaining information relating to the long series of questions an ombudsman would be likely to pass on to the Commission concerning the execution of its duties. The Commission was also critical of the European Parliament's right, confirmed in the Treaty, to appoint *ad hoc* Committees of Inquiry and to receive complaints (the right of petition).

The Commission therefore attempted a diversionary tactic, proposing a system of organised co-operation among the national ombudsmen rather than the establishment of a European Ombudsman. However, this idea met with limited sympathy among the Member States, especially since the resulting powers of control would be neither visible nor effective.

* * *

The most controversial issue during the negotiations concerned the link between the European Parliament and the Ombudsman. The European Parliament was not either particularly enthusiastic about the establishment of a European Ombudsman. It considered that an ombudsman would take attention away from its Committees of Inquiry and the Committee on Petitions, and could lead to duplication in this respect.

Among the Member States, there was a fear that the European Parliament would never appoint an ombudsman if it was so

unfavourably disposed towards the establishment of such an institution. It was also feared that even if Parliament appointed an ombudsman, his powers and economic and administrative circumstances could place him in a position of dependency, which Parliament could exploit in order to put pressure on him or to "starve him into submission" [8]. The question was therefore whether a different appointment procedure should be chosen. Consideration was given to the idea of the Ombudsman being appointed by the Council or the Member States rather than by the European Parliament. This was discussed in 1991 during the course of the Luxembourg and Dutch Presidencies, both of which put pressure on the European Parliament to accept a European Ombudsman.

In deference to the scepticism of the European Parliament, several Member States proposed, during the Intergovernmental

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[8] Equivalent considerations came to the surface again in 1993-4 in connection with the negotiations between the Council and the European Parliament on the Ombudsman's duties. At the same time as the Council adopted the Decision of 7 February 1994 approving the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, the Council approved a letter from the President of the Council to the President of the European Parliament with the following content: "In connection with the approval of the Decision of the European Parliament on the Ombudsman's duties and the general conditions governing the performance of the Ombudsman's tasks, the Council would like to draw the attention of the European Parliament to the fact that certain provisions in the Parliament's rules of procedure do not appear to be compatible with the Treaty and the Decision on the Ombudsman. At the interinstitutional conference on 25 October 1992, it was agreed that the European Parliament would make the necessary changes to its rules of procedure in order to render them compatible with the Treaty and the Decision on the Ombudsman.

Following the European Parliament's first revision of its rules of procedure, there are still three points which require particular emphasis with respect to the common wish of the institutions to safeguard the independence of the Ombudsman as laid down in the Treaty: Article 160 concerning resignation of the Ombudsman, since a "dismissal procedure" is introduced which is not laid down in the Treaty, namely where the Ombudsman is asked to resign; Article 161(1), concerning adoption of implementing provisions relating to the Decision, which apparently introduces a procedure in accordance with which these measures are to be adopted by the European Parliament, while Article 14 of the Decision specifies that these measures are to be laid down by the Ombudsman; Article 161(2) and (3), concerning notification of information known to the Ombudsman to the Committees of the European Parliament and to the courts in the Member States, which goes beyond what is laid down in Articles 3 and 4 of the Decision.

It is clear that the provisions governing the Ombudsman in both the Treaty and the Decision take precedence over any provision contained in an institution's rules of procedure, that a provision in these rules of procedure which contravenes the Treaty or the Decision cannot be implemented, and that the Ombudsman's duties shall consequently be applied in compliance with the Treaty and the Decision. "

Conference, that any complaint to the Ombudsman be channelled via MEPs. British MEPs were very influential here, given that this structure was already the one in place in the United Kingdom, where the Parliamentary Ombudsman handles only those complaints which have come to him via a member of the UK Parliament.

Denmark was against this proposal, as it considered that the citizens' right of direct access to the Ombudsman was one of the crucial elements of the structure, and this view was accepted at the Intergovernmental Conference.

The result was that citizens are guaranteed direct access to the Ombudsman, who can also conduct inquiries he considers to be justified (on his own initiative or on the basis of complaints from citizens). Allegations of maladministration are submitted to the institution in question, which must issue its comments within a period of three months. The Ombudsman then draws up his final report, which is sent to the European Parliament and to the institution in question. The person who made the complaint is notified of the outcome of the inquiry.

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One of the persistent myths emanating from the negotiations at the Intergovernmental Conference was that Denmark had actually proposed the abolition of the Committee on Petitions. This is not true. There was no Danish proposal, direct or indirect, to abolish the Committee on Petitions. There was simply no Danish proposal to confirm the Committee on Petitions in the Treaty.

Denmark regarded the Committee on Petitions as an internal matter of the European Parliament. The Committee was established and had its legal basis in the European Parliament's rules of procedure, and it worked well. If Denmark was not particularly interested in the Committee, this was because the system was unfamiliar to the Danes. Added to this was the fact that Denmark saw the European Parliament and the Commission as close allies in the legislative process. It therefore wanted to establish effective control mechanisms which were independent of this alliance and which would be capable of exerting control over the Commission. The establishment of a European Ombudsman was a means to this end.

Denmark anticipated that the European Ombudsman would, on his own initiative, establish voluntary co-operation with the national ombudsmen, thereby creating a network which would put him in a

position not simply to draw on information and experience from his national colleagues, but also, via these, to be able actively to conduct inquiries in the Member States, where he considered that a specific case rendered this necessary and justified.

There was no discussion of the connection between the establishment of a European Ombudsman and the discussion at the Intergovernmental Conference on whether or not to confirm in the Treaty the European Parliament's right to appoint *ad hoc* Committees of Inquiry. These were generally seen as two separate forms of control. The exception here was the Commission which, as stated above, feared at this stage that endless resources would be used to obtain information for the Committee on Petitions, the Ombudsman and the Committees of Inquiry.

Neither was there any discussion during the negotiations at the Intergovernmental Conference of the connection between the European Ombudsman and the Courts in Luxembourg (the Court of First Instance and the Court of Justice), with the exception of a short discussion as to whether there was a desire to confirm in the Treaty the possibility of the Ombudsman, on behalf of citizens, referring cases to the courts. The idea was that the Ombudsman would be able to represent citizens of limited means and ensure that important issues were subjected to legal process. The idea was also linked to the fact that the rules governing the ability of citizens to take legal action had not been liberalised. The idea was not implemented, because it was unfamiliar in the Danish Ombudsman system and, as such, alien to the scheme forming the basis of the negotiations.

It is clear from the preceding analysis that the decision to establish a European Ombudsman constituted a pawn in a greater political game concerning the negotiations on the Maastricht Treaty. There was however also an ulterior motive. The decision was a *quid pro quo* offered to Denmark, among others, in return for acceptance of other parts of the Maastricht Treaty, not least of which the introduction of a number of significant legislative powers, particularly co-decision for the European Parliament, which Denmark had traditionally been against.

When the negotiations on a new treaty are concluded, it is usual for Member States to go their separate ways and look at which of their respective key issues have been included in the outcome of the negotiations. This was also the case following the conclusion of negotiations on the Maastricht Treaty.

The Commission's President at the time, Jacques Delors, was of course aware of this mechanism and knew that Denmark's representatives would look at the list of 33 proposals they had submitted and check which and how many had been included in the Maastricht Treaty. The *quid pro quo*, or trade-off, was that Denmark accepted important institutional elements in the Political Union in return for achieving, among others, the establishment of a European Ombudsman.

For Denmark's part, there were also important domestic policy interests at play. Denmark's accession to the Maastricht Treaty had first to be approved in a referendum. The Government therefore badly needed to come home with concrete and positive results which could be "sold" to the Danish people, who were particularly sceptical about the Community's transition to a Political Union. The introduction of a European Ombudsman was one of the meaningful and visible means of building bridges to the new EU and making the Union more open, present and citizen-friendly.

Chapter 4

The Process of Drafting the European Ombudsman's Statute

Ezio Perillo

1 Introduction

The Maastricht Treaty was signed on 7 February 1992, although it did not enter into force until 1 November 1993, some 10 months after the 1 January deadline laid down in the Treaty itself. In fact, its ratification proved to be quite controversial, as opinions on the Treaty differed considerably from one Member State to another: they ranged from great enthusiasm (the Luxembourg Parliament, for example, ratified the Treaty on 2 July 1993 by a very large majority, with 51 Members in favour and 6 against), through enormous uncertainty (as in France, where ratification of the Treaty was only barely approved in a referendum), to quite negative views (most notably in Denmark, particularly during the campaign on the referendum held on 2 June 1992, at which 50.7% of voters rejected the Treaty).

The creation of a new European Community body, the European Ombudsman, was certainly not, at least initially, the reason for these procedural problems. Indeed, at no stage during the ratification period was this new Community competence called into question. Nevertheless, contrary to the expectations of certain politicians at the time, the provision for such a body (in line with a tradition that was especially cherished by the countries of northern Europe) was not to succeed in appeasing the criticisms - widespread even in northern Europe – that the Treaty still had overly "mercantilist" connotations and was subservient to the Europe of bankers, major corporations and Eurocrats [1].

[1] The introduction (page 4) to the explanatory statement accompanying the 14 October 1992 report of the European Parliament's Committee on Institutional Affairs on the regulations and conditions governing the performance of the

On the contrary, there were many reservations concerning the Treaty's "*civic*" provisions, such as those relating to European citizenship. They were deemed, in spite of everything, to be on the one hand incapable of resolving the problem of the European Union's democratic deficit, and on the other, overly federalist. In fact, these provisions had been introduced in the Treaty quite simply to increase the visibility of the proximity of the EU's institutions to its citizens and thus to make one and all more conscious of the feeling of belonging, *uti cives* and not just *uti singuli*, to a democratic and transparent Union, as had been requested on many occasions by the European Parliament [2].

What exactly is meant by transparency in this instance? It means not only the transparency of the legislative process, but also the transparency of the administrative actions of the Community's institutions and bodies. In fact, as regards this aspect of the Treaty, the European Ombudsman was naturally to become one of the means, indeed the only new means, of achieving this objective, which in the life of any

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European Ombudsman's duties (report by Ms Bindi, Doc. PE200.788/fin. - A3-298/92) states the following:

"The ongoing process of European integration and hence the increased involvement of Community institutions in the life of each country implies a strengthening of the links between them and the people. Quite rightly, one of the main concerns emerging from the debate on the ratification of the Maastricht Treaty is the 'remoteness' of the Community institutions and their 'bureaucratisation'. These issues also featured in the debate preceding the adoption of the Treaty, but the progress achieved by that debate is still inadequate. Furthermore, it is true that the Treaty introduces substantially new elements which, if exploited properly, might help to close the gap between the Community institutions and the people. These new points originate in the concept of Union citizenship, which was created in the Treaty itself. One cannot help noting that the ideas contained in it at last go beyond the policy of 'symbols' advocated by European Councils in the early eighties.

[...Therefore,] the time is ripe for a fuller and more profound definition of the relationship between citizens (people in general) and the institutions, but negotiations at diplomatic level have not managed to meet the social demands which have so clearly emerged from the ratifications debate".

[2] In the draft Statute adopted by the European Parliament on 17 December 1992 (*Official Journal* 1992 C 21, p. 141), the first recital stipulated the following:

"Whereas citizens' confidence in the European institutions necessarily depends on the transparency of public administration; whereas considerable importance is attached to the complaints procedure, which helps to encourage the democratic operation of the institutions; whereas, therefore, the creation of the office of Ombudsman is of great importance for Union citizens".

However, in the final version of the Statute, this recital was omitted as a result of the amendments introduced by the Council.

civil community is a fundamental condition governing the administrative functioning of all public authorities.

In short, according to the Treaty, the role of the Ombudsman was to strengthen the relationship of trust between the citizens and the institutions, thus making the actions and functioning of the Community's administration more focused on the citizens' needs and more transparent and accessible in their eyes.

From that point of view, the Ombudsman's role could not overlap with other existing resources aimed at protecting citizens' interests and rights, such as the right to petition, access to documents, the right to contact the European Commission or even the various channels of appeal involving the Community Courts.

The tasks of this new body had quite simply been conceived as the legitimate complement to these traditional instruments for civic and legal progress. They provided *all* EU citizens, regardless of their traditions, with an additional way of interacting with the Community's administration both informally, and with the assistance of a body endowed with the necessary authority [3].

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[3] Paragraph 2 of the explanatory statement in the Bindi report (see above, footnote 1) stated the following:

"The creation of the latter institution, which was first introduced by the Scandinavian countries, is intended to give people a means to defend themselves against administrative abuses, without having to resort to costly legal action, or where legal action is not possible. The right to petition has partly the same function but, obviously, tends to protect the more clearly political interests of citizens. The combination of these two institutions should therefore, in principle, give citizens *a more comprehensive system of protection* of their rights outside the courts, provided that the relationship between the Ombudsman and the right to petition is made clear and the two function consistently with one another" (emphasis added).

The Italian version of this text, which was most likely the rapporteur's mother tongue, used the wording "*un mezzo per difendersi dal prepotere dell'amministrazione*" for the phrase "a means to defend themselves against administrative *abuses*" (emphasis added).

We could try to render "*prepotere*" as "*inappropriate behaviour*" on the part of an administration, because of a failure to do something or doing too much (not necessarily illegally), even when the administration has broad powers of discretion conferred upon it by law. An administrative decision that is legally sound in itself as far as its substance and form are concerned may nevertheless be criticised in relation to the way in which its adoption was managed. It is one thing to contest the *legitimacy* of a decision adopted by the competent authority where there is significant room for discretion; it is another thing to criticise the inappropriate *behaviour* or functioning of this authority during the administrative process leading to the adoption of the act in question. It is certainly not right to claim that this was the *ratio legis* of that part of the explanatory statement in the Bindi report. However, in reconstructing the progress of the preparatory work leading to the creation of this office, we felt it was useful to highlight this difference between the linguistic versions, particularly in relation to the debate on the concept of "maladministration" that appears in Article 138e of the Treaty.

Clearly, this development had two results. Firstly, it supplemented the civic instruments for dialogue and defence that should be available to all European citizens. Secondly, in the medium term, the Ombudsman's action had positive and valuable effects on the smooth functioning and the quality of services provided by a Community administration that has multinational and multicultural dimensions and serves citizens living in countries with different legal and social systems. In this respect, the definition of this body's duties, based in my view on the juxtaposition of the wording of Article 138e (now Article 195) of the EC Treaty and that of Article 2(1) of the Ombudsman's Statute, could not be any clearer or more significant:

"...the Ombudsman is empowered to receive complaints from any citizen of the Union... [and] shall [thus] help to uncover maladministration in the activities of the Community institutions and bodies... and make recommendations with a view to putting an end to it" [4].

1.1 The European Ombudsman as an Instrument of Democracy and an Actor in the Democratic Life of the Union

During the negotiations on the Maastricht Treaty, and thus within the corresponding Intergovernmental Conference, it was first and foremost the Member States that endeavoured to establish such a body at the Community level. These efforts began with an in-depth deliberation of a memorandum presented by the Spanish delegation that set out the key stages in "The Road to European Citizenship" (one being precisely the creation of a European

[4] The power to "make recommendations with a view to putting an end to it" was a new element in the process of establishing the Ombudsman's competences. This power was actually added to the description of duties in Article 138e of the Treaty during the preparatory work in Parliament and subsequently, more specifically, during the interinstitutional negotiations on the Statute. This addition to the text, which the Council wanted to see included in Article 2 of the Statute, thus sought to indicate clearly the objective of the Ombudsman's action ("with a view to putting an end to it") and the way in which this would be achieved ("make recommendations"); this addition seemed appropriate from the outset of the negotiations and Parliament did not oppose it.

Ombudsman) [5] and an examination of a more detailed draft presented by the Danish Government, a document that was to prove very similar to the final wording that eventually became Article 138e of the Treaty on European Union.

It is important to remember that the European Parliament, on the one hand, and the Commission headed by Jacques Delors, on the other, were not initially in favour of the establishment of a European Ombudsman. The former was in reality more concerned about reinforcing the right to petition (until then regulated only by the relevant provisions in its Rules of Procedure) and therefore believed that the creation of a European Ombudsmans office might substantially weaken this parliamentary prerogative. The Commission, however, was most worried about the risk of establishing the umpteenth body at the request of the Member States to monitor further its activities, and particularly in this instance, its administrative activities. As a result, the Commission invoked the principles of subsidiarity and proximity and formally recommended the creation of a European Ombudsman's office, but at the Member State rather than at the EU level.

There is no doubt that this proposal was attractive. The argument drawing the analogy with the role of national judges as Community judges who could protect the rights that the Community's legal order conferred directly on individuals was certainly also appealing.

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[5] It is perhaps useful here to quote this Spanish text as it was supported to a large extent by the European Commission, precisely because of its "subsidiarity"-style approach to the creation of an Ombudsman at European level. It stipulated the following:

"In each Member State a Mediator shall be appointed whose task shall be to assist the citizens of the Union in the defence of their Union rights conferred upon them by this Treaty *before the administrative authorities of the Union and its Member States* and to invoke such rights before judicial bodies, on his own account or in support of the persons concerned..."* (emphasis added)

** Consideration could also be given to two other possibilities: entrusting the tasks laid down in this proposed article to a "European Ombudsman" as an independent organ of the Union or, where appropriate, reinforcing the actions of the national ombudsmen with an "Ombudsman acting at European level".*

That being the case, in analysing the possibilities for the establishment of a European Ombudsman, it is important in my view to distinguish clearly between the role of "Guardian of the Treaties" which is entrusted to the Commission and relates to failures on the part of Member States to comply with their obligations under Community legislation, and the role of "guardian of the prerogatives of individual", in other words prerogatives that citizens may claim in relation to actions of the Community administration that affect them. As far as such a distinction is concerned, I believe that the flaw in the Spanish proposal was that it combined the two roles in question within the same body.

As the debate within the Conference was not producing any clear result, it was decided that the Danish Government should be asked to present a new proposal, which resolved this issue once and for all by advocating the creation of an ombudsman at the European level.

In light of this, following the signature of the Maastricht Treaty, the bodies of the European Parliament, now subject to paragraph 4 of Article 138e of the Treaty, which entrusted Parliament with the task of laying down "the regulations and general conditions governing the performance of the Ombudsman's duties" moved without delay to adopt the Ombudsman's Statute. They did so in spite of Parliament's past views on this issue, and to some extent they also remained indifferent to the difficult and uncertain climate that, as we have seen, already existed in relation to the usefulness and future of this Treaty [6].

This parliamentary activism, which was easy to understand given the expectations of a large percentage of European voters in relation to the entry into force of this Treaty (the European elections were due to take place in June 1994), did not, however, mean that Parliament had, already at that stage, renounced in the procedure its primary role as the institutional representative of all EU citizens.

In the explanatory statement of Ms Bindi's report, this could not have been made clearer: "... the European Parliament has a special role in safeguarding people's political, civil and social rights. By its very nature it is the political representative of the citizens of Europe and by virtue of the provisions of the new Treaty it has become the focus for the non-jurisdictional safeguarding of their rights, including individual rights, vis-à-vis the Community institutions, and not only them" [7]. As we can see, in spite of everything, there was still a certain wariness of the Ombudsman.

The establishment of the Ombudsman's office, the personality and character of the first Ombudsman as well as his first months of activity, which were exercised with great care and concern for Parliament's position, soon overcame this parliamentary apprehension and paved the way for effective and loyal co-operation.

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[6] Parliament's resolution (A3-0298/92) of 17 December 1992 stipulated (in recitals B and C) that "Parliament should therefore forthwith adopt the regulations and conditions governing the performance of the Ombudsman's duties" in order that the Ombudsman "may be appointed and begin to perform his duties as soon as possible" after the entry into force of the Treaty.

[7] Point 2 of the explanatory statement in the Bindi report (see above, footnote 1).

In its resolution on "the role of the European Ombudsman appointed by the European Parliament", adopted in plenary on 14 July 1995 (i.e., scarcely two days after the appointment of the first Ombudsman), the tone had already changed considerably. The European Parliament "undertakes to support the Ombudsman in his activities by considering his reports and, if deemed necessary by the Committee on Petitions, taking appropriate steps to protect the interests of the persons in question, in particular in instances where support from other Community institutions and bodies has been inadequate" [8]. It then goes on to add that Parliament "calls on all Community institutions and bodies, and in particular the Council and the Commission, to co-operate closely with the Ombudsman and, in particular, to place at his disposal the information and documents he requires for the effective performance of his duties" [9].

The years that followed further reinforced this "functional complementarity" between Parliament - and in particular its Committee on Petitions - and the European Ombudsman. Both of these bodies, each within the framework of its respective prerogatives, are effective instruments that citizens can employ to express democratically, at the European level, their legitimate demands and justifiable complaints. The Ombudsman has thus become an instrument of democracy and an actor in the democratic life of the Union.

It is not by chance that the only two significant amendments to this area introduced by the Treaty establishing a Constitution for Europe (signed in Rome on 29 October 2004) seek to reinforce the office's democratic credentials: the first amendment stipulates that "the European Parliament shall elect a European Ombudsman", in contrast to its current status as a body that is merely "appointed" by Parliament. The second amendment relates, however, to the reference, in the body of the Constitution, to the definition of the role of the European Ombudsman: the European Ombudsman is no longer mentioned solely in the articles on the European Parliament, as in the current Treaty, but is covered by an independent, *ad hoc* provision, namely Article I-49 [10], which is now included in Title VI of the Constitution, dedicated precisely to "the democratic life of the

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[8] Doc. A4-0083/94, rapporteur: Eddy Newman, paragraph 5.

[9] *Ibid*, paragraph 6.

Union". Indeed, the Ombudsman is the only European body mentioned in this section.

So what exactly is "the democratic life of the Union"? It is first and foremost the "principle of democratic equality", which provides that "in all its activities, the Union shall observe the principle of the equality of its citizens, *who shall receive equal attention from its institutions, bodies, offices and agencies*" (emphasis added) [11].

Moreover, it is perhaps no coincidence that this provision on the European Ombudsman is also to be found practically in between two other articles that are undoubtedly fundamental in the democratic landscape outlined by the Constitution in this Title. The first of these is the article that introduces for the first time into the Community's legal order the principle of "participatory democracy" in the Union (Art. I-47). The second is the article that lays down the now constitutional rule concerning the "transparency of the proceedings of Union institutions, bodies, offices and agencies" (Art. I-50).

2 The Preparatory Work in Parliament on the Statute of the European Ombudsman

2.1 The Realisation that Parliament had a New Legislative Prerogative

As we have just seen, immediately after the signature of the Treaty on European Union, the bodies of the European Parliament set about establishing the office's internal procedures and working methods with a view to having the Statute adopted as soon as possible, naturally after having received the favourable opinion of the Commission and the unconditional approval of the Council of the EU.

The question was whether or not Parliament could begin and perhaps even conclude the work in question without necessarily waiting

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[10] This article stipulates the following: "A European Ombudsman elected by the European Parliament shall receive, examine and report on complaints about maladministration in the activities of the Union institutions, bodies, offices or agencies, under the conditions laid down in the Constitution. The European Ombudsman shall be completely independent in the performance of his or her duties".

[11] Treaty establishing a Constitution for Europe, Article I-45.

for the Treaty itself to enter into force. The response, contained in Professor Antonio Tizzano's opinion for Ms Bindi, was that "Parliament may, from the point of view of the general rules and in light of the relevant practices, discuss and approve [at any stage] a document on the Statute and duties of the Ombudsman..., on condition that the final decision is formally adopted immediately after the entry into force of the new Treaty. There are no legal obstacles to the adoption of such a document".

In the meantime, at the sitting of 9 March 1992, the President of Parliament had also announced that the Parliament's Enlarged Bureau had decided to authorise the Committee on Institutional Affairs to draw up an own-initiative report on the Statute of the Ombudsman, taking into account the opinions of the Committee on Petitions and the Committee on Civil Liberties and Internal Affairs [12].

Rosy Bindi (EPP - IT) was appointed rapporteur by the Committee on Institutional Affairs. Antoni Gutiérrez Díaz (GUE - ES) was appointed draftsman of the opinion of the Committee on Petitions and Juan de Diós Ramírez Heredia (PES - ES) was appointed draftsman of the opinion of the Committee on Civil Liberties. Ms Bindi also served, at that stage, as Chair of the Committee on Petitions.

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[12] It is also important to point out that on the same occasion, the Enlarged Bureau also called on the Committee on the Rules of Procedure to "...examine the implications of the Treaty on European Union on the EP's Rules of Procedure with a view to putting forward proposals on this subject before the October part-session...". This mandate from the Enlarged Bureau led to the creation, within the Committee on the Rules of Procedure, of a working group, known as the "Maastricht" working group, composed of Sir Christopher Prout (EPP - UK), Willy Rothley (PES - DE) and Luciano Vecchi (PES - IT) and co-ordinated by Florus Wijsenbeek (EPP - NL), the Chairman of the Committee on the Rules of Procedure. Mr Vecchi was, in particular, responsible for those reforms of the Rules that were required under the Maastricht Treaty, with the exception of legislative procedure. To this end, on 5 June 1992, he presented a working document (PE201.052), relating *inter alia* to the establishment of the Ombudsman's Statute, in which he made various suggestions, including the following: "...the general conditions governing the performance of the Ombudsman's duties should take as a basis the fact that the Ombudsman is *an offshoot* of the European Parliament" (emphasis added).

Mr Vecchi subsequently presented a second document in the form of a draft opinion, dated 4 August 1992 (Doc. PE202.023), in which his position had changed considerably. He stated that the Ombudsman's Statute must define "...how he is to give account to Parliament of his activities...". He added that the Statute must also "...grant him some latitude to allow the Ombudsman's job to evolve in the interests of the citizens of the Community, stamped as it will be by the personalities of the various people holding that post, but also in a way which will respect the recommendations made by the European Parliament and its responsible committee".

This "dynamic planning" of Parliament's work was tangible proof of Parliament's awareness of the importance of showing to the voters and to the other Community institutions that it was capable of carrying out its legislative responsibilities to the full (and could therefore be regarded as a trustworthy co-legislator) and of successfully representing the interests of EU citizens.

It was probably for the same reasons that on 17 December 1992, immediately after the vote on her report, Ms Bindi declared in plenary, in the wake of her success, that the vote in question had been an historic one, as it had resulted in the Members of the European Parliament adopting "Parliament's first genuine legislative act... [thus exercising] a primary [legislative] competence" in comparison with that traditionally reserved for the members of the Council.

It could thus be accurate to say that the process leading to the establishment of the Ombudsman's Statute was indeed the first instance that the European Parliament truly became aware of its new prerogative as a co-legislator, even before the entry into force of the new Treaty. This was a prerogative which Parliament would subsequently put even more to the test, during the direct negotiations with the Council concerning the final approval of the Ombudsman's Statute.

2.2 The Various Stages of the Bindi Report

Let us now look more carefully at the development of Ms Bindi's report.

The documentation available in this respect enables us to establish the following chronological sequence: on 6 May 1992, the rapporteur presented a "working document" on the Ombudsman's Statute (Doc. PE200.788) to her Committee; on 26 May, Gutiérrez Díaz presented his draft opinion to the Committee on Petitions (Doc. PE201.190).

The first actual draft Statute appeared just weeks later, on 26 June 1992 (Doc. PE200.788/A). The exact title of this document was: "Draft European Parliament *Regulation* on the regulations governing the performance of the European Ombudsman's duties" (emphasis added).

The Committee on Institutional Affairs then held an extraordinary meeting in Strasbourg (8-9 July 1992) dedicated primarily to a hearing, which was attended by the Council and the Commission, as well as by a significant number of national and regional ombudsmen, members of national parliaments and several experts in the field.

On 9 September, a new document was drawn up by Ms Bindi, this time entitled: "Draft European Parliament *Decision* on the regulations governing the performance of the European Ombudsman's duties" (emphasis added).

In the meantime, at its meeting of 14 July 1992, the Committee on Civil Liberties and Internal Affairs had considered a draft opinion by its draftsman, Ramírez Heredia. The Committee adopted the final draft on 23 September 1992 (Doc. PE200.618/fin.). The Committee on Institutional Affairs essentially retained from this report what later on became the first recital of the Decision adopted in plenary in December that year.

Also on 23 September 1992, the Committee on Petitions adopted the final version of its opinion for the Committee on Institutional Affairs. As was to be expected, this text focused, above all, on the relationship between the Committee on Petitions and the Ombudsman on the one hand, and between the petitions process and the complaints process on the other [13].

Both of these opinions were annexed to the main report of the Committee on Institutional Affairs, which was adopted at the Committee's meeting of 8-9 October 1992 and formally tabled on 13 October (Doc. PE200.788/fin.).

Finally, before being included on the agenda of the December 1992 part-session, a "*corrigendum*" was added to the report on 3 December, with a view to improving the layout of the motion for a resolution and draft Decision.

It should also be noted that while all of this work was taking place, over a period lasting almost 11 months, many studies, relating to comparative law in particular, were carried out on this topic within both the European Parliament and the Commission. In addition, Ms Bindi organised an important study meeting in her beautiful home town of Siena, while the Secretary-General of the European

[13] To be precise, the Committee on Petitions called for the Ombudsman's Statute to include specific provisions that would give the committee responsibility for the following aspects: 1) preparing for the appointment of the Ombudsman and proposing a candidate to Parliament; 2) calling for the dismissal of the Ombudsman on the basis of a report prepared by the committee; 3) examining the Ombudsman's reports on cases of maladministration; 4) examining the Ombudsman's annual report; 5) automatically being forwarded the complaints addressed to the Ombudsman that did not fall within his field of competence; 6) examining the draft regulations governing the internal functioning of the office of Ombudsman before they were submitted to the European Parliament for its approval.

Parliament, Enrico Vinci, held a very interesting seminar in Luxembourg on 27 November 1992.

2.3 The Most Significant Changes made during this Preparatory work

As mentioned above, the "working document" of 6 May 1992 was the starting point for the debate on the Ombudsman's Statute in the Committee on Institutional Affairs. The main aspects of this document were as follows:

- The type of ombudsman created would be a parliamentary ombudsman, as indicated in the Treaty itself;
- The Ombudsman's first task in the Statute would be to conduct the investigations he deems necessary; to this end, it was important to establish "adequate regulations" in order to ensure that "the Ombudsman - who by definition acted as an intermediary between the "weak" citizen and the "powerful" administration - did not become a type of "inquisitor";
- The affirmation of the principle of independence of the Ombudsman and its implementation should also be among the Statute's priorities, particularly through the inclusion of provisions that clearly set out the professional abilities and experience required of such a role (which means, for example, that it need not necessarily be held by a lawyer) and any functions that are incompatible with the post, where appropriate;
- The Ombudsman must be selected in accordance with a transparent and suitably formal procedure;
- Two issues must be taken into account in relation to the Ombudsman's field of competence:
  a) Establishing the boundary between the competences of the Ombudsman and those of judicial bodies;
  b) Drawing the dividing line between a complaint and a petition;
- As regards his powers of inquiry, the Ombudsman must be able to question the officials of the institution concerned, without that institution having the power to refuse, and without any need for prior authorisation or any right on the part of the official not to comply with this obligation. Secondly, the Ombudsman must have access to any relevant document, which may not be refused on grounds of secrecy. Thirdly, it is important to establish the

extent to which the Ombudsman can contact the national authorities operating, within their state, on behalf of the European Commission;

- As regards the Ombudsman's power to carry out an inquiry on his own initiative, should provision be made for "a (parliamentary?) filter to determine the enquires he may conduct?; otherwise, there is a real risk that a power established to defend citizens might become a power of inquisition";
- Follow-ups to inquiries must also play an important role in the Ombudsman's activities. The authorities concerned must respect the principle of loyal co-operation with the Ombudsman, demonstrate that they are prepared to solve the problem and declare their willingness to put the matter right. The Ombudsman must report to Parliament on each individual case and Parliament should endeavour to support the Ombudsman's action;
- Finally, as regards procedures involving the courts, the document stipulated, in relation to the possibility of appeal before the Court of Justice of the European Communities against the acts of the Ombudsman, that "in view of the informal nature of the complaints addressed to the Ombudsman, it could be said that there is no need to provide for such appeal, particularly since the Ombudsman's activities are controlled (even though *a posteriori*) by Parliament";
- However, as regards the Ombudsman's power to refer a matter to the Court of Justice, where one of the institutions was in breach of one of its prerogatives, the working document stated very concisely that "it would be better if Parliament were responsible for this".

Although relatively comprehensive, this document did not raise other questions that might have been extremely useful in the drafting of the text by the legislator. For example, what was meant by "cases of maladministration"? Could the reference to "activities of the Community institutions and bodies", for example, include by extension other administrative authorities? Should a period of limitation be set for the introduction of complaints? What was the situation regarding the Ombudsman's obligation to inform the institution or body concerned as soon as a complaint was referred to him? Finally, was it necessary to make provision for possible co-operation between the European Ombudsman and the national ombudsmen? Furthermore, the working document did not take into consideration

the nature of the act to be used for the adoption of the Ombudsman's Statute nor the form it should take.

On 26 May 1992, following what was most likely a positive discussion on this text, the Committee on Institutional Affairs asked the rapporteur to present a clearly structured draft Statute at its next meeting. In this very short timescale, Parliament's Legal Service lent the rapporteur precious assistance by providing her, at the request of the Chairman of the Committee on Institutional Affairs, with two legal opinions (one on the nature of the act and the other on the aspects concerning the procedures involving the Court) and, on 10 June 1992, a text in due form of a preliminary draft Statute.

As a result, it was to be expected that, in spite of the short time available to her, the draft Statute that Ms Bindi presented to the Committee on Institutional Affairs on 16-17 June 1992 would have been the result of very careful preparation and reflection and would enable the Committee to identify and focus, even at that stage, on a considerable number of issues and aspects that were essential for the establishment of the Statute.

The first important point was that the draft report stated that the act in question should take the form of a "regulation". The second recital of the text stated that "the creation of the office of Ombudsman established direct legal links with the Community's institutions and bodies, with the authorities of the Member States and, in particular, with the citizens of the Community; as a result, this act has the same legal value as a regulation, which is binding in its entirety and directly applicable in all Member States".

The other aspect that had changed since the initial working document was the relationship between the Ombudsman and the Committee on Petitions. The seventh recital of the text thus stated that "in order to avoid any conflict of competences... [between these two bodies], provision should be made for reciprocal referrals with final effect..." [14].

However, this initial draft Statute did not contain the slightest reference to the question raised in the working document on the scope of

[14] Article 2(3) of the draft stipulated the following: "In accordance with the procedure on petitions, the Ombudsman shall refer to the European Parliament for consideration any complaint that does not fall within his field of competence.... The European Parliament shall refer to the Ombudsman any petitions concerning cases of maladministration... Referrals have final effect".

the Ombudsman's powers of initiative nor possible prior control by Parliament ("the filter"). Nor did it contain any reference to the other issue of possible appeals before the Court of Justice. Indeed, none of these issues was raised in the subsequent documents of the Committee on Institutional Affairs; nor did the final text of the Statute resolve them.

Finally, this initial draft did at least make explicit reference to the fact that the office of the European Ombudsman "is established alongside the European Parliament" (Art. 1) and that he "shall take an oath before Parliament" (Art. 8).

We will see later, in section three of this paper, that these provisions (like those on the relationship between the Ombudsman and the Committee on Petitions) were, however, heavily criticised by the European Commission, notably in its opinion on Parliament's draft. To this end, the Commission invoked the issue of respect for the principle of the independence of the European Ombudsman, insofar as he should not have a close relationship with the institution that appoints him.

2.4 The Hearing of 8-9 July 1992

The hearing in question opened with a speech by the President of the European Parliament, Egon Klepsch, and was chaired by the Chairman of the Committee on Institutional Affairs, Marcelino Oreja Aguirre. The documents provided on this occasion included the draft Statute of 26 June 1992, which has just been discussed, a study of comparative law (Doc. PE201.727) and a questionnaire aimed at honing the debate during the hearing (Doc. PE200.793).

As far as the substance was concerned, based on the minutes drawn up by the Committee's secretariat (Doc. PE202.000 of 16 September 1992), the key points that emerged from the hearing were as follows:

- Firstly, it was important to ensure the independence and autonomy of the Ombudsman. Practically all of the national and regional ombudsmen attending the hearing had insisted on these two aspects, with many different arguments [15];
- Secondly, the participants agreed for the most part that it was essential to include in the text of the Statute an explicit reference

[15] Hans Gammeltoft-Hansen, the Danish Ombudsman, heavily criticised, in particular, the idea of establishing "a parliamentary filter" for the Ombudsman's powers of inquiry (see section 2.3 above).

to the arrangements for co-operation between the European Ombudsman and the ombudsmen in the Member States [16];

- Jean-Louis Dewost, the Director-General of the Commission's Legal Service, also drew attention to the fact that Article 19 of the Staff Regulations clearly stated that officials could not be questioned without the prior authorisation of their institution;
- This meant, however, that the next version of the draft Statute included a new provision (Article 2(2)) with the following precept: "The Community institutions and organs *shall be obliged to provide* the Ombudsman with the requested information and give him access to the files concerned, with the right to object on the grounds of secrecy. *Officials and other staff of the Community may not refuse to comply with the Ombudsman's requests on the grounds of the imperative of confidentiality by which they would otherwise be bound*" (emphasis added).

However, the European Commission stuck to its guns. The issues of secrecy and confidentiality, in addition to that of the independence of the Ombudsman, were, in fact, to be the only aspects it defended valiantly in its opinion and throughout the subsequent interinstitutional negotiations.

Finally, after discussing many points in his speech and having emphasised the atypical nature of the act establishing the Ombudsman's Statute, Professor Tizzano declared that he favoured the adoption of a "decision" rather than a regulation, the latter being an act of a particular kind that was clearly defined in the EC Treaty.

2.5 The Draft Statute Adopted by the Committee on Institutional Affairs

The hearing of July 1992 had a significant impact on the structure and substance of Parliament's draft Statute.

A text dated 9 September 1992, which has already been discussed above, was the basis for the final version of the report adopted by the Committee on Institutional Affairs at its meeting of 8-9 October. The text adopted was then officially tabled on 13 October 1992 and dated 14 October 1992.

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[16] The Portuguese Ombudsman, José Menéres Pimentel, also felt that it was essential to establish a relationship between the European Ombudsman and the Court of Auditors.

I do not wish or feel it appropriate to comment at length on, or to interpret, the content and scope of the various provisions in this draft. Having said this, we remain persuaded that, thanks to the outcome of the debate at the hearing and to the contribution of the expert involved, the wording and the presentation of the draft Statute was somewhat improved, the wording becoming clearer and more meticulous and the presentation more structured and concise [17].

More specifically, the issue of "co-operation with the ombudsmen of the Member States", which, as we have already seen, constituted an important element of the national ombudsmen's "demands" aired at the July hearing, was incorporated in the middle of the text, in Article 4. Although it was proposed to work on a "voluntary" basis and to be "the subject of agreements between ombudsmen", this co-operation only received a lukewarm reception in the Council and the final version of the provision was substantially restricted and limited.

The principle of independence of the Ombudsman, which had also been a primary concern of the national ombudsmen, ended up with a much more subtle wording in Article 9 compared with the previous version. This "weaker" wording (which Parliament only managed to restore partially through an amendment on the Ombudsman taking an oath) led, as we have seen, to great concern in the Commission. At the end of this legislative process, the Commission had, however, won its case and succeeded in including in the final text of the Statute a provision that strongly emphasises complete respect for this condition as a fundamental aspect of the Ombudsman's duties [18].

As regards the other salient point in the Statute, namely secrecy and confidentiality, we saw in the previous section that the new provision included in this new text (Article 2(2)) was exactly the opposite of what the Commission had recommended at the hearing. This led the Commission to react accordingly during the interinstitutional negotiations that followed.

Finally, the draft adopted by the Committee on Institutional Affairs confirmed once again the provision in the Statute requiring the

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[17] The number of recitals was reduced to eight, compared with 11 in the text of 26 June, while the number of articles was reduced from 16 to 15, in spite of many new and important points included on that occasion.

[18] Article 9 of the Statute stipulates the following: "the Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union".

Ombudsman to take an oath before the European Parliament instead of the Court of Justice (Art. 8).

2.6 The Adoption of the Draft Statute in Plenary

Parliament adopted the draft Decision in plenary, held in Strasbourg on 17 December 1992, by way of a roll call vote, requested by the EPP Group. The result of the vote was as follows:

Members voting:	93
In favour:	90
Against:	1
Abstentions:	2

The vote, which reflected a large consensus, was preceded by the tabling in plenary of 28 amendments: 26 were tabled by Klaus Hänsch (PES - DE) on behalf of the PES Group; one was tabled by Ms Bindi on behalf of the EPP Group; and the final amendment was a compromise amendment tabled jointly by Ms Bindi and Mr Hänsch.

These texts were approved as a whole by Parliament (with the exception of Amendment No. 17, which was withdrawn), the rapporteur, Ms Bindi, having declared before the vote that she supported all of the amendments in question.

Many new elements were added. We will concentrate on the more substantive and will highlight the major changes by adding emphasis in the text:

- Firstly, a new Article 1 was introduced, which therefore came before the article on "referral to the Ombudsman" and which stipulated that "*the regulations and general conditions governing the performance of the Ombudsman's duties are established by this decision in accordance with Article 138e of the EC Treaty, Article 20d of the ECSC Treaty and Article 107d of the EAEC Treaty*". Furthermore, the first paragraph of the old Article 1 was replaced with the following new provision: "*Within the framework of the Treaty and the conditions laid down therein, the Ombudsman shall help to uncover and put an end to maladministration in the activities of the Community institutions and bodies*" (see footnote 4 above);

- As far as the Ombudsman's so-called "power of recommendation" was concerned, it was thanks to Amendment No. 15, tabled by Mr Hänsch, that this power was at last set out explicitly for the first time in Parliament's draft, specifically in Article 3(7) (new): "For each case of maladministration found, the Ombudsman shall send a report to the European Parliament and to the institution or body concerned, after expiry of the period referred to in paragraph 6. *He may make recommendations in this report.* The person lodging the complaint shall be informed by the Ombudsman of the outcome of the inquiries and any action taken *and recommendations* made";
- Secondly, as regards the relationship between the Ombudsman and Parliament, and in particular the Ombudsman and the Committee on Petitions, paragraph 5 of the old Article 1 was amended as follows: "The Ombudsman may, *with the agreement of the person lodging the complaint*, refer *the latter* to the European Parliament for consideration under the petitions procedure. *Such referral is obligatory where the complaint concerns a matter in which the Ombudsman himself was involved*";
- In relation to the Ombudsman's powers of inquiry, Parliament reinforced his prerogatives, stipulating the following in paragraph 2 of the former Article 2 of the draft Bindi report: "The Community institutions and bodies shall be obliged to supply the Ombudsman with the information requested and give him access to the files concerned. *They may not refuse on the grounds of their duty of confidentiality. Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman*". The wording of paragraph 3 was also amended to make it more comprehensive and binding: "The authorities in the Member States shall be obliged, *at the request of the Ombudsman*, to provide *all the documentation* and information *required to enable him to carry out his task*";
- Moreover, on the subject of the Ombudsman's independence, Amendment No. 23 tabled by Mr Hänsch enabled Parliament to clarify in the former Article 8 of Ms Bindi's draft ("oath of office") the following: "*When* taking up his duties, the Ombudsman shall take an oath before the European Parliament that he will perform his duties with complete *independence* and impartiality in the interests of the Union and its citizens...".

Finally, two other amendments should also be mentioned: they relate to two more specific aspects of the Ombudsman's Statute. In Amendment No. 18, Mr Hänsch referred to the method of appointing the Ombudsman, proposing once again that the Ombudsman should be "elected" by Parliament rather than "appointed". A compromise amendment tabled jointly by Ms Bindi and Mr Hänsch enabled Parliament to approve the following text in Article 6(1): *"The Ombudsman shall be appointed by the European Parliament following an election pursuant to Parliament's Rules of Procedure"*.

The second aspect relates to the Ombudsman's place of work. Amendment No. 25 by Mr Hänsch was approved by Parliament more or less as it stood. Parliament was obviously keen in this instance to assert its prerogative of establishing the seat of the Ombudsman without, however, compromising its position on the issue of Parliament's seat and places of work, an issue that was very topical at that time [19].

Amendment No. 25 thus stipulated the following: *"The seat of the Ombudsman shall be that of the European Parliament. Pending the establishment of that seat, his usual place of work shall be in one of the places of work of the European Parliament. Other details shall be laid down in the implementing provisions"*.

3 The Interinstitutional Negotiations with the Council and the European Commission Leading to the Official Adoption of the Ombudsman's Statute

3.1 The Position of the European Commission

In February 1993, under the Danish Presidency, the Council began examining this issue within Coreper II, taking as a basis only the draft Decision drawn up by Parliament.

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[19] On 12 December 1992, the Representatives of the Governments of the Member States had in fact already taken by common agreement the decision on the location of the seats of the institutions and of certain bodies and departments of the European Communities (cf. *Official Journal* 1992 C 341, p. 1). This then enabled the wording of this article to be reduced during the interinstitutional negotiations with the Council to the following phrase: "The seat of the Ombudsman shall be that of the European Parliament".

There is virtually no documentation available to the public from this phase of the Council's preparatory work on the Ombudsman's Statute. The following information is therefore not official and cannot claim to represent a complete reconstruction of events as it is based primarily on personal notes.

The initial sentiment was that a change in the Council's attitude had occurred: the very positive and innovative approach that had characterised the work in the Intergovernmental Conference concerning the Treaty's provisions on the creation of a European Ombudsman's office was no longer evident at this new meeting.

The impression was that the Council was seeking to limit the Ombudsman's remit to a much greater extent than had the Member States themselves, when meeting in the Conference. The Council's concerns appeared to relate, in particular, to possible repercussions of the Ombudsman's powers of inquiry on the activities of the Member States' authorities at the Community level.

The European Commission, however, had left behind the reservations and fears it had expressed at the time of the Intergovernmental Conference and now, looking very favourably on the office of Ombudsman, felt that it was one of the most important elements of European citizenship and vital in "strengthening democratic control".

Thus, in the context of the opinion it had to deliver before the Council's approval, with a view to the final adoption of the Ombudsman's Statute, it declared that it could "broadly approve" the approaches and principles adopted by Parliament in its draft Statute.

As evidenced from the preceding analysis, the Commission essentially had two "concerns". The first was ensuring the *complete independence* of the Ombudsman, especially in relation to the type of "supervision" over the Ombudsman that the European Parliament had established through various methods.

The second related to the scope and arrangements concerning the information that, on the basis of Parliament's draft Decision, the Ombudsman could obtain, both from *documents* that had to be supplied to him and from *testimony* from officials.

In its opinion (Doc. SEC(93)539 final), formally presented to Parliament and the Council on 27 April 1993 (not published in the *Official Journal*), the Commission stressed, above all, that the independence of the Ombudsman would be easier to guarantee, if, contrary to Parliament's proposal, the Ombudsman, like the Members of the Commission or the Court of Auditors, took an oath before the

Court of Justice instead of the European Parliament. The Commission also argued that the Ombudsman's independence would be better safeguarded if, again contrary to the proposal in Article 11(2) of the text proposed by Parliament, he remained free to determine the establishment of his secretariat.

As far as the Commission was concerned, a clear and unconditional reference to this principle in a specific provision of the Statute would guarantee for citizens and the institutions concerned the essential visibility of this fundamental condition of the Ombudsman's duties.

The Commission received from the outset staunch support from the Council on all of these points. Furthermore, the Council, concerned about the competences and powers that the Treaties conferred on the other institutions, hastened to underline, as a counterpart to the independence of the Ombudsman, the general principle whereby "the Ombudsman shall perform his duties in accordance with the powers conferred on the Community institutions and bodies by the Treaties".

It is unsurprising that Parliament made no strong objections to these points, nor as regards the authority before which the Ombudsman would have to give a "solemn undertaking". These pertinent changes were thus incorporated without any major difficulties into the final text of the Statute in the following articles: Article 1(2) (principle of respect for powers), Article 9(1) (principle of complete independence), and Articles 11 and 16 (Ombudsman's establishment plan and budget).

The situation was, however, much more turbulent from the start, with respect to the scope of the Ombudsman's powers of inquiry. From the outset, the Commission objected to the fact that, under Article 3(2) of the draft Statute drawn up by Parliament, the Ombudsman could have "unlimited" access to the documents and files held by the Community institutions concerned.

In fact, the Commission argued that in most Member States where an ombudsman's office operated, such a law was subject to certain restrictions on grounds of secrecy or confidentiality. The Commission therefore proposed amending Article 3(2) as follows (emphasis added below):

"The Community institutions and bodies shall be obliged to supply the Ombudsman with any information *required for his investigation and*

give him access to the files concerned. They may *refuse only on duly substantiated grounds of secrecy*.

Officials and other servants of *Community* institutions and bodies must testify at the request of the Ombudsman. *They shall speak on behalf of their institution or body. They shall supply the Ombudsman with any information in their possession except information which, on duly substantiated grounds of secrecy, their institution or body has not authorised them to divulge*".

This text encompasses, albeit in a more clearly articulated fashion, the reservations expressed at the hearing in July 1992 by Mr Dewost.

According to the Commission, the wording used should make it possible to reconcile two key requirements. The first, which was the *rule*, was to grant the Ombudsman the right to access any information required for his inquiry, be it documents or testimony; the second, which was the *exception* and thus required strict interpretation, sought to stipulate that the Community's institutions and bodies could refuse to divulge certain information on duly substantiated grounds of secrecy.

The Commission again indicated its concern with regard to the fate of inquiries in cases where, because of legal proceedings concerning the facts that had been put forward, the Ombudsman had to "suspend" or terminate consideration of a complaint. Article 2(7) of Parliament's draft stipulated that in these cases the Ombudsman "may inform the European Parliament of the outcome of his investigations up to that point".

The Commission had doubts about the appropriateness of such a provision, which was likely to result in a "partial and biased" account of the situation given that the inquiry had not been terminated. It therefore called for it to be removed.

Following on from this, the Council presented a new text, which Parliament supported without any major opposition. Article 2(7) in the final version of the Statute therefore stipulates the following:

"When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point *shall be filed without further action*" (emphasis added).

3.2 The Position of the Council: Secrecy or Confidentiality?

Let us return now to the Council, which we left, at the beginning of this section, examining, in April 1993, the draft Statute it had received from Parliament.

As already indicated, in spite of the good will and diplomacy of the Danish Presidency, the Council had, from the outset, adopted an attitude that clearly sought to reduce to a more "reasonable" scope the position and text of the European Parliament.

Throughout the negotiations, the crucial points at issue were respect for the secrecy and confidentiality of the information to be supplied to the Ombudsman as part of his investigations, and ensuring, where possible, that the actions of the national authorities were outside the scope of the European Ombudsman's inquiries.

In addition, with regard to other substantive points, which had also been raised during the hearing of 8-9 July 1992, the Council put forward significant changes which, after very constructive discussions in the Interinstitutional Conference, were quickly approved by the three institutions.

With the exception of the points already raised in the previous pages (such as respect for the principle of conferral (Art. 1), the independence of the Ombudsman (Art. 9), the filing of complaints that had become "obsolete" (Art. 2(7)) and the seat of the Ombudsman (Art. 13)), the first item worth mentioning here was the requirement to lay down, for obvious reasons of legal certainty, a period of limitation for lodging complaints with the Ombudsman.

The Council's initial proposal for a new Article 2(4) stipulated that "a complaint shall be made *within one year* of the date of the action in question and must be preceded by the appropriate administrative approaches to the institutions and bodies concerned" (emphasis added).

In Parliament's view, the proposal for a one-year deadline and, in addition, that such deadline would be calculated from "the date of the action in question" (proposals that were quite revelatory of the new reductionist and conservative attitude adopted by the Council from the beginning of the negotiations) was unacceptable. Equally unacceptable was the Commission's alternative proposal, which stated that the complaint should be lodged "within a reasonable period". If the Council's proposal could not be accepted because of the excessively short period of limitation, which risked reducing or even wiping out the Ombudsman's opportunity for intervention, the

Commission's proposal could not be accepted because of the vague and debatable nature of the concept of a "reasonable period".

The compromise solution put forward by Parliament [20], which established a limitation period of "two years", was accepted by the Council only during the second interinstitutional meeting [21]. On the same grounds of legal certainty, Parliament also indicated that the *dies a quo* for calculating this deadline for lodging a complaint had to be "the date on which the facts on which it is based came to the attention of the person lodging the complaint".

The wording of the last sentence in this article put forward by the Council on the requirement for the lodging of a complaint to be preceded by the "appropriate administrative approaches" was not changed however, as Parliament did not object to it.

In the drafting of the Statute, this clause constituted a new element in the context of the conditions governing the "admissibility" of complaints to the Ombudsman. The Council's objective was probably to enable the Community administrations concerned to take preventive steps or even anticipate the possible "reaction" of the Ombudsman, who, in the absence of this kind of "early warning" system, could have challenged the administration unexpectedly.

In the same vein, the Council also had little difficulty in obtaining Parliament's support for inclusion at the end of Article 2(2) of the following condition: "The Ombudsman shall inform the institution or body concerned as soon as a complaint is referred to him".

In relation to the complex issue of the relationship between the Committee on Petitions and the Ombudsman in dealing with their respective complaints and petitions (See Article 2(5) of Parliament's draft), the Council, rather hastily, imposed the following new (and final) wording on Parliament: "The Ombudsman may advise the person lodging the complaint to address it to another authority".

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[20] Parliament had initially proposed "three years" in view of the provision in the Statute of the Court of Justice establishing a five-year period of limitation for instituting proceedings before the Court in matters arising from non-contractual liability.

[21] A curious development occurred at that meeting. During the first meeting of the interinstitutional conference, after an initial discussion, Parliament's delegation to the negotiations left the room where the Council was sitting (the negotiations were being held at the Council's buildings in Luxembourg on this occasion) and went to the meeting room that had been allocated to it. Council's services, however, had forgotten to cut off the internal listening network and the members of Parliament's delegation were able to hear and follow perfectly the discussion that the Council members were having at that moment in the other room. The irony of the situation was that they were in the midst of discussing... transparency!

However, the Commission called for the provision in question to be removed in its entirety from the text of the Statute.

As far as the relationship between the European Ombudsman and the national ombudsmen was concerned, reference has already been made (in section 2.5) to the Council's lukewarm reception of Article 5 in the text adopted by Parliament. Nevertheless, the European Parliament, which was keen to maintain in the Statute some reference to co-operation among the various ombudsmen, finally accepted, against its own inclination, the somewhat restrictive wording of this provision, which, in the final version of the Statute, reads as follows (emphasis added below to identify amendments):

"*Insofar as it may help to make his enquiries more efficient* and better safeguard the rights and interests of persons who make complaints to him, the Ombudsman *may co-operate with authorities of the same type in certain Member States provided he complies with the national law applicable. The Ombudsman may not by this means demand to see documents to which he would not have access under Article 3*".

The last sentence of this article, which also says a lot about the Council's new "restrictive" approach to the process of establishing the general conditions governing the performance of the Ombudsman's duties, goes straight to the heart of the interinstitutional negotiations: the issue of respect for the secrecy and confidentiality of national or even government documents and information.

The Council presented an initial proposal at the negotiations, in which it initially nonetheless recognised the general "rule", to use the expression employed by the Commission, whereby the Community administrations *are obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned.*

The "exception" was, however, the subject of a much more detailed but also much broader proposal, especially as far as Parliament's draft was concerned, which contained practically no exceptions or limitations whatsoever.

The European Commission had, as we have seen, adopted in its opinion a position that was less uncompromising than that of the Council, but limited the Ombudsman's powers to the same degree.

The negotiations on this point were quite difficult, with Parliament finding itself alone in defending the Ombudsman's right to exercise his powers of inquiry "to the full". Parliament's action was nevertheless resolute and positive: it succeeded first of all in limiting the

"exception" to *"duly substantiated* grounds of secrecy" (emphasis added), thus excluding grounds of confidentiality and any possibility of an "arbitrary" refusal.

With regard to the information the Ombudsman requests of the Member State authorities, such information may be refused only if it is covered by "laws or regulations on secrecy", which therefore means that the national authorities do not have any powers of discretion over access to such information, "or by provisions preventing its being communicated".

The Council, at the time under a Belgian Presidency, refused to budge on any of the other aspects. By the end of these negotiations, the Council had managed to include the following rules in the final text of Article 3 of the Statute:

"2. The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy.

They shall give 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.

They shall give access to other documents originating in a Member State after having informed the Member State concerned.

In both cases, in accordance with Article 4, the Ombudsman may not divulge the content of such documents.

Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman; they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy".

As regards the obligation of national authorities to supply information, Article 3(3) of the European Parliament's text stipulated that: "the authorities in the Member States shall be obliged, at the request of the Ombudsman, to provide all the documentation and information required to enable him to carry out his task".

However, the final version, as amended by the Council, stipulates the following:

"3. The Member States' authorities shall be obliged to provide the Ombudsman, whenever he may so request, via the Permanent Representations of the Member States to the European

Communities, with any information that may help to clarify instances of maladministration by Community institutions or bodies unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated. Nonetheless, in the latter case, the Member State concerned may allow the Ombudsman to have this information provided that he undertakes not to divulge it".

4 Final Considerations

The interinstitutional negotiations on the Statute of the Ombudsman ended under the Belgian Presidency on 25 October 1993 (cf. the minutes of Parliament's sitting of 17 November 1993, Part II, Item 5) [22].

On 17 November, Parliament adopted the text of its draft Decision, incorporating the amendments approved by the Council. By a decision of 7 February 1994, the Council approved this draft (*Official Journal* L 54, p. 25) and forwarded it to Parliament in a letter from Minister Pangalos to President Klepsch, dated 10 February 1994.

In this letter, the Council recalled first and foremost that, following the abovementioned meeting of 25 October 1993 of the Interinstitutional Conference, Parliament had also agreed to amend its Rules of Procedure where necessary, so that it was "compatible with the Treaty and the Decision on the Ombudsman".

The Council therefore drew Parliament's attention to a number of points:

"Following Parliament's first revision of its Rules of Procedure, three points must be highlighted in relation to the common desire of the institutions to ensure the independence of the Ombudsman as laid down in the Treaty:

- Rule 160 on the Decision on the Ombudsman insofar as it provides for a "dismissal" procedure which is not laid down in the Treaty, and in particular Parliament's authority to ask the Ombudsman to resign;
- Rule 161(1) on the adoption of the provisions implementing the

[22] During the Interinstitutional Conference, the three institutions concerned also initialled Interinstitutional Agreements on the "Interinstitutional Declaration on democracy, transparency and subsidiarity" and on "procedures for implementing the principle of subsidiarity".

Decision, which appears to provide for the adoption of these provisions by Parliament while Article 14 of the Decision stipulates that these provisions shall be adopted by the Ombudsman;

- Rule 161(2) and (3) on the Ombudsman's obligation to forward the information he receives to Parliament's committees and the penal authorities of the Member States, which goes beyond the provisions in Articles 3 and 4 of the Decision".

Finally, it puts Parliament on its guard: "it goes without saying that the provisions laid down in the Treaty and in the Decision on the Ombudsman take precedence over any internal Rules of Procedure of an institution, that any provision in the Rules of Procedure that is contrary to the Treaty or the Decision cannot be implemented, and that, as a result, the Statute of the Ombudsman will be implemented in accordance with the Treaty and the Decision".

The European Parliament wisely amended the relevant Rules of its Rules of Procedure to ensure that no contradictions between them and the corresponding provisions of the Treaty and the Decision on the Ombudsman could be invoked by any other body.

Finally, on 9 March 1994, the European Parliament adopted the final Decision, in due form, on the regulations and general conditions governing the performance of the Ombudsman's duties [23].

The process of drafting this Statute thus lasted almost two years all told: from March 1992, when work began in Parliament, to 9 March 1994, when it was officially adopted.

If we were to attempt to make a general assessment, we could certainly say that the final result is a relatively balanced Statute. In our view, this balance was to a large extent achieved through the intertwining of the different positions of the three institutions concerned. This was a feature that characterised the process as a whole.

The European Parliament, which, as we saw, was at the outset very hesitant about establishing this body and remained concerned, first and foremost, with asserting its prerogative of the right to petition and its "privileged role" in protecting the political, civil and social rights of EU citizens, gradually changed its attitude and adopted a

[23] *Official Journal* 1994 L 113, p. 15. In the meantime the Maastricht Treaty had entered into force. From the point of view of the necessary legal instruments, everything had therefore been done to allow the first European Ombudsman to be appointed as soon as the Treaty entered into force. However, for various reasons, Jacob Söderman, the first European Ombudsman, was not appointed until 12 July 1995, several months later.

much more constructive and co-operative approach to the role of the Ombudsman, without necessarily doing away with the central feature that characterised the nature of the new body, which was that it was to be a "parliamentary Ombudsman".

The three key provisions in the Ombudsman's draft Statute, namely Articles 3 ("Powers of the Ombudsman"), 4 ("Obligations") and 5 ("Co-operation with ombudsmen in the Member States"), provide for a body endowed with the powers required for its role, without necessarily establishing an "inquisitor". Moreover, as far as the Community's legal order is concerned, the Ombudsman's activities are ideally placed both in relation to the European Parliament (which holds regular dialogue with the Ombudsman and which, where necessary, can provide him with the support he requires to carry out his duties successfully) and in relation to the citizens. At the same time, the effectiveness of the Ombudsman's actions to safeguard citizens' rights and interests is reinforced through co-operation with the ombudsmen of the Member States.

On the other hand, the Council, confronted with the actual scope of the powers of inquiry that could be conferred on the Ombudsman, (which had probably not been adequately assessed during the Intergovernmental Conference), adopted a very specific approach on the ground with a view to limiting considerably the scope of these powers, from the point of view of both time (period of limitation) and substance (respect for secrecy).

The Commission, finally, once convinced that this new body at the European level would be an important element in "strengthening democratic control", acted in both a wise and tactful manner during the negotiations. On the one hand, it helped Parliament banish its final reservations regarding its role as "controller" of the Ombudsman and to support wholeheartedly the latter's full and effective independence. On the other hand, very sensibly and meticulously once again, it supported the Council's arguments aimed at reconciling the Ombudsman's activities with the confidentiality requirements relating to the actions of the institutions (and the Member States' authorities).

It was this "institutional intertwining" concerning the role of the Ombudsman and the general conditions governing the performance of his duties which helped produce a result that was not only balanced but also further strengthened the democratic nature of the legal basis of his Statute, which provides for very close legislative dia-

logue between the three institutions concerned.

In this context, and in view of a possible revision of the Statute, greater transparency of this legislative dialogue and the work involved would, in our view, have important added value for the visibility and democratic nature of this special legislative procedure.

Last but not least, this process of adopting the Ombudsman's Statute will be remembered because of the interest and enthusiasm it generated in Parliament throughout the preparatory work, which directly involved three parliamentary committees (plus the Committee on the Rules of Procedure) and a significant number of services of the Secretariat General.

The path travelled in the direction of fully shaping the role of the Ombudsman and the general conditions governing the performance of his duties did not, however, end with the adoption of his Statute. On 22 September 1995, the European Parliament concluded a framework agreement with the European Ombudsman on administrative co-operation in various areas of activity. The Staff Regulations and the Financial Regulation were also amended to take account of his role and the conditions required to ensure and guarantee his independence.

This having been said, the fact remains that the legal personality of the Ombudsman, which is well established through the relevant provisions in this area, has not yet been expressly included in a specific legislative provision.

It is, nonetheless, also the case that over his first ten years of activity, the European Ombudsman has certainly made his mark and has asserted his personality within the EU's institutions, while increasing his visibility in the eyes of the EU's citizens. With discretion and consistency, he has achieved results that, as noted at the beginning of this chapter, have had useful and positive effects on the smooth functioning and the quality of services provided by the Community's administration. The Ombudsman's role as a body devoted to improving the democratic life of the Union and the transparency of the institutions is, therefore, quite rightly enshrined in the Rome Treaty establishing a Constitution for Europe.

CHAPTER 5

The Early Years of the European Ombudsman

Jacob Söderman

Foreword

This chapter tells the story of the main features of the development of the European Ombudsman's office during its early years, as I remember them. I do hope that the reader will benefit from it by understanding how the activities gradually advanced.

Ian Harden, now Head of the Legal Department of the Ombudsman's office, has assisted me with this chapter. I thank him for his invaluable help with it, and above all for his firm commitment and great work during the early years of the European Ombudsman's office.

I also thank every member of my former staff for their tireless work and enthusiastic spirit during those years. I do hope that their work will be duly remembered when the European Union turns into Citizens' Europe.

I would also like to thank the incumbent Ombudsman, P. Nikiforos Diamandouros, for giving me the opportunity to contribute this chapter to the volume celebrating the 10th Anniversary of the European Ombudsman institution.

1 Introduction

On 12 July 1995, the European Parliament elected me as the first Ombudsman of the European Union. At the beginning of September, I began dealing with the practical issues involved in setting up the office. On 27 September, I gave a solemn undertaking before the Court of Justice of the European Communities in Luxembourg and, from that date, I began to deal with complaints.

The first task was to set up the office. In accordance with Article 13 of the Statute [1], I decided to establish the office in the European Parliament buildings in Strasbourg, since that is the seat of the European Parliament. To facilitate the work, I later decided also to establish an outpost in Brussels with a small permanent staff.

When the election of the Ombudsman took place, 53 complaints had already been registered, the first dating back to 8 April 1994. By the end of the year 1995, 298 complaints had been registered and a few months later, on 31 March 1996, the total had reached 537. From that point on, the rate at which complaints arrived continued to increase, exceeding two thousand per year in 2002.

During the early period, the flow of complaints showed a few tendencies that were maintained throughout the early years. The main reasons for complaints could be found in the quest for more openness, involving access to documents and information, and staff matters, especially recruitment through competitions. Furthermore, complaints also dealt with infringements of human or fundamental rights, contractual disputes and various programmes of grants and subsidies.

Most of the complaints came from individual citizens. Complaints from associations or enterprises accounted for less than 20% of the total. The possibility to lodge a complaint through a Member of the European Parliament was rarely used. The number of complaints sent electronically, by e-mail or via the on-line complaint form on the website, went up year after year to become the majority of complaints.

This chapter will not give an account of all the normal administrative problems in recruiting staff, struggling for budgetary resources, setting up working practices, carrying out inquiries and hearing witnesses, establishing co-operation with the EU institutions and bodies and laying down the goals for how to inform citizens. Each of these items could justify a chapter by itself.

Instead, I shall outline the main issues relating to the European Ombudsman's activities in climbing the stairs towards becoming a meaningful and respected actor on the European scene, thus achiev-

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[1] European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, *Official Journal* 1994 L 113, p. 15. Article 13 states: "The seat of the Ombudsman shall be that of the European Parliament".

ing the task set out in the Maastricht Treaty by remedying European citizens' problems and disputes with the EU administration in a swift and reliable way. I shall briefly introduce these issues here, and deal with them in more depth in parts 2 to 6 below.

As I see it, the first main issues were the struggle to obtain agreement on what the term *maladministration* means and to establish what *good administration* is, by drafting and promoting a *Code of Good Administrative Behaviour*. This Code contains the rules and principles that should be respected by all members of staff in all their activities, including the exercise of discretionary powers.

The European Commission, and subsequently the other EU institutions and bodies, agreed, from the very beginning, to respond to complaints concerning *contractual disputes* and problems with different projects related to European programmes of grants and subsidies. This proved to be very helpful to businesses and associations, since complaints to the Ombudsman turned out to be an effective remedy in many cases.

The lack of openness and the many complaints about lack of access to documents or information formed another main issue, known in European jargon as "lack of transparency". For the Ombudsman, during the early years, it meant a struggle *towards open administration.*

When the Charter of Fundamental Rights of the European Union was announced to the European citizens in 2000 by the Presidents of the European Parliament, the Council, and the Commission [2], the Ombudsman's office committed itself to ensuring that the European institutions and bodies fulfilled, as a matter of good administration, the *expectations of citizens related to the solemn proclamation of the Charter.*

In part 7 of the chapter, I will briefly refer to some visions and dreams I had during the early years of the institution, which I tried to promote in the European Convention that drafted a Constitution for Europe. Some of them might still prove to be useful for the future activities of the Ombudsman's office.

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[2] The Charter was proclaimed on 7 December 2000 during the Nice meeting of the European Council and published in *Official Journal* 2000 C 364, p. 1.

2 What is Bad and what is Good Administration?

One of the first problems concerning the Ombudsman's powers and mandate was to find an adequate answer to the question: "What is maladministration"? Neither the Treaty nor the Statute defines the term. In the various contacts with EU institutions and bodies, two kinds of doubts arose.

First of all, an argument was presented stating, in substance, that questions of legality were reserved for the courts and that the Ombudsman should focus only on administrative problems for which no judicial remedy existed. Secondly, one could note a firm opposition to the Ombudsman assessing whether discretionary powers had been used within the limits of the authority conferred on the decision-maker.

The outcome of the negotiations leading to the Maastricht Treaty was that the European Ombudsman was based on the model coming from Denmark [3], where the Ombudsman acts almost like an administrative court. The answer to the first question thus did not seem difficult. It is good administration to follow the law and it is definitely maladministration not to follow the law. Very few ombudsmen in the Member States work on the basis that they should not normally deal with cases that could be presented to the judiciary. To me it appeared that it could only be good if administrative disputes could be solved without going to court, as the courts are normally overburdened with cases. Naturally the citizen should always have the possibility to go to the courts, if he or she so wishes.

It also seemed obvious to me that even when the administration has been entrusted with a large margin of discretion in solving matters, it must, when using its discretionary powers, still respect the principles of European administrative law, upheld by the Court of Justice. These legal principles thus set the boundaries within which the decision-maker may exercise discretion [4]. If such boundaries did not exist, the institutions would not have discretion, but arbitrary pow-

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[3] The Danish Ombudsman was the third such office (after Sweden and Finland) in the world. A constitutional amendment on the Ombudsman was adopted in 1953 and implementing legislation was enacted in 1954. The first ombudsman took office in 1955. See S. Hurwitz, "The Danish Parliamentary Commissioner for civil and military administration" (1958), *Public Law*, p. 236.

[4] The Council of Europe's 1997 publication *The Administration and You: A Handbook*, (ISBN 92-871-3124-4), gives a useful account of these principles.

ers, and could act in a dictatorial way. This should not happen in a society where the rule of law prevails, as in the European Union.

The ongoing discussions and arguments about the meaning of maladministration led the European Parliament, in its resolution on the Ombudsman's Annual Report for 1996 [5], to encourage the Ombudsman to define the term clearly in his next Annual Report. The same resolution also encouraged the Ombudsman to make full use of the mandate conferred on him by the Treaties to deal with maladministration in the activities of the Community institutions and bodies.

In my first Annual Report, for the year 1995 [6], I had explained my view of the meaning of maladministration by saying that there is clearly maladministration if a Community institution or body fails to act in accordance with the Treaties 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. I added that the European Ombudsman must take into account the requirement of Article F (now Article 6) of the Treaty on European Union that Community institutions and bodies are to respect fundamental rights. The analysis of maladministration in the Annual Report for 1995 also included a list of examples of maladministration. This list was not meant to be exhaustive and I made clear that I believed it is better not to attempt a rigid definition of maladministration, which is an open-ended term.

As clear limits to what may be counted as maladministration, I mentioned that decisions of a political nature, as for example the work of the European Parliament or its organs, are excluded. I also explained that it is not the Ombudsman's task to examine the merits of legislative acts such as regulations or directives. The Treaty itself rightly excluded the judicial activities of the Community Courts from the Ombudsman's mandate.

After consulting all the national ombudsmen and similar bodies in the Member States about their understanding of the term maladministration and carefully analysing their responses, I made a proposal in

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[5] *Official Journal* 1997 C 286, p. 41.

[6] See p. 17. All the annual reports are available through the European Ombudsman's website at:
http://www.euro-ombudsman.eu.int/report/en/default.htm

the Annual Report for 1997 to define the term maladministration in the following way:

"Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it".

The relevant part of the 1997 Annual Report (chapter 2, pages 22-27) includes background information and explanations relating to the definition, concerning, among other things, the principle of the rule of law, the lawful use of discretionary powers and limits in supervising contractual disputes [7]. It goes without saying that, as already stated in the Annual Report for 1995, the definition includes respect for human rights and fundamental freedoms.

In its resolution, the European Parliament accepted the definition of maladministration that I had presented [8]. In the plenary debate on the Ombudsman's Annual Report in the European Parliament, Anita Gradin, the Member of the European Commission responsible for relations with the European Parliament and the Ombudsman, also welcomed the definition [9].

The dispute over the term maladministration was thus resolved. From time to time, questions have been raised in ignorance of the deliberations and reasons that led to the above definition, which was accepted by the European Parliament as the body responsible for dealing with the Ombudsman's reports. However, once the representatives of the institution or body concerned have received appropriate information on the matter, they have agreed to co-operate in the Ombudsman's inquiries.

3 Looking for a Code of Good Administration

There are essentially two ways to inform citizens and civil servants of what good or bad administration really means in practice. The first is for the Ombudsman to decide on a case-by-case basis during investigations and publish the results. The second is to adopt and publish a law or code of good administrative behaviour, which by now exists in

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[7] See also part 3 of the present chapter.

[8] *Official Journal* 1988 C 292, p. 168.

[9] The plenary debate was held on 16 July 1998. Commissioner Gradin stated: "...I welcome the fact that the meaning of the term 'maladministration' has now clearly been defined. This clarifies the Ombudsman's mandate. It also facilitates our work and that of the Ombudsman in identifying how we are to combat this maladministration".

most of the Member States. The two methods are of course not mutually exclusive.

At the European level, an important initiative towards a code was taken by Roy Perry, the rapporteur for the Committee on Petitions, which, in its report concerning its activities in 1996-7, called for clear standards of service to citizens by Community institutions and bodies [10]. When, on 21 October 1997, I raised that matter at a meeting in Strasbourg with the Secretary General of the European Commission, Carlo Trojan, he informed me that the Commission had begun drafting such a code for its officials. In December 1997, he sent me the first draft of a code of conduct for the European Commission officials in their relations with the public. I responded to that draft by sending some comments concerning form and content and provided the Commission with national examples of codes of good administration.

In June 1998, the biennial congress of the European lawyers' association, FIDE, was held in Stockholm. As general rapporteur for the theme "The citizen, the administration and Community law", I raised, among other things, the need for a code of good administration and gave information about the preparatory work in the European Commission [11]. Many of the participants who spoke at the congress emphasised the urgent need for such a code and suggested that the Ombudsman should take the initiative to draft a standard code for the Community institutions and bodies to consider.

As the timetable of the Commission's preparatory work did not seem to be according the matter the highest priority, I decided, in November 1998, to launch an own-initiative inquiry into the existence and public accessibility of a code of good administrative behaviour for officials of the Community institutions and bodies in their relations with the public. In the letter to the institutions and bodies, I outlined the substantive, procedural and further obligations a code might contain and asked them to respond by February 1999.

It turned out that most of the institutions had a favourable attitude to such a code. At the same time, it seemed that a model code would make it easier for them to move forward in the matter. As there still was no fixed timetable for the Commission's version, my Office draft-

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[10] A4-0190/97, 24 May 1997.

[11] The FIDE report is available on the Ombudsman's website in English and French at: http://www.euro-ombudsman.eu.int/fide/en/default.htm

ed a model code of good administrative behaviour and I recommended it to all the Community institutions and bodies in July and September 1999, adding that I planned to make a special report to the Parliament about the matter in 2000.

The Commission and Parliament's administrations, and later the Council's, each adopted their own slightly different codes. Most other institutions and bodies adopted codes following the model recommended by the Ombudsman. The matter was then put before the European Parliament in 2000 in a special report [12]. Parliament adopted a resolution approving the Ombudsman's Code of Good Administrative Behaviour, with some useful amendments, and urged the Commission to draft a regulation on the matter [13]. In its resolution on the annual report on the activities of the European Ombudsman for 2000, the Parliament also considered that the Ombudsman should apply the principles in the Code of Good Administrative Behaviour in his work "so as to give effect to the citizens' right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union" [14].

In the end, there was overwhelming support in Parliament for both resolutions, but in the Committee on Legal Affairs (which gave an opinion to the Committee on Petitions) there was a heated debate on some of the articles of the Code and indeed on the need for and purpose of the whole Code. At one point, I was worried whether the draft opinion would be accepted at all. Then Neil MacCormick, a Member of the European Parliament from Scotland, asked for the floor and said: "There are two important issues at stake here. First of all the rule of law and second showing respect for European citizens". After that intervention and the balanced summing-up speech by the

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[12] Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV), 11 April 2000. All the Ombudsman's special reports are available on his website at: http://www.euro-ombudsman.eu.int/special/en/default.htm

[13] European Parliament resolution on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour, C5-0438/2000 - 2000/2212 (COS), 6 September 2001 (A5-0245/2001).

[14] European Parliament resolution on the annual report on the activities of the European Ombudsman, C5-0302/2001 - 2001/2043(COS), 6 September 2001, point 7 (A5-0280/2001).

rapporteur, Jean-Maurice Dehousse, the debate took a positive direction and the Code obtained the necessary support.

Article 41 of the Charter of Fundamental Rights establishes the citizens' right to good administration at the level of principle, following a proposal that I made in a speech to the Convention drafting the Charter, on 2 February 2000. To me, the natural step forward would be to draft an EU law on good administration to uphold and promote the significance of that fundamental right.

Let me add that it would be easy for the EU to do that, since its institutions and bodies already follow the principles anyway and the law would surely be seen as the Union reaching out to its citizens and leaving its bureaucratic past behind.

4 Dealing with Contractual Disputes

When the first complaints arrived in relation to contractual matters, I was doubtful as to whether or not I should deal with them. Most national ombudsmen do not deal with complaints about contracts, perhaps because these are thought to be commercial disputes, for which there is already an alternative to the courts in the form of commercial arbitration. However, the definition of maladministration accepted by the European Parliament is certainly broad enough to include failure to comply with rules governing the award of contracts and failure to fulfil obligations under a contract. It also seemed reasonable that, as a matter of good administration, the EU institutions and bodies should be able to explain their position in a contractual dispute with a company, an association or an individual citizen. I was also mindful of the fact that the Commission uses contract as a legal framework for awarding grants or subsidies to promote non-commercial objectives.

I therefore sent the first contractual complaints against the Commission for an opinion. The Commission agreed to answer and in many cases reacted by settling the dispute rapidly itself, as for example in a number of cases concerning late payment [15] and a case about delay in issuing an addendum to a contract [16]. Other institutions and bodies followed the Commission's good example.

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[15] See, for example, the decision on complaint 601/99/IJH, in the European Ombudsman's *Annual Report* for 2000, p. 113.

[16] See decision on complaint 1123/98/IJH, in the European Ombudsman's *Annual Report* for 1999, p. 123.

Since contracts are governed by national law, it seemed necessary to limit the scope of review as regards possible breach of contract to examining whether the Community institution or body can provide a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If it does so, the Ombudsman concludes that the inquiry has not revealed an instance of maladministration [17]. The fact that the Ombudsman finds no maladministration in these circumstances does not affect the right of either party to bring the contractual dispute before a court of competent jurisdiction, or to take the matter to arbitration.

Many of the contractual complaints involve situations where the complainant's contract is with a third-party, which in turn has a contract with the Commission. Although the Commission has no contractual obligations to the complainant in such situations, it must still follow principles of good administration. For example, the Commission undertook to handle compensation claims arising out of the termination of a complainant's contract with a foreign government. The amount at stake for the complainant was EUR 1.5 million. I recommended that the Commission propose a settlement, which it agreed to do [18] .

Dealing with complaints about contractual matters revealed a great deal of dissatisfaction about late payments by the Commission. This led me to suspect that there could be a systemic problem which might create special difficulties for small and medium-sized enterprises. I launched an own-initiative inquiry into the matter in December 1999, in which the Commission acknowledged the problem and gave a rather convincing account of its on-going attempts to remedy it. I therefore closed the inquiry with a finding of no maladministration, but left open the possibility of returning to the issue in the future [19]. As well as focusing attention on the systemic problem, the publicity generated by this inquiry led to a large number of individual complaints about lack of payment, many of which led to a rapid solution for the complainant.

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[17] This position was first formulated in the decision on complaint 768/96/CP/UK/IJH, in the European Ombudsman's *Annual Report* for 1998, p. 199.

[18] See decision on complaint 444/2000/ME, in the European Ombudsman's *Annual Report* for 2002, p. 179.

[19] OI/5/99/(IJH)/GG, closed on 16 February 2001, in the European Ombudsman's *Annual Report* for 2001, p. 215.

5 Towards an Open EU Administration

In the summer of 1995, when I was first elected, one of the main topics of discussion in the European Union was "transparency". This term was used in a very broad way and sometimes one had the feeling that some of those who took part in the debate did not really have a clear picture of what it meant. Almost any failure in the activities of the Community institutions and bodies appeared to be linked to lack of transparency.

At the same time, a significant proportion of the complaints sent to the Ombudsman really concerned lack of information, receiving wrong information, refusal of access to documents, or decision-making behind close doors. The citizens clearly wanted to interact with a more open administration within the European Union.

At the Intergovernmental Conference that led to the Maastricht Treaty, there had been a serious attempt to obtain a Treaty provision about public access to documents, but the pertinent proposal was refused. Instead, there was agreement to annex to the Treaty Declaration 17, which included the following statement:

"The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration" [20].

This Declaration led the Commission and the Council to adopt a joint Code of Conduct that contained rules on public access to their documents as early as 1993. The rules in the Code of Conduct were implemented through separate Decisions made by each institution on the basis of its power of internal organisation [21]. The Code of Conduct and the Decisions provided for unsuccessful applicants to be informed both of judicial remedies and of the possibility to complain to the Ombudsman.

A decision of the Court of First Instance made clear that the Council and Commission Decisions contain enforceable rights for

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[20] Declaration on the Right of Access to Information, annexed to the Final Act of the Maastricht Treaty.

[21] Code of Conduct concerning public access to Council and Commission documents, *Official Journal* 1993 L 340, p. 41; Council Decision 93/731 of 20 December 1993 on public access to Council documents, *Official Journal* 1993 L 340, p. 43; Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, *Official Journal* 1994 L 46, p. 58.

individuals [22]. The Court of Justice subsequently rejected a challenge to the validity of the Council Decision brought by the Dutch government in the case *Netherlands v Council* [23]. It was thus clear that the right of access to Council and Commission documents is a matter of Community law, regardless of whether the contents of the document fall within the scope of the Community, or of one of the other two so-called "pillars" of the EU under the Maastricht Treaty.

At first, the Council contested this view in its answer to a complaint made by a British journalist concerning documents relating to the third pillar (i.e., at that time, co-operation in justice and home affairs). It argued that access to third-pillar documents is a third pillar matter and so outside the Ombudsman's competence, but later the Council admitted that the right of public access to documents is governed by Community law and is therefore within the Ombudsman's mandate [24].

In June 1996, I began an own-initiative inquiry into the question of whether the other Community institutions and bodies, apart from the Council and the Commission, had established publicly available rules on access to documents. The inquiry included all the other Community institutions, as well as four bodies established by the Treaty and eight decentralised bodies operational at the time. In the case of the European Parliament and the Courts in Luxembourg, it concerned only their administrative work. Later on, the European Central Bank and Europol were included in the inquiry [25].

From the answers, it appeared that the Office for Harmonisation in the Internal Market had adopted satisfactory rules and that most of the other institutions and bodies intended to follow the good example set by the Commission and the Council in adopting satisfactory rules.

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[22] Case T-194/94, *John Carvel and Guardian Newspapers v Council, European Court Reports* 1995, p. II-2765.

[23] Case C-58/94, *Netherlands v Council, European Court Reports* 1996, p. I-2169.

[24] See decision on complaint 1087/10.12.96/STATEWATCH/UK/IJH, the European Ombudsman's *Annual Report* for 1998, p. 41. NB: The Treaty of Amsterdam, which came into force on 1 May 1999, brought the third pillar into the Ombudsman's mandate.

[25] Own-initiative inquiries 616/PUBAC/F/IJH and OI/1/99/IJH: see the European Ombudsman's *Annual Report* for 1996 p. 80 and the *Annual Report* for 2000 p. 194.

In the *Netherlands v Council* case, the Court had stated that:

"So long as the Community legislature has not adopted general rules on the right of 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 interest of good administration" [26].

I took this statement as a starting point and recommended to all the institutions and bodies in question that they should adopt rules on public access to documents within the following three months. Later, I made a special report on the matter to the European Parliament, in which I was able to inform the Parliament that nearly all the institutions and bodies concerned had adopted such rules [27]. I would like to emphasise that both the European Central Bank and Europol established appropriate rules on access to their documents.

In 1999, on the occasion of the 10th anniversary of the Court of First Instance, a seminar on transparency in the Community institutions and bodies was organised in Luxembourg. I was invited to speak and had the opportunity to make clear what I understood transparency to mean. This is what I explained:

- The processes through which decisions are made should be understandable and open;
- The decisions themselves should be reasoned;
- As far as possible, the information on which decisions are based should be available to the public [28].

Satisfactory transparency of the administration means that citizens should be able to understand *what* the public authorities are doing, *why* they are doing it and *what* they are planning to do in the future. Therefore transparency is fundamental to democracy; it is a condition both for the accountability of public power to citizens and for their participation in public life.

In the Treaty of Amsterdam, the idea of citizenship was reinforced with a statement that the Union is founded on the constitutional

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[26] See footnote 23 above, paragraph 37.

[27] Special report of 15 December 1997, *Official Journal* 1998 C 292, p. 170.

[28] The speech was delivered on 19 October 1999 and the text is available on the Ombudsman's website at:
http://www.euro-ombudsman.eu.int/speeches/en/cfi10.htm

principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law [29]. Article 1 of the Treaty on European Union was also amended to state on the matter of transparency that decisions should be taken "as openly as possible".

The Ombudsman's activities in the field of transparency, undertaken during the early years of the institution's operation, had a beneficial impact on the openness of the so-called "Article 226" or "infringement" procedure. This is the procedure through which the Commission, acting in a role in which it has come to be known as the "Guardian of the Treaties", enforces European law against Member States failing to comply with it. The Commission accepted step by step that principles of good administration, including openness, should apply in the administrative process of dealing with citizens' complaints against Member States. In October and December 1996, I finished my inquiries into two cases where the Commission's procedures for dealing with infringement complaints had left the complainants dissatisfied and even feeling that the Commission's approach was arrogant and high-handed. The following year, I began an own-initiative inquiry which led the Commission to accept some procedural guarantees for complainants [30]. In response to criticisms and suggestions in a subsequent case, the Commission adopted a Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [31].

The Union's commitment to transparency was also relevant to recruitment procedures, and the Community institutions and bodies had to give up unnecessary secrecy [32]. Furthermore, the Ombudsman's office took a stand for more openness in many disputes concerning access to documents. In most cases, the institutions and bodies followed the Ombudsman's suggestions and opened up their procedures and files.

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[29] Article 6 (1) of the Treaty on European Union.

[30] See decisions on complaints 206/27.10.95/HS/UK and 132/21.9.95/AH/EN, the European Ombudsman's *Annual Report* for 1996, p. 58 and p. 66 respectively. The own-initiative inquiry was 303/97/PD, in the *Annual Report* for 1997, p. 270.

[31] COM/2002/0141 final, *Official Journal* 2002 C 244, p. 3.

[32] Special Report to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures, 18 October 1999, *Official Journal* 1999 C 371, p. 12.

For my activities in the field of transparency, the case law of the Court of First Instance and the Court of Justice provided great support [33]. Their stand on the matter reminded me of the great work of the Supreme Court of the United States in the 1950s and the 1960s, when the Court insisted on respect for human rights and fundamental freedoms, to which a part of the US governmental administration appeared indifferent and even hostile.

The Treaty of Amsterdam also took a significant step forward, by adding a new Article 255 to the EC Treaty, which stated that there should be legislation on the right to access documents held by the European Parliament, the Council and the Commission. The drafting of this legislation was carried out secretly within the European Commission and when the draft regulation was finally made public in January 2000, I wrote a strongly critical article about it in the European edition of the *Wall Street Journal*. This led to an animated public debate with Romano Prodi, the then President of the Commission, who wrote an article in reply [34]. He also wrote an angry letter to the President of the Parliament expressing doubts about the way I carried out my task. This gave me the opportunity to explain my doubts about the proposal to the Conference of Presidents in the European Parliament on 13 April 2000 [35]. The day before, Mr Prodi and I had had an opportunity to discuss the matter in a friendly atmosphere and reach a basic understanding on it.

The most important result of the exchange in the press was that the European Parliament took a strong interest in the draft regulation and managed to adopt, as co-legislator with the Council, a text which has to be considered as a significant step forward for transparency in the Union [36]. In practice, its application is not limited only to the three institutions mentioned above, since other legislation extends it to the executive agencies and the principles it contains should be

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[33] See, for example, the cases referred to in footnotes 22 and 23 above.

[34] My article appeared in the *Wall Street Journal Europe* of 24 February 2000. Mr Prodi wrote in the same newspaper on 9 March 2000.

[35] I produced a paper for the Conference of Presidents entitled "Three steps for citizens", in which I welcomed the Commission's programme of internal reform and identified three essential steps for citizens:
- to establish clear rights of access to documents,
- to make transparent the right to good administration and
- to guarantee the right to legal protection under Community law.

[36] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *Official Journal* 2001 L 145, p. 43.

applied by all the other EU institutions and bodies covered by the European Ombudsman's own-initiative initiative inquiry on rules about access to documents, as well as the many other bodies that have subsequently been established.

As one can see, there was a lot of progress, in the early years of the Ombudsman's office, in the march towards an open administration within the European Union. Much, however, remained to be done. The doors of the Council of Ministers remained closed when adopting laws binding for the European citizens, contrary to the principle expressed in the Amsterdam Treaty that "decisions should be taken as openly as possibly". The Council also refused to release an opinion by its legal service on the proposal for rules on access to documents, even when the legislative process had been concluded [37].

The most embarrassing failure was that the Commission firmly opposed my suggestion to establish freedom of speech for its own officials, a right that the overwhelming majority of Member States in the Union had acknowledged for officials working in their respective public administrations.

For me, it is difficult to understand that, first, the best staff available is recruited to the EU, and then the management cannot trust them to use their freedom of speech in a just, constructive and positive way for Europe and its citizens. I do hope that those who have the power in this matter will come to their senses. It does not even need courage to have trust in one's own staff; just a positive attitude is required.

6 Promoting Fundamental Rights

In the 1995 Annual Report, I took the view that, if a Community institution or body fails to act in accordance with fundamental rights as required by what was then Article F of the Treaty on the European Union (now Article 6), this would constitute an instance of maladministration. Thus, respect for human rights and fundamental freedoms, or fundamental rights as they are usually called within the Union, was part of my mandate.

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[37] See Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 1542/2000/(PB)SM, 12 December 2002.

In the first few years, I did not receive a significant number of complaints concerning respect for fundamental rights by the institutions and bodies. Instead, there was an ongoing discussion on what would be the right way forward to strengthen the European Union's commitment to human rights. The Santer Commission's proposal for acceding to the European Convention on Human Rights failed when the Court of Justice surprisingly issued a negative opinion on the matter in March 1996 [38]. That meant that one had to look for a new path to go forward.

In 1993, the Treaty of Maastricht committed the Union to respecting fundamental rights, as guaranteed by the European Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law. However, after the Court's opinion mentioned above, the Member States did not take advantage of the opportunity provided by the Amsterdam Treaty negotiations in 1997 to endow the Community with competence to adhere to the European Convention or to any other international human rights instrument.

Accordingly, the result was that the Treaty referred to human rights but did not say what they were. Although citizens could find the text of the European Convention without too much difficulty, most would have difficulty in knowing what are the "the constitutional traditions common to the Member States". The second problem was the gap in protecting rights at the level of the Union. The Member States had all signed the European Convention and many other human rights instruments, but the European Union had not signed any human rights instrument that its institutions and bodies were obliged to respect.

Finally a Convention to draft a Charter of Fundamental Rights for the European Union was set up, following the conclusions of the European Council in June 1999 during the German presidency. The European Ombudsman was invited to follow its work as an Observer.

As I mentioned in Part 3 above, at the Convention's session in Brussels, in February 2000, I advocated the right for citizens to have their affairs "dealt with properly, fairly and promptly by an open,

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[38] Opinion 2/94, Accession of the Community to the European Convention on Human Rights, *European Court Reports* 1996, p. I-1759.

accountable and service-minded administration"; that is to say, the right to good administration. I also drew the Convention's attention to the fact that rights are not worth anything without effective remedies, both judicial and non-judicial.

The first Convention, as we know, successfully agreed on a Charter of Fundamental Rights of the EU, in which a new fundamental right, the right to good administration, was included for the first time in any international human rights instrument. But the Member States were not ready to make the Charter legally binding, some of them fearing that the Council of Europe's role in defending human rights would drastically decline, since the European Union had not adhered to that Convention.

As the greatest achievement of the French presidency, the Charter seemed to be under threat. To address the problem, the President of the Council of Ministers, Mr Védrine, the President of the Commission, Mr Prodi, and the President of the European Parliament, Ms Fontaine, decided to *proclaim* the Charter to European citizens at the Nice summit of the European Council in December 2000.

For many observers, it was not quite clear what, if anything, this solemn proclamation of the Charter meant in practice, because the Charter was not legally binding on the activities of the Community institutions and bodies. For me, good administration required that the rights and values contained in the Charter of Nice, as proclaimed by the Presidents of the main EU institutions, should subsequently be followed in the daily work of these three institutions and of the Community institutions and bodies at large. What meaning could its solemn proclamation otherwise have for the citizens?

Accordingly, my office carried out three own initiative inquiries in 2001 to examine the application of certain Charter rights at the level of the Union: one of these inquiries concerned the officials' freedom of expression and another concerned the right to parental leave. Both led the Commission to propose amendments to the Staff Regulations. In the case of freedom of expression, the Commission was unfortunately not prepared to abandon altogether the possibility of censorship in the case of officials writing about their work, but it proposed some more flexible requirements. Another own-initiative inquiry into age discrimination in recruitment led to the abolition of that form of discrimination. By making a special report to the European Parliament, I also managed to convince the Commission

to end a form of indirect sex discrimination affecting seconded national experts [39].

Furthermore, I advocated a law on good administration to promote the new fundamental right to good administration, but the Prodi Commission was not ready to accept that. However, the Commission did finally respond positively to my proposal that it should adopt a special code for its administrative handling of Article 226 complaints concerning infringements of Community law by Member States, which would be consistent with the right to good administration contained in Article 41 of the Charter of Fundamental Rights [40].

I also carried out an inquiry on possible racism in the recruitment of officials, initiated by a complaint from a citizen. The inquiry led, in June 2002, to a promise from the Commission to adopt an action plan to promote equal opportunities.

At the beginning, some senior officials, especially the then Secretary General of the Council, expressed objections to following the fundamental rights contained in the Nice Charter. The other institutions and bodies, however, generally followed it loyally to the benefit of the citizens, as promised by the solemn proclamation. During the early years, the Charter also inspired the Court of First Instance and the Court of Justice to use its principles and articles in their reasoning. The Court of Human Rights in Strasbourg also gave the Charter due credit by doing the same.

So, the work of the successful Convention which drafted the Charter of Fundamental Rights, the three Presidents' solemn proclamation of it and our small office's struggle to make it a living reality for European citizens were not in vain. The Charter is marching on.

7 Where there is a Right there should be a Remedy

The European Ombudsman was also invited to be an Observer when the European Convention that was destined to produce a draft Treaty establishing a Constitution for Europe was established in 2002.

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[39] Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 242/2000/GG, 15 November 2001.

[40] Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, (COM/2002/0141 final) 20 March 2002, *Official Journal* 2002 C 244, p. 5.

My main goal at the Convention on the question of fundamental rights was to see to it that the Charter of Fundamental Rights become legally binding within the scope of European law and that the EU also accede to the European Convention of Human Rights. These two achievements were included in the Convention's final proposal for a Constitutional Treaty. Commissioner Antonio Vitorino did a great job in convincing the Convention members and some of the Member States that this would be a good way to underline the Union's commitment to human rights. I also expressed the view that the Union should consider signing up to all the human rights treaties to which a majority of the Member States have acceded [41].

The European Convention on Human Rights (1950) is the most developed system to supervise the protection of human rights in the world, but the Council of Europe has also developed other important international human rights instruments, such as the European Social Charter (1961) and the Conventions to prevent Torture and Inhuman and Degrading Treatment and for the Protection of National Minorities. There are also United Nations instruments, such as the Universal Declaration of Human Rights (1948), The International Covenant on Economic, Social and Cultural Rights (1966) and another one on Civil and Political Rights (1966), as well as a number of International Labour Organisation Conventions, such as those concerning Freedom of Association and Protection of the Right to Organise (1948) and the elimination of the worst forms of child labour (1999).

These are examples of international instruments that many of the Member States have agreed to be bound by. To me, it seems clear that the Union's commitment to fundamental rights should be at the same level as that attained in those Member States that have travelled the farthest in that direction.

For the citizens, it is of course good that there be rights set out in law and treaties of various kinds. But every right needs an effective remedy. In societies governed by the rule of law, rights and remedies go together. Article 47 of the Charter says that everyone whose rights and freedoms, as guaranteed by the law of the Union, are violated has the right to an effective remedy before a court. To me that is not enough.

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[41] Speech to the European Convention, 28 February 2003.

I therefore proposed to the European Convention that the Constitution should contain a chapter on remedies available when citizens' rights under European law, including fundamental rights, are not respected. The chapter should begin with the right to have access to courts: they are the main guarantors of the rule of law and also of European law. The important role of the Court of Justice should be duly mentioned in this context, as should the role of national courts [42].

As the courts in many Member States are costly and overworked, they should only deal with cases that cannot be solved in a smoother way. I underlined that European citizens should have a right to an extra-judicial remedy, when they have a dispute with the public administration. The remedy could either be an ombudsman or a similar body with a constitutional mandate. For the European citizens, it would be good to have such a remedy which, at its best, would be flexible, quick and without cost to the complainant.

I informed the Convention that the European Ombudsman and the existing ombudsmen and similar bodies in the Union already co-operate in a network to promote good knowledge of European law and to transfer cases rapidly to the body most able and competent to deal with them. The national and regional ombudsmen are competent to deal with European law and have, as a rule, long experience with human rights questions. They could thus play an important role in helping to make the Charter of Fundamental Rights a living reality in all corners of Europe.

The network and the implementation of the Charter would both be strengthened, if, in the event no solution could be found in a normal Ombudsman investigation and the case raised an important issue of principle, the European Ombudsman could refer fundamental rights cases to the Court of Justice. I also envisaged that the chapter on remedies should make clear that citizens have the right to petition the European Parliament about infringements of European law by Member States. The Commission should have a duty to co-operate with the European Parliament in ensuring that the petitions are examined using a fair and open procedure.

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[42] Speech to the European Convention, 24 June 2002. For the detailed proposal, see CONV 221/02, 26 July 2002.

Much to my regret, the Constitutional Treaty does not have a chapter that informs the European citizens of the remedies available to them. For the development of a citizens' Europe this is a true setback. If European law does not ensure effective remedies to bring the rights to the citizens that it envisages, the citizens will not have trust in the Union.

So the fight to establish effective remedies to promote the correct application of European law must go on.

8 Closing Words

From the preceding account, I hope you can see that a lot was achieved during the first years of the European Ombudsman institution. You can also see that a lot of work for the European citizens remains to be done before they can feel that the Union is theirs. From all that I know, this work is in good hands.

These achievements were possible because the main Community institutions and bodies were committed to promoting good administration for European citizens. Of course, over the years, there were moments when a lot of arguing and convincing had to be done, but, even at the most difficult times, I enjoyed a lot of support from the European Parliament, and many other people in the Community institutions and bodies and from all over Europe, with whom I cooperated and whom I learned to respect. The fact is that wherever you go in Europe, the citizens want to have an open, accountable and service-minded public administration. So when you are working for these goals you are never really alone. I furthermore believe that the proactive role I was encouraged to pursue as the first European Ombudsman was beneficial to the mission lying before me, a mission that to many appeared impossible.

I also benefited from a committed, competent, active and enthusiastic staff, to whom I am eternally grateful for their work during these years. I am glad that the European citizens show their confidence in the Ombudsman's office by turning to it in ever-increasing numbers to solve their problems and hear their complaints.

When I left office in April 2003, the main task ahead seemed to be to get the network of ombudsmen and similar bodies to work in a gradually more effective way in solving disputes arising from the application of European law wherever it occurs, at any level in the

European Union. Much work had been done in this field by organising regular conferences, appointing liaison officers, publishing a "Liaison letter"(a kind of trade journal for ombudsmen in Europe), creating an internet co-operation including regular electronic news about ombudsman matters, and putting in place a procedure for assisting the offices in the Member States with the correct application of Community law in their inquiries.

Nevertheless, by March 2003 we had not yet managed fully to reach out to the citizens by telling them that this network might assist them in disputes concerning Community law, wherever in the European Union they may reside. In this work, the co-operation of not only the national ombudsmen and similar bodies is needed, but also that of regional ombudsmen and similar bodies. In the future, the network could also gradually embrace the municipal level, by at least inviting the ombudsmen of the main cities in Europe to join it.

I once said in a speech that the Ombudsman is not Santa Claus, Batman or Asterix, but only an institution of the European Union with the task of helping citizens with grievances against the European Union administration. I would like to take the opportunity here to clarify my statement. If the European network of ombudsmen is given sufficient powers and thus a true possibility to act as a flexible, prompt and cheap remedy in European law matters, wherever problems might occur within the European Union, then the Ombudsman will be worth much more for the European citizens than any of these illustrious fantasy figures. For it will be he who will bring them both the information that they need concerning their rights according to European law, and an effective remedy to help them in their daily lives.

CHAPTER 6

The European Ombudsman: Protecting Citizens' Rights and Strengthening Parliamentary Scrutiny

*Paul Magnette**

With the benefit of hindsight, we can see that the creation of the European Ombudsman formed part of a new trend in the legitimisation of the European Union. This legitimisation process entailed subjecting 'all of the Union's institutions to standard sets of rules and procedures, or scrutiny by agents who are dedicated to a single task but responsible for applying it across the entire EU institutional system' [1]. Yet, initially, the nature of this new kind of "agent" was unclear. On the one hand, the Ombudsman is formally a parliamentary body, designed to reinforce the ability of Members of the European Parliament (MEPs) to control EU institutions and administrations; it thereby constitutes a classical form of parliamentary scrutiny. On the other hand, the profile and role of this organ resembles that of a court. It is approached by individual complainants and it defines and applies "general principles" to solve the cases submitted to it; as such, it is one of the organs designed to guarantee respect for the rule of law. It is by finding an original combination of these two sets of powers that the first European Ombudsman managed to make a success of this institution. The powers of the Ombudsman, limited as they are, gave him the opportunity to combine the instruments of parliamentary scrutiny and judicial control in an original way. Moreover, given the hybrid nature of his status and role, the Ombudsman was well equipped to scrutinise those agents that cannot - at the risk of

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1 J. Peterson and M. Shackleton, (eds) (2002), *The Institutions of the European Union*, Oxford: Oxford University Press, p. 366.

losing their independence - be submitted to the more classical forms of parliamentary control, thereby helping to reconcile delegation with the principle of parliamentary democracy [2].

1 Why a European Ombudsman?

The idea of creating a European Ombudsman was first evoked in a European Parliament resolution in 1979, and the issue was raised again by the Adonnino Committee (1985), which was appointed to explore ways of creating a "Citizens' Europe". But it was not until the intergovernmental negotiations in 1990-1, which led to the Treaty of Maastricht, that the institution was established [3]. The Spanish government had drafted an ambitious proposal which was soon supported by Denmark. Basing their argumentation on their respective national traditions, both countries contended that it was necessary to appoint an ombudsman in every EU country with the task of protecting individual rights and receiving complaints from citizens. This seemed all the more important for Spain and Denmark, as the possibilities which European citizens had for litigation in these countries were notably restricted, given the limitations of the *ad hoc* mechanism enabling them to bring a direct action to the European Court of Justice (ECJ). The other Member States were more reluctant, as was a majority in the European Parliament. Parliament had consistently presented itself vis-à-vis the Council and the Commission as the guardian of citizens' rights and a majority of its Members saw the Ombudsman as a potential source of competition. Parliament's Committee on Petitions already offered citizens the possibility of complaining, they argued, making the establishment of this new mechanism redundant. This line of argumentation was similarly used in domestic debates in Austria, Germany, Italy and Luxembourg. The Chair of the Committee on Petitions even declared that it was "a publicity manoeuvre that deprives citizens of some of their

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[2] P. Lindseth, (2002), "Delegation is dead, long live delegation: managing the democratic disconnect in the European market-polity", in C. Joerges and R. Dehousse (eds), (2002) *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press, pp. 139-63.

[3] P. Magnette, (ed.) (1997) *De l'étranger au citoyen: construire la citoyenneté européenne*, Paris/Bruxelles: De Boeck-Universités, and P. Magnette, (1999) *La citoyenneté européenne: Droits, politiques, institutions,* Bruxelles: Editions de l'Université de Bruxelles.

rights" [4]. In spite of this reluctance, the compromise proposed by the Luxembourg Presidency was finally adopted.

The Treaty of Maastricht reflected the aforementioned hesitations. On the one hand, it gave a very precise definition of the role of the Ombudsman, with no possibility for him to play a significant political role. On the other, the Ombudsman was under the direct authority of the Parliament which could be inclined to give him a more political profile. He was to be appointed by the European Parliament after each election - by a majority vote. Parliament defined his powers and means of action, and it could also request his resignation. The Ombudsman's Statute, adopted by the European Parliament in March 1994, reflected the will of MEPs to make the institution into one of their instruments of control: the Ombudsman can act both on his own initiative and on complaints forwarded by MEPs (in addition to action taken on the basis of complaints addressed directly to him); his means of action and procedures are precisely defined and a system of information exchange ensures that he will not deal with political questions that concern the Petitions Committee. It was of particular symbolical significance that his place of work was to be in Strasbourg, the seat of the European Parliament. From the start, the European Ombudsman was to be as much a vector of parliamentary control over the executive - in the old Nordic constitutional tradition - as the independent guardian of citizens' rights.

The appointment of the first Ombudsman caused bitter party controversy within the European Parliament. A first vote in the Petitions Committee resulted in a dead heat with the same number of votes for the left-wing and right-wing candidates. A second vote had to be organised, which left time for the two main political groups, the EPP (Group of the European People's Party and European Democrats) and the PES (Socialist Group in the European Parliament), to agree on the name of a single candidate. Jacob Söderman, who was elected, had a political profile after a career as Justice and Social Affairs Minister, before becoming Finland's National Ombudsman. The approach he adopted in his new role was to confirm that he would not confine himself to the strict definition given in the Treaty, but would play an important political role with the support of the Parliament which elected him.

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[4] Viviane Reding (EPP, Luxembourg), who subsequently became a Member of the European Commission (*Agence Europe*, 16 May 1991).

2 A Magistrate of Influence

In the first months of operation, the Ombudsman was forced to adopt a low profile because of the novelty of the institution and the controversy which had marked its creation. Complying strictly with the letter of the Treaties and the Statute which defined his function, he pledged allegiance to the Parliament which had elected him and exercised control over him. In his first report, submitted after only a few months of activity, he declared that he would not tackle political questions but would carefully examine the admissibility of complaints and study them cautiously. But he also specified that he did not intend to confine his mission to mere instances of maladministration. "Given the background of the establishment of the office", he gave himself a "double mission" - "both the effective implementation of the rights of citizens at all levels of governance of the Union, and transparency in the work of Community institutions and bodies" [5]. Even if the allusion went unnoticed, it heralded his intention to assume the double role played by the ombudsman in the Nordic tradition - he was to help individuals in their dealings with the administration, while also considering the possibility of promoting, on his own initiative, the principles of transparency and accountability which are inherent in the concept of "good administrative practices". From then on, he repeatedly declared that, by proposing solutions concerning instances of maladministration, his objective was not only to provide redress in specific instances but also to contribute to the 'consolidation of an open, democratic and accountable administration' [6].

The dual nature of his jurisdiction, constantly alternating between individual cases and general principles, closely resembles that of the European Court of Justice. But the Ombudsman's mission is very different from a judicial mission - he has extended powers of investigation and can conduct inquiries on his own initiative but cannot impose any legal obligation. He can only submit draft recommendations, sometimes accompanied with "remarks" or "reform proposals", to the institutions found guilty of maladministration but is not

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[5] The European Ombudsman's *Annual Report* for 1995, p. 5.

[6] The European Ombudsman's *Annual Report* for 1995, p. 24.

empowered to impose sanctions [7]. To carry out his mission successfully, he must establish relations of mutual confidence and esteem with the institutions he is in contact with. The administration concerned is free to decide if it will follow his recommendations. The only risk is that its "wrong-doing" will be made public by the Ombudsman and its public image damaged. His coercive means are thus less certain than those of a court which can condemn and impose sanctions, accompanied by financial penalties and damages. Nevertheless, his capacity to define his priorities and carry out inquiries is greater than that of a court. What might therefore be seen as a weakness of the institution can thus be turned into an advantage in the institutional arena. The Ombudsman has tried to maximise the quasi-judicial aspects of his role, by adopting strategies vis-à-vis the Community administration which resemble the European Court of Justice's conduct since the 1960s. He has often used the pretext of specific cases to express general principles which, according to him, should prevail beyond the specific circumstances of the case at hand. Through his decisions, he has gradually established a "jurisprudence" based on a teleological philosophy of "good administrative practices" and even "good governance". So, while he has no power to make binding decisions, his apparent weakness may also be a source of diffuse power. Unlike judges who are compelled to adopt a moderate tone in order to preserve the legal authority of their decisions, the Ombudsman may, and often does, exercise political pressure.

Moreover, unlike the judges at the European Court of Justice, he has the fundamental privilege of being able to conduct inquiries on his own initiative. Whereas the Court depends on the cases brought to it to develop its jurisprudence - which explains why it is often seen as providing incomplete protection in the area of fundamental rights [8] - the Ombudsman is free to determine his own priorities. He is therefore in a position to adopt strategies which resemble those of a parliamentary Committee of Inquiry. Until now, the Ombudsman has used this discretionary power cautiously. He has always justified his

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[7] The European Court of Justice does not have strong powers of sanction either. Its decisions must be enforced by national authorities, and it is only on the request of the Commission, and after a lengthy procedure, that it can impose fines on Member States failing to observe its rulings.

[8] Joseph Weiler considers that the judges' dependence on the complaints lodged by individuals is the main obstacle to "judicial activism". See J. Weiler, (1999), *The Constitution of Europe*, Cambridge: Cambridge University Press.

decision to conduct an inquiry, by referring to the increasing number of complaints on some very specific issues. In so doing, he poses as the "defender" of citizens rather than the autonomous custodian of certain general principles. He has also imposed some constraints on his activities, by limiting the number of own-initiative inquiries to two or three essential questions per year.

The Ombudsman knows that his position would not amount to much if he were not supported by thousands of citizens who submit their cases to him every year. Since he came to office, he has always adopted an open strategy of communication, giving dozens of interviews and public conferences. He knows that his power depends on a good public image and that the institutions controlled by his services are all the more likely to follow his recommendations, if they think they are influenced by public opinion. The Ombudsman openly confesses that his main objective is "to inform the people who might have a real reason to complain about maladministration in the activities of a Community institution or body of their right to complain to the European Ombudsman and how to do so". Though his communication strategy is aimed at the general public, it is in fact centred on "targeting accurate information to groups of potential complainants" [9].

From a study of the 1,500 or more complaints received each year [10], we can divide complainants into two categories. Individuals account for 90% of the cases coming to the Ombudsman. The remaining 10% are divided among businesses (from 20 to 60%, depending on the year), citizens' associations (from 50 to 90%) and MEPs (from 10 to 30%). It is of course important to point out that three-quarters of the total number of complaints are deemed inadmissible, since they mainly concern disputes with national administrations [11].

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[9] The European Ombudsman's *Annual Report* for 1999, p. 281.

[10] The number of complaints received each year is constantly increasing, rising from 298 in 1995 to 1,557 in 1999 and reaching 3,726 in 2004. The number of complaints submitted per Member State corresponds roughly to its population. However, countries hosting EU institutions whose residents have more frequent dealings with the Union's administrations, and, to a lesser extent, the Nordic countries, which are more familiar with the ombudsman's procedures, show a slightly higher ratio of complaints in relation to their population. See P. Magnette, (1999) *La citoyenneté européenne: Droits, politiques, institutions*, Bruxelles: Editions de l'Université de Bruxelles.

[11] In such cases, according to the principle of subsidiarity, he tries to advise complainants to address the relevant national or regional ombudsman. The European Ombudsman has developed close links with these offices through the creation of a 'network of ombudsmen' covering the national and regional administrative levels.

The diverse origin of complaints helps channel the Ombudsman's activity. He has first to deal with individual complaints concerning the practices of Community administrations, within the framework of well-defined administrative procedures. Beyond this, a small number of complaints are lodged by organised groups - firms, associations, lobbies, groups of journalists, often supported by MEPs - which use the possibility to complain to modify the working methods of the Union [12]. The Ombudsman's attitude does not vary much in either case. He does not distinguish between minor cases of maladministration which require only an *ad hoc* solution and real "affairs" with political repercussions. His relatively formal approach resembles that of the Court: even if the complainants are not driven by political motives, the Ombudsman often tries to highlight the "general interest" dimension of the cases he receives, however insignificant they may appear *a priori*. This is what happens, for example, with the numerous complaints concerning the relations between the Commission and the staff directly or indirectly working for it [13]. As the main Community "administration", the Commission is, more often than the other institutions, accused of unfair practices by its staff, individuals or companies that work for it, or benefit from its financial support. The vast majority of cases against the Commission have to do with recruitment competitions (the "*concours*"), work contracts, orders or subsidies, various questions relating to the payment of private business services, etc. In such cases, the task of the Ombudsman is to request information from the administration concerned, conduct an inquiry (if the practices of the administration are called into question), and find a solution when the two parties fail to reach a satisfactory agreement. Frequently, the intervention of the Ombudsman is sufficient to convince the administration concerned to take adequate steps to resolve the matter, as, for example, in cases of late payment or requests for information. The administration may sometimes refuse to resolve the case and may thus receive a critical remark

[12] Statistics provided by the Commission and the Council concerning information requests reveal the same groups of actors.

[13] There are also complaints lodged against the Council, the Parliament and other Community bodies by their staff. These complaints are notably fewer but this is obviously due to the fact that there are fewer people working for these institutions.

or "maladministration report" with a "recommendation" to find a solution [14].

Relationships with the other institutions are generally based on mutual confidence and co-operation, but the Ombudsman may adopt a stricter and even openly political tone. After the Prodi Commission came to office, for example, he issued a severe warning to the new team who were suspected of not taking his mission seriously enough. Were this unhelpful attitude to have become a general rule in the approach of the then-newly installed Commission, it would rapidly have destroyed the achievements of the fruitful and constructive co-operation that had already developed and made his task of enhancing relations between European citizens and the Community institutions and bodies impossible [15].

3 From Particular Cases to General Principles: The Teleological Approach of the Ombudsman

Such clashes are rare. The Ombudsman usually tries to convince the institutions in less "tough" terms. But the moderate tone he usually forces himself to adopt does not prevent him from taking initiatives with considerable political implications. In addition to the resolution of dozens of cases of maladministration - usually in the form of friendly solutions - the Ombudsman tries to act in a preventive way. He may consider that recurrent complaints bear witness to the inadequacy of certain administrative practices, which must therefore be reformed. The Ombudsman's position evolves then from that of an institution that provides *ex-post* redress to individuals to one embracing a more ambitious strategy of reform. Through the careful selection of cases which he sees as symbolically important, he bestows on

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[14] The Ombudsman finds that there has been no maladministration in about half of the cases. Between 10 and 30% of complaints are settled in a friendly or unilateral way by the institution, while 10% of cases result in the Ombudsman issuing a 'critical remark' to the institution concerned. In less than 5% of cases, maladministration leading to a 'draft recommendation' is the result.

[15] The success of the Ombudsman's first term (1995-9) may be partly explained by the appointment of Anita Gradin, the Swedish Commissioner - who shares the same language and civil culture as Mr Söderman - to the post of "correspondent" of the Ombudsman within the European Commission. This greatly facilitated the adaptation of the Commission services to the demands of the Ombudsman, which often require an important investment in time and human resources on the part of the Commission's civil servants.

the institution a power of initiative and pressure in the continuous reform of EU governance. Some examples help to illustrate this strategy.

The fight against discrimination is one of the Ombudsman's favourite topics. After noting that many cases concerned the existence of age limits in recruitment examinations - limits denounced as discriminatory by some individuals - the Ombudsman started an inquiry on his own initiative in 1998. He asked each institution to explain and justify their recruitment policy. After studying and comparing national laws on the subject and international texts on the protection of fundamental rights, he pointed out that some age limits did not seem to be "objectively justified". He based his argument on the provisions of the Treaties and on secondary legislation banning discrimination [16], and used the case law of the Court of Justice as an argument in asking the Commission to take the initiative leading to the adoption of an institutional agreement providing for a complete ban on all age limits in recruitment. What needs to be emphasised here is the Ombudsman's method rather than the content of such an important decision, whose significance derived from the fact that it went against established, widespread practice. His services could have limited themselves to just examining each case and proposing tentative solutions to the administrations concerned. Instead, the Ombudsman decided to bestow a far-reaching dimension on the problem. His method - studying national, international and Community law provisions - and his choice of privileging the most "equitable" rather than the most common solution resemble the inductive reasoning that the European Court of Justice used to establish the "general principles of Community law" [17].

The Ombudsman conducted another similar inquiry the same year. Taking up an old tradition of the Court, he stated general rules relating to the "principles of good administrative practices", even though they were not necessarily applicable to the case in point. Repeating

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[16] New Article 13, added by the Treaty of Amsterdam in 1997, provides that "...[w]ithout prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, *age* or sexual orientation" (emphasis added).

[17] D. Simon, (1991) "Y a-t-il des principes généraux du droit communautaire"?, *Droits* 14: 73-86.

an almost ritual formula, namely, "[t]he principles of good administrative practices impose...", he progressively built up an implicit code of good administrative behaviour from the study of concrete cases. He drew up a list of unwritten rules taken from public law and administrative codes of conduct, which should at all times govern the action of administrations. These include acknowledging receipt of all inquiries, replying to requests and taking action promptly, recording all documents in registers and archives, taking into consideration all pertinent elements before making a decision, providing reasons for and explaining decisions.

Not limiting himself to merely stating the principles, one after the other, the Ombudsman seized the opportunity provided by an inquiry to systematise his own "jurisprudence" in the form of a proposal for a written code of good administrative behaviour. He established basic rules (legality, equal treatment, proportionality, legal security) largely inspired by the case law of the European Court of Justice [18] and added formal rules, shaped by national public law and his own experience (right of parties to be heard, time limits, notifications and reasons), and even some rules of courtesy which, according to the Ombudsman, should characterise all relations between the administration and citizens (polite answers, apologising for errors). In order to justify this initiative, the Ombudsman first evoked his mission of "promoting good administrative practices" and the official declaration of "the Union's commitment to democratic, transparent and accountable forms of administration" [19] - an expression that can be found again and again in the Ombudsman's argumentation. He then explained that his inquiry was aimed at determining whether such codes existed in Community law. At that point, it was strictly speaking an inquiry. In a second stage, he analysed the homogeneity of the few existing rules and used the pretext of these incomplete and heterogeneous norms to put forward his own proposal for a code with which administrations were strongly invited to comply. This code of good administrative behaviour has become the Ombudsman's favourite theme. He has presented his philosophy in

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[18] L. Azoulay, (2002) "The judge and the Community's administrative governance" and S. Kadelbach, (2002) "European administrative law and the law of a Europeanised administration", in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press, pp. 109-37 and 167-206 respectively.

[19] The European Ombudsman's *Annual Report* for 1999, p. 222.

public lectures before Community law specialists, academics and judges, and in journals read by the same public [20]. In 2000, he pleaded his case in front of the members of the Convention charged with drafting the Charter of Fundamental Rights. Since many Convention members, mainly those from the Nordic countries, shared his opinion [21], a fundamental right to good administration was incorporated in the Charter adopted at the Nice Summit in December 2000. In less than five years, the Ombudsman had managed to codify the doctrine of good administrative behaviour and have it incorporated in a Charter which is the expression of the Union's fundamental values and which will acquire basis in a treaty based, if the Constitutional Treaty is ratified.

4 Guarding the Guardians: Promoting Transparency and Participation in "European governance"

In circles close to the European microcosm, some actors rapidly understood how they could benefit from the Ombudsman's interventions to further their cases. Not all complaints lodged by companies, associations, journalists and MEPs aim to influence EU mechanisms, but it is the case for a few of them. The economic actors who denounce cases of maladministration usually target the Commission in its role as "the economic executive power". As Guardian of the Treaties, the Commission has always relied on actions brought by individuals and companies to ensure that national administrations comply with Community law, notably in the area of competition and state aids. But there were no legal provisions in the Community system for individuals to "guard the guardians". In infringement proceedings, the Commission alone decides about the appropriateness of an action and can just as easily decide not to follow up an action brought by individuals. This discretionary power has never been challenged by the European Court of Justice, in spite of many actions for annulment brought by firms against the Commission's decision not to start, or to defer, legal action, and despite repeated calls from legal scholars to check the Commission's room for manoeuvre.

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[20] J. Söderman, (1998) "Le citoyen, l'administration et le droit communautaire", *Revue du Marché Unique Européen* 2: 19-67.

[21] G. Braibant, (2001) *La charte des droits fondamentaux de l'Union européenne*, Paris, Le Seuil.

Since the Ombudsman came to office, some companies, judiciously advised by specialised law firms, have seen him as a means of convincing the Commission to abandon its tradition of acting as a discretionary authority and be more flexible as regards observations brought by third parties. Every year some complaints involve the Commission's decisions to drop legal actions. Many citizens associations and lobbies, notably the most active environmental groups, have adopted the same attitude. France's nuclear tests in 1995, for example, brought some 40 complaints from British environmental groups. As they could not bring direct action against the French authorities, they accused the Commission of not having enforced a provision in the European Atomic Energy Community (EAEC) Treaty, which enables the Commission to force the Member State concerned to take complementary health measures. The Ombudsman's inquiry could not consider the appropriateness of France's nuclear tests or the Commission's decision not to enforce Article 34 of the EAEC Treaty. It concentrated rather on the way the Commission had made its decision. Each year many similar cases deal with Council Directive 85/337/EEC [22], which requires environmental impact assessments in all public or private projects above a certain size. The complainants invoking this directive accuse the Commission of not having controlled the application of the provisions by national authorities. In the same vein, they also refer to another directive about the conservation of wild birds [23]. In all cases, the associations initiating these actions have first tried to act at the national level, and then appealed to the Commission, before eventually turning to the Ombudsman.

In such cases, the Ombudsman's role is, rather like that of the Court in the field of administrative law, ambiguous. Theoretically, he examines the way the Commission has reached its decision not to bring infringement proceedings against a Member State. Although the control is only about the procedure, it may radically alter the content of the decision. In fact, the difference between content and form is very difficult to make out in such cases. When a company contests the Commission's authorisation of state aid for a competitor, or when

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[22] Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment; *Official Journal* 1985 L 175, p. 40.

[23] Council Directive 79/409/EEC on the conservation of wild birds, *Official Journal* 1979 L 103, p. 1.

an association regrets that the Commission has not initiated an infringement proceeding against a national authority accused of violating Community law, the main objective is to change the content of the decision. The Ombudsman tries to keep to the formal aspect of the case - his remarks mainly concerning time limits, absence of response, failure to adequately justify decisions. But while criticising some aspect of the procedure, he may touch upon the content of the decision. There have been instances when the Ombudsman has accused the Commission of not having "correctly assessed" the situation before making a decision. In these cases, he has based his argumentation on the fact that the Commission examined some arguments and not others [24]. In another case, the Ombudsman reproached the Commission with having failed to "really balance the interests of the opposing parties" [25]. Under the pretext of a formal control, the Ombudsman may thus interfere with the decision. The question which, therefore, poses itself is what room for manoeuvre is there for institutions to make their decisions, if the Ombudsman can decide what information they should use and how? It is true that the Ombudsman's caution has prevented such cases from happening - up until now - but the formal character of the control he exercises does not guarantee that his intervention will not affect the substance of the decision.

From isolated cases which seem to form part of co-ordinated strategies pursued by complainants, the Ombudsman has, once again, tried to develop a more general policy. In 1997, for example, he undertook an inquiry on his own initiative about "the possibilities for improving the quality of the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community law in the period before judicial pro-

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[24] See the Ombudsman's decision on complaint 650/98(PD)GG in the Ombudsman's *Annual Report* for 1999 p. 194. This complaint was lodged against the Commission's decision to close an anti-dumping procedure. The Ombudsman found an instance of maladministration in the attitude of the Commission which had not taken sufficient notice of the evidence and of the complainant's arguments.

[25] See the Ombudsman's decision on complaint 1057/25.11.96/STATEWATCH/UK/IJH against the Council in the Ombudsman's *Annual Report* for 1998, p. 178. It should be noted that the Court of First Instance had adopted the same reasoning in similar cases concerning access to Council documents. See B.K. St C. Bradley, (1999) "La transparence de l'Union européenne: une évidence ou un trompe l'œil"?, *Cahiers de droit européen* 35(3-4): 283-362.

ceedings may begin" [26]. He noticed the frustration of individuals who are informed by the Commission of its decision not to start, or to drop, a legal action, and suggested that the procedure should be modified to allow complainants to formulate their observations. In a normative tone, the Ombudsman pointed to two advantages of the proposed procedure. Firstly, it would most likely contribute to a more effective administration, by giving complainants the opportunity to criticise the Commission's views and therefore give the Commission the opportunity to respond to this criticism. Secondly, it would enhance the citizens' trust in the Commission, by allowing them to participate more fully in the Article 169 (now Article 226) procedure and thereby make these activities more transparent [27]. In the name of efficiency, legitimacy and transparency, of which he states he is the guardian, the Ombudsman empowers himself with the right to suggest procedural reforms which aim to increase citizens' participation in administrative procedures. The Commission is free not to take any notice but may feel under a certain amount of pressure, as the Ombudsman uses public conferences, relations with his national counterparts, and privileged contacts with MEPs to argue that his reforms are fully justified. Though he has no power to impose his recommendations, he has developed a strategy of influence in order to challenge the Commission's longstanding tradition of secrecy.

Because of the numerous cases of "lack or refusal of information" from administrations received each year, the Ombudsman has, since 1996, also embarked on a crusade for transparency. Some complaints had deliberately been lodged before the Court by journalists and citizens' associations for the purpose of promoting transparency [28]. As he was receiving the same kind of complaints, the Ombudsman started, in his second year in office, an inquiry into citizens' access to the documents of EU institutions. This theme had been put on the agenda by the Danish and Dutch governments towards the late 1980s, and by Sweden and Finland after they joined the Union. Transparency had therefore become one of the leitmotivs in the debate about the

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[26] The European Ombudsman's *Annual Report* for 1997, p. 284.

[27] The European Ombudsman's *Annual Report* for 1997, p. 285.

[28] C. Grønbech-Jensen, (1998) "The Scandinavian tradition of open government and the European Union: problems of compatibility"?, *Journal of European Public Policy* 5(1): 185-99.

reform of the Union, and the Treaty of Amsterdam constituted a decisive step forward, introducing the subjective right of citizens to access the documents of EU institutions. The Union's institutions have often been reluctant to respect their obligations, and this has become an ideal battleground for the Ombudsman. He first requested that Community institutions and bodies inform him about their rules and regulations on the subject, and warned them that "the fact of not adopting or of not facilitating rules about public access to documents" was "an instance of maladministration". He recommended the adoption of such a set of rules within three months. In order to give more weight to his action, he submitted a special report on the matter to Parliament, which thanked him for his initiative. The following year, he received further complaints about lack of transparency, especially in Council proceedings. The complainants used the Ombudsman while they also brought similar cases to the Court of First Instance (CFI). The Ombudsman notified the Council in 1997 that he found its reasoning for refusing access to certain documents unsatisfactory, and asked it to keep a record of the measures taken concerning its policy on justice and home affairs. These recommendations, which converged with the case law of the CFI, were then accepted by the Council.

In the same vein, he recommended that the Commission keep a public record of the documents produced in the framework of comitology, in order to facilitate access to information. After receiving further complaints, he conducted another inquiry on his own initiative in 1998 about four Community bodies which had not made public their rules of access to information [29]. He then embarked on a detailed analysis of the replies given by the institutions concerned and notified them of his position. While admitting that there could be legitimate exceptions to the principle of transparency, he referred to the case law of the CFI and insisted on the fact that such derogations should be strictly limited. For example, he contested the interpretation of the European Central Bank (ECB), which contended that the minutes of its Governing Council were not "administrative documents" that should be accessible to the public. The Ombudsman did not go as far as demanding that they should be systematically made

[29] The institutions involved were the Community Plant Variety Office, the European Agency for Safety and Health at Work, Europol and the European Central Bank.

public - which would have been an openly political intervention on his part - but argued that rules should be established to facilitate public access to the documents which the ECB wanted to keep secret.

Like the European Court of Justice, which has established the legal principles in the Community, the Ombudsman has both stated and promoted the general principles which, in his view, are an integral part of the notion of "good administrative practices". In the exercise of the ambitious mission of reforming European governance that he sees as his task, the Ombudsman defends a demanding conception of "democracy" which echoes Nordic constitutional traditions. All his actions, whether they be the treatment of complaints or his own-initiative inquiries, follow the same political logic. His aim is to consolidate the political accountability of the administration, by encouraging citizens to be more vigilant on the basis of three structural principles:

- Transparency in the decision-making process; citizens can only control institutions, if they can follow their actions and have access to their documents;
- The development of written criteria of good administrative behaviour; citizens can only contest public action, if they can invoke formal criteria set and applied by the authorities; and
- Citizens' participation in the decision-making process and the possibility of litigation, even on administrative questions; information about public action and the administration's criteria would be meaningless, if there were no ways of challenging them.

All of these actions form part of the same approach - attenuating the "authority of decisions made" by extending to the administrative sphere the principles of public information, deliberation and control constituting the normative foundations of parliamentary democracy. The Ombudsman has seized every opportunity to defend this conception of governance which he finds not only more democratic but also more efficient. Echoing the argument of "deliberative democracy", he opposes the frequently used argument that some confidentiality should be preserved in the decision-making process, declaring: "Was it really efficient for the Santer Commission to collapse in March [1999], leaving the Union's activities badly hampered for half a year in the absence of a lead from an active Commission? An important reason for the collapse was what had been done behind the curtain of confidentiality. Furthermore, experience shows that open administration, which is practised in Member States, seems to

be an effective tool against fraud and corruption, while a closed and confidential handling of public affairs appears to provide opportunities for fraud and corruption" [30].

5 Conclusions

Although most observers were sceptical about the role of the institution after it was introduced in the Maastricht Treaty, the Ombudsman has since demonstrated the value of this organ. Making inventive use of what could appear to be loose and weak powers, he has given a sound and original profile to his office. Use of his prior national experience and of good relations with the Members of the Commission and the Parliament made it possible for the first appointed Ombudsman to be highly ambitious with his mission. He knew his first task was to seek solutions to complaints from individuals and solve individual cases of maladministration. But he also interpreted his mission to include drawing up an exhaustive list of instances of "malfunctioning" in European governance and proposing remedies. On the one hand, acting like a Court, he interpreted the cases submitted to him in a teleological way, with an eye to building a demanding doctrine of "good administration" [31]. On the other, acting as a parliamentary organ, and with the strong support of the European Parliament, he used his powers of inquiry to suggest wide-ranging reforms in European governance. In so doing, the Ombudsman has promoted the principles of transparency, participation and explanation - underpinned by a philosophy of "deliberative" administrative action - which are also supported by the Court [32].

With a view to strengthening his role, the Ombudsman has always given priority to the defence of his own prerogatives and to the promotion of his institution. In order to make his investigations more efficient, he suggested, in 1997, that the Commission allow its staff to express their views freely during his inquiries (currently, they are

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[30] The European Ombudsman's *Annual Report* for 1999, p. 13.

[31] His interpretation of the notion of 'administration' is, moreover, very broad. By examining complaints concerning (a) the way the Commission controls the application of law, (b) the Council's practices in police co-operation or (c) the internal workings of the Parliament's party groups, the Ombudsman has blurred the traditional frontiers between politics and administration.

[32] M. Shapiro and A. Stone Sweet (eds), *On Law, Politics and Judicialisation*, Oxford: Oxford University Press, pp. 228-57.

only allowed to answer questions according to their supervisors' instructions [33]). Two years later, he asked Parliament to modify his Statute and lift all remaining restrictions imposed on his functions as an investigator.

Finally, his fruitful relations with his national or regional counterparts provide new opportunities for him to defend and promote the institution of the Ombudsman at all levels of the administration, even beyond the legal boundaries of the Community [34]. The Ombudsman has not yet convinced all the actors involved in European governance to follow his philosophy of good administration. But by combining quasi-judicial actions and reasoning with parliamentary inquiries and political proposals, he has at least demonstrated that the two classical paths of accountability can be reconciled. As European governance relies ever more on delegation and independent regulation, this new and hybrid form of scrutiny looks likely to become ever more important.

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[33] In accordance with his usual strategy, the Ombudsman conducted an own-initiative inquiry in 2001.

[34] The first European Ombudsman expressed his regret that some countries have no ombudsman and even suggested that each Member State should "have an obligation to ensure that its legal structure includes an effective and appropriate non-judicial body to which citizens may apply for this purpose" (European Ombudsman's *Annual Report* for 1998, p. 11). This is a clear case of interference in "national constitutional traditions".

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CHAPTER 7

Parallel Functions and Co-operation: the European Parliament's Committee on Petitions and the European Ombudsman

Saverio Baviera

1 Judicial and Non-Judicial Remedies

The European Union's legislative acts affect, to a significant degree, all aspects of everyday life, creating rights and obligations for us all. That is why provision is made for individuals to challenge the European institutions' decisions. Under the EU system of judicial remedies, the European Court of Justice and the Court of First Instance rule on those cases brought before them not only by institutions and Member States but also, in certain circumstances, by individuals. In addition, the Court of Justice rules on questions of Community law raised in individual proceedings before national courts, and referred to it by those courts.

However, beside the system of judicial remedies, there is the possibility of a different type of recourse, allowing individuals to engage in dialogue with the European institutions. According to Article 21 of the EC Treaty, "...[e]very citizen of the Union shall have the right to petition the European Parliament..." and "...[e]very citizen of the Union may apply to the Ombudsman". These two instruments - petitions to the European Parliament and complaints to the European Ombudsman - have a different history and are of a somewhat different nature.

2 The Right to Petition the Parliament and to Complain to the Ombudsman

The right to address petitions to the European Parliament was formally enshrined in Parliament's Rules of Procedure in 1981, soon after the first direct elections. However, the practice of receiving and

dealing with petitions is as old as the Parliament itself. Parliament's endeavours to confer as official a character as possible on petitions initially led to the signing of an interinstitutional declaration on petitions (1989) and subsequently to the inclusion in the Maastricht Treaty of the right to address petitions to the Parliament. It is laid down in Articles 21 and 194 of the current EC Treaty. The reason for these endeavours was the desire to be as effective as possible in dealing with issues raised in the form of petitions, thereby strengthening Parliament's natural ties with citizens, and at the same time reinforcing Parliament's position within the European institutional framework, since, by acting directly on behalf of the people, it would naturally acquire greater weight.

With the creation, in 1987, of a standing committee exclusively responsible for petitions, the system was, on the whole, considered to function satisfactorily. That is probably why the idea of creating a European Ombudsman was not welcomed from the outset by all within Parliament. It was seen as an alternative to petitions. And yet, the idea had originated in Parliament itself when, just before the first direct elections in 1979, a report (doc.29/79), drawn up by Sir Derek Walker-Smith on behalf of the Legal Affairs Committee, had launched the idea of "the appointment of a Community Ombudsman by the European Parliament". It was only when the preparatory work leading up to the Maastricht Treaty clearly showed that the idea was to have a system in which petitions to the Parliament and complaints to the European Ombudsman would coexist, and indeed in which the two bodies would co-operate, that that initial resistance was overcome, paving the way for the creation of the European Ombudsman.

Thus, the EC Treaty (Article 195) provides for an Ombudsman appointed by the European Parliament and empowered to receive complaints concerning instances of maladministration in the activities of the Community institutions or bodies. In order to investigate these, or on his own initiative, the Ombudsman shall conduct inquiries, the outcome of which he reports to the European Parliament. Within the Parliament, the internal body competent for maintaining contacts and organising relations with the Ombudsman is the Committee on Petitions.

3 Procedures and Powers

The procedures for presenting petitions to the European Parliament and addressing complaints to the European Ombudsman, as well as the way these are dealt with by the respective bodies, have some features in common, but differ in important respects.

Unlike bringing a case before the Court of Justice or the Court of First Instance, introducing a petition or a complaint entails *no cost*. Both the European Parliament and the European Ombudsman strive to facilitate public access, by receiving petitions and complaints in any form (including on-line) and by being very flexible concerning the formal requirements to be followed. Moreover, guidance as to how to introduce a petition or complaint is made available on their respective websites.

Due to the administrative nature of the procedure of complaint to the Ombudsman, two conditions apply which are intrinsic to all such remedies [1]: the complaint must be presented within a certain *deadline* ("...two years from the date on which the facts on which it is based came to the attention of the person lodging the complaint...") and it "...must be preceded by the appropriate administrative approaches to the institutions and bodies concerned...". Given the political character of the institution to which petitions are addressed, and the fact that these are not necessarily directed against the activity of a European institution (see below), these conditions do not formally apply to petitions.

For both petitions and complaints, *confidential* treatment is the exception. According to Article 10 of the European Ombudsman's Implementing Provisions [2], a complaint can be classified as confidential if the complainant so requests, or when the Ombudsman considers it necessary to protect the interests of the complainant or of a third party. As for petitions, "...unless the person submitting a petition asks for it to be considered in confidence, it shall be entered in a public register..." [3] and dealt with in public, according to the general

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1 See Article 2(4) of the European Ombudsman's Statute, adopted by the European Parliament on 9 March 1994 (*Official Journal* 1994 L 113 p. 15) and amended by its decision of 14 March 2002 deleting Articles 12 and 16 (*Official Journal* 2002 L 92 p. 13).

2 See the European Ombudsman's website at: http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm

3 European Parliament, Rules of Procedure, Rule 191(8).

rules on committee meetings. It is worth pointing out that, before the onset of direct elections, the Rules of Procedure provided, on the contrary, that the meetings of parliamentary committees (whose task it is to prepare the deliberations of the plenary, held in public session) take place *in camera*, save when otherwise decided by the committee. It was believed at that time that a public session could, in some circumstances, constitute an obstacle to a frank debate and jeopardise the resolution of matters submitted to the committee. Since then, the spirit of openness in the EU decision-making process has prevailed, due, *inter alia*, to the decisive contribution of the European Ombudsman.

Regarding the consultation of committee documents relating to petitions, the European Parliament applies the general principle of *public access* to documents as laid down in Regulation 1049/2001 [4] - itself another result of the activity of the European Ombudsman. Thus, the draft reports and draft opinions of the Committee on Petitions can be consulted by members of the public, as can minutes of meetings, summaries of petitions, notices to Members, etc. [5]

The European Ombudsman's documents are, in principle, likewise available for consultation: Article 14 of the European Ombudsman's Implementing Provisions [6] also takes Regulation (EC) 1049/2001 as the basis for public access, although paragraph 2 lays down some limitation due to the extended powers of investigation conferred upon the Ombudsman by the Treaty: "...where the Ombudsman inspects the file of the institution concerned or takes evidence from a witness..., the public shall not have access to any confidential documents or confidential information obtained as a result of the inspection or hearing...". The same condition applies to documents consulted by the complainants themselves [7].

Given that both the Ombudsman and the Committee on Petitions have the function to serve the public, the starting element of the procedure is normally an external input, i.e., receipt of a petition or a complaint. Nonetheless, since both bodies have a recognised mission

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[4] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *Official Journal* 2001 L 145, p. 43.

[5] European Parliament, Rules of Procedure, Rule 97.

[6] See footnote 2 above.

[7] European Ombudsman, Implementing Provisions, Article 13.

to improve the functioning and effectiveness of Community institutions, they can also *autonomously* perform actions of a general scope to attain this goal.

Rule 192(1) of the Parliament's Rule of Procedure states that "...the committee responsible may decide to draw up a report or otherwise express its opinion on petitions it has declared admissible...". Of course, from the viewpoint of the internal relationship among the various bodies of Parliament, tension could, in theory, flow from the Committee on Petitions' power to table reports in plenary session on matters which, by definition, also fall within the remit of another committee. It should be noted that while each parliamentary committee specialises in a specific sector, such as environment, agriculture, transport, and so on, and is responsible for preparing all sector-related questions for debate by the whole House, the Committee on Petitions' field of action is determined more by the form in which a given question comes before the Parliament rather than by its substance - a petition, as opposed to, say, a Commission proposal. However, it seems that, in practice, conflicts of competence are rare and agreement is normally found, so that reports tend to be prepared by the Committee on Petitions.

Furthermore, according to the general rules governing relations among the various parliamentary committees, the Committee on Petitions can draw up opinions for other committees, and sometimes makes use of this possibility, when another committee prepares a report whose subject-matter is germane to the content of one or more petitions.

The following reports and opinions can be recalled in the context of such autonomous action:

- Report (doc. A5-0355/2003) on Petition 461/2000 concerning the protection and conservation of great apes and other species endangered by the illegal trade in bush meat - Rapporteur: Proinsias De Rossa;
- Report (doc. A5-0451/2003) on Petition 842/2001 concerning the effect of discriminatory treatment afforded to persons with multiple sclerosis in the European Union - Rapporteur: Uma Aaltonen;
- Opinion on a Proposal for a Directive (COM(01)0257) - 2001/0111 (COD) on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States - Draftsman: Ana Palacio Vallelersundi;

- Report (Doc. A5-0186/2001) on Petitions 470/1998 and 771/1998 concerning silicone implants - Rapporteur: Janelly Fourtou; and
- Two opinions on asylum: Opinion (PE 302.934) on a common asylum procedure and uniform status for persons granted asylum, and Opinion (PE 311.464/fin.) on the proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in a Member State by a third country national - Draftsman: Luciana Sbarbati.

The European Ombudsman's autonomous initiative is spelled out in Article 195(EC), in a form of words echoed in the Statute (Article 3): "The Ombudsman shall, on his own initiative or following a complaint, conduct all the inquiries which he considers justified to clarify any suspected maladministration in the activities of Community institutions and bodies". The Implementing Provisions [8] specify that, where powers of investigation and procedures are concerned, there is no difference between own-initiative inquiries and the investigation of complaints. Examples of own-initiative inquiries can be found in the Ombudsman's annual reports and include the following:

- Sometimes national experts are temporarily seconded to European institutions. A gap appeared in the system, as the relevant internal procedures for the resolution of disputes was not available to them. Following a draft recommendation from the Ombudsman, the European Commission undertook to adopt an *ad hoc* procedure to deal with complaints presented by national experts (inquiry OI/1/2003/ELB [9]);
- In December 2003, the Ombudsman, noting that the Commission is represented in the Board of the European Schools and provides a large part of their funding, started an own-initiative inquiry into the Commission's plans to promote good administration in the School. The inquiry stressed the need to help the Schools to ensure improved and maintained levels of trust with parents, as well as increased efficiency. In September 2004, the Commission responded positively, enclosing a copy of a recent Communication (COM (2004) 519 final) on the matter (inquiry OI/5/2003/IJH [10]); and

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[8] European Ombudsman, Implementing Provisions, Article 9.

[9] The European Ombudsman's *Annual Report* for 2004, section 3.8.

[10] The European Ombudsman's *Annual Report* for 2004, section 3.8.

- When examining a complaint made by an unsuccessful bidder in a tender procedure organised by the Commission, the Ombudsman examined the remedies available in such instances. He considered that the Commission might have failed to provide unsuccessful bidders with a review procedure, and that this might constitute maladministration. An own-initiative inquiry was therefore opened, with the result that the Commission took steps to remedy the situation, and adopted, in July 2003, a Communication (COM(2003)395 final) to this end (inquiry OI/2/2002/IJH [11]).

Finally, the *powers of investigation* of the two bodies vary considerably. Under Article 195 of the EC Treaty, the European Ombudsman has the task to "conduct inquiries". To that effect, "...the Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned...", except on duly substantiated grounds of secrecy. This obligation also applies, in certain conditions, to documents originating in the Member States [12]. The same text provides that "...officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman...", although they speak in accordance with instructions from their administrations and are bound by professional secrecy.

As regards the Committee on Petitions of the European Parliament, Rule 192 of the Rules of Procedure stipulates that, when considering petitions or establishing facts, the Committee may organise hearings or send delegations of Members *in situ*, and that the Commission may be requested by the Committee to submit documents, supply information and grant it access to its facilities. This text appears to be vaguer than Article 3 of the Ombudsman's Statute. It places a somewhat diminished legal obligation on the Commission to provide documents or other information, and mentions no direct contact with other institutions or bodies. There is, however, a form of balance in the scheme of things, since it can be argued that the more direct powers of investigation conferred upon the European Ombudsman offset a remit for the complaints received by him which is less extensive than that of the petitions addressed to the European Parliament.

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[11] The European Ombudsman's *Annual Report* for 2003, p. 201.

[12] The European Ombudsman's Statute, Article 3(2).

4 The Differing Contents of Petitions and Complaints

The EC Treaty states that the right of *petition* can be exercised, if the question submitted falls within the Community's sphere of activity and if the petitioner is directly concerned. The first condition is extremely wide, since "the Community's sphere of activity" not only encompasses the entire remit of the institutions, as defined by the Treaties and Community secondary legislation, but also all areas in which an activity is actually carried out, such as all the fields on which the European Parliament holds debates or examines reports. Moreover, Rule 191 of the Parliament's Rules of Procedure goes beyond the Treaty, in that it refers to a "...matter which comes within the European Union's fields of activity...", thereby moving from Community to Union activities, thus including all matters pertaining to the second and third pillars.

The second condition ("...if the petitioner is directly concerned...") is applied in a very broad sense by the Parliament. Thus, it is not considered necessary for the petitioner to be personally and materially affected by the subject-matter of the petition. Concern for a general issue is deemed sufficient. By way of example, a petition from a German resident worried about deforestation in South America is admissible.

Parliament is the authority which decides upon the admissibility of petitions, and the criteria hitherto applied point to a general desire to broaden admissibility as much as the texts allow. The Committee on Petitions has admitted petitions on matters pertaining to the protection of the environment, public health and consumer protection; free movement of workers and of services; freedom of establishment and recognition of diplomas; the right to move to a Member State other than one's own, irrespective of employment; various aspects of agricultural policy in the Union and its impact on third countries; fiscal policy, customs union and the free movement of goods, and many other issues. The reason why the admissibility criteria are applied in such a wide manner is exquisitely political: Parliament deems that petitions constitute a useful means of constantly keeping in touch with citizens, thus offsetting the current disquiet and dissatisfaction in the European public mind regarding political institutions in general, and European institutions in particular. Petitions contribute to the democratic functioning of the Union and, as such, are a valuable means of making good the democratic deficit, which is widely regard-

ed as a major problem. In this perspective, petitions are valued by the Parliament as an essential tool, and as such are welcomed and admitted in the fullest possible way. Besides, according to one of the latest annual reports [13] presented by the Committee on Petitions to the Parliament, "...petitions forwarded by individuals... enable the European Union to assess the way in which Community law is being implemented at national and European level".

If one compares such a wide remit with the admissibility criteria for a *complaint* addressed to the Ombudsman, the difference in content becomes immediately apparent. Only complaints referring to particular "instances of maladministration" in the activities of Community institutions can be dealt with by the Ombudsman. This clearly focused and targeted criterion contrasts with the yardstick for determining the admissibility of petitions (which have to come "within the European Union's fields of activity"). Again, the Ombudsman's more restricted scope for action is compensated for by the wide powers of investigation conferred upon him.

As for the concept of "maladministration", the Ombudsman has, at the European Parliament's request and in the framework of his annual reports, defined it as occurring "...when a public body fails to act in accordance with a rule or principle which is binding upon it" [14].

Thus defined, the substantive difference between petitions and complaints demonstrates in what cases a petition should be addressed to the Parliament and when, instead, it would be more appropriate to file a complaint with the European Ombudsman. As we have seen, whereas the latter's powers of investigation have greater thrust, the field of action of the former is substantially wider. On the one hand, petitions are not necessarily linked to maladministration (petitioners very often regret the adverse effects of the correct implementation of purportedly unjust measures). On the other hand, petitioners, unlike complainants, are not necessarily limited to querying the actions of Community institutions and bodies, and may well invoke Parliament's support against the activity of national administrations, when these are called upon to apply Community law.

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[13] Report (A5-0271/2002) on the deliberations of the Committee on Petitions during the parliamentary year 2001-2002; Rapporteur: Ioannis Koukiadis; motion for a resolution, paragraph 1.

[14] See the European Ombudsman's *Annual Report* for 1997, p. 23 and *Annual Report* for 2004, section 2.2.3.

However, the Ombudsman and the Committee on Petitions, while perfectly aware of this difference in scope, considered it inappropriate to dwell publicly on it, nor did they wish to insist upon rigid compliance with the rules of admissibility of these instruments, since this would probably have been regarded by the general public as an instance of bureaucratic hair-splitting. Instead, a pragmatic approach was chosen, and from the outset the Ombudsman and Committee on Petitions decided simply to exchange petitions and complaints received by one but which should have been addressed to the other. This form of co-operation has existed and functioned for many years to the general satisfaction of all concerned [15].

There are many other forms of co-operation between the Committee on Petitions and the Ombudsman, such as frequent meetings of the European Ombudsman with the Chairman, Rapporteurs and Members of the Committee, his participation in several of the Committee's sittings, as well as contacts at the Secretariat level. These various contacts are used to address particular petitions or complaints, but also to air administrative matters as well as general issues of "strategy", such as how best the two bodies can effectively co-operate in the interest of the people. It can safely be stated that they see each other not only as counterparts but as allies.

It is interesting, in this respect, to recall some relevant sections from the Committee's annual reports. The desire is often expressed to "...reinforce the necessary co-operation between the Committee responsible and the Ombudsman, with due regard for their respective powers..." [16]. A proposal which at one stage was put forward by the first European Ombudsman was that - excluding petitions dealing with political questions - his office "...could perform a preliminary examination of the admissibility of petitions when these allege violations of Community law, help in the drafting of adequate and prompt replies to citizens, as well as co-operate in networking with national

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[15] See also Explanatory Memorandum to the Annual Report - doc. A6-0040/2005 - of 11 February 2005 on the deliberations of the Committee on Petitions during the parliamentary year 2003-2004; Rapporteur: Rainer Wieland.

[16] See Reports on the Annual Report on the activities of the European Ombudsman for the year 2001 (Doc. A5-0267/2002 - Rapporteur: Eurig Wyn - Motion for a Resolution, par. 21) and for the year 2002 (Doc. A5-229/2003 - Rapporteur: the Earl of Stockton - Motion for a Resolution, par.17).

and regional ombudsmen and petitions committees..." [17]. Objective difficulties sometimes prevail, however. Thus, the report on the European Ombudsman's Annual Report for 2003 cannot help noting that "...one factor hampering co-operation is undoubtedly the different working methods" [18].

Among the common battles the two bodies have fought together, mention must be made of the support the Committee on Petitions offered the Ombudsman in his attempts to view documents concerning infringement procedures. In the Committee's opinion, withholding such documents is detrimental to the very effectiveness of Community law [19].

5 Petitioners and Complainants

While the nature of petitions and complaints may differ, according to the Treaty there is a substantial similarity between those who can address a complaint to the Ombudsman and the authors of a petition to the Parliament. Article 21(EC) mentions "every citizen", whereas both Article 194 (right of petition) and Article 195, describing those entitled to address the European Ombudsman, refer to "any citizen of the Union" and to "...any natural or legal person residing or having its registered office in a Member State". EU citizens who live outside Europe and non-EU citizens residing in Europe are thus covered.

In addition, paragraph 10 of Rule 191 of Parliament's Rules of Procedure allows consideration of "...petitions addressed to Parliament by natural or legal persons who are neither citizens of the European Union nor reside in a Member State nor have their registered office in a Member State". When this was formally introduced as an amendment to the Rules of Procedure, the established practice had been to admit those petitions anyway. This approach, and the ensuing Rule quoted above, stemmed from the belief that receiving petitions is an asset for the Parliament, and that dealing with them

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[17] Report on the European Ombudsman's Annual Report for 2001, quoted above - Doc. A5-0267/2002, Explanatory Memorandum, p. 16.

[18] Doc. A6-0030/2004 - Rapporteur: Proinsias De Rossa - Explanatory Memorandum, p. 14.

[19] See the above quoted Report - Doc. A5-0267/2002 - on the European Ombudsman's Annual Report for 2001, Explanatory Memorandum, p. 15.

allows it to be more effective in its day-to-day work and in its contacts with the other institutions (see above, Section 4).

However, in order to safeguard the essence of the right of petition - a right which can, as such, only be attributed to citizens and residents - Rule 191(10) goes on to prescribe that petitions submitted by non-EU citizens not resident in the Union "...shall be registered and filed separately. The President shall send a monthly record of such petitions received during the previous month, indicating their subject matter, to the committee responsible for considering petitions, which may request those which it wishes to consider".

6 The Procedures Involved in Following-Up on Petitions and Complaints

The tools at the disposal of the two bodies designed to ensure the follow-up of petitions and complaints respectively are defined in the pertinent legislative texts and have been fine-tuned by day-to-day practice.

According to Parliament's Rules of Procedure (Rule 192) and established practice, once a *petition* is declared admissible it can:

- Be dealt with by the Committee (this is the case in the vast majority of petitions) with the co-operation of the European Commission, which is asked to provide information, normally in writing. Debates on these petitions take place in a public sitting of the Committee in the presence of Commission representatives, who as a rule are asked to present their documents and to answer observations raised by Members;
- Some petitions are sent for an opinion to other parliamentary committees responsible for the subject-matter, particularly when petitions "seek changes in existing law". The other parliamentary committees can either provide information or deal autonomously with the question raised in the petition; and
- Some petitions are forwarded to the competent national authorities or national parliamentary committees or to national, regional or local ombudsmen, in the belief that these can best deal with the problem raised.

Apart from the possibility quoted above for the Committee to draw up a report on a petition, it is worth noting that, according to para-

graph 5 of the same Rule, "...the committee shall, where necessary, submit motions for resolutions to Parliament on petitions which it has considered". From the point of view of the Rules, this option is certainly different from the one illustrated in paragraph 1 quoted above, since in the Parliament's Rules, the nature of a report is quite distinct from that of a motion for a resolution. To my knowledge, this possibility has never been used.

The follow-up of *complaints* is dealt with in the EC Treaty, the Ombudsman's Statute and his Implementing Provisions. The principle is that, when conducting an inquiry, the Ombudsman engages in continuous dialogue with the institution or body in question, making draft recommendations, receiving detailed opinions (for which a deadline is set), and generally seeking, in co-operation with that institution or body, to satisfy the complainant. If the investigation shows that there is maladministration, there can be either a friendly solution, or a critical remark (where the instance of maladministration can no longer be eliminated and it has no general implications), or a draft recommendation, either when the instance of maladministration can still be eliminated or when the question has general implications. In any event, the Ombudsman's overall mission to point his finger at the malfunctioning of the system is summed up in his right - and duty - to report to the European Parliament, in particular, as specified in Article 11 of his Implementing Provisions. More specifically:

- When he considers that an institution's reaction on a particular instance of maladministration is not adequate, the Ombudsman sends a special report to the Parliament, thus seeking the latter's backing and fulfilling his own responsibilities under the Treaty and the Statute;
- Moreover, an annual report is submitted to the Parliament by the Ombudsman on his activities as a whole, including the outcome of his inquiries. Such reports are very detailed and comprehensive, and are debated by the Parliament on the basis of a document prepared by the Committee on Petitions.

7 The Different Possible Outcomes

A question which is often asked concerns the evaluation of results achieved through the exercise of the right of petition or by submit-

ting complaints to the Ombudsman. Results are not, however, easy to evaluate in practice. Turning first to the question of admissibility, it is a fact that, despite the earnest desire of both the Committee on Petitions and of the Ombudsman to be as open as possible in receiving and dealing with petitions and complaints, the rate of inadmissibility is noticeably high. The statistics annexed to the European Ombudsman's annual reports show that slightly less than three-quarters of all complaints received are not admitted, mostly because they are not directed against a Community institution or body. As to petitions, the admissibility rate is around 35-40%. This is due mainly to the complexity of Community legislation, and the difficulty of properly informing people about their rights to address European institutions. But even when considering only those petitions and complaints which are admitted and dealt with, it would be wrong to determine a success rate on a mathematical basis alone. Petitions or complaints are often a last resort, since all other avenues have been tried in vain. In addition, very often petitioners or complainants are directed to the national, regional or local ombudsmen or committees on petitions, as a preliminary examination of the question shows that the problem in question can best be tackled at national, regional or local level. A mathematical approach to determining the success rate would not do justice to the importance of petitions and complaints which, as already indicated above, demonstrate that Europe is indeed open to the people.

That important premise having been made, it is interesting to quote some particular cases of *petitions* and complaints, taken from the latest annual reports:

- A number of petitions contested German legislation on chimney sweeps, which restricts access to, and the exercise of, these activities in Germany to local skilled chimney sweeps. The Commission, alerted by the Committee on Petitions, came to the conclusion that this legislation was infringing both the right of establishment and the freedom to provide services. After a series of official contacts between the Commission and the German authorities, the Committee was informed in December 2003 that the German authorities were prepared to modify the law (Petition 853/2000 and others).
- Two petitions concerned the quality of drinking water in Spain, one in Alicante, the other in an area of Barcelona. Both were forwarded to the Commission and in both cases a formal infringe-

ment procedure was opened against Spain for breach of Directive 80/778/EEC concerning the quality of water intended for human consumption. In both cases, after a long correspondence, the Spanish authorities announced the measures taken to solve the problem (Petitions 699/2000 and 586/1996).

- A petitioner with a Belgian diploma in the education of children with learning difficulties was not allowed to work in France, as his qualification was not recognised as equivalent to the French diploma. In the framework of the examination of these petitions, the Commission considered that France had failed to comply with the provisions of the relevant directives (Directives 89/48/EEC and 92/51/EEC), and initiated infringement proceedings against France (Petition 418/01).
- When an Italian petitioner moved to Portugal from his previous place of residence (Switzerland), he was required to pay a tax to register his vehicle. Portuguese nationals are exempt from this tax. The petition was transmitted to the Commission as the case was believed to be an example of discrimination on the grounds of nationality. Following contacts with the Portuguese authorities, the latter informed the Commission that they shared this view. Therefore, as of 1 January 2001, the exemption from this tax was extended to all EU citizens moving to Portugal from a third state (Petition 269/98).
- A petitioner, who had been obliged to flee Germany in 1939 and had taken British citizenship since 1947, applied for German pension benefits in 1992 but was informed that pension entitlement was conditional on his applying for German citizenship, which he refused to do. Having lost an action he had brought in a German court, and having unsuccessfully petitioned the German *Bundestag*, he referred the matter to the Committee on Petitions of the European Parliament. Following the latter's contacts with the German authorities, the latter changed their decision, entitling the petitioner to pension benefits retroactively from 1 January 1995 (Petition 353/2002).

The following feature among the complaints submitted to the Ombudsman and included in his latest annual reports:

- A recent complaint concerned the duty of European institutions to properly and promptly reply to requests for information. A German citizen knew that a riding centre for disabled and social-

ly disadvantaged children in Berlin faced financial difficulties, and wrote to the European Commission to ask whether the EU could grant assistance. Aggrieved that he had received no reply to three letters sent over several months, he complained to the Ombudsman, underlining the fact that he had since learnt, from a German Member of the European Parliament, that it would indeed have been possible to apply for a grant, but that the deadline had in the meantime expired. At the end of the procedure, having received the Commission's reply and justification for the delay in answering, the Ombudsman made a critical remark. He did not accept the Commission's submission that it would have been inappropriate to supply the complainant with a long list of programmes. Moreover, he noted that a call for grant proposals for a relevant programme had been published in the *Official Journal* on the same day as the Commission had first written to the complainant. He thus considered that the Commission had failed to properly inform the complainant (complaint 753/2003/GG [20]).

- A small British company entered into an exploratory contract with the Commission aimed at preparing a research proposal. The contract was signed by the Commission on 4 February 2002, but the company had to submit its proposal by 12 February 2002. The proposal submitted was subsequently considered ineligible. The company complained to the Ombudsman, maintaining that the reason why errors had been made was because of the extremely short deadline that the Commission had imposed. After examining the Commission's arguments, the Ombudsman issued a draft recommendation, asking the Commission to consider compensation to the company, which had suffered damage as a result of maladministration by the Commission. The latter considered that, although it did not necessarily agree with the Ombudsman's conclusions, the particular nature of the case justified the granting of compensation on an *ex gratia* basis (complaint 1878/2002/GG [21]).
- The Brussels correspondent of a German magazine, who covered a number of alleged financial irregularities concerning one of the

[20] The European Ombudsman's *Annual Report* for 2004, section 3.4.3.

[21] The European Ombudsman's *Annual Report* for 2004, section 3.5.1.

Directorates General of the Commission (Eurostat), complained that the Commission repeatedly refused to provide information he had requested in writing between March and August 2002, on the grounds that the questions concerned an ongoing investigation by OLAF (the European Anti-Fraud Office). After a long procedure, entailing two written opinions from the Commission, the Ombudsman proposed a friendly solution, which consisted of asking the Commission to consider providing the requested information unless there were valid reasons for not doing so. This was done in the end, and the case was closed (complaint 1402/2002/GG [22]).

8 Conclusion

In the European Union, a Committee on Petitions and a European Ombudsman are both empowered, in different ways, to receive and deal with public requests and complaints concerning the institutions. The coexistence of two such mechanisms is not unique, and can be found in some Member States.

Smooth co-operation between the two bodies is one of the cornerstones of the system, whose aim is essentially to provide citizens and residents, as effectively as possible and free of charge, with an extrajudicial means of drawing the attention of European institutions to their desires and concerns.

As well as allowing the public to actively participate in the improved functioning of the institutions, the Committee on Petitions of the European Parliament and the European Ombudsman contribute, with their day-to-day work, to improving the image of the European Union and, ultimately, to enhancing its democratic nature and filling the widely - if not necessarily correctly - perceived democratic deficit.

[22] The European Ombudsman's *Annual Report* for 2003, p. 123.

Chapter 8

The Policy-Relationship between the European Ombudsman and the European Parliament's Committee on Petitions

Eddy Newman

1 Author's Introductory Note

The author was a leading member of the European Parliament's Committee on Petitions from its establishment as a separate Parliamentary Committee in January 1987 until he left the European Parliament in July 1999. Consequently, this examination of the policy relationship developed between the Committee on Petitions and the European Ombudsman draws on the author's experience up to July 1999. In 1994 the author was the Parliamentary Rapporteur on the Role of the European Ombudsman and chaired the Committee on Petitions between July 1994 and January 1997, the period which included the election of the first Ombudsman, the Ombudsman's establishment of his office and the first year or so of the Ombudsman's work.

For the following two and a half years, when Alessandro Fontana chaired the Committee on Petitions, the author was its senior Vice-Chair and continued to play an important part in the Committee's relations with the Ombudsman, including as Rapporteur for the Parliament's Report on the Ombudsman's Report for 1997. From his observation, at a distance, of the European Parliament and the work of the Ombudsman since July 1999, the author believes that the main features of the policy relationship that was developed between the Committee on Petitions and the Ombudsman by 1999 remained in place until 2003 for the remaining tenure of Jacob Söderman, and that this provided the basis for the ongoing policy relationship that exists between the Committee on Petitions and the second European Ombudsman, P. Nikiforos Diamandouros.

2 The Potential for Rivalry

Prior to the agreement at Maastricht in 1992 of the Treaty on European Union, the European Parliament and its Committee on Petitions had been lukewarm, to put it mildly, about the proposal that would surface from time to time for the appointment of a European Ombudsman. As late as May 1991, the European Parliament agreed a resolution referring to this matter, arising from the Annual Report of its Committee on Petitions for 1990/91 (Rapporteur: Viviane Reding). Parliament stated that it was opposed to the creation of a European Ombudsman, as this would undermine and compete with Parliament and its Committee on Petitions.

The European Parliament was wary about giving up any of its role in monitoring other European Community institutions, particularly the European Commission. Although most Members of the European Parliament were not involved in the work of the Committee on Petitions, they were aware that constituents with individual complaints about European Community matters could be informed about their right to petition. These MEPs also knew that they could brief or consult colleagues on the Committee on Petitions in relation to a petition about which they had an interest. The Committee members would investigate matters and, if necessary, would request the European Commission or the national authorities to remedy matters or to take a particular course of action.

Once the Member States had agreed to the Treaty on European Union, most MEPs pragmatically accepted that there would be an Ombudsman. The position that the Ombudsman was clearly to be a European Parliamentary Ombudsman, and that his mandate was limited to investigating maladministration in European Community institutions and bodies, went some way to reinforcing this pragmatic acceptance by the European Parliamentarians.

Understandably, the MEPs on the Committee on Petitions were the most concerned about a potential rival to their role. The Parliament was sensitive to this and gave its Committee on Petitions these important functions: to consider the role of the Ombudsman; to be the Parliamentary Committee responsible for the European Parliament's relations with the Ombudsman once appointed; and, initially, to interview and make a recommendation for the holder of the post. Following the interviews in 1994, the deadlock which materialised in the Committee over which candidate to recommend to plenary even-

tually resulted in a Parliamentary rule change, limiting the function of the Committee on Petitions in the Ombudsman appointment procedure to that of interviewing candidates and ensuring that all validly nominated candidates would be in a ballot in which all MEPs could take part.

As the rule change led to the whole procedure having to be repeated in early 1995, and necessitated a fresh call for nominations, the most significant result of the deadlock in the Committee of Petitions, was that citizens of Austria, Finland and Sweden, the Member States that joined the European Union on 1 January 1995, could be nominated. Finland's National Ombudsman, Jacob Söderman, was nominated and he was eventually elected by the European Parliament as the first European Ombudsman.

Once the Ombudsman took up his post, in September 1995, many observers expected to see open tension between the Ombudsman, who would be keen to commence investigations of the many complaints that were waiting for his attention, and the Committee on Petitions, whose members might resent losing part of their function and being "outshone" by the Ombudsman. However, both the Ombudsman and the Chair of the Committee on Petitions (the author) were sensitive to these potential difficulties and made strenuous efforts to ensure that practical working arrangements and a co-operative culture were developed from the start.

Only a small proportion of the petitions submitted to the European Parliament alleged maladministration by Community institutions or bodies. Rather, most of the admissible petitions concerned possible non-implementation of European Community legislation in a Member State, or proposals on European policies. Typically, petitions concerned obstacles to free movement within the European Community, such as non-recognition of qualifications obtained in a different Member State, access to education or work, residence permits, working conditions, taxation and customs, transfer of social and pension rights, and border controls. Many petitions were received about European Community environmental laws, in particular inadequate environmental impact assessments of major projects. Other petitions were about European Community funded projects, European Community development aid and animal welfare.

In the small number of cases (about 1%) where a petition did allege maladministration by a Community institution or body (usually the European Commission), the Chair of the Committee on Petitions

obtained the agreement of the Committee that - with the agreement of the petitioner - these should be passed to the Ombudsman. This was due to a mutual recognition that, within the relatively narrow confines of his mandate, the powers and influence of the Ombudsman are much greater than those of the Committee on Petitions.

Unlike the Committee on Petitions, the European Ombudsman has wide-ranging powers of inquiry to investigate complaints. European Community institutions and bodies are required to provide him with the information and evidence he requests and to allow him to inspect relevant files. In addition, national administrations are expected to provide information relevant to his investigation of maladministration by Community institutions and bodies.

Similarly, the Ombudsman agreed to notify complainants who had submitted inadmissible complaints to him which might be suitable for conversion to petitions, that they could submit their complaints to the European Parliament as petitions. When the Ombudsman presented his Report for 1997 to the European Parliament, he referred to the high number of complaints that he had received from European citizens concerning the application of European Community law by public administrations in the Member States. He informed the Parliamentarians that he had "...transferred or advised a growing number of these complaints to be dealt with ...as petitions to the European Parliament, when they include a matter of principle which needs political experience or pressure to be solved" [1].

It is important to note here that petitions to the Parliament do not have to be signed by large numbers of people, or even by more than one person. Any individual European citizen or resident can submit a complaint about a matter within the fields of activity of the European Community, in the form of a petition to the European Parliament.

In providing information about its work, the European Parliament and its Committee on Petitions ensured that its publicity aimed at citizens promoted both the role of the European Ombudsman and the right to petition the European Parliament. In turn, the Ombudsman ensured that his publicity often included reference to the possibility to petition the European Parliament in areas outside his mandate.

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[1] The European Ombudsman's speech to the European Parliament, 16 July 1998.

3 Complaints and Petitions

Following the publication of his first Report, the Ombudsman came under some criticism when it became known that 78% of the complaints received in his first few months in office were inadmissible. However, the Committee on Petitions came to his defence, and explained what he could investigate and what it could examine.

In his speech during the parliamentary debate on the Report, in his capacity as Chair of the Committee on Petitions, the author described the work of the Ombudsman and the Committee as "...complementary. One (the Ombudsman) deals with allegations of maladministration in European Community institutions and bodies, the other, the Committee on Petitions, deals with the general area of European Union fields of activity, particularly non-implementation by Member States of European Union law and proposals to improve European Union policies" [2].

During an interview at the time, the author gave an example to differentiate between the remits of a petition to the European Parliament and a complaint to the European Ombudsman: "With the Petitions Committee, a legitimate petition would be when a British person in France thinks they are being discriminated against on the job market because they are British. This is against their rights as an EU citizen and is a legitimate petition. It is not a legitimate case for the Ombudsman unless you claim you took your case to the European Commission and the person refused to read your letter or collaborated with his French colleague against your case" [3].

4 Querying the Ombudsman's Statistics

As Rapporteur for 1997, the author, in preparing his Report, queried some aspects of the Ombudsman's statistics in his Annual Report for 1997. Of the 1,181 complaints received in 1997 and the 225 carried forward from 1996, plus 6 own-initiative inquiries (a total of 1,412), the Ombudsman had determined admissibility on 97% (1,366) by 31 December 1997. Of the total, 73% (998) of the complaints were

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[2] Eddy Newman's speech to the European Parliament, 20 July 1996.

[3] *The Parliamentary Monitor*, London, July 1996, Brussels Report, "Policing the Bureaucrats", Eddy Newman quoted by Belinda Gannaway.

described as outside his mandate, usually because they were not against a European Community institution or body, or because they did not concern maladministration. Therefore, around 27% (368) were within the mandate, but 10.1% (138) were described as inadmissible and 2.5% (34) of these were described as having no grounds for inquiry.

This left just 14.3% (196) of the cases where inquiries were initiated. As a result of the position revealed in these statistics, there was some criticism levelled at the Ombudsman for initiating inquiries in just 1 in 7 of the cases that he received. Uninformed critics, who rushed to judgement and were not prepared to study the Ombudsman's Report or to ask for clarification from him, wanted to know why the Ombudsman had to discard 6 out of every 7 complaints submitted to him, even before any inquiry was begun.

In fact, 16 of the 34 "no grounds for inquiry" cases were dealt with or were being considered by the Committee on Petitions. The author established that the 18 other cases were mainly allegations that were vague; or cases where supporting documentation was not forwarded by the complainant - even after a reminder; or where the complaint was about an institution or body not replying to the complainant's letter, but doing so after the Ombudsman's intervention.

Out of the 138 complaints that were within the Ombudsman's mandate, but inadmissible, in 64 cases prior administrative approaches had not been made to the institution or body concerned, which should have an opportunity to deal with the matter that led to the complaint. A total of 17 cases were being, or had been, dealt with by a Court, 5 cases involved staff who had not exhausted internal remedies, and 4 were beyond the time limit.

That left 48 cases described as "author/object not identified". As Rapporteur, the author queried these cases with the Ombudsman, who explained that these concerned instances where the complainant did not identify himself or the Community institution or body concerned, or where the complaint was vague, very general or incomprehensible.

By the time of the Newman Report, the Ombudsman had been in post about two and a half years. The co-operation and policy relationship between the Ombudsman and the Committee on Petitions was such that these kind of questions could be asked, full answers could be given, and the Committee had the maturity to explain that the low proportion of complaints leading to inquiries (14%) was a sign nei-

ther of failure by the Ombudsman nor of faultless administration by the European Community's institutions and bodies.

The author pointed out in his Explanatory Statement that "...it is hard to believe that these figures represent a fair picture of the reality, or, in other words, that the European Union's administration is almost without fault. Hence it is of the utmost importance that the public is given a clear and comprehensive picture of the possibility to complain, as well as the legal basis for the Ombudsman's work and the mandate within which he operates" [4].

So the correct conclusion was to publicise not only the citizens' right to complain to the Ombudsman, but also his mandate and what was required of and from complainants.

5 The Ombudsman's Independence and the Limitations of his Powers

In 1995 and 1996, the European Ombudsman received 39 complaints related to the French nuclear tests in Mururoa [5] and 27 complaints about the Newbury Bypass in Southern England [6]. The Ombudsman accepted that these were admissible, as they alleged failures by the European Commission to use its powers correctly as Guardian of the Treaties and European legislation, and he opened inquiries on these cases. However, he found no evidence of maladministration. Many MEPs, including members of the Committee on Petitions, felt very strongly about the French nuclear tests and about alleged failures to apply properly the Environmental Impact Assessment Directive (85/337/EC) in cases such as the Newbury Bypass. Consequently, the Ombudsman did come in for some criticism by some MEPs for his finding of no maladministration. Nevertheless, most members of the Committee on Petitions understood that - whatever their own views on the political issues raised - the Ombudsman had "stretched" his mandate as far as he could.

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[4] Report on the Annual Report on the Activities of the European Ombudsman in 1997 (Doc. PE 226.262/DEF - C4-0270/98); Committee on Petitions; Rapporteur: Eddy Newman (Explanatory Statement).

[5] See Decision on complaints 34/21.7.95/PMK/EN against the European Commission, the European Ombudsman's *Annual Report* for 1996, p. 21.

[6] Decision on complaints 206/27.10.95/HS/UK against the European Commission, the European Ombudsman's *Annual Report* for 1996, p. 58.

These Committee members accepted that he could neither deal with the related political issues, nor accuse the European Commission of an inappropriately soft approach to Member State governments without evidence of maladministration.

However, as mentioned later, the Ombudsman took on board his accumulated experience of investigating Article 169-related complaints (failure by a Member State to implement European Community law), such as those concerning the Newbury Bypass. He subsequently launched an own-initiative inquiry [7] into the unnecessary difficulties for Article 169 complainants to the Commission caused by the latter's administrative procedures. (Under subsequent revision of the Treaties, Article 169 was renumbered Article 226.)

In his Report of the Committee on Petitions on the Ombudsman's Annual Report for 1996, the Rapporteur, Nikolaos Papakyriazis, also pointed out that the Ombudsman's mandate under the Treaty included submitting reports to the European Parliament, which itself had given the Committee on Petitions responsibility for relations with the Ombudsman. He went on to observe that "[t]he fact that the Ombudsman acts totally independently in the performance of his duties does not prevent Parliament playing its political role, scrutinising the Ombudsman's reports and submitting appropriate proposals, where necessary" [8].

Even though the European Parliament is self-evidently a European Community institution, the European Ombudsman cannot supervise the legislative or policy making role of the Parliament and its Committee on Petitions, but only its administrative activity. The Ombudsman himself accepted that "...the political work of the European Parliament cannot be considered as an administrative activity" [9]. Indeed, early on in his first term as European Ombudsman, Jacob Söderman received various complaints alleging maladministration by the Committee in dealing with petitions, but he declared these complaints inadmissible. He recognised that the

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[7] See the European Ombudsman's "further remarks" in his *Annual Report* for 1996, p. 65, and the Ombudsman's decision on the own-initiative inquiry in his *Annual Report* for 1997, p. 270.

[8] Report on the Annual Report on the Activities of the European Ombudsman in 1996 (A4-0211/1997); Committee on Petitions; Rapporteur: Nikolaos Papakyriazis.

[9] Speech by Jacob Söderman on "The Role of the European Ombudsman" to the 6th Meeting of European National Ombudsmen, 9 September 1997.

Committee on Petitions "...is a political body dealing with petitions as a political task of the Parliament" [10].

Undoubtedly, without this clear rejection by the Ombudsman of a role in considering appeals against decisions of the Committee on Petitions, there could have been a constant source of friction between the Committee and the Ombudsman.

On occasion, the Committee on Petitions did pass petitions to the Ombudsman. For instance, the Committee considered various petitions concerning "milk quotas" in Italy and Germany. The Committee looked at the substantive policy issue of whether the milk quotas were compatible with the Common Agricultural Policy and the European legislation and Treaties.

As the petitioners also claimed that the European Commission had not fulfilled its obligations to ensure that Italy complied with European Community law, the Committee on Petitions regarded this as possible maladministration and passed this aspect to the Ombudsman. The Committee recognised that the Ombudsman was better placed than itself to investigate possible maladministration.

6 Access to Information

The first report issued by the European Ombudsman, covered the period from the commencement of his term of office in September 1995 until the end of that year. As early as in the Report by Nuala Ahern on the Ombudsman's Annual Report for 1995, the Committee on Petitions called on the European Commission "...to place at his [the Ombudsman's] disposal the information and documents he requires for the effective performance of his duties". The Ahern Report also commented that "...transparency and good administrative practice of the European institutions are a crucial issue" [11].

The Ombudsman presented his first Report to the plenary session of the European Parliament and this was followed by Ms Ahern presenting the Report of the Committee on Petitions. In the debate held jointly on the two connected Reports, the Ombudsman said that complaints about a lack of openness or refusal of access to informa-

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[10] Ibid.

[11] Report on the Annual Report on the Activities of the European Ombudsman in 1995 (A4-0176/1996); Committee on Petitions; Rapporteur: Nuala Ahern.

tion headed the list of issues raised with him. Consequently, he had asked all the European Community's institutions and bodies about their rules on public access to documents. The Rapporteur backed him, by calling on the European institutions to support the right of access to information. As Chair of the Committee, the author welcomed the Ombudsman's initiative on greater access to documents and information held by the institutions and bodies.

In January 1997, the European Ombudsman concluded that failure to adopt, and make available to the public, rules governing public access to documents could constitute an instance of maladministration, and made a recommendation to the European Community institutions and bodies to adopt such rules [12].

Detailed opinions were submitted by the European Community institutions and bodies and, in December 1997, the Ombudsman issued his first special report [13], commenting on their response and drawing attention to matters which the European Parliament could pursue further. The Ombudsman did not make any recommendations on the substance of the rules, as he felt that this was outside the scope of his remit. However, he suggested that the European Parliament might wish "...to examine whether the rules that have been adopted ensure the degree of transparency that European citizens expect of the Union" [14].

The Committee on Petitions had experienced its own difficulties in getting access to certain documents from the European Commission in connection with its examination of a number of petitions. It did not hesitate to back the Ombudsman when he raised the difficulties he was having with the Commission over their withholding of certain documents from him, and over the "institutional" lack of complete candour of some officials.

The Committee on Petitions called for the Ombudsman "...to have access, when carrying out inquiries, to all relevant documents, and

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[12] Decision and recommendations in the own-initiative inquiry 616/PUBAC/F/IJH, the European Ombudsman's *Annual Report* for 1996, p. 81.

[13] Special Report by the European Ombudsman to the European Parliament following the own initiative inquiry into public access to documents (616/PUBAC/F/IJH), *Official Journal* 1998 C 44, p. 9. See also the European Ombudsman's *Annual Report* for 1997, p. 276. The full text of special reports is available through the Ombudsman's website at: http://www.euro-ombudsman.eu.int/special/en/default.htm

[14] Section 3 of the special report cited in the preceding footnote.

obtain freely given and hierarchically untrammelled replies from persons whose evidence is necessary to his just and proper assessment of the complaints submitted to him" [15].

Here, the Committee on Petitions supported the Ombudsman in his rejection of the Commission's view that it could refuse him access to a file on grounds of secrecy, even when he would undertake to keep the contents confidential. Similarly, the Ombudsman was supported by the Committee on Petitions in his view that it was unacceptable that Commission officials must always speak to him only in accordance with instructions (rather than freely), even if those instructions were for the official to lie to the Ombudsman!

7 Own-Initiative Inquiries

One of the most important powers available to the European Ombudsman is the own initiative inquiry.

"Article 138e of the Treaty gives the Ombudsman power to initiate inquiries on his own initiative as well as in response to complaints. Within the limits of my mandate, I have tried to use the own-initiative power so as to promote transparency in the Union by initiating ... inquiries into subjects where a number of complaints appeared to indicate general dissatisfaction on the part of citizens" [16].

The Committee on Petitions agreed that "the European Ombudsman's own-initiative inquiries can pinpoint administrative irregularities with political implications" [17].

In an earlier speech to the Committee on Petitions on 25 November 1996, the European Ombudsman reported that he had begun three own initiative inquiries, all related to transparency. Firstly, he was committed to establishing the rules of access to documents held by the European Community institutions and bodies, the organisations his mandate permitted him to investigate [18]. Secondly, he was investi-

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[15] Report on the Annual Report on the Activities of the European Ombudsman in 1998 (A4-0119/1999); Committee on Petitions; Rapporteur: Laura De Esteban Martin.

[16] Ombudsman's speech to the Committee on Petitions, 19 January 1998.

[17] Report on the Annual Report on the Activities of the European Ombudsman in 1997 (A4-0258/1998); Committee on Petitions; Rapporteur: Eddy Newman.

[18] See Decision and recommendations in the own initiative inquiry 616/PUBAC/F/IJH, the European Ombudsman's *Annual Report* for 1996, p. 81.

gating certain aspects of a recruitment competition for European Commission translators [19]. Thirdly, he was advocating more openness in the European Treaty's Article 169 procedure for complainants to the European Commission who allege breach of European Community law by a Member State [20]. In the exchange of views in the Committee that followed the Ombudsman's presentation, strong support was given to him for having used his powers to initiate these investigations, all of which related to issues that the Committee on Petitions had faced during its handling of numerous petitions over the years.

Another issue which had been the subject of several petitions to the European Parliament over the years was the use of age limits in the recruitment of personnel to European Community institutions. In July 1997, the Ombudsman started an own-initiative inquiry, following receipt of a series of complaints that this established practice was discriminatory [21]. He wanted to examine whether these age limits might be without an adequate legal basis and might constitute maladministration. The European Commission and the European Parliament did respond positively by altering their policies. The Ombudsman's inquiry and its outcome were welcomed by the Committee on Petitions.

Following the Ombudsman's inquiry into the competition for translators, and as he had received many complaints alleging general lack of transparency in the recruitment procedures of the European Commission and the other Community institutions and bodies, he opened a further own-initiative inquiry in November 1997 [22]. This new inquiry looked at the degree of transparency in the staff recruitment procedures of these institutions and bodies.

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[19] See Decision in own initiative inquiry 674/COMLA/F/PD, the European Ombudsman's *Annual Report* for 1997, p. 269.

[20] See the European Ombudsman's "further remarks" in his *Annual Report* for 1996, p. 65 (Decision on complaints 206/27.10.95/HS/UK), and the Ombudsman's decision on the own-initiative inquiry in his *Annual Report* for 1997, p. 270.

[21] See, for instance, the Ombudsman's decision on complaint 42/25.11.96/SKTOL/FIN/BB against the European Commission, the European Parliament, the Court of Auditors, the Committee of the Regions and the Economic and Social Committee in the *Annual Report* for 1997, p. 40. See also the Ombudsman's website on this issue:
http://www.euro-ombudsman.eu.int/age/en/default.htm

[22] The inquiry led to a special report being made to the European Parliament: see the Ombudsman's website at:
http://www.euro-ombudsman.eu.int/special/pdf/en/971004.pdf

One of the European Ombudsman's own-initiative inquiries arose directly from a petition sent to the European Parliament [23]. In 1997 the petitioner was in dispute with the European Commission about her pension rights, arising from a period of employment in the late 1970s with the Commission's Latin American Delegation. As the Committee on Petitions considered this to be an allegation of maladministration by the European Commission, the Committee agreed to transfer the petition, as a complaint, to the Ombudsman. However, the petitioner was a Chilean citizen so, as she was neither a citizen of the Union nor a resident of an EU Member State, the Ombudsman had to declare the complaint inadmissible. As the Ombudsman considered that this was a matter worthy of investigation, he used his power to launch an own-initiative inquiry into the matter. As a result of the inquiry, the European Commission sent some relevant information to the complainant. The Ombudsman informed her of this result of his action and, subsequently, concluded that the inquiry could be closed.

The Committee on Petitions continued to support the way in which the Ombudsman used the provision to launch own-initiative inquiries. The author explained that the Ombudsman launched these inquiries "...usually when he has found instances of maladministration brought to his attention as a result of his inquiries into complaints, but where it appears worthy of additional investigation to see if the nature of the maladministration is more general" [24].

8 Code of Good Administrative Behaviour

In the Papakyriazis Report of the Committee on Petitions on the Ombudsman's Report for 1996, the Rapporteur said that the Ombudsman's role was important to ensure good administration, whereas the European Parliament's responsibility was to ensure that democracy functions in the European Union.

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[23] See own-initiative inquiry 1150/97/OI/JMA, the European Ombudsman's *Annual Report* for 1998, p. 268.

[24] "The European Ombudsman - The First Four Years" an article by Eddy Newman in *The Ombudsman*, Journal of the British and Irish Ombudsman Association, March 2000.

The author's Report of the Committee on Petitions on the Ombudsman's Report for 1997 endorsed the Ombudsman's support for a code of conduct on good administrative behaviour.

The idea of such a code had been proposed by the European Parliament and Roy Perry, Rapporteur for the Committee on Petitions for its Report on its activities for 1996-7.

In November 1998, the Ombudsman launched an own-initiative inquiry into the existence and public accessibility in the Community institutions and bodies of a code of good administrative behaviour for officials in their relations with the public. Subsequently, this became the subject of a special report by the Ombudsman who emphasised its importance for the citizens and residents of the Union.

9 Article 226 (previously Article 169) Complaints

The first full year in office of the European Ombudsman was 1996. In addition to frequent informal contacts with the Chair and members of the Committee on Petitions, the Ombudsman attended the Committee on three occasions during 1996: initially to present his first Annual Report for the latter months of 1995, and twice subsequently for an "exchange of views" with Committee members. This level of attendance at formal meetings of the Committee became the pattern for subsequent years.

When the Ombudsman attended the Committee on Petitions in 1997 in connection with his own Report for 1996, the Committee members dwelt on the Ombudsman's ability to make "own-initiative inquiries", particularly in connection with the European Commission's role as the "Guardian of the Treaties". Article 226 (previously Article 169) of the Treaty states that, in the event of an infringement of Community law, the European Commission may open proceedings against a Member State for failure to fulfil a Treaty obligation. Often the attention of the Commission was drawn to a possible infringement by a complaint made by a citizen directly to the Commission, and sometimes this was done by the Committee on Petitions raising a relevant petition with the Commission.

There was a consensus amongst members of the Committee on Petitions that the Ombudsman should go as far as he could under his mandate to promote the European Commission's robust use of this

Article 169 infringement procedure to ensure Member States implemented Community law in full. Consequently, the Committee on Petitions backed the Ombudsman when the European Commission's lawyers were trying to suggest that he did not have the power even to examine the procedural aspects of their responses to Article 169 complaints which they received.

In 1996, one third of complaints to the Ombudsman that resulted in an inquiry concerned Article 169 complaints to the European Commission. These included environmental impact assessment issues regarding the aforementioned Newbury Bypass [25], the M40 motorway in the United Kingdom [26] and other infrastructure projects. Problems raised included the administrative process before judicial proceedings may begin; the excessive time taken to process complaints; lack of information to the complainants about the handling of their complaints; and failure by the Commission to explain its reasoning behind decisions that Member States had not infringed Community law.

The Ombudsman concluded that the European Commission's procedures caused difficulties for Article 169 complainants, so he launched his "own-initiative inquiry" in April 1997 [27]:

"The result is that the Commission itself should consider enhancing the position of the individual complainants in the procedure as a matter of good administrative behaviour. The initiative does not deal with the Commission's discretionary power to decide whether to bring an infringement before the Court of Justice or not" [28].

Arising from his inquiry was the Ombudsman's further proposal that the European Commission should inform complainants of its provisional conclusion when no breach of Community law was found. The complainant would be invited to submit any observations within a specified time period. Consequently, the Commission could take account of the complainant's comments on its provisional con-

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[25] See Decision on complaint 206/27.10.95/HS/UK against the European Commission, the European Ombudsman's *Annual Report* for 1996, p. 58.

[26] See Decision on complaint 132/21.9.95/AH/EN against the European Commission, the European Ombudsman's *Annual Report* for 1996, p. 66.

[27] See the European Ombudsman's "further remarks" in his *Annual Report* for 1996, p. 65 (Decision on complaints 206/27.10.95/HS/UK), and the Ombudsman's decision on the own-initiative inquiry in his *Annual Report* for 1997, p. 270.

[28] The Ombudsman's speech to the European Parliament, 14 July 1997.

clusion. In practice, the Commission would be unlikely to change its conclusion, but "...the citizen - and others - will know clearly whether the Commission thinks there is an infringement of Community law or not ...It will allow for more transparency in this matter" [29].

In response to the Ombudsman, the European Commission indicated that it would accept his proposal to improve complainants' prejudicial procedural rights and would henceforth inform them of its intention to close a file and of its reasons for that intention.

The Ombudsman and the Committee on Petitions both continued to recognise the need to collaborate to put pressure on the European Commission to improve the Article 169 procedure. When the Ombudsman presented his Report for 1997 to the Committee on Petitions, he spoke of "...the necessity to develop the Article 169 procedure by granting the complaining citizens more rights to take part, so as to achieve better results in promoting the rule of law and enhance understanding of the Commission's activities" [30]. At the same meeting, he expressed his wish to work jointly on this issue with the Committee on Petitions and its Rapporteur on his Annual Report (the author).

In the Newman Report of the Committee on Petitions on the Ombudsman's Report for 1997, the European Parliament expressed support for the Ombudsman's efforts in relation to the infringement procedure under Article 169 of the Treaty. The Rapporteur (the author) wrote that "...it seems obvious that the Ombudsman's commendable initiative has led to a clear improvement of the citizen's position vis-à-vis the Commission in cases of complaints" [31].

In this matter, the Ombudsman went along with the Committee on Petitions as far as the limit of his mandate, but not as far as the Committee would have liked, if there had been more powers available to him.

Consequently, the following year the Committee on Petitions further endorsed "...the efforts made by the European Ombudsman to ensure that in the period before judicial proceedings may begin, pro-

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[29] The Ombudsman's speech to the European Parliament's Committee on Legal Affairs, 26 November 1997.

[30] The Ombudsman's speech to the Committee on Petitions, 20 April 1998.

[31] Report on the Annual Report on the Activities of the European Ombudsman in 1997 (A4-0258/1998); Committee on Petitions; Rapporteur: Eddy Newman (Explanatory Statement).

vided for under Article 169 of the EC Treaty, European citizens enjoy a participative, transparent and two-way relationship with the Commission as regards the processing of their complaints about infringements committed by Member States, and are not, on the contrary, relegated to a purely passive role as mere sources of information" [32].

10 Defining "Maladministration"

In the Ahern Report on the Ombudsman's Report for 1995 [33], the Committee on Petitions accepted that it was too early to demand a rigid definition of maladministration. However, in the Papakyriazis Report on the Ombudsman's Report for 1996 [34], the Committee pointed out that the European Community institutions and bodies did not have common administrative rules and that the Member States had very different administrative traditions.

In his Explanatory Statement, the Rapporteur noted the context in which 65% of the complaints received during 1996 were inadmissible. He argued that a definition of maladministration could reduce the number of inadmissible complaints, as more potential complainants would see that their complaints were outside the Ombudsman's mandate and could not be taken up by the Ombudsman. It was also suggested that it would assist the Ombudsman to demonstrate why he had decided a complaint was inadmissible, and why therefore - in such cases - he was not proceeding to a determination of whether or not there were grounds for the complaint to be investigated.

So, just a year after the Ahern Report, the Committee obtained the agreement of the Parliament to call on the Ombudsman for a clear definition of the term, "maladministration". The Ombudsman then undertook to provide a definition in his Report for 1997, stating that "...[a]s there is no possibility to have the European Community Treaty amended for this purpose, I have promised that I will define

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[32] Report on the Annual Report on the Activities of the European Ombudsman in 1998 (A4-0119/1999); Committee on Petitions; Rapporteur: Laura De Estaban Martin.

[33] A4-0176/1996.

[34] A4-0211/1997.

the term more explicitly in my Annual Report for 1997 to give the Parliament and its responsible Committee [on Petitions] the possibility to make observations on it..." [35].

In the Newman Report of the Committee on Petitions on the Ombudsman's Report for 1997, the European Parliament welcomed the Ombudsman's definition of maladministration:

"Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it" [36].

Parliament agreed that "...the definition and the examples mentioned in the annual report for 1997 give a clear picture as to what lies within the remit of the European Ombudsman" [37].

Examples of the types of maladministration that the Ombudsman gave in his Report for 1997 included "...administrative irregularities or omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay, and lack or refusal of information" [38].

11 Conclusion

Towards the close of the Parliamentary five year term in which the European Ombudsman had come into office, and after three and a half years of working with him, the Committee on Petitions expressed "...its satisfaction at the irreproachable and creative co-operation between the European Ombudsman and the Committee on Petitions" [39].

This "creative co-operation" had developed in marked contrast to many expectations. It is a tribute to both the first and second European Ombudsmen, and to the members of the Committee on Petitions since 1994. Such a positive working relationship has been of benefit not just to complainants and petitioners. All European Union

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[35] Speech by Jacob Söderman on "The Role of the European Ombudsman" to the 6th meeting of European National Ombudsmen, 9 September 1997.

[36] *Annual Report* of the European Ombudsman for 1997, p. 23.

[37] Report on the Annual Report on the Activities of the European Ombudsman in 1997 (A4-0258/1998); Committee on Petitions; Rapporteur: Eddy Newman.

[38] *Annual Report* of the European Ombudsman for 1997, p. 22.

[39] Report on the Annual Report on the Activities of the European Ombudsman in 1998 (A4-0119/1999); Committee on Petitions; Rapporteur: Laura De Estaban Martin.

citizens and residents have been able to benefit from a situation where the European Community institutions and bodies need to be alert to the fact that any maladministration on their part can be investigated and exposed by the European Ombudsman. Consequently, the very existence of the European Ombudsman, and his partnership with the Committee on Petitions, helps to promote good administrative practices within the administrations of the European Union.

CHAPTER 9

Safeguarding the Rights of European Citizens: the European Commission Working with the European Ombudsman

Anita Gradin and Ranveig Jacobsson

1 A New Institution

A totally new situation came about for the European Commission and its staff when the European Ombudsman started his work in 1995. The very idea of a possibility for European citizens to have access to Commission files and decisions was new. So was the possibility for European citizens to lodge complaints about maladministration by the European Commission.

It was quite natural for Nordic people to take on such tasks. As Commissioner responsible for relations with the Ombudsman, I could use my long experience as Member of Parliament and Cabinet Minister in the Swedish Government. The tradition of openness and public access to files, archives and decisions of public authorities is a long one in Sweden. My cabinet in the European Commission also had both theoretical and practical knowledge of the importance of openness in relations with citizens.

The European Ombudsman, Jacob Söderman, had a background as both Cabinet Minister and National Ombudsman in Finland. This proved to be a strong combination.

Our common aim was to work out a good and efficient relationship between the European Ombudsman and the European Commission. In the Commission, the then Secretary General, David Williamson, and Jean-Claude Eeckhout, responsible within the Secretariat General for relations with the Ombudsman, were instrumental in their clear support for the right of the Ombudsman to have access to documents.

During the first year (the Ombudsman started work in September 1995), there was a lot of criticism - including overt criticism - of the

right of a person "outside the Commission" to have access to the information he asked for. In some parts of the Commission - including Commissioners' cabinets - there were what verged on hostile reactions when the first practical cases were forwarded to the Commission.

Quite a few people were of the opinion that the Ombudsman should be treated as any other ordinary citizen when it came to access to documents - and that he should wait for answers as everybody else had to do. This did not sit very well with the thinking of people from countries used to national ombudsmen, public access to documents and the citizens' right to information. This meant that there was a huge job to be done in terms of "education" on the roles and tasks of authorities when it comes to openness to the public.

Each Commissioner's cabinet was represented by a cabinet member in the weekly meeting on relations with the European Parliament (meetings of the so-called *Groupe des Affaires Parlementaires* - GAP). Since the Ombudsman was elected by Parliament and accountable to Parliament, it seemed quite natural that the complaints and the Commission's answers to them should be treated in the GAP. Such a proposal was put forward. Initially a number of Commissioner's representatives "were not amused" at all. However, the rule was settled, and a report on issues raised and answers given was provided, and sometimes discussed, during these meetings.

For those used to the right of the public to ask for documents, some of the initial reactions were quite astonishing. Answers were drafted that told the Ombudsman in a rather unpleasant manner that the complainant was wrong and the Commission had acted correctly - "full stop". Others told the Ombudsman that it was "improper" to look into certain cases. Of course, such drafts never reached either the GAP or the Ombudsman. And rather soon - although there was still reluctance in some quarters - the feeling came about that the fact that the Ombudsman had the right to look into possible maladministration was indeed a good thing for the Commission as well.

2 The Benefits of an Open Administration

Transparency and openness are a vital part of a democratic culture. They are equally essential to the healthy evolution of the European Union. Citizens, both in individual States and in the European

Union, should have the possibility of having their voices heard when it comes to how the administration is handled and how decisions are implemented. In the end, the European Union is made up of its citizens, and cannot grow strong without their active participation.

People must have the sense that Community legislation makes a difference and offers them something positive. Citizens must have the sense that their rights will not be ignored in the process. They must have the sense that there exist forms of redress; that the institutions will listen sympathetically to their grievances.

For the European institutions, the Ombudsman represents a healthy challenge, when it comes to transparency, openness and good administration. Knowing that all actions could, and should, be scrutinised, provides an impetus to improve the administration further.

European integration has become increasingly complex by successive amendments to the Treaties. It must be made simpler, more open and more democratic. Europe must be made understandable for the individual.

Without the public acceptance that goes with it, it will become difficult to move the integration process forward. There is a key link between people's sense that the Community's institutions are open and responsive, and acceptance of further integration.

This is in line with the continuing efforts of the Commission to put the interests of the citizen at the centre of Community policies.

3 Building a Good Relationship with the Ombudsman

With this as a platform and starting point, we began the work of building a solid relationship with the Ombudsman and, at the same time, of changing practices and policies within the Commission to embrace a more modern approach in the interest of European citizens.

The European Ombudsman, Mr Söderman, wrote an article after his first year in office, in which he stated: "I sometimes feel that there is a dinosaur in every public body. It lives in the basement and guards the files. These beasts have an aversion to open doors and daylight, and feel strongly that documents should be kept securely locked away".

Little by little, the light entered the basement. During the first years, there were cases that led to changes in Commission practices,

for example regarding age limits for applicants to posts within the Commission and candidates' right to see their files. Others concerned time limits for answering inquiries and questions from the Ombudsman and the public. Such rules were put in place.

One important issue concerned the Commission's archives, and the use of a register for incoming and outgoing documents. We were very surprised to learn, when we started in the Commission, that each Commissioner's archives were "private" and that we could do what we wanted with the documents. For us, this was an unacceptable scenario. So, we introduced strict practices, from day one, registering all items and later transferring them to the Commission's archives. However, it was not enough to do this within one's own cabinet only. In order to ensure openness to the public, this had to spread to the whole institution.

Many of the critical remarks from the Ombudsman during these years led to important changes. Some led to changes in internal administrative procedures, resulting, in turn, in important improvements in terms of relations with European citizens. In some cases friendly solutions were found. The Ombudsman's recommendations to all EU institutions to adopt internal rules for public access to documents [1] was another important step forward.

The efforts to agree on a code of good administrative behaviour met with greater difficulties and, in 1998, the Ombudsman started an own-initiative inquiry into the existence and the public accessibility of a code of good administrative behaviour of officials in relations with the public. The aim was to lay down a code of conduct on good administrative behaviour. The work in the Commission came to a halt in the Spring of 1999 but the European Parliament adopted the European Code of Good Administrative Behaviour in 2001, on the basis of a proposal from the Ombudsman [2]. The underlying basis for the Code was the Charter of Fundamental Rights of the European Union, which contains the right to good administration (Article 41) and the right to complain to the European Ombudsman (Article 43).

One other crucial area concerned the Ombudsman's right to have access to all relevant Commission documents, and the possibility of

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[1] See the Ombudsman's own-initiative inquiry 616/PUBAC/F/IJH, the European Ombudsman's *Annual Report* for 1996, p. 80.

[2] See the European Ombudsman's website on this issue at: http://www.euro-ombudsman.eu.int/code/en/default.htm

interviewing staff. A focal point was the complaints concerning infringements, where we made efforts to introduce internal Commission rules, enabling the Ombudsman to have access to all the files. This met with opposition from the Legal Service and the Ombudsman stated in 1999 that "...[t]he whole idea of the Ombudsman's office all over the world is that he should always be able to see all the files and all the dossiers in a case. If they are confidential or restricted, of course that binds him. He cannot show the relevant part of the document to the complainant, but the complainant will know that the Ombudsman has been able to check everything and that he can therefore explain the facts".

4 Conclusion

Looking back, it is obvious that there has been real progress in the area of transparency. Misunderstandings, different views and different traditions of course provided grounds for profound discussions. But by and large, improvements in the area of transparency in the European administration have come about relatively quickly. There is, however, still much to be done before European citizens feel that they play an active - and respected - part in the European integration process.

It is quite obvious that we have different national traditions, and not least differences in culture and attitudes. This goes both for legislation and internal procedures. But the problems are not insurmountable, and should not be, if we wish to build a solid European Union in the interest of its citizens. Good practices, such as the Code of Good Administrative Behaviour, are a helpful tool in raising awareness among staff of their obligations - and also providing them with workable procedures and guidance.

Our main objective should be a common one - to promote and assure a European administration, which listens to citizens and provides them with the best possible service.

Greater openness will improve our decision-making. It is also an important tool in preventing corruption. And above all it is vital for democracy.

Chapter 10

The European Commission's Internal Procedure for Dealing with the European Ombudsman's Inquiries

Jean-Claude Eeckhout and Philippe Godts

There are few subjects drier than procedure - particularly internal procedure! And yet, the development of internal rules from 1993 governing, for the most part, the way the European Commission handles complaints sent by the Ombudsman testifies to a genuine openness and particular sensitivity within the Commission to the institution of the Ombudsman.

A familiar concept in the Scandinavian countries, amongst others, the Ombudsman function made a concrete appearance within the European institutional architecture in 1995. It was the responsibility of the Commission, in a broad vision of its role as Guardian of the Treaties, to arrange matters in such a way that this new institution could operate as effectively as possible. It had to demonstrate openness without upsetting the institutional balance. It was important that relations between the Commission, the most frequent target of complaints from citizens, and the European Ombudsman, the defender of the people of Europe, were crowned with success.

This chapter attempts to trace the history of the development of this procedure, to describe its principal characteristics and to discuss specific aspects ranging from admissibility to friendly solutions. A few suggestions for improvement are made, but most of all the contribution seeks to highlight the balance characterising the procedure. Finally, the authors raise the issue of the degree to which the procedure in question facilitates good administration.

1 History

1.1 The Secretary General's Note of 4 November 1993

The Commission's internal procedure relating to the Ombudsman (hereinafter referred to as the 'Ombudsman procedure') owes its general conception entirely to a short note from David Williamson, at the time Secretary General of the Commission, to the Directors General and Heads of Service, dated 4 November 1993.

Negotiation of the Ombudsman's Statute had led to an interinstitutional agreement on 25 October 1993 between the European Parliament, the Commission and the Council, which, in accordance with Article 138(e) of the EC Treaty, was to be converted to a formal proposal by the Parliament.

Sending the text of this interinstitutional agreement to the Directors General and Heads of Service, the Secretary General summarised as follows the internal procedure that was yet to be established:

"In the case of a referral to the Commission by the Ombudsman, Directorate E of the Secretariat General will ask for a draft response from the Directorate General or service concerned. The Commission's opinion will be formally issued by the Secretariat General with the agreement of the Legal Service, under the authority of the President and the competent Commissioner, who will be duly authorised".

This note lays down the substance of the two essential principles characterising the Ombudsman procedure: authorisation and subdelegation.

1.2 The Authorisation Decision of 7 September 2004

Following the Council Decision of 7 February 1994, approving the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties (the Ombudsman's Statute), and the final vote by the European Parliament on the Statute, during the plenary session of March 1994, a first draft authorisation decision was drawn up on 15 March 1994 by the Commission's Secretariat General in co-operation with the Commission's Legal Service.

In substance, it was a case of authorising the President and the competent Commissioner for the matter in question to send the Ombudsman the information and documents he had requested from the Commission, and authorising Commission officials to testify before the Ombudsman. The explanatory memorandum makes explicit reference to the corresponding Treaty provisions and to the European Ombudsman's Statute, most notably Article 3.2 of the Statute.

In accordance with the Commission Decision of 23 July 1975, establishing the principles and conditions according to which the Commission may delegate its powers, the Commissioner thus authorised is always required to determine whether the decision to be made should be submitted to the College of Commissioners. Furthermore, the favourable opinion of the Legal Service and the agreement of the associated services on the draft decision are essential conditions for an authorisation procedure to be undertaken.

The draft authorisation decision stated from the outset that decisions taken under this authorisation would comply with the criteria set by the code of conduct drawn up by the Commission and the Council on public access to Commission and Council documents [1].

This concern regarding the disclosure of data and information to the complainant was then reinforced by an additional reference to Article 4 of the European Ombudsman's Statute, which states that the Ombudsman and his staff shall be required not to divulge information or documents which they obtain in the course of their inquiries, and a reminder that Article 214 of the Treaty establishing the European Community applies to the Ombudsman and his staff.

When consulted on these references, the Secretariat General's services in charge of access to documents felt that it was reasonable for them to be associated with the procedure, to the extent that they were responsible for implementing the code of conduct on access to documents. The services concerned understood that this code of conduct did not apply directly to the Ombudsman, any more than the current Regulation 1049/2001 [2] does. The reference inserted in the

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[1] Code of Conduct concerning public access to Council and Commission documents, *Official Journal* 1993 L 340, p. 41; implemented as regards the Commission through Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, *Official Journal* 1994 L 46, p. 58.

[2] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *Official Journal* 2001 L 145, p. 43.

explanatory memorandum was, nevertheless, meant to remind the services that the information provided to the Ombudsman was likely to circulate externally.

On the initiative of the Legal Service, it was requested that the reference should appear both in the explanatory memorandum and in the text of Article 3 of the Ombudsman's Statute. More specifically, an explicit reference was added to the explanatory memorandum, concerning the exception on duly substantiated grounds of secrecy from the general duty of the Community institutions and bodies to provide information to the Ombudsman. In the same memorandum a further reference was made to the principle according to which the Community institutions and bodies should not give access to documents originating in a Member State and classed as secret by law or regulation without the prior agreement of the Member State concerned.

1.3 Amendment of the Authorisation Decision of 13 December 1995

In a note dated 12 July 1995, the appropriate services within the Secretariat General drew Mr Williamson's attention to the need to amend the authorisation decision granted to the President, in order to take account of the appointment within the new Commission of a Member, Anita Gradin, charged with special responsibility for relations with the Ombudsman. The services felt that a subdelegation would be appropriate.

The proposal was made to authorise the President to make decisions in agreement not only with the competent Commissioner for the matter in question but also in agreement with the Commissioner responsible for relations with the Ombudsman. On 13 September 1995, the College of Commissioners approved this amendment.

1.4 Subdelegation Decision of 30 October 1995

Description

By its decision of 7 September 1994, the College subdelegated the use of the authorisation granted to the President to the Commission's Secretary General.

The use of this subdelegated authorisation was subordinate to the application of the general provisions in force regarding the exercise of authorisations, and in particular:

a) To the agreement of the Commissioner responsible for relations with the Ombudsman and of the Commissioner with competence for the matter in question,
b) To the favourable opinion of the Legal Service and
c) To the agreement of the associated services.

The President could at any time withdraw this subdelegation, while in the event of doubts over the economic and/or political scope of the decision to be taken, the Secretary General would refer the matter to the President.

Comments

The documents relating to the circumstances governing the granting of this subdelegation do not reveal any opposition or challenge to the idea. Little consultation appears to have preceded the decision. The administrative management of an ever-increasing number of files, always involving several consultations and movements, seemed to those concerned, in particular to President Santer's office, more the responsibility of the Commission's services than of the cabinets. Furthermore, because the agreement of the cabinets was automatically required on proposals for comments or documents to be transmitted to the Ombudsman, the political authority of the Commission in any case ensured the necessary supervision of the files.

1.5 Appointment of Co-ordinators within the Directorates General and Cabinets

On 22 December 1995, Mr Williamson asked each Directorate General to appoint a co-ordinator to be responsible for relations with the Ombudsman. On 9 February 1996, a similar request was sent to the Heads of Cabinet.

1.6 Instructions for the Internal Procedure: The Writing of Note SP (97)3900

Once the decisions of principle on authorisation and subdelegation had been adopted by the College, the main axes of the internal procedure fell into place almost automatically. These included assign-

ment of complaints to the services responsible and associated services, preparation of draft responses by the service responsible with the agreement of the associated services, securing of the agreement of the Legal Service and the cabinets and finally transmission to the Ombudsman by means of a letter from the Secretary General.

However, it was still necessary to set out the whole procedure in detail and to specify the deadlines and the routing of documents in an internal procedural note, which was signed by the Secretary General, giving instructions to the services and cabinets.

Furthermore, in addition to a detailed description of the internal procedure, this document had to contain at least some general comments on the Ombudsman's task with reference to the Treaty and the rules to be followed by the services for access to the file, in the event of inadmissibility, etc. Finally this procedural note had to be agreed formally with the cabinets and sent to the College of Commissioners.

Although the writing of the draft note in question by the Secretariat General's services took only a short time, the adoption of the text by the political authorities and its publication within the Directorates General was slow in coming [3].

The cause of this delay was the difficulty with taking *ab initio* a simple decision on the procedure and, once this had been accomplished, the massive difficulty of finding an appropriate wording for the instructions to be given to the services in the event of a complaint to the Ombudsman regarding infringement proceedings.

Initially, the Legal Service's concern that it should give an opinion only when in possession of all the relevant documents led it to oppose the Secretariat General's proposal for a procedure that would involve co-ordination of each complaint by the Secretariat General, once the consultation stage with the associated services had been completed.

But the drafting of the part of the procedural document giving guidelines on how to proceed with files dealing with infringement proceedings was only completed in 1997. The delay was due to the parallel handling, during 1995 and 1996, of the first complaints to the Ombudsman in the Allen and Head [4] and Newbury Bypass [5] files, con-

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[3] In the meantime, guidelines on the operation of the procedure had been given to the co-ordinators in the Directorates General.

[4] See Decision on complaint 132/21.9.95/AH/EN against the European Commission, the European Ombudsman's *Annual Report* for 1996, p. 66.

[5] See Decision on complaints 206/27.10.95/HS/UK against the European Commission, the European Ombudsman's *Annual Report* for 1996, p. 58.

cerning an alleged infringement of Directive 85/337 on environmental impact, followed by the McKenna [6] complaint challenging the Commission's decision not to apply Article 34 of the Euratom Treaty to French nuclear tests.

The issues involved were raised in a general way during a meeting, on 21 March 1996, between the Directors General of the Commission and Mr Söderman, but the controversy did not fade and did not even come to an end within the Commission when the Ombudsman closed the various files relating to infringement allegations.

In the meantime, on 17 July 1996, the Commission had decided (PV1302 - point 4) that where complaints were made to the Ombudsman concerning infringement proceedings, the Commission should give the Ombudsman the information required to exercise his recognised powers to conduct inquiries into the administrative procedures used by the Commission when examining the case in question, without prejudice to provisions concerning confidentiality and secrecy laid down in the Ombudsman's Statute.

Although Mr Söderman may have been pleased by this decision, the controversy arose once again when the Ombudsman expressed the wish, on 11 September 1996, to have access to the files of certain infringement proceedings. A *sui generis* presentation was organised in the case of the Allen and Head file.

Following this meeting, the internal guideline document on the Ombudsman procedure was distributed in July 1997, bearing the reference number SP (97) 3900. It is worth noting that this document was updated on 22 June 2004.

2 Principles

2.1 A Single Authorisation and Subdelegation procedure

It can honestly be said that between 1995 and 2004 there was only one Ombudsman procedure. From the time the Secretary General's note was written on 4 November 1993, the two fundamental princi-

[6] See Decision on complaints 34/21.7.95/PMK/EN against the European Commission, the European Ombudsman's *Annual Report* for 1996, p. 21.

ples of this empowering/subdelegation procedure for handling not only the preparation of comments on the complaints and documents, but also, at least *a priori*, requests for testimony, were:

- *Authorising* the President in agreement with the competent Member of the Commission and with the subsequent additional agreement of the Member responsible for relations with the Ombudsman, and
- *subdelegation* of this authorisation to the Secretariat General.

The addition of the prior approval of the Member responsible for relations with the Ombudsman, once the Commission had appointed one, did not alter the fundamental principles of the procedure. It can even be said that it made it more balanced. We will come back to this point later.

In the authorisation decision, it was also clearly stated that the Legal Service, like the services concerned, should be viewed as associated services whose favourable opinion was required before any communication or documents could be sent to the Ombudsman.

With regard to the subdelegation to the Secretariat General, this, strictly speaking, amounted to delegation by the President to the Secretary General. In other words, the prior favourable opinion of the services concerned and of the Legal Service was required. Conversely, when the President terminated a subdelegation, he was not able to make a decision regarding the procedure single-handedly but once again the agreement of the services, the Legal Service and the cabinets concerned was required.

2.2 Collective Responsibility

The principle of collective responsibility is put into effect in various different ways in this procedure. To begin with, it should be noted that requests for information sent by the Ombudsman to the Commission, where they relate to complaints about maladministration, are addressed to the College of Commissioners in the person of its President.

It was the College that agreed to the authorisation and therefore, in accordance with the Commission Decision of 23 July 1975 on authorisation, the authorised Member is, at all times, required to determine whether the decision to be taken should be submitted to the College. Although *de facto* no complaint to the Ombudsman has ever

been referred to the College, it is nevertheless true that several questions of principle have been submitted to the appropriate authorities at the cabinet level and then sent to the College, which has either approved them or taken note of them.

In addition, the distribution of roles in the case of authorisation and also in the context of subdelegation means that all the services concerned can work together. It is very frequently the case that three or four Directorates General are involved in one case, in addition to the Legal Service. It would not be incorrect to think that, under these conditions, a genuine collective responsibility is in play, certainly much more effectively than if the files were sent automatically to all the services or cabinets across the board.

Finally, the subdelegation procedure can be used at any time by the President, and, as already mentioned, it is the responsibility of the Secretary General, in the case of doubt regarding the technical, economic and/or political scope of the decision to be taken, to refer the matter back to the President. When this happens, the President must submit the file to the College. Thus, as indicated earlier, the College was consulted by the President on the issue of sending information to the Ombudsman in files relating to infringement proceedings.

2.3 Balance in the Distribution of Roles

The distribution of roles in the internal management of the Ombudsman procedure merits a brief description.

The Lead Service

The lead Directorate General, consulted in depth, except in rare cases of flagrant maladministration, has a duty to explain itself, justify itself, or in other words, defend itself.

The complainant is in principle well known to the services concerned because, for the complaint to be admissible, he or she must have contacted them in advance. The services will do everything in their power to assert their arguments and defend their position.

The lead service is in charge of the procedure under the supervision of the service of the Secretariat General responsible for relations with the Ombudsman.

The Associated Services

Although the associated Directorates General look only at those areas of the file that concern them specifically, their joint role in the process helps, often quite significantly, to avoid any form of unilateralism. Whether the matter concerns a payment disputed or rejected by the Commission, the social dimension of a measure taken by the Directorate General for Administration or the environmental dimension of a regional policy decision, this plurality of points of view is essential.

It should also be noted that the point of view of the Directorate General for Budget is not restricted simply to the cost aspect of measures either contested or to be decided in order to put right a case of maladministration. The advice of the central financial service often provides a fine example of good administrative practice.

The Legal Service

The Legal Service plays the "traditional" role of legal advisor to the Commission, similar to its activity in the case of judicial proceedings. However, this comment should be qualified in at least two ways. Firstly, complaints to the Ombudsman are not, in terms of either content or procedure, the same as cases brought before the courts. Secondly, although a legal analysis remains necessary, dealing with complaints referred to the Ombudsman is not only a matter of legal arguments. From this point of view, the contribution and creativity of the Legal Service are of paramount importance, particularly in developing friendly solutions and presenting them in an appropriate legal form.

Cabinets

Either the cabinet of the lead service or the cabinet(s) of the associated services supervises the administration's position. Although, on the whole, these units are inclined to support the position of the administration, in so far as it is defensible, their role is nevertheless essential for countering any tendency to excessive bureaucratic formalism in the services' responses and positions.

The Secretariat General

The Secretariat General can become involved as lead or associate service, particularly where requests from citizens for access to documents are concerned. On a horizontal level, meanwhile, it is the responsibility of the Secretariat General's services charged with rela-

tions with the Ombudsman to be the guardian of the Ombudsman procedure in the first instance. This task involves checking that operations proceed correctly and that deadlines — which are more indicative than imperative but are nonetheless essential for ensuring that a response is given within the timescales laid down by the Ombudsman — are respected.

The aim is not only to facilitate the physical transmission of files but also and more fundamentally, to ensure that the necessary forms of collective responsibility are respected. It is also important for the Secretary General to be capable of confirming that the principles involved in subdelegation have been respected.

Apart from this, it is the job of the Secretariat General to check the coherence and quality of the positions of all the services concerned. In the event of disagreement among the services, the Secretariat General is responsible for organising the necessary consultations. The same goes for disagreements among the cabinets. Where necessary, if these continue, the cabinet of the President must take over the file.

Finally, the Secretariat General's services responsible for relations with the Ombudsman are required to ensure that responses are "Ombudsman friendly". This responsibility can encourage it to recommend the acceptance of friendly solutions, where appropriate. The Secretariat General also takes the lead on any questions relating to the Ombudsman's Statute, its interpretation or implementation.

The Cabinet Responsible for Relations with the Ombudsman

This is the cabinet supervising the services of the Secretariat General responsible for relations with the Ombudsman. It has particular responsibility for ensuring that responses are "Ombudsman friendly", and intervenes on all questions of principle and on matters relating to the Ombudsman's Statute.

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The stakeholders involved and their respective roles in the overall procedure have generally made it possible for positions to emerge that are solid, thorough, coherent and open to the positions of the Ombudsman.

Without wanting to engage in excessive generalisations, it seems obvious that, without the active involvement of the associated services and of the Secretariat General, the naturally dominant weight of

the lead service in drawing up draft responses—a practice that is eminently reasonable—could occasionally lead to excessively formalistic positions being adopted in the procedure. Similarly, the intervention of the cabinets sometimes enables the debate to be situated in a context focusing on appropriateness and good administration rather than on the search for a formal absence of error or for a purely legalistic conception.

In fact, statistical evidence suggests that, in a very large majority of cases, the Commission's argumentation has been flawless.

3 Some specific aspects of the internal procedure

3.1 Admissibility

Article 2(3)-(8) of the Ombudsman's Statute lays down the conditions required for a complaint to be judged admissible by the Ombudsman. There are cases where the Commission's services consider that the admissibility conditions have not been fulfilled. Even if determining admissibility is not within the remit of the institution under scrutiny but is the responsibility of the Ombudsman, the instructions for the internal procedure require the services in these cases to draw up comments based only on the corresponding provisions of the Ombudsman's Statute.

3.2 Confidentiality with Regard to the Complainant

The first Ombudsman, Mr Söderman, made it clear that he was prepared under certain conditions to deal in a confidential manner with the information and documents sent to him.

Consequently, until June 2004, the instructions for the internal procedure stated that if the competent services felt that the information should remain confidential, they should specify this in their texts. It was the task of the Secretariat General to take the measures necessary to obtain a guarantee from the Ombudsman that confidentiality would be respected.

More precise instructions concerning this matter were given to the services on 9 November 1999. The general principle underpinning these instructions is that the Ombudsman informs the complainant

of the position the Commission has taken, by sending him or her copies of the Commission's comments. Although the examination of a complaint by the Ombudsman should not be considered to be the same as judicial proceedings, Mr Söderman applied the adversarial principle to this procedure. By derogation, under certain conditions the Ombudsman allowed the transmission of some documents and information to him under conditions of confidentiality.

It is not for us to review all the circumstances that brought about a change of approach by the Ombudsman. Suffice it to say that, following discussions in the Council about the changes proposed by the European Parliament to the Ombudsman's Statute, the Ombudsman reviewed this practice and decided that any document sent to him would automatically be sent to the complainant. However, another form of gentleman's agreement has since emerged in the context of the inspection of files.

Nevertheless, it seems legitimate to question the absolute application of the adversarial principle to the Ombudsman's investigations. To be sure, it seems quite natural for the Ombudsman to compare the positions of both sides. Indeed, trying to resolve conflicts between a citizen and an administration constitutes the very essence of his job. This notwithstanding, the application, without exceptions, of the adversarial principle to this type of complaint appears to be excessive.

For example, what, under these circumstances, is to be done with documents and information to which the institution would refuse access to citizens under Regulation 1049/2001 [7] regarding public access to documents? Giving them to the Ombudsman could lead to the procedure being hijacked. Not producing them could, however, disadvantage the administration in some cases.

The solution provided by the Ombudsman himself concerning the inspection of files causes other problems, however, in relation to the file established by the Ombudsman's services and the specific rules of access to that file laid down by the Ombudsman. [8]

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[7] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *Official Journal* 2001 L 145, p. 43.

[8] The Ombudsman's *Annual Report* for 2004 contains a section (2.6.4) which addresses this issue.

3.3 Testifying

The authorisation procedure mentioned above also made provision, from the outset, for dealing with requests from the Ombudsman for officials to testify. The same principles that apply to the transmission of documents and information should also apply in such cases. It is, however, striking to note that none of the authorisations to testify has ever applied these principles.

What actually happened was that, when confronted with the initial requests by the Ombudsman in the cases of the Athens Casino [9] and the Thessaloniki Metro [10], the Secretariat General followed by analogy the procedure in force for authorising officials to testify before the national parliaments. This meant that prior authorisation had to be requested from the GAP (meeting of all the members of the cabinets responsible for relations with the European Parliament) on the basis of a note issued from the superiors of the person concerned, following prior authorisation from the responsible cabinet.

The instructions for the internal procedure were undoubtedly better suited to the submission of written contributions than to that of a simple procedure authorising officials to testify.

As far as testifying is concerned, the Ombudsman's Statute states explicitly that officials "shall speak on behalf of and in accordance with instructions from their administrations...". This wording may surprise some people, since one may question the scope of evidence given in accordance with "instructions". It is easy to see why the Parliament, alerted by Mr Söderman, wanted to amend the Statute on this point.

However, we should avoid any misconceptions. We are not talking here about sworn testimony before a judicial authority, but rather about testimony given in the context of an investigation into good or bad administration. This should quite rightly be the testimony of an official. Whether the official likes it or not, he operates within a hierarchy and performs his functions within a general context of following instructions.

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[9] See Decision on complaint 1140/97/IJH, the European Ombudsman's *Annual Report* for 1999, p. 83.

[10] See Decision on complaint 995/98/OV, the European Ombudsman's *Annual Report* for 2001, p. 116.

3.4 Friendly Solutions

The initial text of the procedure in question did nothing to specify how to proceed in the case of friendly solutions. However, in response to a letter from the Ombudsman, dated 16 October 2002, on eliminating maladministration through compensation, the Commission concluded on 16 December 2002:

"...that it is good practice to eliminate maladministration and its consequences once a case has been established and if possible, taking account of the principle of proportionality, to put the person lodging the complaint in the situation they would have been in if the maladministration had not taken place; where this situation cannot be envisaged, the Commission will examine on a case-by-case basis whether and how action can be taken to remedy the inconvenience caused. In exceptional cases, financial compensation could be envisaged. The Commission will take inspiration *mutatis mutandis* from the case law of the European Court of Justice on matters of non contractual liability..." [11] .

This response was inserted into the procedural document as amended in 2004, with the clarification that the decision of principle concerning friendly solutions would be taken in accordance with the normal rules of procedure. However, when a friendly solution involves a payment, the legal basis and the budget line to be used should be examined in conjunction with the Secretariat General, the Legal Service and the Budget Service on a case-by-case basis.

In the light of past experience, it seems clear not only that the decision of principle concerning friendly solutions can be applied in different ways, but also that it is sometimes more difficult to find a procedure to implement a friendly solution than it is to reach agreement on the principle of such a solution.

3.5 Procedural Improvements: A few Suggestions for Friendly Solutions

Decision-making on friendly solutions is undoubtedly one of the most difficult to fit into the Ombudsman procedure. It requires the

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[11] Letter of 16 December 2002 from the Secretary General of the European Commission to the European Ombudsman regarding elimination of maladministration by compensation and follow-up on critical remarks, published on the European Ombudsman's website at: http://www.euro-ombudsman.eu.int/letters/pdf/en/20021216-1.pdf

prior acknowledgement by the services and cabinets concerned that the matter has not been handled properly. It would surely be worthwhile to provide a little more support for this type of decision in order to reduce, to some extent, its "emotional" impact.

A Few Guidelines Could be Drawn Up

These guidelines could include clear mention of the absence of the rule of *precedent* in the Ombudsman's practice. In substance, this is about the fact that *the Ombudsman himself* does not refer in the handling of a case to a solution obtained previously. This is not about the effect that a Commission decision could have on other similar situations. This latter aspect is covered by the reference made to the principle of proportionality in the response sent to the Ombudsman on 16 December 2002 (see 4 below). Furthermore, the absence of the use of precedent in cases solved through friendly solutions does not prevent the Ombudsman from drawing up a draft recommendation that is more general in scope.

Another principle that should be mentioned in the guidelines is that of the *"non-persecution"* of the person lodging the complaint. In substance, this is about not penalising the complainant for making the complaint. This would apply to cases where the services and cabinets, while acknowledging the existence of a breach, envisage changing a situation only in the future and in a general way. This solution, which hypothetically would not deal with the initial complaint, could be deemed to penalise the complainant and should therefore be avoided. In any case, it would conflict with the purpose of referring cases to the Ombudsman.

A third principle would be to recommend taking into account the risk of being sanctioned *by public opinion.* This is obviously a very difficult principle to handle in view of the subjective nature of opinions and predictions. However, this risk—which economic operators increasingly take into account—should encourage the Commission in certain cases to be more *consistent.* How does one justify an attitude in an Ombudsman file that the Commission would condemn in its relations with Member States?

Finally, as well as drawing up guidelines, it would certainly be useful, if, every time a proposal for a friendly solution was examined, the central financial service of the Directorate General for Budget were involved, in addition to the other services concerned. From experi-

ence, this financial service generally takes an approach reflecting good administration that complements that of the Legal Service.

3.6 Critical Remarks

Once a file has been closed by the Ombudsman, the Commission's initial attitude was not to reply, even if the decision included a critical or further remark.

This pragmatic attitude, justified by the desire not to prolong debates endlessly, was altered in response to a request by the Ombudsman who has set up a special register for these types of remarks. The Commission decided to respond in all cases, in accordance with standard procedure, to criticisms levelled by the Ombudsman.

3.7 An Ombudsman-Friendly Procedure?

Does the procedure that has been described above allow sufficient openness to the needs of good administration?

It is difficult to answer this question, because it is obvious that the concept of good administration can be interpreted in many different ways. It should be recognised, however, that many of the Ombudsman's concerns have been taken on board by the Commission in its administrative management. Purely by way of example, we could mention the change in the way the Commission views access to corrected copies of examination papers in open competitions, the issue of payment deadlines, the role of the complainant in infringement proceedings, the application of the concept of good administration to legal errors, the line to be followed in friendly solutions, etc.

We must recognise that these developments have been made possible in the context of the procedure described above and that, by adapting the principle of collective responsibility, that procedure has allowed the different dimensions of administrative and legal rigour and the defence of the institution in cases that often closely resemble litigation to be reconciled with real openness to good administration as defined by the European Ombudsman.

This delicate balance in the Commission's responses is well illustrated in the passage concerning friendly solutions quoted in section 3.4

of this chapter above. The balanced nature of these replies succeeds in responding to the concerns expressed by each service involved and consulted, subject to the co-ordination of the Secretariat General under the authority of the cabinet responsible for relations with the Ombudsman. Without wanting to give too much away, it would be possible to link almost every expression used in this passage with the service that wrote it. So, for example, we could identify the source of references to the principle of "proportionality", which guides the principle of restoring good administration, or "the case law of the Court of Justice on matters of non contractual liability", which flags the possibility of financial compensation, in legal terms. The expressions "if possible", "on a case-by-case basis", "whether and how", "in exceptional cases", *"mutatis mutandis"* and the frequent use of the conditional are a sign of the many compromises that arose from the dialogue between the services, which undoubtedly give the procedure its charm.

4 Conclusions

It is striking that the general conception of the internal procedure for processing Ombudsman files was defined at the end of 1993, well before the first European Ombudsman began work. The way that the principle of collective responsibility has been able to have effect through the process of authorisation and subdelegation, as well as the balance in the distribution of roles among those responsible within the cabinets and services for examining the files, are the fundamental elements of this procedure. That this balance has permitted real openness to the concerns expressed by the European Ombudsman cannot be denied. Salient features of this balance are the development of a structure charged with specific responsibility for relations with the Ombudsman that is both administrative and political and the fact that it was entrusted with the handling of the whole range of individual cases.

CHAPTER 11

Special Reports Submitted by the European Ombudsman to the European Parliament

Roy Perry

1 The Ombudsman and his Relationship with the European Parliament

The European Ombudsman is the European citizens' prime guard against instances of maladministration within the European institutions. As with most national ombudsmen, although not all, the final sanction of the European Ombudsman is to report instances of maladministration to the parliament, in this case the European Parliament. This may be by means of the annual report or special reports.

The European Ombudsman is not only an important part of the democratic framework of the European Union but is also crucial to ensuring all institutions are reminded of their democratic obligations. It is Parliament that appoints the Ombudsman, it is to Parliament that he reports and with whom he needs to maintain a close working relationship, if he is to be successful. Parliament, comprising the directly elected representatives of the peoples of Europe, is the final resort of European citizens who seek to ensure that all institutions implement their procedures properly. The European Ombudsman is an important means by which Parliament can ensure that the administration is as it should be. If the Ombudsman perceives a need to make a special report, this must never be treated as a minor or routine matter and Parliament, assuming it endorses the Ombudsman's findings, needs to ensure that the Ombudsman's recommendations are implemented and not ignored.

Clearly for the relationship to work successfully, Parliament must have full confidence in the Ombudsman and the Ombudsman in Parliament.

They need him and he needs them. (Note: in this chapter *he* embraces *she*)

2 The Role and Powers of the Ombudsman and the Significance of Special Reports

The very democratic basis of the EU means that all officials will want to operate within the framework of a sound administration. Institutions should welcome guidance on good administration and should normally respond positively, if any shortcoming is drawn to their attention by the European Ombudsman. What the Ombudsman cannot and should not be able to do is to countermand the administrative action of an institution, let alone any exercise of discretion by an institution in the area of policy.

Normally an indication of maladministration by the Ombudsman will and does produce a remedy. This may be achieved by way of a friendly solution or, if necessary, a critical remark.

A more serious difficulty arises when the Ombudsman and the institution concerned cannot agree that there has been an act of maladministration, even if they agree about the circumstances of a case. In yet other instances there may be systematic practices of an institution that, in the opinion of the Ombudsman, do not meet the highest standards of good administration.

On this point, it is noteworthy that the Commission, in particular but not solely, has so far failed to adopt the Ombudsman's recommended Code of Good Administrative Behaviour. It would surely be helpful to institutions and citizens alike, if there were a commonly agreed definition of what is meant by "good administration".

Where these specific failures occur and most especially if they are of a systemic nature, then the ultimate sanction of the Ombudsman is to make a special report to the European Parliament drawing attention to the failing. The increasing status of the Parliament and readiness to exercise its powers should make any erring institution, most especially the Commission, attentive to its views.

3 Special Reports

Beginning with the first special report in 1997, there were nine special reports up to December 2004. Four of these reports were the result of own-initiative inquires by the Ombudsman and five followed

on from specific complaints made to the Ombudsman that raised issues of a general nature [1].

- **Special report made on 15 December 1997 to the European Parliament following the own-initiative inquiry into public access to documents (616/PUBAC/F/IJH):** This report followed on from an inquiry by the Ombudsman into the failure of certain institutions to introduce clear rules relating to public access to documents. (Access to information in various forms is a recurring theme of the special reports). As a result of the Ombudsman's initiative or co-incidental with it, 13 out of the 14 Community institutions adopted rules relating to access to documents. The Ombudsman welcomed the progress that was made and, as will be seen, revisited the issue in subsequent reports.
- **Special report made on 18 October 1999 to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures:** This concluded with a requirement by the Ombudsman that candidates in selection procedures should be given copies of their own marked scripts.
- **Special report made on 11 April 2000 to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV):** The Ombudsman's own-initiative inquiry was launched in 1998, following a resolution of the European Parliament that all institutions should be guided by a common and binding Code of Good Administrative Behaviour. Whilst all institutions professed themselves in support of the principle, none - including the Parliament itself - had such a code. The Commission's proposal at the time of the special report was in draft form and was for guidance only and not binding. The Ombudsman recommended that the Parliament should take an initiative under Article 191 EC Treaty to propose a binding regulation on all institutions.

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[1] The special reports referred to in this chapter are available on the European Ombudsman's website at:
http://www.euro-ombudsman.eu.int/special/en/default.htm

- **Special report made on 23 November 2000 to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH:** This is a further report dealing with access to information, in particular the right to know names of outside participants at meetings of Commission officials. The particular circumstances in this case hinged on the fundamental right to privacy, claimed by certain participants at the meeting. In the Ombudsman's opinion, there was no fundamental right to privacy to attend meetings with Commission officials. The Commission is, after all, a public body.
- **Special report made on 15 November 2001 to the European Parliament following the draft recommendation to the European Commission in complaint 242/2000/GG:** This report dealt with a complaint by a national expert seconded to the Commission, who turned to the Ombudsman because she was barred from working part-time. She claimed that the Commission was therefore discriminating against women applicants. The Ombudsman recommended that the Parliament should adopt a resolution blocking the Commission's self-imposed rule of not employing seconded national experts in a part-time capacity. He saw no good reason to delay this because of the more general reform of the institution's employment practices.
- **Special report made on 30 November 2001 to the European Parliament following the draft recommendations to the Council of the European Union in complaint 917/2000/GG:** This followed a complaint by Statewatch - a UK-based non-governmental organisation - which objected that decisions by committees of the Council often did not refer to documents that were relied upon in arriving at their conclusions, nor were all documents consulted listed. The Ombudsman advised the Parliament to adopt his recommendation as a resolution. The recommendation laid down that all documents requested in this case should be provided and that a register of documents held should be made available to the public.
- **Special report made on 5 December 2002 to the European Parliament following the draft recommendation to the European Parliament in complaint 341/2001/(BB)IJH:** This followed a complaint made against the Parliament by a candidate who was refused access to the names and marks of successful candidates in an open competition. The Ombudsman was of the opinion that

the names of candidates in open competitions should be made available and invited the Parliament to adopt this recommendation as a resolution.

- **Special report made on 12 December 2002 to the European Parliament following the draft recommendation to the Council of the European Union in complaint 1542/2000/(PB)SM:** The complainant, a research student, had been denied access to certain documents on the basis that they were legal opinions. The Ombudsman took the view that there should not be an automatic exclusion of all legal opinions. There needed to be a demonstrable case that disclosure would harm the Council's decision-making process. The Council also challenged the Ombudsman's right to investigate such cases. The Ombudsman recommended to the Parliament that Council can only refuse to disclose legal opinions in certain cases and that there was no right for a blanket refusal.
- **Special report made on 20 December 2004 to the European Parliament following the draft recommendation to the European Commission in own-initiative inquiry OI/2/2003/GG:** Although an own-initiative inquiry had been carried out in this case, the report was prompted by a complaint. This came from the press officer of the Commission's delegation in Islamabad, who alleged discrimination in the form of the grading of his position. The Ombudsman concluded that the Commission needed to reconsider its rules concerning the classification of posts of press officers in its delegations in third countries, in general, and the classification of the post of the complainant, in particular. He recommended that Parliament adopt a resolution to this effect.

4 Parliament's Reaction to Special Reports

It has been the practice of the Petitions Committee to consider all special reports presented to the Parliament by the Ombudsman and to refer to any special reports in its annual report on the work of the Ombudsman.

For the most part, these annual reports have noticed with satisfaction the moves and promises by institutions, normally the Commission, to take on board the recommendations made by the Ombudsman. For instance Astrid Thors, in her report on the special

report on the complaints raised by *Statewatch* [2], noticed with satisfaction the moves made by the Commission to increase transparency.

Similarly Jean Lambert, in her report of October 2002 [3], welcomed the proposals made by the Commission to eliminate discriminatory aspects of its employment practices.

However the same rapporteur, Ms Lambert, was less sanguine in the conclusions following the special report in the aforementioned case 713/98/IJH, dealing with access to information regarding attendees at meetings convened by the Commission.

For the most part, the Ombudsman's special reports deal with principles to which the European institutions are happy to pay lip service, e.g., transparency, non-discrimination, good administration.

The continued failure of all institutions to have a common and binding Code of Good Administrative Behaviour demonstrates, however, that the procedure of submitting special reports is not a guarantee of success.

One must never underestimate the ability of bureaucracies to procrastinate and obfuscate. In this respect, the bureaucracies of all the EU institutions, including that of the European Parliament, have learned well from their national counterparts.

Since a special report is the ultimate sanction of the Ombudsman and the ability to allow a report to "gather dust" is the best device for ignoring its conclusions, the European Parliament would do well to introduce a mechanism that gives more force to its resolutions following its consideration of a special report.

Rather than expressing a plea or a pious hope that a recalcitrant institution might mend its way by some date in the future, the Parliament would do well to consider establishing deadlines for compliance.

Any failure to respect the required deadline should then result in an automatic budgetary resolution to deny funds to the institution or head of institution at fault, i.e., stop the Commissioner's or Secretary General's salary. That would surely concentrate the mind of officials and give teeth to future special reports.

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[2] Report on the Special Report from the European Ombudsman to the European Parliament in complaint 917/2000/GG (A5-0363/2002).

[3] Report on the Special Report from the European Ombudsman to the European Parliament in complaint 242/2000/GG (A5-0355/2002).

Chapter 12

Holding the Administration Accountable in Respect of its Discretionary Powers: the Roles and Approaches of the Court, the Parliament and the European Ombudsman

Gregorio Garzón Clariana [1]

1 Introduction

The Court, the European Parliament and the European Ombudsman already play different roles towards the administration of the Community institutions and bodies ("the administration") and each has its own delimited powers within the system. By inserting Articles 138 C to 138 E [2] into the EEC Treaty, the Maastricht Treaty acknowledged existing functions for Parliament, such as the right of petition and the possibility to exercise investigating powers by creating a temporary Committee of Inquiry. But, perhaps even more importantly, the Treaty created a new player with a new perspective: the European Ombudsman. To fully grasp the various roles and approaches that these three players adopted and the influence they have acquired as regards the role and performance of the administration, a combined approach will be taken. Each one of the three bodies will be analysed separately, followed by a comparison highlighting the main differences between them. Furthermore, not only will the wording of the legal instruments be outlined, but attention will also be paid to their actual position as reflected in their practice. Due to its limited scope, the chapter does not attempt to provide a complete account but focuses only on crucial features and distinctions between the three bodies.

[1] The author expresses his thanks to Marta Windisch for the contribution she provided in the context of the draft of this article.

[2] Now Articles 193 to 195 EC.

2 The Role and the Approach of the European Ombudsman

2.1 In General

The first European Ombudsman described part of his mission in his first Annual Report to the European Parliament as being "...to enhance relations between the Community institutions and European citizens" [3].

By virtue of Article 195 (1), the Treaty on the establishment of the European Communities empowers the Ombudsman to *receive complaints* from any citizen of the Union [4] or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and Court of First Instance acting in their judicial roles [5].

With regard to the wording of Article 195 (1) EC [6], three main items need to be stressed at this point:

Firstly, the competence of the European Ombudsman is limited exclusively to the activity of Community institutions and bodies [7]. He may even conduct inquiries on possible maladministration in the European Parliament [8]. Any complaint against an activity of a Member State institution or an international organisation is inadmissible. Activities of the Community courts fall under the remit of the

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[3] The European Ombudsman's *Annual Report* for 1995, Part I.3.3.

[4] The right to apply to the Ombudsman in any of the official languages and the right to receive an answer in the same language are guaranteed to every citizen of the Union under Article 21 EC.

[5] Comparable provisions concerning the European Ombudsman have also been included in the Treaty establishing a Constitution for Europe, which was signed in Rome on 29 October 2004, and which at the time of writing is undergoing a ratification process in the Member States. See Articles I-10, I-49, II-103, III-128 and Article III-335 thereof.

[6] On the basis of Article 41 of the Treaty on European Union, the European Ombudsman's powers are extended to cover matters of police and judicial cooperation in criminal matters (third pillar).

[7] The Treaty establishing a Constitution for Europe explicitly includes agencies and offices under the scope of bodies falling within the Ombudsman's mandate.

[8] See, for example, the Ombudsman's *Annual Report* for 2004, where the Ombudsman reported his inquiries, *inter alia*, into the Parliament's rules on traineeships, into the implementation of the rules on smoking, and into unjustified termination of translation contracts.

Ombudsman's powers only if these fall outside of the scope of their judicial roles.

Secondly, neither the EC Treaty nor the Statute of the European Ombudsman [9] provides a definition of the term "maladministration", thus leaving the exact scope of the Ombudsman's powers rather unclear. It was the Ombudsman himself who attempted to delimit his powers by attributing meaning to this term. Already in his Annual Report for 1995, he described maladministration as a situation in which a Community institution or body fails to act in accordance with the Treaties or with the Community acts which are binding upon it, or when it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance. Additionally, he provided a non-exhaustive list of examples of maladministration, including negligence, unfairness, abuse of power, etc. He later provided a definition of the term, which reads: "...[maladministration] occurs when a public body fails to act in accordance with a rule or principle which is binding upon it" [10].

Finally, in order to fall within the scope of the powers of the European Ombudsman, the complaint has to be lodged by a person authorised to do so under Article 195 (1) EC. At this stage, it is worth noting that the Statute of the European Ombudsman provides further admissibility criteria, for example the requirement to submit the complaint within two years of the date on which the underlying facts came to the attention of the complainant [11].

Despite the fact that the Ombudsman is empowered to make inquiries into the work of the administration and to review the acts thereof, there are crucial distinctions between the role of the Ombudsman and the role of the Community courts in holding the administration accountable for its activities. These differences and the actual relationship between the Community courts and the European Ombudsman will be outlined in the following paragraphs.

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[9] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (*Official Journal* 1994 L 113, p. 15, as amended by Decision of the European Parliament of 14 March 2002, *Official Journal* 2002 L 93, p. 13), adopted on the basis of Article 195 (4) of the EC Treaty. Article 14 of this decision provides that the Ombudsman shall adopt the implementing provisions for the decision.

[10] See the Ombudsman's *Annual Report* for 1997, p. 23.

[11] See Articles 1.3, 2.3, 2.4 and 2.8 of the Ombudsman's Statute.

A first distinction lies in the fact that the European Ombudsman is empowered directly by the Treaty [12] to conduct *own-initiative inquiries*, whereas the Community courts can only open proceedings at the request of a party or tribunal empowered to initiate these [13].

The first Ombudsman started to conduct own-initiative inquiries soon after his appointment, shaping the role of the institution and contributing to the present strength of the office [14]. On the other hand, he took care to use this power in a balanced way, gaining respect for his office by the Community institutions while avoiding the dangers of devaluing his position, which recourse to too much criticism could bring about. The European Ombudsman thus limits himself to conducting only a few own-initiative inquiries a year, especially in cases where, based on the complaints he receives from the public, he perceives the existence of a general problem [15].

To ensure that the European Ombudsman is able to exercise his powers fully and effectively, Article 3 of the Statute of the Ombudsman imposes an obligation on the Community institutions and bodies to supply the Ombudsman with any information he has requested and to give him access to the files concerned, unless there are duly substantiated grounds of secrecy [16]. The obligation to provide useful information is also extended to the Member States'

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[12] Article 195(1) EC.

[13] See Article 226 and following Articles of the EC Treaty. See also Article 21 and following Articles of the Statute of the Court of Justice.

[14] Already in the *Annual Report* for 1997, he made use of own-initiative inquiries, including an inquiry into the procedures used by the institutions for the recruitment of their staff, to promote transparency, to inquire into the procedures used by the Commission in dealing with complaints from the citizens about infringements of Community law by Member States, as well as into complaints concerning public access to documents.

[15] In his *Annual Report* for 2004, the Ombudsman divided his own-initiative inquiries into two groups: the investigation of a possible case of maladministration submitted by a non-authorised person and an inquiry into a systemic problem in the institutions. With regard to the latter, inquiries concerning the operational weaknesses in the administration of the European Schools and the internal complaints procedure for seconded national experts were carried out by the Ombudsman in 2004.

[16] The European Ombudsman requested the European Parliament to broaden his access to documents and on 6 September 2001, the European Parliament adopted a resolution seeking an amendment of Article 3 of the Statute. Three main amendments were proposed:
- the possibility of refusing to communicate a dossier to the Ombudsman on "duly substantiated grounds of secrecy" should be removed and the Ombudsman should be allowed to "consult and take copies of any document" while imposing a duty on the Ombudsman not to divulge content of classified documents,

authorities. However, the Ombudsman does not have the power to coerce such assistance directly but in case of refusal he informs the European Parliament, which makes "appropriate representations" [17].

With regard to witness testimony, the Statute of the Ombudsman only obliges officials and other servants of the Community institutions to testify at the request of the Ombudsman, stipulating that "...they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy" [18]. However, unlike the position in court proceedings, they do not swear an oath. On the other hand, the Court may request an expert opinion from any individual or body it chooses, it can hear witnesses and has the power of imposing pecuniary penalties on defaulting witnesses [19].

Another distinction concerns the scope of the respective powers of the Ombudsman and the judicature, after finding a deficiency within the activities of the administration. In this respect it has to be stressed that, unlike the Community courts, whose judgements are enforceable directly on the basis of the Treaty [20], the European Ombudsman cannot impose obligations. His decisions are not legally binding and cannot be enforced. This may lead to a friendly solution [21] of the matter with the institution in question. Otherwise, the European Ombudsman can only inform the European Parliament and its com-

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- the requirement for Community institutions or bodies to ask for the "prior agreement" of the Member State for giving the Ombudsman access to a classified document originating in that State should be replaced by a requirement only to "inform the Member State concerned",
- as regards testimonies, the requirement for the officials to "speak on behalf of and in accordance with instructions from their administration and continue to be bound by their duty of professional secrecy" should be replaced by a requirement to "give complete and truthful information".

The resolution was forwarded to the Council and Commission and published in the *Official Journal* of the European Communities on 21 March 2002 (C 72 E, p. 336). The adoption of the amendments is still pending.

17 Article 3.4 of the Ombudsman's Statute.

18 Article 3.2 of the Ombudsman's Statute.

19 Articles 25, 26 and 27 of the Statute of the Court of Justice.

20 Articles 244 and 224 EC.

21 See Article 6 of the Decision of the European Ombudsman adopting implementing provisions adopted on 8 July 2002 and amended by decision of the Ombudsman of 5 April 2004.

mittees [22], make critical remarks [23], or issue recommendations [24]. His annual report is published in all the official languages. To improve the level of his contact with the public at large, the Ombudsman set up a website. As a result, the role that the European Ombudsman actually plays with regard to correcting instances of maladministration very much depends on his own personality and authority, the quality and credibility of his reports and the efficiency of his staff. This fact determines, on the one hand, the readiness of the institutions to change their practices on the basis of an inquiry, and on the other hand, the acceptance of his powers by the general public [25] and the extent to which they address their complaints to him - the two being very closely inter-linked.

Article 195 EC further stipulates that the Ombudsman cannot conduct inquiries, if the alleged facts are or have been the subject of legal proceedings [26]. For this reason, the Ombudsman declared as inadmissible a complaint which involved the same parties and the same facts as a case already brought before the Court of First Instance [27]. On the other hand, a previous decision of the Ombudsman does not preclude court proceedings in an identical matter.

Furthermore, as regards the relationship between the Ombudsman and the Courts, it is important to briefly touch upon the judgement of the Court of Justice in the *Lamberts* case [28]. On appeal, the Court

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[22] According to Article 195 (1) EC, the Ombudsman forwards a report to the European Parliament and the institution concerned in each case of maladministration, after giving the institution concerned three months to inform him of its views. He also submits to Parliament an annual report on the outcome of his inquiries. Rule 195 of Parliament's Rules of Procedure provides that the committee responsible shall draw up a report on each annual report of the Ombudsman. Furthermore, Rule 195 (3) states that the Ombudsman may also inform the committee responsible at its request or be heard by it on his own initiative. See also the Decision of the Ombudsman adopting implementing provisions.

[23] See Article 7 of the Decision of the European Ombudsman adopting implementing provisions.

[24] Article 8 of the Decision of the European Ombudsman adopting implementing provisions.

[25] In the *Annual Report* for 2004, the Ombudsman stated that he had received 3 726 complaints that year.

[26] Article 195 (1) EC, Articles 1.3.and 2.7. of the Statute of the Ombudsman.

[27] Complaint 216/8.11.95/MH/A, the European Ombudsman's *Annual Report* for 1996, p. 15.

[28] Case C-234/02, *European Ombudsman v Frank Lamberts*, judgement of 23 March 2004 (not yet reported).

confirmed the conclusions of the Court of First Instance and declared admissible in principle an action for damages caused by an alleged mishandling of a complaint by the Ombudsman. The Court thus affirmed that, in exceptional circumstances, a citizen might be able to demonstrate that the Ombudsman has committed a sufficiently serious breach of Community law as to cause damage to the citizen concerned [29]. The Court also held that judicial review of the activities of the Ombudsman is not precluded by the review powers available to the Parliament in this regard [30], and does not call into question the independence of the Ombudsman [31]. On the other hand, the Court of First Instance refused to rule on an alleged failure to act by the Ombudsman, emphasising that the Ombudsman is not an institution within the meaning of Article 232 EC (former Article 175 EEC) [32].

To conclude on the outline of distinctions between the European Ombudsman and the Community Courts, it is worth highlighting that despite the creation of a set of "soft-law rules" [33], especially in the context of principles of good administrative behaviour, the European Ombudsman is not positioned outside the scope of Community law, but instead is bound by it as interpreted by the Community Courts.

Some cases could give the impression that the Ombudsman had attempted to give his own interpretation of Community law or to create new binding rules. Thus, in case 1542/2000/(PB)SM concerning the access of the public to documents and specifically to the legal opinions of the legal services, the Ombudsman considered that the public should normally have access to documents relating to the Council's actions in its legislative capacity and presented a special

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[29] *Ibid.*, paragraph 52.

[30] *Ibid.*, paragraph 43.

[31] *Ibid.*, paragraph 48.

[32] Order of the Court of First Instance of 22 May 2000, *Associazione delle cantine sociali venete v European Ombudsman and European Parliament* (Case T-103/99, *European Court Reports* 2000, p. II-4165).

[33] See for example P. G. Bonnor, "The European Ombudsman: a novel source of soft law in the European Union", *European Law Review*, February 2000, pp. 39-56.

report to Parliament [34]. This was not in line with the established case law of the Community Courts. In case 2371/2003/GG, the Ombudsman first made a draft recommendation to the Council but later closed the case with a finding of no maladministration, thus respecting the judgement of the Court of First Instance of 23 November 2004 (*Turco* case, T-84/03) as regards the right of the Council to refuse access to opinions of its legal service [35]. In any case, the review of the legality of Community acts remains with the Courts [36]. In requesting the right to intervene before the Courts, as already foreseen for the European Data Protection Supervisor by Article 47 of Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [37], the Ombudsman has confirmed that he wants to cooperate with the Courts rather than to compete with them.

As noted above, the actual role that the European Ombudsman plays in the overall functioning of the Community organism, especially *vis-à-vis* the institutions, depends on the interpretation of, and the use given to, his powers as delimited in the EC Treaty and the Ombudsman's Statute. The first European Ombudsman took a very active role and frequently used a teleological approach in interpret-

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[34] On 10 June 2003, the Ombudsman informed the Committee on Petitions of the European Parliament that, subsequent to the special report, proceedings had been brought in the Court of First Instance (Case T-84/03, *Maurizio Turco v Council*) which raise the same issue of legal principle as the special report: that is to say, the correct interpretation of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (*Official Journal* 2001 L 145, p. 43) as regards legal service opinions on draft legislation. In light of this information, the Committee on Petitions decided not to make a report on the Ombudsman's special report. The Ombudsman therefore closed the file on the complaint.

[35] See the European Ombudsman's *Annual Report* for 2004, section 3.1.2: http://www.euro-ombudsman.eu.int/report04/pdf/en/rap04_en.pdf

[36] By analogy, one could quote the Court's argument on the distinction between the power of review of the Court of Auditors and the power of review exercised by the Court of Justice: "(...). The Court of Auditors only has power to examine the legality of expenditure with reference to the budget and the secondary provision on which the expenditure is based (commonly called "the basic measure"). Its review is thus in any event distinct from that exercised by the Court of Justice, which concerns the legality of the basic measure" (Case 294/83, *Parti écologiste "Les Verts" v European Parliament, European Court Reports* p. 1339, paragraph 28).

[37] *Official Journal* 2001 L 8, p. 1.

ing the rules which regulate his function and his powers, in order to "...underline the commitment of the Union to open, democratic and accountable forms of administration" [38]. In order to defend citizens' rights effectively, he also referred to "the right to good administration" in the Charter of Fundamental Rights which was solemnly proclaimed by the institutions in 2000 but has not yet become part of the binding primary law - even if the European Parliament, at least, feels itself to be already bound by the Charter. Moreover, he also stressed the importance of adopting a binding code of conduct concerning good administrative behaviour [39]. Recently, the current European Ombudsman has touched upon the important issue of how public confidence in his work may be affected if an institution or body provides inaccurate information in response to his inquiries. In this context, the Ombudsman has sent a special report to the European Parliament calling upon the European Anti-Fraud Office (OLAF) to acknowledge that it made incorrect and misleading statements in its submissions to the Ombudsman in the contexts of the latter's inquiry and proposed that the Parliament adopt a resolution on the matter [40].

2.2 The Approach of the Ombudsman Where the Administration Enjoys a Margin of Discretion

In one of his decisions, the Ombudsman pointed out that,

"...in implementing its work programmes, the Commission necessarily enjoys a degree of discretion, for the exercise of which it is accountable to the European Parliament through the budgetary procedure. Furthermore, the Ombudsman's role in dealing with allegations of maladministration is to act as a guardian of the rule of law, of good administration and of fundamental and human rights. In the present case, the relevant question for the Ombudsman is whether

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[38] The European Ombudsman's *Annual Report* for 1995, p.21.

[39] The European Ombudsman presented a special report to the European Parliament, on which a resolution was adopted calling on the Commission to draft a proposal for a regulation taking into account the amendments proposed by the Parliament (European Parliament resolution on the European Ombudsman's special report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (C5-0438/2000 - 2000/2212 (COS)), *Official Journal* 2002 072 E, p. 331).

[40] See http://www.euro-ombudsman.eu.int/special/pdf/en/042485.pdf

the Commission has acted in accordance with the rules and principles that are binding on it, including the principles of good administration set out in the European Code of Good Administrative Behaviour" [41].

Hence, the Ombudsman respects the discretionary powers of the Commission to decide on the merits, and he rather seems to turn his attention towards procedural deficiencies.

With regard to infringement procedures under Article 226 EC, where the Commission enjoys a broad margin of appreciation as to whether to initiate proceedings against a Member State, the Ombudsman has made a consistent effort to increase transparency and draw up a code of procedure for the treatment of complaints [42]. Influenced by his initiatives, the Commission adopted a communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [43].

As the Ombudsman already stated at the FIDE Congress in Stockholm in 1998, it is generally acknowledged that the Commission enjoys a broad discretionary power as to whether or not to bring an infringement action before the Court of Justice. It was suggested, however, that the Commission should provide reasons for its decision not to bring proceedings. Another point of view was that there could be valid political reasons for not bringing proceedings, but that sometimes it could be too embarrassing to reveal those reasons publicly [44].

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[41] Decision of the European Ombudsman on complaint 1096/2004/(AJ)TN against the European Commission.

[42] The position of the complainants is generally very weak. The Commission stressed in its 1999 Annual Report on its monitoring of the application of Community law that citizens are not parties to the procedure and that the procedure cannot in any case change their personal situation. On the other hand, complaints from citizen were recognised as a valuable source of information for the Commission to identify violations of the Community legal order. See Seventeenth Annual Report on monitoring the application of Community law (1999) COM/2000/0092 final as well as the judgement of the Court of First Instance in case T-191/99, *Petrie v Commission, European Court Reports* 2001, p. II-3677. An outline of how the European Ombudsman has dealt with complaints against the "Guardian of the Treaties" in the context of the Article 226 procedure is also provided in the recent *Annual Report* for 2004, section 2.8.2.

[43] Document COM(2002)141 final, *Official Journal* 2002 C 244, p. 2.

[44] "The Citizen, the Administration and Community law", report to the final plenary session of the 1998 FIDE Congress Stockholm, Sweden, 6 June 1998 see: http://www.euro-ombudsman.eu.int/speeches/en/fide1.htm

In his speech at the European Law Conference in Stockholm (Session 8, 12 June 2001), the Ombudsman noted that he deals with complaints alleging maladministration in the exercise of the Commission's discretion in the infringement procedure according to three general principles:

First, the person should have the right to submit observations before a decision affecting his or her interests is taken. Second, the institutions must give reasons for its course of action. Third, the institution exercising discretionary power must remain within the limits of its legal authority. Furthermore, he stressed that "...the Ombudsman does not question the merits of a discretionary decision when the institution or body concerned has remained within the limits of its legal authority" [45].

3 The Role and the Approach of the European Parliament

Even though the position of the European Parliament is weaker than that of many national parliaments [46] and is not yet fully on an equal footing with the Council of the European Union, the European Parliament has the power of supervision *vis-à-vis* the administration [47]. This power is exercised through several means.

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[45] See: http://www.euro-ombudsman.eu.int/speeches/en/2001-06-12.htm

[46] Just to mention a few differences: unlike many national parliaments, it is not the sole and supreme law-maker, but shares the law-making powers with the Council; it does not have full powers in all spheres of the three pillar structure of the European Union; it has the right of legislative initiative only with regard to its elections and the Statute of the European Ombudsman; it cannot fully control the law implementation which is delegated to the administration and it cannot have individual Commissioners removed from office.

[47] The position of the European Parliament in the comitology procedure has been strengthened but could still be improved, especially in comparison to national parliaments and their power towards administration in implementing the laws. The Commission has to inform the European Parliament about the work of the committees and send it all drafts implementing basic instruments adopted under the co-decision procedure. The European Parliament can exercise its right of scrutiny according to Article 8 of Decision 1999/468/EC and adopt a resolution in the plenary, if it considers that the draft measure exceeds the implementing powers enshrined in the basic instrument. An amendment of Decision 1999/468/EC has now been tabled by the Commission (COM (2002) 719) and the Council's final agreement is pending.

Questions [48] can be posed by the European Parliament or by its Members [49] on the activities of the institutions and their field of responsibility and have to be answered by the administration. They can take oral or written form: written questions are published in the *Official Journal* of the European Union together with their answers. If a written question cannot be answered within the time limit set, it may be placed on the agenda of the meeting of the committee responsible at the request of the author [50]. The questions thus serve both the aim of gaining information for the European Parliament on the activities of the administration as well as the aim of informing the public on eventual shortcomings.

Next, Article 193 EC provides for the setting up of *Committees of Inquiry* [51] with the functions "...to investigate, without prejudice to the powers conferred by this Treaty on other institutions or bodies, alleged contraventions or maladministration in the implementation of Community law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings". Unlike the Ombudsman, a Committee of Inquiry has a temporary character [52], and is created for a particular, expressly determined, purpose [53]. Another difference is the scope of the inquiry, as a Committee of Inquiry has the authority to look into any contravention, not only maladministration, within the entire ambit of the implementation of Community law [54], including, for instance, its

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[48] Article 197 EC, Article 21 and Article 39 EU, Rules 108 to 111 and Annex II of the European Parliament Rules of Procedure. See also Article 110 of the Euratom Treaty and Article 23 of the now expired Treaty on the European Coal and Steel Community.

[49] See Order of the Court of First Instance of 17 January 2002 in Case T-236/00, *Stauner e. a. v European Parliament, European Court Reports* 2002, p. II-135, paragraphs 60-62.

[50] Rule 110 (3) of the Rules of Procedure.

[51] Before the Maastricht Treaty entered into force, Committees of Inquiry were already regulated by the Rules of Procedure of the European Parliament.

[52] According to Article 193 EC, it shall cease to exist on the submission of its report.

[53] The decision to set up a temporary Committee of Inquiry, specifying in particular its purpose and the time limit for submission of its report, shall be published in the *Official Journal* of the European Union.

[54] A Committee is empowered to conduct inquiries within the scope of Community law, not on matters belonging to the second or third pillar of European Union law.

implementation by Member States or their regional governments [55]. Like the Ombudsman, a Committee of Inquiry may not investigate matters at issue before a court, including national courts [56], but it can do so once the legal proceedings have been completed. The authorities and bodies concerned are obliged to provide the Committee with all necessary documents, except in instances of secrecy or for reasons of security, and it can request any person to give evidence before it [57].

Article 193 EC provides that the Committee of Inquiry is constituted to investigate "...without prejudice to the powers conferred by the Treaty on other institutions or bodies". The setting up and the work of a Committee of Inquiry is therefore conducted without prejudice to the activities of other institutions or bodies, including the European Ombudsman, with regard to identical subject matter.

The inquiry of the Committee does not generally result in the imposition of any sanction. Instead it mainly serves the purpose of informing the Parliament, and potentially also the public, of eventual deficiencies in the application of Community law. The negative outcome of an inquiry, however, can be the basis for other procedures, including recourse to the Court of Justice, for example under Article 226 EC.

In addition to the powers which enable the European Parliament to gain information on the activities of the administration, there are several means by which it can sanction shortcomings. Besides being empowered to bring a case against the Council or the Commission to the Community courts, the Parliament has strong prerogatives with regard to the adoption of the general budget. This power serves as a mechanism to exercise pressure on the administration.

Furthermore, the European Parliament not only approves the composition of the Commission at its appointment, as it demonstrated in 2004 as regards the composition of the Barroso Commission, but it is

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[55] According to Rule 176 of the Rules of Procedure, the Committee can be set up to investigate alleged contraventions of Community law or alleged maladministration in the application of Community law, which would appear to be the act of an institution or body of the European Communities, of a public administrative body of a Member State, or of persons empowered by Community law to implement that law.

[56] Article 2(3) of the Decision of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry (95/167/EC, Euratom, ECSC, *Official Journal* 1995 L 113, p. 2).

[57] *Ibid.*, Article 3 (4).

also empowered to pass a *motion of censure* and have the whole Commission resign as a body [58]. In the history of the European Communities, no motion of censure has been adopted and even the Santer Commission resigned on its own initiative due to the results of an independent experts' inquiry.

As regards the European Parliament's direct link to the Union's citizens and residents, *the right to petition the Parliament* [59] has been firmly anchored in the EC Treaty [60]. It is the corollary of the obligation on the side of the Parliament to deal with the petition, and forms an indirect means by which Parliament may acquire valuable information for the exercise of its supervisory functions. In order to be admissible, a petition has to concern a matter which comes within the Community's field of activity but it does not necessarily need to be directed only against Community institutions. It can also touch upon other levels of governance. Furthermore, the matter in question has to affect the petitioner directly. However, the petition can concern matters other than exclusively legislative or administrative problems. When dealing with an admissible petition, the Committee on Petitions may decide to draw up a report or otherwise express its opinion and, when necessary, submit motions for resolution to the European Parliament. Furthermore, the Committee submits a regular report to the European Parliament on its work and on the measures taken by other institutions in respect of petitions [61].

With regard to the relation between the Committee on Petitions and the European Ombudsman, the Committee is generally responsible for the Parliament's relations with the Ombudsman and it drafts the report on the Ombudsman's annual report. As far as the delimitation of responsibility between these two bodies is concerned, agreement was reached soon after the creation of the office of the Ombudsman. Once the matter is pending before the Committee, the Ombudsman refrains from dealing with it, unless the petitioner gives his consent to referring the matter to the Ombudsman. On the other hand, with the consent of the complainant, the Ombudsman may

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[58] Article 214 and Article 201 EC.

[59] The petition can be filed by a citizen of the Union or by any natural or legal person residing or having its registered office in a Member State. See also Article 44 of the Charter of Fundamental Rights.

[60] Article 21 together with Article 194 EC.

[61] See Rules 191 to 193 of Parliament's Rules of Procedure.

transfer a complaint to the European Parliament to be dealt with as a petition [62]. A matter already decided by the Committee could be re-examined by the Ombudsman only if there were new facts justifying such recourse. Moreover, the decisions taken by the Committee itself are not subject to the Ombudsman's review [63]. As noted in the European Ombudsman's Annual Report for 2004, their mutual relationship was further enhanced by the Ombudsman's support of the idea, contained in a recommendation in the De Rossa report [64], of the Committee having access to the European network of ombudsmen [65].

4 The Community Courts

The following paragraphs outline several procedures by means of which the Court of Justice and the Court of First Instance of the European Communities (and also the future European Union Civil Service Tribunal [66]) can make the administration accountable.

The *judicial review of the legality* of binding acts adopted by the institutions can be initiated by a direct action, in accordance with Article 230 EC [67], on the basis of Article 241 EC during a proceeding initiated for a different reason, or by means of an indirect action within the preliminary ruling procedure under Article 234 EC. The case law [68] clearly reflects the fact that where the administration enjoys a wide margin of appreciation, especially with regard to market management and emergency measures, the intensity of review is rather low and the Court will be more reluctant to annul the measure in ques-

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[62] Article 2.4 of the Decision of the Ombudsman on implementing provisions, adopted on 8 July 2002 and amended by decision of the Ombudsman of 5 April 2004.

[63] The European Ombudsman's *Annual Report* for 1995.

[64] Document A6-0030/2004.

[65] European Parliament resolution of 18 November 2004 on the annual report on the activities of the European Ombudsman for the year 2003, point 27 (A6-0030/2004).

[66] Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, *Official Journal* 2004 L 333, p. 7.

[67] Article 230 EC explicitly lays down the grounds for annulment, which are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule relating to its application and misuse of power.

[68] See for example the judgements in the *Deuka* case (Case 78/74, *European Court Reports* 1975, p. 421), the *Biovilac* case (Case 59/83, *European Court Reports* 1984, p. 4057), and the *Antillean Rice Mills* case (Case C-390/95P, *European Court Reports* 1999, p. I-769, paragraph 48).

tion. In this context, in a case regarding state aids, the Court of First Instance stated that:

"...discretion on the part of the Commission involves the consideration and appraisal of complex facts and circumstance. Since it is not for the Court to substitute its own assessment of the facts, particularly the economic circumstances, for that of the author of the decision, the Court must, in such a context, confine its review to determining whether the Commission complied with the *rules governing procedure* and *the provision of the statement of reasons,* whether the *facts are accurately stated* and whether there has been any *manifest error of assessment* or *misuse of powers ...*" [69](emphasis added).

The approach described above is also followed in cases concerning the *non-contractual liability* of the Community according to Article 288 EC. With regard to legislative [70] "measures of economic policy", where the institution has a wide scope of discretion, a sufficiently serious breach of Community law (where the institution manifestly and gravely disregards the limits of discretion) is a necessary requirement for making the Community liable. Where the institution in question has only very limited, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach [71].

Moreover, in the context of the *infringement procedures* under Article 226 EC, the Commission, as was already mentioned, has discretion to start proceedings and this margin of appreciation is recognised and respected by the Court. In its judgement of 21 June 1988, it noted that "...in the context of the balance of powers between the institu-

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[69] Judgement of the Court of First Instance of 14 October 2004 in Case T-137/02, *Pollmeier Malchow v Commission* (not yet reported), paragraph 52, At this stage it can be noted that the Court of First Instance regards it as settled case law that the obligation to provide a statement of reasons, which is laid down in Article 253 EC, is an essential procedural requirement. It is distinct from the question of whether the reasons given are correct, which goes to the substantive legality of the contested measure. See judgement of the Court of First Instance of 18 November 2004 I Case T-176/01, *Ferriere Nord v Commission* (not yet reported), paragraph 106.

[70] In considering the act to be of a legislative nature, the Court looks into the substance rather than the form and requires an element of discretion on the part of the decision-maker. See the *Antillean Rice Mills* case, footnote 68 above, paragraph 60.

[71] Judgement of the Court of 4 July 2000, *Bergaderm e. a. v Commission* (Case C-352/98P, *European Court Reports* 2000, p. 5291, paragraphs 43 and 44).

tions laid down in the Treaty, it is not for the Court to consider what objectives are pursued in an action brought under Article 169 [72] of the Treaty" [73]. The Court did not review the Commission's motives for bringing the action but it placed a certain limit on the discretion of the Commission as regards the time-frame of the procedure, as it is obliged to respect the Member State's right of defence [74].

With regard to the *proceedings* for the institution's failure to act *(Article 232 EC)*, it has to be noted that the action will be admissible only if there was a legal obligation on the part of the institution to act, not if the institution has discretion to decide whether to take action. However, it can be used in instances when an institution is obliged to act, but has discretion in evaluating the merits when taking a decision [75].

The role of the Community courts, however, goes far beyond individual judicial proceedings. In particular, the Court of Justice is empowered to give interpretations of Community law [76]. The Court of Justice used the power of interpretation to shape Community law and its determinant features, such as direct effect or supremacy. Case law created by Community courts is based on precedents, as the Courts build on their own jurisprudence and, in most instances, rely on their previous line of reasoning in a similar case. Moreover, in the context of a preliminary ruling procedure, the Community courts tend to refer to previous judgements, if the requesting courts pose questions in identical cases without presenting any new factors [77].

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[72] Now Article 226 EC.

[73] Judgement in *Commission v United Kingdom*, (Case 416/85, *European Court Reports* 1988, p. 3127, paragraph 9).

[74] In this respect, both extremely short as well as lengthy proceedings could be deemed unacceptable, if they make it practically impossible for the Member State to defend itself. For more details on the subject see P. Craig and G. de Búrca (2002), *EU Law: Text, Cases and Materials* (third edition), Oxford: Oxford University Press, Chapter 10.

[75] In its judgement of 13 July 1971 in Case 8/71, *Deutscher Komponistenverband*, (*European Court Reports* 1971, p. 705), the Court held that Article 232 EC (former Article 175 EC) refers to a failure to act in the sense of a failure to take a decision or to define a position, and not an adoption of a measure different from that desired or considered necessary by the persons concerned.

[76] According to Article 220 of the EC Treaty, the Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed. Furthermore, within the Article 234 preliminary ruling procedure, Community courts can give interpretations of the Treaty, of the acts of institutions, and of the statutes of bodies established by an act of the Council, where those statutes so provide.

[77] See for example Case 28-30/62, *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie, European Court Reports* 1963, p. 31.

Although the European Ombudsman is viewed as the source of new "soft norms", he cannot contravene the existing written rules or the interpretation given to them by the Community courts.

To assure consistency of jurisprudence, especially with regard to the unity of interpretation of Community law, the Community courts are organised in a hierarchical structure with the Court of Justice at the top, being empowered to review the judgements of the Court of First Instance [78]. Likewise, connected cases can be referred from the Court of First Instance to the Court of Justice. Furthermore, the Council can unanimously create permanent judicial panels as first instance judicial bodies for certain subject matters [79], whose decisions can be reviewed by the Court of First Instance [80]. By contrast, the decisions of the Ombudsman are not subject to appeal.

However, it also has to be noted that a judicial proceeding is not always the most feasible solution and the applicants then tend to seek other forms of redress, especially if they do not have standing [81] or if they deem the court proceedings too costly [82] or lengthy.

5 Conclusion

The brief analysis provided in this article demonstrates that, although the courts, the European Parliament and the European Ombudsman have been assigned different roles and have different tools available, they complement each other in making the administration accountable.

A functioning judiciary is empowered to coerce the administration to correct its mistakes and misapplication of the written rules, while it tries to respect the sphere of political choices that the administration has to make in implementing Community law. The Court of

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[78] See for instance Article 225 (2) of the EC Treaty.

[79] See Articles 220 and 225a EC. See also Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, *Official Journal* 2004 L 333, p. 7.

[80] Article 225a EC.

[81] Especially the Article 230 EC proceedings have turned out to be almost inaccessible for individual applicants.

[82] Among other reasons, the applicant may not have available the financial means to pay the legal assistance, while, according to Article 19 of the Statute of the Court of Justice, applicants other than states or institutions must be represented by a lawyer authorised to practice before a court in a Member State or EEA state.

Justice remains the only institution competent to interpret Community law and to guarantee its uniform application. For individual citizens or legal persons, proceedings before Community courts are not always easily accessible. It is especially in these cases that the Ombudsman provides an inexpensive and flexible solution for individuals who wish to draw attention to the wrongdoings that the administration has caused to them. Nevertheless, the Ombudsman does not and cannot replace the courts. Rather, the two function side by side.

The European Parliament, being the only directly-elected European institution, is empowered to exercise general supervisory functions *vis-à-vis* the administration through several means. For European citizens it also provides another means for highlighting deficiencies in the administration. However, its overall position is not yet as strong as the one of some national parliaments. Nevertheless, it has managed to strengthen its profile and to gain respect in the Community institutional scheme.

Compared to the legal remedies available before the Community courts, a complaint to the Ombudsman represents a softer method, which does not ensure a remedy. The Ombudsman's main task is to turn the attention of the public to the problems and contribute to their solution by means of public pressure, possibly with the help of the European Parliament. Furthermore, the European Ombudsman is empowered directly by the Treaty to conduct own-initiative inquiries. This allows him not only to react to cases of maladministration which happened in the past, but also gives him the possibility to advise the Community institutions as regards their future behaviour.

The Ombudsman's influence thus very much depends, on the one hand, on the quality and credibility of his reports and the efficiency of his staff, and on the other on the personality and authority of the Ombudsman himself - how active he is not only to inquire into individual complaints but also to perceive and highlight general shortcomings in the activities of the administration.

Chapter 13

The European Ombudsman's Resources - the Budget and Related Issues

Juan Manuel Fabra Vallès

1 Introduction

According to Article 195 (formerly 138e) of the Treaty establishing the European Community, the European Parliament shall appoint an Ombudsman empowered to receive complaints from the citizens of the Union, and from any legal person residing or having its registered office in a Member State, concerning instances of maladministration in the activities of Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

To serve this major objective, the European Ombudsman conducts inquiries, establishes instances of maladministration, and refers the matter to the institution concerned, which then has a period of three months in which to inform the Ombudsman of its views. The Ombudsman subsequently forwards a report to the European Parliament and the institution concerned. The person lodging the complaint is informed of the outcome of the inquiry.

Furthermore, and according to his Statute [1], the Ombudsman seeks a solution with the institution or body concerned to eliminate the instance of maladministration and deal with the complaint.

Every year, the Ombudsman submits an annual report to the European Parliament on the outcome of his inquiries.

Article 11 of the Ombudsman's Statute states that to carry out its activities the Ombudsman shall be assisted by a secretariat, the prin-

[1] The European Ombudsman's Statute was adopted by Parliament on 9 March 1994 (*Official Journal* 1994 L 113, p. 15) and amended by the Parliament's decision of 14 March 2002 deleting Articles 12 and 16 (*Official Journal* 2002 L 92, p. 13).

cipal officer of which shall be appointed by the Ombudsman himself. The officials and servants of the Ombudsman's secretariat shall be subject to the rules and regulations applicable to officials and other servants of the European Communities. Their number shall be approved each year as part of the budgetary procedure.

2 The Budgetary Procedure

The procedure to establish the Ombudsman's budget is laid down in the Financial Regulation applicable to the general budget of the European Communities [2].

The Statute of the European Ombudsman provided originally for the Ombudsman's budget to be annexed to the European Parliament's budget, included in section I of the general budget of the European Union. This was the situation from 1995 to 2000.

In December 1999, the Council adopted a Regulation [3] amending the Financial Regulation applicable to the general budget of the European Communities, in which it was decided that the Ombudsman's budget should be independent.

This Regulation stated that the Ombudsman shall, each year before 1 July, draw up an estimate of the institution's revenue and expenditure for the following year. This estimate shall also be sent to the budgetary authority no later than 1 July each year. This principle has been maintained in the current Financial Regulation (Article 31 of Council Regulation 1605/2002).

This means that, as far as the budgetary procedure is concerned, the Ombudsman's budget has been put on an equal footing with the budget of the European institutions, the Economic and Social Committee, the Committee of the Regions and, more recently, the European Data Protection Supervisor.

In practice, the Ombudsman has the same degree of rights and duties in respect of his budgetary procedure and now disposes of a higher level of autonomy and independence to prepare and amend his own budget.

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[2] Title III of Council Regulation (EC, EURATOM) 1605/2002 of 25 June 2002 and its implementing rules, *Official Journal* 2002 L 248, p. 1.

[3] Council Regulation (EC, ECSC, EURATOM) 2673/1999 of 13 December 1999 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, *Official Journal* 1999 L 326, p. 1.

Under the current Financial Regulation, the Commission places a preliminary draft budget before the Council by 1 September each year at the latest and transmits it, at the same time, to the European Parliament.

This preliminary draft budget contains a summary general statement of the expenditure and revenue of the Communities and consolidates the estimates referred to in Article 31 of the Regulation, including, therefore, the part referring to the Ombudsman's budget (Article 33 of Council Regulation 1605/2002).

In support of the preliminary draft budget [4], the following working documents have to be provided [5]:

I) In respect of staff of the institutions:
   a) A statement of the policy for permanent and temporary staff;
   b) For each category of staff, an organisation chart of budgetary posts and persons in post on the date of the presentation of the preliminary draft budget, indicating their distribution by grade and administrative unit;
   c) Where a change in the number of persons in post is proposed, a statement of the reasons justifying such a change;
   d) A list of posts broken down by policy area;
II) A detailed statement of borrowing and lending policy;
III) In respect of subsidies to the bodies referred to in Article 32 of the Financial Regulation, an estimate of revenue and expenditure prefaced by an explanatory memorandum drawn up by the bodies concerned and, for the European Schools, a statement showing revenue and expenditure prefaced by an explanatory memorandum.

Furthermore, the Commission may, on its own initiative or if requested by the other institutions, each in respect of its own section, present to the Council a letter of amendment to the preliminary draft budget on the basis of new information which was not available at the time the preliminary draft was established.

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[4] See Commission document CES (2004) 350.

[5] Commission Regulation (EC, Euratom) 2342/2002 of 23 December 2002, *Official Journal* 2002 L 357, p. 1, laying down detailed rules for the implementation of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

The Council then establishes the draft budget in accordance with the procedure laid down in Article 272 (3) of the EC Treaty and Article 177(3) of the Euratom Treaty. The Council places the draft budget before the European Parliament at the latest by 5 October of the year preceding that of implementation of the budget.

Finally, the President of the European Parliament declares the budget officially adopted in accordance with the procedure provided for in Article 272 (7) of the EC Treaty and Article 177 (7) of the Euratom Treaty.

3 Evolution of the Ombudsman's Resources

To carry out his activities and to deal with an increasing number of complaints, the Ombudsman's budget has evolved in recent years, mainly as a result of increasing the number of staff and related expenditure.

In the first full year of operation - 1996 - the total budget of the Ombudsman's office amounted to EUR 1,200,000. At that time the office was composed of 13 posts. By the year 2005, the budget had risen to EUR 7,312,614 [6] and the office is now composed of 51 posts.

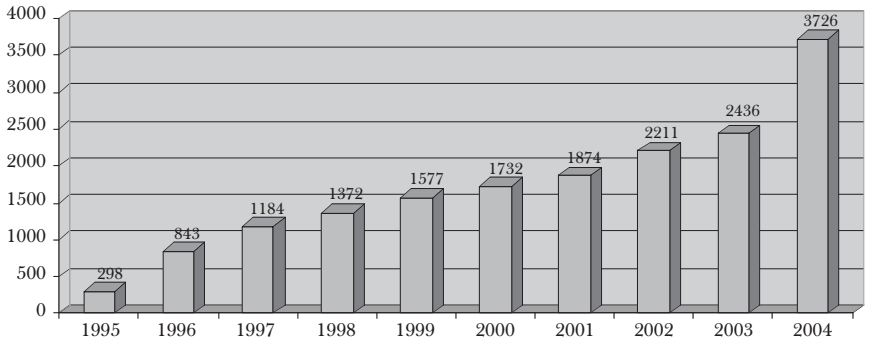
Table 1 - Evolution of the Ombudsman's budget (in EUR)

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Staffing expenditure	889,439	903,800	1,815,819	2,003,178	2,355,953	2,878,797	3,011,390	3,197,181	3,719,727	4,780,000	6,239,614
Operational expenditure	285,561	271,200	764,000	772,000	802,000	824,000	887,926	712,145	715,926	999,968	1,070,000
Special expenditure	25,000	25,000	2,000	2,000	2,000	2,000	3,000	3,000	3,000	3,000	3,000
TOTAL	1,200,000	1,200,000	2,581,819	2,777,178	3,159,953	3,704,797	3,902,316	3,912,326	4,438,653	5,782,968	7,312,614

Over this period, the number of complaints has steadily increased.

[6] The General Budget adopted for 2005.

Graph 1 - Evolution of the number of complaints



4 Structure of the Budget

The budget of the European Ombudsman is divided into three titles. Title 1 covers the staff and makes up almost 90% of the total. It provides for salaries, allowances and other costs related to the staff. Title 2 of the budget covers buildings, equipment and miscellaneous operating expenditure. Title 3 contains a single chapter, from which subscriptions to international ombudsmen organisations are paid.

It is important to mention that, to avoid unnecessary duplication of administrative and technical staff, many of the services needed by the Ombudsman's office are provided by, or through, the European Parliament. These services relate, among others, to provision of offices, translation and interpretation, administrative expenditure, accounting services, printing, security and IT services. Co-operation with the European Parliament is an efficient way for a small office to take advantage of the knowledge and infrastructure of a bigger institution. This has certainly resulted in savings to the EU budget. The services provided by the European Parliament are paid through a liaison account [7].

[7] The co-operation between the European Parliament and the European Ombudsman was initiated by a Framework Agreement dated 22 September 1995, completed by Agreements on Administrative Co-operation and on Budgetary and Financial Co-operation, signed on 12 October 1995. In December 1999, the Ombudsman and the President of the European Parliament signed an agreement renewing the co-operation agreements, with modifications, for the year 2000 and providing for automatic renewal thereafter

5 Human Resources

As mentioned earlier, the greatest part of the Ombudsman's budget, around 90%, is devoted to staff expenditure.

Table 2 - Evolution in the number of staff

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Ombudsman staff	10	13	16	17	23 (1)	24 (2)	26 (3)	27 (4)	31 (5)	38 (6)	51 (7)

(1) All temporary posts - (2) 6 permanent posts - (3) 14 permanent posts - (4) 9 permanent posts - (5) 13 permanent posts - (6) 15 permanent posts - (7) 12 permanent posts

The increase in the number of staff is linked to the increasing number of complaints submitted to the Ombudsman. When discussing the size of the Ombudsman's office, two factors have to be considered:

- The increasing number of policy areas managed by the European institutions and the need to maintain a close relationship with citizens;
- The enlargement of the European Union.

Both factors have been taken into account when preparing the human resources plan for 2005, which shows the sharpest increase in staff in comparison with previous years.

The accession of ten new Member States on 1 May 2004 implies an extension of the Ombudsman's activities to 25 Member States and to more than 450 million people.

Just like the other bodies of the European Union, the Ombudsman's office must be prepared to face this challenge and to serve in the best way possible all citizens and all legal persons residing or having their registered office in a Member State.

Concerning the nature of the posts, there are two elements that have to be dealt with carefully. The first concerns the nature of the posts, that is, temporary versus permanent. Up to now, most of the legal officers - who are responsible for dealing with complaints - are on temporary posts. Permanent posts have been traditionally reserved for administrative posts.

It should be noted that basing the core of the Ombudsman's activity on temporary posts could lead to a loss of knowledge and experience and to a break in the continuity of the work. However, temporary posts allow more flexibility in terms of recruiting staff according to the office's needs and priorities.

The second element is related to the degree of specialised qualifications required for the posts, namely opting for experts specialised in different branches of the Community's administration versus staff able to deal with all kind of complaints, irrespective of the subject matter. It is clear that the main role of the Ombudsman is the fight against maladministration by the EU institutions and bodies. However, EU regulations and directives regulate an increasing number of policy areas, meaning that European legal frameworks and the various administrative procedures are increasingly complex. A balance between staff qualified to deal with complaints irrespective of the area concerned, and experts specialised in those areas attracting a higher number of complaints might be needed (e.g., the area of contracts that was the subject of many decisions adopted by the Ombudsman in 2003).

6 Conclusion

The institution of the Ombudsman of the European Union has its own budget, which is adopted following the same procedure as that of the European institutions, the Economic and Social Committee and the Committee of the Regions.

The Ombudsman's resources have evolved over the years to enable the institution to assume the role, and face the tasks, assigned to it by the Treaty and its own Statute.

There is a clear link between the resources needed by the Ombudsman's office and the increasing number of complaints submitted to the Ombudsman. This increase is the consequence of the higher number of areas managed by the European institutions and the closer relationship between the Community's administration and European citizens, including citizens' growing awareness of the role of the European Ombudsman. The Ombudsman's structure has evolved accordingly. As with the other bodies of the Union, the 2004 enlargement will continue to have an impact on the Ombudsman's work.

The Ombudsman's staff has to be sufficient in terms of numbers and qualifications alike. While permanent posts guarantee the continuity of the work, a certain degree of flexibility is considered necessary to allow the Ombudsman to best carry out the tasks of the institution.

Chapter 14

Reflections on the Future Role of the Ombudsman in a Changing Europe

P. Nikiforos Diamandouros [1]

1 Introduction

Now that we have traced the tale of the European Ombudsman - from the ideas and initiatives that led to the inclusion of an Ombudsman for the Union in the Treaty of Maastricht to its present-day incarnation as an effective and respected institution charged with promoting the rule of law, good administration and the protection of human rights - it behoves me as the incumbent Ombudsman to outline my thoughts about the future. These thoughts include the direction that I wish to take the institution in during my time in office, the changing European stage on which the Ombudsman will carry out his activities and, finally, the relationship between the work of the European Ombudsman as an institution and the broader evolution of ombudsmanship in Europe.

The environment in which the European Ombudsman will play his part in protecting and promoting citizens' rights is changing. To fully harness the potential of this institution over the coming years, we must successfully steer it through the present critical juncture in the development of the EU. As the Union works to integrate recently arrived Member States, as it expands further to embrace countries in Eastern and Southeastern Europe, and as it works out how best to deliver the benefits of deeper integration to citizens, the European Ombudsman must remain true to his task of promoting the rule of law, good administration and fundamental rights all over Europe.

[1] In preparing this chapter, I collaborated closely with Rosita Agnew, Joint Head of the European Ombudsman's Communications Sector. I am grateful for her invaluable assistance and for the time and energy she devoted to this task.

But before setting out my vision for the future of this institution and my thoughts on the evolution of ombudsmanship more generally, I would like briefly to pick up from where my predecessor, the first European Ombudsman, Jacob Söderman, signed off and to complete the story of the first ten years of the institution.

2 The Past Two Years...

When the European Parliament elected me on 15 January 2003, I was conscious of the relatively short amount of time I had to try to live up to the high expectations generated by the work of the first European Ombudsman. My mandate was up for renewal by the new Parliament that would be elected in June 2004. One of my chief concerns in taking over the reins from my distinguished predecessor was to build on his achievements. His tireless efforts ensured that by the time I took office on 1 April 2003, I was at the helm of an effective and respected institution, capable of systematically and successfully promoting openness, accountability and good administration. A great distance had been covered from the days when some were unwilling or unable to see "... how useful the new body would be in galvanising efficiency and democracy within the context of the European Union's unfolding institutional dynamic" [2].

I quickly set about directing my energies to deliver on the promises I had made during my election campaign, namely to enhance the effectiveness of the European Ombudsman's Office, to promote the rule of law, good administration and respect for human rights, and to reach out to all the Union's citizens. The enlargement of the EU was a central theme of all three priorities. I immediately embarked upon a restructuring of the Office to ensure that we were fully able to serve citizens of 25 Member States in all 21 Treaty languages. With an eye to promoting the rule of law, good administration and respect for human rights, I stepped up exchanges with the EU institutions and bodies, frequently addressing senior members and high-ranking officials to underline the value of reacting promptly and constructively to complaints and of taking initiatives to improve the standard of service to citizens.

From a broader perspective, I further developed relations with ombudsmen throughout Europe, visiting all of my colleagues as part of

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[2] Carlos Moreiro González, see p. 27 above.

institutions to manage themselves more effectively and to achieve better results.

A second aspect to be explored in terms of the ombudsman's working methods concerns general recommendations, i.e., recommendations that address systemic issues rather than the problems of specific complainants. In the classical approach, compliance with the ombudsman's general recommendations which approaches 100% is considered to be an essential condition affecting the institution's legitimacy and authority. The concern underlying such a view is that if the administration starts to reject the ombudsman's recommendations, the ombudsman's authority may suffer irreparable damage.

Current developments suggest that a somewhat more risk oriented reform approach with respect to general recommendations appears to be emerging. Here the rationale is that the ombudsman's role as a catalyst of continuous reform reduces the relevance of a near to 100% compliance rate. In fact, there are those who contend that an ombudsman whose recommendations are always accepted is likely to be perceived as overly concerned with ensuring that his or her recommendations are within the limits of what the administration will accept. These observations, I should emphasise, only relate to general recommendations - in respect of recommendations in cases concerning a specific complainant's grievances and claims, the view remains that normally these should always be followed.

It is my impression that many national ombudsmen, especially those established more recently, are moving in the direction of a more risk oriented approach. It may well be, therefore, that one interesting development in European ombudsmanship is the emergence of ombudsman models characterised by the greater willingness to build more risk, in the sense that I use the term here, into the calculus of decisions relating to general recommendations designed to address issues regarding systemic maladministration.

The European Ombudsman has judiciously made use of the opportunities implicit in such an approach and will continue to aim high in terms of proposals and recommendations to the EU institutions and bodies designed to improve the EU administration.

5.2 Achieving Results through Partnerships

To state that ombudsmen do not work alone, that they depend on their institutional interlocutors, and that good and constructive relations with these interlocutors should be maintained and developed is perhaps to state the obvious. Despite this, the extent and nature of such partnerships is one of the areas in which particularly significant variations exist among ombudsman institutions in Europe. I would, therefore, like briefly to attempt to identify key issues and to offer one or two modest goals for the future.

Ombudsmen and the Courts

The right to seek a judicial remedy is fundamental [10] and wherever the rule of law exists, the courts are its most essential guarantors. Where ombudsmen also exist, citizens can choose the non-judicial ombudsman remedy as an alternative to going to court. It is important to underline that this does not involve duplication of roles, nor the possibility of inconsistent interpretation and application of the law, primarily because the decisions and recommendations of ombudsmen are not legally binding. Moreover, courts and ombudsmen are, or can be, linked in several direct and indirect ways.

An important indirect link is the mutual use of decisions. Naturally, ombudsmen apply the courts' case law. For example, the European Parliament's Jurisconsult, Gregorio Garzón Clariana, rightly emphasises in his contribution to this volume that the European Ombudsman is bound by Community law as interpreted by the Community Courts [11]. The courts may also find it useful to turn to an ombudsman's reports to obtain inspiration for their interpretation of the law. It is difficult to make predictions about future developments in this regard. The most we can say is that the constant evolution of both legal principles and the principles of good administration will provide both opportunity and good reason for courts and ombudsmen to further and fruitfully develop their indirect interchange.

Such a development may, in fact, also be supported by the positive experiences with a direct link between ombudsmen and courts that can be found in some, albeit only a few, European countries. In

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[10] See Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights.

[11] See p. 197 above.

an extensive information tour which covered all 25 Member States. This latter activity formed part of our efforts to raise awareness among citizens throughout the enlarged Union about the Ombudsman's work. We launched new publications, intensified direct contact with citizens at meetings, seminars and conferences, and made the Ombudsman's website available in all Treaty languages. The unprecedented 53% increase in complaints to the European Ombudsman in 2004, and the sustained upward trend in 2005, bears witness to citizens' increased awareness of their rights and about how to exercise those rights.

Much has been achieved, but more remains to be done. The past two years have involved leading the institution from the founding and early development stage, managed with distinction by my predecessor, to a period combining consolidation with growth. As we head into the institution's second decade, it is incumbent upon the Ombudsman to build on the lessons of the past ten years and to explore new ways of serving citizens, of informing them about their rights, and of promoting their empowerment.

When I stood for re-election as Ombudsman at the end of 2004, I outlined to Members of the European Parliament my thoughts and ideas on how best to proceed. I would like to think that Parliament's decision to re-elect me on 11 January 2005 constitutes an endorsement of these ideas. More generally, I regard the strong support for my candidacy by virtually all the political groups as tangible evidence of the esteem in which Parliament has come to hold this institution. Such broad ranging, cross party support is critical in enabling the Ombudsman to best confront the challenges ahead.

3 Key Challenges for the European Ombudsman in the Coming Years

I believe that the most important challenges facing the institution of the European Ombudsman in the coming years are:

- To ensure that citizens' rights deriving from EU law are respected at every level in the Union;
- To make certain that EU institutions and bodies conform to the highest standards of administration in all their activities; and
- To guarantee that the institution of the European Ombudsman serves the citizen in the most efficient and effective way possible.

3.1 Respect for Citizens' Rights

Information to Citizens

Key to ensuring full respect for citizens' rights is awareness raising among citizens about the rights that have been granted to them. The European Ombudsman must continually strive to improve the quantity and quality of information provided to citizens. Moreover, those who feel that their rights have been infringed should be aware of where to turn for help. Given the high proportion of complaints that fall outside the mandate of the European Ombudsman, our efforts should be directed at finding ways to better inform citizens of the various *non-judicial* means of redress available to them. This involves working with the European Parliament's Committee on Petitions, the European Commission's EUROPE DIRECT and SOLVIT schemes, and other similar bodies to inform citizens of the whole range of redress mechanisms. Initiatives include developing a user-friendly system for advising complainants on where to turn - delivered, for example, via the European Ombudsman's website - and the possibility of a single telephone number across the Union for people wishing to contact the ombudsman network. This could be especially useful for citizens who are exercising the right to move and reside freely in the Union, for example.

Public Administrations

Equally important in ensuring respect for citizens' rights is the need for national, regional and local administrations in the Member States to take full account of these rights in their everyday work. The implementation of EU law is, after all, largely their responsibility. When these public administrations fail to take full account of citizens' rights, ombudsmen in the Member States have a key role to play in providing effective remedies.

Understandably, citizens who believe that a Member State is not respecting Union law often seek a remedy at the Union level. Some citizens complain to the European Commission, in its role as Guardian of the Treaties. Citizens also petition the European Parliament concerning infringements. In practice, it often falls to the Commission to examine these cases as well. Finally, many citizens complain to the European Ombudsman against public administrations of the Member States, but such complaints are outside the mandate.

It is therefore of utmost importance that we raise awareness among citizens about the key role played by national and regional ombudsmen in resolving problems regarding their EU law rights. I am reinforced in this belief by the fact that ensuring full and correct implementation of Union law is not just a matter of providing effective remedies, vital though that is. It also involves the difficult and painstaking task of strengthening the capacity of public authorities of the Member States to follow the law, observe principles of good administration and respect human rights.

Ombudsmen throughout the Union can play a key role in heightening the familiarity of the judiciaries and public administrations in the Member States with Union law and European legal culture. Ombudsmen are particularly well suited to combining such reactive and proactive functions and to creating synergies between them.

The European Network of Ombudsmen

The current situation in the Union is that there are ombudsmen in all 25 Member States, either at the national or regional level or, in some countries - such as Spain - at both levels. The network of co-operation among the European Ombudsman and national and regional ombudsmen, which was created by my predecessor, comprises some 90 offices in 29 countries throughout Europe. The network co-operates on a daily basis in case handling, and on a continual basis in sharing experiences and best practice through seminars and meetings, a bi-annual newsletter, an electronic discussion forum and an electronic daily news service.

As European Ombudsman, I will continue to develop co-operation with my counterparts at the national and regional level, with a view to ensuring respect for citizens' rights throughout the Union. One concrete way that we could develop co-operation is through joint inquiries. Increasingly, the implementation of EU law and EU funded programmes involves co-operation among Community institutions and administrations in the Member States. To protect citizens' rights and provide them with effective remedies, co-operation among administrations needs to be matched by co-operation among ombudsmen. Joint inquiries would not involve any change in the mandates either of the European Ombudsman or of the national and regional ombudsmen. The added value of a joint inquiry would come from exercising our different mandates together, on a voluntary basis, so as to get to the root of a complaint, rather than investigating

limited aspects in isolation. Naturally, a lot of preparatory work needs to be done to make joint inquiries effective. But I am confident that I can work together with my colleagues throughout the Union to make this possibility a reality.

I am equally eager to work with ombudsmen and similar bodies in helping potential EU Member States improve the quality of their democracies and their respect for citizens' rights. The Romanian Ombudsman has been a member of the European network of ombudsmen for many years now and we recently welcomed the new Bulgarian Ombudsman to the community of ombudsmen in Europe. I have already visited Turkey on two occasions to promote efforts to establish the ombudsman institution in that country and, during my time as Greek Ombudsman, worked extensively on the development of the institution in Southeastern Europe. I anticipate that our activity in this area will be stepped up in the coming years.

3.2 The Highest Standards of Administration in the EU Institutions and Bodies

The European Ombudsman has a dual role. In addition to his primary function of serving as an independent mechanism of external control of the EU public administration, he should be regarded as a valuable source of information for all institutions wishing to improve the quality of their administration. The ultimate goal for all of us must be to ensure the best possible service to the citizen. The increasing willingness of the EU institutions to work with the Ombudsman in improving the service that they provide shows that they indeed understand and appreciate this dual role. We will continue to develop initiatives in this area to make certain that the EU institutions and bodies adopt a citizen centred approach in all their activities.

Friendly Solutions

In pursuit of this goal, I shall work with all EU institutions and bodies to try to increase the number of friendly solutions to complaints. One way that we could achieve this is by analysing the friendly solutions reached since the creation of the European Ombudsman's office, in order to find common characteristics that might help indicate the types of complaints that have greater potential of being solved this way. We will, of course, need the co-operation of the institutions in this project, but, I remain persuaded that, by working

together, a procedure capable of increasing the frequency of this "win-win" outcome can be developed.

In-Depth Inquiries

In recent years, we have used in-depth own-initiative inquiries to help the EU institutions and bodies raise the quality of their administration. I am of the belief that we could increase the number of inquiries of this type, wherever this could be most useful. I would be particularly interested in investigating the administration of certain Community funded programmes, in order to identify problems and to encourage best practice. Such investigations could be carried out at the European level and perhaps also, with the co-operation of the appropriate ombudsmen, at the national and regional levels through joint investigations.

Higher Quality Responses to the Ombudsman's Work

For the most part, the EU institutions and bodies respond positively to the Ombudsman's remarks, recommendations and reports. There is always room for improvement, however. Raising the quality of the responses to citizens' complaints helps enhance the stature and legitimacy of the administration in the eyes of the citizens who are the ultimate beneficiaries of improved practices. It is for this reason that, at a meeting on 25 May 2005 with the College of Commissioners of the European Commission, the institution which is the target of some 70% of the Ombudsman's inquiries, I encouraged the institution to consider adopting measures to spread and strengthen best practice among its various Directorates General, departments and services, in the preparation of responses to the Ombudsman's inquiries. In this regard, I was gratified to hear both President Barroso and individual Commissioners firmly reiterate the Commission's commitment to search for ways designed to improve the quality of service rendered to complainants by the institution.

The European Code of Good Administrative Behaviour

The European Code of Good Administrative Behaviour, drafted by the European Ombudsman and adopted by the European Parliament in 2001, provides a sound example of the Ombudsman serving as a resource to help improve the quality of the administration. The Code contains the rules and principles that should apply to all the Union institutions and bodies. It is intended to explain in more detail what the right to good administration, as laid down in Article 41 of the EU's

Charter of Fundamental Rights, should mean in practice. The Code serves as a useful guide for civil servants, encouraging the highest standards of administration. Moreover, it tells citizens what, concretely, they can expect from the European administration.

For some time now, the European Ombudsman has been urging the European Commission to take an initiative to put an end to the present confusing situation, in which different institutions and bodies apply a variety of different codes. The fact that the Commission's own code of good administrative behaviour closely parallels the European Code should, I hope, make such a task easier to tackle. Such an eventuality would not only help citizens to understand the Union level of governance better, but would also set a good example to help promote open, efficient and service minded administration at all levels of the Union.

After all, the impact of the Code has not been limited to the Union's institutions and bodies and I am pleased to note that it has received wide recognition and approval internationally, in the Member States and candidate states, in the Council of Europe and elsewhere in the world. It is a European success story of which both Parliament and Ombudsman can be justly proud.

An Ever Wider Remit

As Europe develops, so clearly will the areas of responsibility of the European Ombudsman. Europol - the European Police Office - has already been the subject of over half a dozen inquiries by the Ombudsman. If the EU creates a common border police, such a new organisation could well be covered by the Ombudsman's mandate. It is vital that we be ready to handle complaints in these new areas, potentially in the form of joint inquiries with national ombudsmen.

3.3 The Ombudsman Serving the Citizen Efficiently and Effectively

As the "guardian of good administration", the Ombudsman must set an example to other EU institutions and bodies by delivering a first class service to citizens. Their complaints, which after all are the lifeblood of any ombudsman institution, must be handled promptly and effectively. Ensuring the prompt and effective handling of complaints was a key motive for the establishment of the European network of ombudsmen back in 1996.

The Ombudsman's Statute

It is equally important that citizens have full confidence in the Ombudsman's power to find the truth. In order to maintain confidence in the institution, the Ombudsman must be able to investigate as thoroughly and as rigorously as possible the complaints which citizens entrust him with. With this in mind, I would very much like to revisit the issue of the Ombudsman's Statute - notably on the Ombudsman's access to documents and hearing of witnesses.

4 A Changing Environment - Implications for the Work of the European Ombudsman

These are the challenges I see facing the European Ombudsman in the coming years and the various avenues I intend to explore in attempting to best address those challenges. But I am mindful that the context in which this activity will be played out is ever changing.

There is no denying that we are at a critical juncture in the development of a citizens' Europe. In December 2001, the Laeken European Council announced the calling together of a Convention on the future of Europe to consider the key issues arising for the Union's future development and try to identify the various possible responses. In a lengthy process of public meeting and debate, the European Convention drafted a Constitution for Europe and presented the results to the European Council in June and July 2003 [3]. In October 2004, the Heads of State and Government of all 25 Member States of the EU signed the Treaty establishing a Constitution for Europe. Following the negative results of the French and Dutch referenda on ratification of the Treaty, however, the European Council agreed at its meeting of 16-17 June 2005 on the need for "a period of reflection" [4].

As European Ombudsman, I was an Observer at the European Convention and fought hard to put citizens' interests at the centre of debate. Whatever, the eventual fate of the Constitution as such, I firmly believe that the drafting process was extremely valuable in

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[3] Report from the Presidency of the Convention to the President of the European Council, CONV 851/03, 18 July 2003.

[4] Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution For Europe, SN 117/05, 18 June 2005.

terms of clarifying important issues for citizens and ombudsmen alike. In this regard, I would underline a great achievement that, in the coming years, should have significant implications for ombudsmen throughout Europe: the unequivocal recognition both of ombudsmanship in Europe and of good administration as a citizens' right. The very fact that the broad and diverse membership of the European Convention and all the EU Heads of State and Government endorsed these ideas will surely help promote our work in the future.

4.1 Recognition of Ombudsmanship

Those charged with drafting the Constitution ensured that the European Ombudsman was included in both Article I-10 of the title on citizenship and fundamental rights and in Article I-49 of the title on the democratic life of the Union. Ombudsmanship was thus recognised as an essential link between the Union's commitments to human and fundamental rights and its democratic commitments and aspirations. The fact that European policy makers chose to reinforce ombudsmanship so significantly is not merely based on a shared vision for the future. It is also a response to the very high credibility that ombudsmen in Europe have, over the past several decades, given to the concept of ombudsmanship, through their effective promotion of the rule of law and good administration.

It is interesting in this regard to recall one of the arguments in favour of creating a European Ombudsman, as explored by Carlos Moreiro González in his contribution to this volume. He states: "...the very political notion that was essential to the creation of the status of European citizenship constituted, for at least two reasons, the basis that would later support, if not justify, the creation of the European Ombudsman. Firstly, because much in the same way as this institution is regarded as one of the essential ingredients of contemporary constitutionalism, its acceptance at the supranational level formed part of the constitutionalisation of Europe. Secondly, because, once it was in operation, it would strengthen citizens' confidence in the European Union's institutional mechanisms, by giving them a new channel for monitoring those mechanisms" [5].

[5] See p. 28 above.

4.2 The Charter of Fundamental Rights of the European Union

As an Observer at the Convention that drafted the Charter of Fundamental Rights of the European Union during the year 2000, the European Ombudsman called for "the right to good administration" to be included as a fundamental right. The Charter contains this right in Article 41. Good administration is essential for citizens to be able to fully enjoy their rights, including their human rights. If rights are delayed as a result of negligence, diluted as a result of inconsistency or denied as a result of discrimination, these rights are effectively meaningless.

Implementation of the Charter at the Union level

In relation to the Union level of governance, as Mr Söderman points out in his contribution to this volume, the European Ombudsman has actively promoted the Charter ever since its proclamation by the European Parliament, the Council and the Commission at the Nice summit in December 2000. In dealing with complaints and in own-initiative inquiries, the Ombudsman has consistently taken the view that failure to respect the rights contained in the Charter is maladministration. By referring to the Charter, the Ombudsman succeeded, in 2002, in persuading the institutions to abolish two forms of discrimination in the recruitment and staff policy of the EU institutions and bodies, namely discrimination on the basis of age in open competitions and on the basis of gender for seconded national experts. In 2005, the Commission agreed to abolish the use of age limits in its traineeship programme, again following pressure from the Ombudsman, who, in issuing his recommendation, referred to Article 21 on non-discrimination in the Charter.

The Treaty establishing a Constitution for Europe incorporates the Charter as its Part II, thus underlining the importance of enhanced protection of citizens' fundamental rights at all levels of the Union. Were the Charter as such to become legally binding, as would happen with entry of the Constitution into force, our work in this area would surely be strengthened.

As European Ombudsman, I would like to explore with the European Parliament how to make sure that citizens' complaints about violations of the rights contained in the Charter can be looked into as rapidly and effectively as possible and eventually brought

before the European Court of Justice, if an important issue of principle cannot be resolved in any other way. Parliament, of course, already has full rights, as an institution, to initiate cases before the Court. In this context, it could be useful for the Ombudsman to be able to intervene in such cases - a possibility already envisaged for the European Data Protection Supervisor, who began work in 2004. In my mind, the aforementioned revision of the Statute could provide an excellent occasion to examine this issue, with a view to determining how best the European Ombudsman can work at the Union level of governance to continue to deliver the benefits of the EU Charter to citizens.

4.3 Enhanced Protection of Fundamental Rights Throughout the Union

I have already touched upon the critical role played by the European network of ombudsmen in resolving complaints from citizens who feel that their rights under EU law are not being respected. In light of the increasing activity of the Union in the area of fundamental rights, this role is bound to become even more significant in the coming years, particularly so given the heightened sensitivity linked to the protection of human and fundamental rights in the more recently established ombudsman institutions in the countries that joined the Union in 2004. By deepening our existing co-operation, we can help ensure that a comprehensive, coherent and effective system of non-judicial remedies is available in the Member States to help citizens enjoy their rights under Union law - including their fundamental rights - in their relations with public authorities in the Member States.

Citizens who wish to protect their fundamental rights against public administrations in the Member States can, of course, bring proceedings in national courts. But going to court should be the *last*, not the first, resort for a citizen who has a problem with the public authorities. I therefore firmly believe that it would benefit citizens greatly if we were to strengthen non-judicial remedies in the Member States.

This would:

- Enhance choice for citizens by providing an alternative remedy;
- Strengthen subsidiarity;

- Spare Union institutions from overload; and
- Contribute to administrative capacity building in the Member States, where needed.

A Uniformly High Level of Service

For me, the fact that we may now refer to ombudsmanship as part of the European legal and political tradition - confirmed by the inclusion of ombudsmanship in the Constitution signed by the EU Heads of State and Government - implies that efforts must be made to ensure that citizens' rights are equally well protected irrespective of which ombudsman they turn to. To be sure, ombudsmen will continue to apply different working methods, prudently adapting their individual offices to their respective political-institutional environments and legal and political cultures. The level of rights enjoyed by the citizens, however, ought to be the same across the board. This clearly cannot be the task of ombudsmen alone, but requires a continuous dialogue with the legislators, who should provide the ombudsmen with the necessary powers and resources to achieve this goal.

4.4 Co-operation among Ombudsmen is the Way Forward

The intensity of our co-operation will continue to increase in the future, both at the geographical level, as the EU grows, but also at a substantive level, as the implementation of EU law at the national level becomes an ever more important area of concern for national ombudsmen. I look forward to intensifying co-operation with my ombudsman colleagues throughout Europe, so that together we can make rights a living reality for all citizens.

In view of the fact that our paths will be inextricably linked in the years ahead - even more so than they are at present - I would like now to devote some reflections to the evolution of ombudsmanship in Europe. An attempt to understand the direction ombudsmanship is taking will surely help us to chart the best way forward for our work together.

5 The Evolution of Ombudsmanship in Future Europe

To make qualified projections about the future of ombudsmanship in Europe requires a brief examination of what "European ombuds-

manship" - if indeed it makes sense to use such a term - currently implies, and how it has developed in recent years. The recent transitions to democracy in Central and Eastern Europe have led to a sharp increase in the number of parliamentary ombudsman institutions. All the new EU Member States from this region have such an institution, and the candidate countries for EU membership, including Turkey, either have already established an ombudsman or intend to do so. While a detailed analysis of European ombudsmanship is clearly not possible in this short chapter, I propose to adopt a relatively simple method in order to, at least, obtain an indicative overview. This will enable us to determine to what extent the basic features of the prototype ombudsman model are generally recognisable in ombudsman institutions in Europe today.

Let me firstly attempt to summarise the essential features of ombudsmanship for the purposes of this examination. To my understanding, these are:

- The personal dimension of the office, built around a publicly-recognised office-holder;
- The independence of its work;
- Free and easy access for the citizen;
- A primary focus on the handling of complaints (i.e., its reactive mode);
- Use of proactive means to achieve goals;
- A review function that encompasses legal rules and principles, principles of good administration, and fundamental and human rights;
- A general mandate to supervise the entire reach of the public administration (but rarely extending to include the courts);
- A lack of power to issue binding decisions; and
- Instead, a distinct preference for working methods based on the use of persuasion, moral authority and, in some cases, the authority of the government or assembly by which the ombudsman is appointed.

My visits to all the EU Member States, as well as to the candidate countries for EU membership, have left me with the strong impression that ombudsmen in Europe have, to a very considerable extent, these basic features in common. Important variations do exist, but in most cases these can be attributed to the particular context in which the ombudsman operates, or to attempts to enhance the prototype model.

I have also been struck by the high level of recognition accorded to the institution in many countries. In light of the new ombudsman institutions that have been set up in Europe over the last 10-15 years, I think it is safe to say that the office of parliamentary ombudsman continues to be recognised as a central and effective source of protection for individuals and legal entities in their dealings with the public administration. This is clearly illustrated by the fact that ombudsmen in the new democracies of Central and Eastern Europe have almost all been entrusted with a mandate to promote human rights. The sensitivity of issues relating to human rights in these countries cannot be overestimated. Their ombudsmen, therefore, not only have the important specific task of ensuring respect for human rights in individual cases, but also have a general responsibility in contributing to the rebuilding of trust and confidence in government and to the nurturing and empowerment of civil society.

The broad conclusion deriving from these brief remarks is, therefore, that it makes perfect sense to talk about "European ombudsmanship". To address the issue of how European ombudsmanship might develop in the future, and how we might expect these developments to influence the work of the European Ombudsman, I will focus on two topics: the proactive nature of ombudsmanship and how ombudsmen can achieve results through partnerships with other institutions and bodies.

5.1 The Proactive Nature of Ombudsmanship

The proactive work of ombudsmen manifests itself both in the review function of ombudsman institutions and in the way ombudsmen operate.

The Review Function of Ombudsman Institutions

In his contribution to this volume, Paul Magnette states: "Like the European Court of Justice, which has established the legal principles in the Community, the Ombudsman has both stated and promoted the general principles which, in his view, are an integral part of the notion of 'good administrative practices'" [6]. In exploring the substance of ombudsmen's review, I would like to go one step further

[6] See p. 121 above.

and to underline the frequent application of open ended principles of good administration.

In general, such principles allow the ombudsman to assess issues flexibly and in a forward-looking fashion. As my predecessor stated in his 1997 Annual Report, "...the open ended nature of the term [maladministration] is one of the things that distinguishes the role of the Ombudsman from that of a judge" [7]. In fact, the application of such open ended principles of good administration may even influence the development and application of legal rules and principles.

In this respect, I would like to recall a question posed by the former Danish Ombudsman, the late Lars Nordskov Nielsen, on the occasion of the Danish Ombudsman's 40th anniversary, which remains just as topical ten years later. Mr Nielsen asked "...whether the Public Administration Act should... form the sole basis for the Ombudsman's assessment of whether a matter was dealt with correctly" [8].

The same question could today be posed for Europe more generally, where over recent years we have seen a very notable tendency to create written instruments - whether legally binding or not - containing rules on good administration. The culmination of this was arguably the introduction of the aforementioned right to good administration in the EU's Charter of Fundamental Rights.

Such efforts to clarify and reinforce principles of good administration in written instruments can only be good for the citizens. For ombudsmen, however, they do raise the question of whether we are moving into a phase where we will content ourselves with merely supervising the correct implementation of already formulated legal rules about good administration, or whether we will continue to apply a broad and flexible concept of good administration, capable of contributing to the continuous improvement of administrative behaviour.

The late Mr Nielsen strongly advocated the importance of maintaining the principle of good administration as a flexible basis for review, and I for my part certainly follow that advice in my daily practice as European Ombudsman. It is my impression that this approach

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[7] The European Ombudsman's *Annual Report* for 1997, p. 22.

[8] L. N. Nielsen, (1995) "The Ombudsman in the Future" in H. Gammeltoft-Hansen and F. Axmark (eds), *The Danish Ombudsman*, The Danish Ombudsman and the Danish Ministry of Foreign Affairs, p.123.

is also applied by national ombudsmen throughout Europe, who appear to steer clear of a rigid model of review. I have, furthermore, been encouraged by recent decisions of the Court of First Instance that appear to recognise implicitly the importance of maintaining a flexible principle of "good administration" as applied by ombudsmen [9].

I personally welcome this, particularly given that ombudsmen function as the link between the highest and most fundamental principles - such as human dignity and equality before the law - and the perhaps prosaic but nevertheless crucially important norms of day-to-day administrative behaviour towards citizens (replying to letters, politeness, service-mindedness and so forth).

Thus, it is not only my expectation but also my hope that an important role for ombudsmanship in future Europe will be to contribute to the development of administrative cultures based on flexible and evolving principles of good administration and capable of enhancing the capacity of public administration to adhere to best practice and to render high quality services to the user. Such a development, which will further secure the distinct role of ombudsmen in the evolving European legal and political culture, is central to achieving full respect for citizens' rights throughout the Union and to strengthening the role of ombudsmen in bringing about that reality.

Ombudsmen's Working Methods

It is well known that most ombudsmen have proactive powers of inquiry, in addition to their main responsibility for handling complaints. These include, for example, powers to conduct inspections and to initiate so-called own-initiative inquiries. Furthermore, most ombudsmen have the power to recommend changes to laws and administrative practices. In addition to these formal proactive powers, ombudsmen naturally also have the important role of providing public officials with guidance as to how they themselves, and the public administrations in which they serve, can continuously improve their relations with individuals and associations. This is part of what is sometimes referred to as the ombudsman's "educational" role.

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[9] Case T-193/04 R, *Tillack v Commission*, Order of the President of the Court of First Instance of 15 October 2004 (not yet published); and Cases T-219/02 and T-337/02, *Lutz Herrera v Commission*, judgement of 28 October 2004 (not yet published).

This is a role that I have been increasingly devoting attention to as European Ombudsman, as is evidenced by the many meetings I have held with members and officials of the EU institutions and bodies, with a view to offering guidance on how best to respond to complaints and how to improve procedures. My impression from visiting colleagues at the national level across Europe is that these proactive powers are very widely used in the newer ombudsman institutions and are increasingly being deployed by the older institutions as well.

Particularly important in this respect are issues of legitimacy, raised, somewhat inevitably, by the use of proactive working methods increasingly employed by ombudsmen. A first aspect concerns the public officials' perceptions of the ombudsman's use of his or her proactive powers. Unlike complaint-handling - where the ombudsman is simply responding to an individual's use of his or her rights - the employment of proactive working methods inevitably involves the risk that officials might doubt whether the ombudsman's actions are truly necessary and justified. In my view, the increasingly positive response of public administrations to such proactive activities by ombudsmen suggests not only that the actual initiatives are well perceived, but also that a broad proactive role of ombudsmen is increasingly and widely considered natural and legitimate.

And rightly so! As I stated earlier, the Ombudsman must fulfil a dual role as both a mechanism of external control and a resource to help improve the quality of the administration. I constantly remind the EU institutions and bodies that they should view the ombudsman as a resource for public sector managers, especially those who are trying to create or maintain an organisational culture placing an emphasis on service to citizens and focusing on quality of output. Viewed from this perspective, complaints can be a useful source of information to management in a large and necessarily complex organisation. The information they contain enables managers to dig down into their organisations, focus on the quality of output from individual units and take corrective action if necessary. As I emphasise during meetings with the members and officials of the EU institutions and bodies, complaints and own-initiative inquiries provide an opportunity to explain to citizens what has been done to put right any shortcomings that may exist and to receive credit for that action. Tackling the underlying causes of maladministration produces a double benefit: in addition to helping avoid future complaints, it also enables

Spain, Portugal and Poland, for instance, the national ombudsman has the power to refer questions regarding the validity of legislation to the constitutional court. I understand from my colleagues in those countries that this power can be extremely useful and that, on balance, it adds to the effectiveness of their work. This power naturally requires the exercise of great care and skill to avoid the appearance of taking sides in political controversies.

A different kind of direct link exists in the Nordic countries, where, for instance, the Swedish and Finnish Parliamentary Ombudsmen are empowered to prosecute public officials. The Danish Parliamentary Ombudsman has the power to recommend that a complainant be given free legal aid to take his or her case to the courts. I understand that such recommendations are always followed, and therefore effectively constitute a referral mechanism, albeit an indirect one. Again, such powers are used with considerable caution and prudence. The Swedish Ombudsman, so I understand, rarely prosecutes more than two to four times a year.

It is my impression that European ombudsmanship has reached a stage of maturity, if you like, that makes it appropriate to revisit the issue of ombudsmen's access to courts. If relevant safeguards are built into any such system of direct access - for instance giving the courts discretion not to take up the ombudsman's request for an interpretation - access to courts could well be both acceptable and useful within most European jurisdictions.

As far as the European Ombudsman is concerned, Peter Biering recalls in his contribution to this volume that, during the negotiations at the Intergovernmental Conference leading up to the Treaty of Maastricht, there was a short discussion as to whether there was a desire "...to confirm in the Treaty the possibility of the Ombudsman, on behalf of citizens, referring cases to the courts. The idea was that the Ombudsman would be able to represent citizens of limited means and ensure that important issues were subjected to legal process. The idea was also linked to the fact that the rules governing the ability of citizens to take legal action had not been liberalised". He explains that the idea was not implemented because this form of referral was "...unfamiliar in the Danish Ombudsman system and, as such, alien to the scheme forming the basis of the negotiations" [12]. Ten years on

[12] See p. 50 above for both quotations.

from the setting up of the institution, however, it may well be time to revisit this question, most notably - as I have explained - in the area of the EU Charter.

The Ombudsman and the Legislative and Executive Powers

As regards ombudsmen's relations with governments and parliaments, I shall mention only the issue of legislation. In line with my previous remarks concerning the tendency towards increased focus on proactive working methods, such as own-initiative inquiries, one may envisage the possibility of increased dialogue between ombudsmen and their respective governments and/or parliaments, when legislation relating to the ombudsman's broad concerns is being drafted and discussed. I am aware, for instance, both that the Swedish Parliamentary Ombudsmen are systematically consulted on relevant legislation and that the Estonian Chancellor of Justice has the right to speak at sessions of the parliament and of the government, when these discuss law proposals.

To be sure, such a practice may be perceived in some countries as constituting too close an involvement in the political process and the potential controversies often associated with it. On the other hand, it is my impression that ombudsmen are increasingly perceived as highly relevant sources of information in the process leading to the implementation of laws. This is what I sometimes refer to as the Ombudsman's "x-ray function". By way of example, reports from ombudsmen in candidate countries for EU membership have, on several occasions, been used by the European Commission to obtain information as to the state of implementation of legislation relating to rights.

In terms of the European Ombudsman, where a complaint highlights problems, we often encourage changes to the rules in place, with a view to improving the quality of the administration in the future. An example in the area of access to documents helps illustrate this point. Following a complaint about the European Parliament's traineeship scheme, the Ombudsman suggested that Parliament consider revising its rules to make clear that the list of names of persons who accept the offer of a traineeship will be a public document. More generally on access to documents, it may be useful to recall that after the European Ombudsman had criticised the Commission's initial proposal for a regulation on public access to documents in January 2001, the Commission withdraw its proposal and introduced a ver-

sion that, in the eyes of the Ombudsman, was considerably improved. The Ombudsman made his remarks in light of his experience of treating citizens' complaints in this area of access to documents of the EU institutions and bodies.

It may well be, therefore, that the ombudsmen's cumulative knowledge and experience with respect to the implementation of laws will be increasingly taken into account at the level of drafting legislation.

Ombudsmen Working Together

The final interlocutors that I would like to mention are really better referred to as colleagues. They are the family of ombudsmen, at the European, national, regional and local levels.

As citizens become increasingly aware of their rights under EU law, co-operation among ombudsmen in Europe is bound to develop. Such future co-operation might increasingly take the form of joint inquiries, the creation of common channels for the provision of information and advice, and the development of new ways of sharing information and best practice.

6 Conclusion

The ultimate goal of the European Ombudsman is to make certain that EU citizens are increasingly aware of their rights and know how to ensure that their EU rights are fully respected. This would go a long way towards meeting the expectations generated by the Danish proposal to establish the European Ombudsman, which, according to Mr Biering, in his contribution to this volume, was to be "...one of the meaningful and visible means of building bridges to the new EU and making the Union more open, present and citizen-friendly" [13].

As I have developed at length, the goal of effectively promoting and protecting citizens' rights under EU law - in an ever changing environment - can only be realised through close co-operation with the EU institutions and bodies, and particularly with national and regional ombudsmen and similar bodies. I am encouraged by the fact that my predecessor as European Ombudsman, Jacob Söderman, ended his contribution to this volume with a similar conclusion - namely

[13] See p. 51 above.

that ombudsmen throughout Europe must work together to achieve results for citizens.

In this chapter, I have sought to trace evolving trends growing out of discernible patterns linked to the operation of the ombudsman institution in the EU and to detect the particular implications that these may have on the work of the European Ombudsman. Our ways of working together as ombudsmen will surely develop as European ombudsmanship goes from strength to strength on the basis of our extensive collective experience and the vitality of our institutions.

Annex I:

Key Documents and References

Full references are given below to certain key documents mentioned in the various chapters of this volume, together with certain other documents that have been added for the sake of completeness, or because of their potential interest to those studying the European Ombudsman.

The texts of four documents (the Spanish and Danish proposals to the Intergovernmental Conference on Political Union (1990-1), Article 195 (formerly 138e) of the Treaty establishing the European Community, and the Statute of the European Ombudsman) are set out in annexes II-V below.

Many other useful documents can be found in the 'Resources' section of the European Ombudsman's website (see: http://www.euro-ombudsman.eu.int).

This annex does not contain references to documents published by the European Ombudsman. These are available on the European Ombudsman's website, referred to above.

1 Documents from the period before the signing of the Treaty on European Union

Miscellaneous documents

1. Recommendation 757 [by the Assembly of the Council of Europe] (1975) on the conclusions of the Assembly's Legal Affairs Committee with the Ombudsmen and Parliamentary Commissioners in Council of Europe member states (Paris, 18-19 April 1974).

2. The "Adonnino Report" - Report to the European Council by the *ad hoc* committee "On a People's Europe", A 10.04 COM 85, SN/2536/3/85.
3. Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union (COM(90)600).

Parliamentary questions

1. Lord O'Hagan, written question 562/74 to the European Commission on "accessibility of the European Commission" (*Official Journal* 1975 C 55, p. 13; this includes the Commission's reply).
2. Lord O'Hagan, written question 663/74 to the European Commission on a "Community ombudsman" (*Official Journal* 1975 C 86, p. 54; this includes the Commission's reply).
3. Barbara Castle, written question to the European Commission on "a European Ombudsman" (*Official Journal* 1988 C 123, p. 8; this includes the Commission's reply).

Motions for resolutions of the European Parliament

1. Motion for resolution under Rule 43 tabled by Lafuente Lopez: *"Sur la création et l'institution de la fonction de défenseur des citoyens européens"*, 26 September 1986 (B2-863/86).
2. Motion for resolution under Rule 63 tabled by Barbara Castle: "A European Ombudsman", 12 August 1987 (B2-804/87).

European Parliament reports and resolutions

1. Report drawn up on behalf of the Legal Affairs Committee on the appointment of a Community Ombudsman by the European Parliament, 6 April 1979 (PE 57.508/fin.). Rapporteur: Sir Derek Walker-Smith.
2. Resolution on the appointment of a Community Ombudsman by the European Parliament, 11 May 1979 (*Official Journal* 1979 C 140, p. 153).

3. Resolution on strengthening the citizen's right to petition the European Parliament, 14 June 1985 (*Official Journal* 1985 C 175, p. 273).
4. Resolution on the deliberations of the Committee on Petitions during the first six months of 1987, 15 October 1987 (*Official Journal* 1990 C 175, p. 214).
5. Resolution on the deliberations of the Committee on Petitions during the parliamentary year 1989-1990, with indications as regards future procedure for handling petitions, 15 June 1990 (*Official Journal* 1990 C 175, p. 214).
6. Resolution on the deliberations of the Committee on Petitions during the parliamentary year 1990-1991, 14 June 1991 (*Official Journal* 1991 C 183, p. 448).
7. Resolution on the deliberations of the Committee on Petitions during the parliamentary year 1991-1992, 8 July 1992 (*Official Journal* 1992 C 241, p. 66).
8. Resolution on the deliberations of the Committee on Petitions during the parliamentary year 1992-1993, 25 June 1993 (*Official Journal* 1993 C 194, p. 381).

2 Documents from the period after the signing of the Treaty on European Union

The European Ombudsman's Statute

1. Report of the Committee on Institutional Affairs on the regulations and conditions governing the performance of the European Ombudsman's duties, 14 October 1992 (A3-0298/92). Rapporteur: Rosy Bindi.
2. Resolution on the European Ombudsman - Regulations and general conditions governing the performance of the European Ombudsman's duties, 17 December 1992 (*Official Journal* 1992 C 21, p. 141).
3. Resolution on democracy, transparency and subsidiarity and the Interinstitutional Agreement on procedures for implementing the principle of subsidiarity; the regulations and general conditions governing the performance of the Ombudsman's duties; the arrangements for the proceedings of the Conciliation

Committee under Article 189b EC, 11 November 1993 (*Official Journal* 1993 C 329, p. 132).

4. 94/262/ECSC, EC, Euratom: Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, (*Official Journal* 1994 L 113, p. 15). This is the document known as "the Statute of the Ombudsman". The full text of the original Statute (i.e., before the minor amendments effected by item 4 below) is set out in Annex V.
5. 2002/262/EC, ECSC, Euratom: Decision of the European Parliament of 14 March 2002 amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties, *Official Journal* L 92, p. 13.
6. Commission opinion on amendments to the regulations and general conditions governing the performance of the Ombudsman's duties, 6 March 2002 (COM/2002/0133 final).
7. European Parliament resolution amending Article 3 of the regulations and general conditions governing the performance of the Ombudsman's duties (1999/2215(ACI)), 21 March 2002 (*Official Journal* 2002 072 E, p. 336).

Amendment of Parliament's Rules of Procedure (appointment of the Ombudsman)

1. Report on the amendment of Rule 159 of the European Parliament's Rules of Procedure concerning the appointment of the Ombudsman, 29 November 1994, Committee on the Rules of Procedure, the Verification of Credentials and Immunities (A4-0085/94). Rapporteur: Ben Fayot.
2. Second report on the amendment of Rule 159 of Parliament's Rules of Procedure concerning the appointment of the Ombudsman, 21 February 1995, Committee on the Rules of Procedure, the Verification of Credentials and Immunities (A4-0024/95). Rapporteur: Ben Fayot.
3. Third report on the amendment of Rule 159 of Parliament's Rules of Procedures concerning appointment of the Ombudsman, 25 April 1995, Committee on the Rules of

Procedure, the Verification of Credentials and Immunities (A4-0094/95). Rapporteur: Ben Fayot.

4. Decision amending Rule 159 of Parliament's Rules of Procedure concerning appointment of the Ombudsman, 16 May 1995 (*Official Journal* 1995 C 151, p. 35).

Amendment of Parliament's Rules of Procedure (role of the Ombudsman)

1. Report on the role of the European Ombudsman appointed by the European Parliament, 25 November 1994, Committee on Petitions (A4-0083/94). Rapporteur: Edward [Eddy] Newman.
2. Resolution on the role of the European Ombudsman appointed by the European Parliament, 14 July 1995 (*Official Journal* 1995 C 249, p. 226).
3. Report on amendment of Rule 161 of the European Parliament's Rules of Procedure relating to the Ombudsman of the Rules of Procedure of the European Parliament, 26 April 1994, Committee on the Rules of Procedure, the Verification of Credentials and Immunities (A3-0302/94/A). Rapporteur: José Maria Gil-Robles Gil-Delgado.
4. Report on amendment of Rule 161 of the European Parliament's Rules of Procedure relating to the Ombudsman of the Rules of Procedure of the European Parliament, 16 May 1994, Committee on the Rules of Procedure, the Verification of Credentials and Immunities (A3-0302/94/B). Rapporteur: José Maria Gil-Robles Gil-Delgado.
5. Report on the amendment of Rule 161 of Parliament's Rules of Procedure, 16 December 1997, Committee on the Rules of Procedure, the Verification of Credentials and Immunities (A4-0416/1997). Rapporteur: Brian Crowley.
6. Decision amending Rule 161 of the Parliament's Rules of Procedure on the activities of the Ombudsman, 16 July 1998 (*Official Journal* 1998 C 292, p. 116).
7. Report on amendment of Rule 161(2) of Parliament's Rules of Procedure concerning the activities of the Ombudsman, 21 January 1999, Committee on the Rules of Procedure, the Verification of Credentials and Immunities (A4-0016/99). Rapporteur: Johannes Voggenhuber.

Reports on the Ombudsman's Annual Reports (Parliament's Committee on Petitions)

1. Report on the annual activity report (1995) of the Ombudsman of the European Union (European Ombudsman), 30 May 1996 (A4-0176/96). Rapporteur: Nuala Ahern.
2. Report on the annual report on the activities of the European Ombudsman in 1996, 18 June 1997 (A4-0211/97). Rapporteur: Nikolaos Papakyriazis.
3. Report on the annual report on the activities of the European Ombudsman in 1997, 26 June 1998 (A4-0258/98). Rapporteur: Edward [Eddy] Newman.
4. Report on the annual report on the activities of the European Ombudsman in 1998, 18 March 1999 (A4-0119/99). Rapporteur: Laura De Esteban Martin.
5. Report on the activities of the European Ombudsman in 1999, 22 June 2000 (A5-0181/2000). Rapporteur: Astrid Thors.
6. Report on the annual report on the activities of the European Ombudsman for the year 2002, 16 June 2003 (A5-0229/2003). Rapporteur: The Earl of Stockton.
7. Report on the annual report on the activities of the European Ombudsman for the year 2003, 29 October 2004 (A6-0030/2004). Rapporteur: Proinsias De Rossa.

The Parliament's resolutions on these reports are available at: http://www.europarl.eu.int/plenary/default_en.htm

Reports on the Ombudsman's special reports (Parliament's Committee on Petitions)

1. Report on the Special Report by the European Ombudsman to the European Parliament following his own-initiative inquiry into public access to documents, 2 July 1998 (A4-0265/98). Rapporteur: Astrid Thors.
2. Report on the Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures, 12 October 2000 (A5-0280/2000). Rapporteur: Herbert Bösch.

3. Report on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour, 27 June 2001 (A5-0245/2001). Rapporteur: Roy Perry.
4, Report on the Special Report to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH, 27 September 2001 (A5-0423/2001). Rapporteur: Jean Lambert.
5. Report on the Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 242/2000/GG, 14 October 2002 (A5-0355/2002). Rapporteur: Jean Lambert.
6. Report on the Special Report from the European Ombudsman to the European Parliament in complaint 917/2000/GG - "Statewatch", 30 October 2002 (A5-0363/2002). Rapporteur: Astrid Thors.

The Parliament's resolutions on these reports are available at:
http://www.europarl.eu.int/plenary/default_en.htm

3 Note on references to documents produced by EU institutions

The text contains a number of references to documents produced by EU institutions, with which some readers may not be familiar.

COM documents: (e.g., COM (2004) 519 final). These are used for preparatory texts and proposals for legislation, as well as reports and Commission communications to other institutions. They are available in the *Official Journal* and on Eur-Lex (http://europa.eu.int/eur-lex/en/index.html).

SEC documents: (e.g., SEC (93) 539 final). These are unpublished documents of the European Commission. Documents are classified as SEC documents if they do not fit into any other series.

PE-numbered, A-numbered and B-numbered documents: PE-numbered documents are European Parliament documents (e.g., PE 318.504/DEF). The PE-number remains the same throughout the

entire process of discussion and adoption. A-numbers (e.g., A5-0271/2002) are given to reports adopted by the European Parliament's committees. Both categories of document are available on the European Parliament's website (http://www.europarl.eu.int/home/default_en.htm). B-numbers (e.g., B2-863/86) are given to documents that are submitted to Parliament for discussion and adoption in plenary.

SN documents: These are unpublished documents of the Council of the European Union (e.g., SN 3940/90).

SI documents: These are unpublished documents produced by the European Commission's Secretariat-General on the work of the Council, for instance in connection with intergovernmental conferences (e.g., SI (90) 751).

Annex II:

The Spanish Proposal for a European Ombudsman

SPANISH DELEGATON

Intergovernmental Conference on Political Union

EUROPEAN CITIZENSHIP

(21 February 1991)

The text proposed by the Spanish delegation is based on the note on citizenship it submitted in SN 3940/90 of 24 September 1990, annexed in full hereto.

This proposal envisages a specific framework for the general aspects of European citizenship as one of the three pillars of the future Union and the foundation of its democratic legitimacy. The concept and content of citizenship are conceived of as having an evolving dimension and as being an element which should inform all the policies of the Union.

For these reasons, and bearing in mind the conclusions of the European Council meeting on 14 and 15 December 1990 in Rome, it is suggested that the Treaty include a Title specifically devoted to a general framework for citizenship.

No mention is made, although this is not ruled out, of possible specific treatments of citizenship in individual areas, some of which are already under examination in the Conference, particularly in the chapter on the extension of redefinition of jurisdiction, such as judicial co-operation, public health or the disclosure of information, to mention only a few of the abovementioned initiatives.

PREAMBLE

RESOLVED to lay the foundation for an integrated area serving the citizen, which will be the very source of democratic legitimacy and a fundamental pillar of the Union, through the progressive constitution of a common citizenship, the rights and obligations of which derive from the Union.

[...]

Article 9

In each Member State a Mediator shall be appointed whose task shall be to assist the citizens of the Union in the defence of the rights conferred upon them by this Treaty before the administrative authorities of the Union and its Member States and to invoke such rights before judicial bodies, on his own account or in support of the persons concerned.

The Mediators shall likewise have the task of making available to the citizens of the Union clear and complete information concerning their rights and the means of enforcing them.

The Mediators shall submit an annual report to the European Parliament*.

[...]

II. Content of European citizenship

[...]

(e) Safeguarding of European citizens

It would seem necessary for the development of the concept of European citizenship to be accompanied by provision for mechanisms to facilitate its practical functioning. That would include the need to provide for some form of safeguard at both national and Union level.

The European citizen, who already enjoys the right of petition through the Committee on Petitions of the European Parliament and who also has access to the Court of Justice in certain cases, could receive greater protection of his rights within the framework of the

* Consideration should likewise be given to two other possibilities, namely entrusting the functions referred to in this proposed Article to a European "ombudsman" as an independent organ of the Union or one answerable to the European Parliament, or reinforcing the actions of the national mediators with an ombudsman acting at European level.

Union by submitting petitions or complaints to a *European* "Ombudsman" whose function would be to protect the specific rights of the European citizen and help to safeguard them.

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

[...]

Annex III:

The Danish Proposal for a European Ombudsman

The Danish proposal for a European Ombudsman (1991)

(Unofficial translation - May 2005)

Ombudsman

New Article 140 A
The European Parliament shall appoint an Ombudsman empowered to receive submissions from physical or legal persons domiciled in a Member State concerning deficiencies in the administration of the institutions.

Pursuant to the instructions, the Ombudsman shall conduct inquiries for which he finds grounds, either on the basis of submissions or on his own initiative.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

New Article 140 B
The Ombudsman shall be appointed after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

New Article 140 C

The Ombudsman shall be completely independent in the performance of his duties. In the performance of his duties he shall neither seek nor take instructions from anybody. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

New Article 140 D

The European Parliament shall lay down instructions for the Ombudsman after obtaining the opinion of the Commission and with the unanimous approval of the Council.

These instructions shall also contain more detailed guidelines for the relationship between the Ombudsman and the European Parliament's Committee on Petitions.

New Article 140 E

The Ombudsman shall appoint a secretariat to assist him in his work.

Annex IV:

The Treaty Basis for the European Ombudsman

Consolidated version of the Treaty establishing the European Community

Article 195

1. The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State 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.

In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

2. The Ombudsman shall be appointed after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment.

The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

3. The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any body. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

4. The European Parliament shall, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, lay down the regulations and general conditions governing the performance of the Ombudsman's duties.

Annex V:

The Statute of the European Ombudsman

DECISION OF THE EUROPEAN PARLIAMENT of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom)

THE EUROPEAN PARLIAMENT,

Having regard to the Treaties establishing the European Communities, and in particular Article 138e (4) of the Treaty establishing the European Community Article 20d (4) of the Treaty establishing the European Community, Article 107d (4) of the Treaty establishing the European Atomic Energy Community,

Having regard to the opinion of the Commission,

Having regard to the Council's approval,

Whereas the regulations and general conditions governing the performance of the Ombudsman's duties should be laid down, in compliance with the provisions of the Treaties establishing the European Communities;

Whereas the conditions under which a complaint may be referred to the Ombudsman should be established as well as the relationship between the performance of the duties of Ombudsman and legal or administrative proceedings;

Whereas the Ombudsman, who may also act on his own initiative, must have access to all the elements required for the performance of his duties; whereas to that end Community institutions and bodies are obliged to supply the Ombudsman, at his request, with any information which he requests of them, unless there are duly substantial grounds for secrecy, and without prejudice to the ombudsman's obligation not to divulge such information; whereas the Member States' authorities are obliged to provide the Ombudsman with all necessary

information save where such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated; whereas if the Ombudsman finds that the assistance requested is not forthcoming, he shall inform the European Parliament, which shall make appropriate representations;

Whereas it is necessary to lay down the procedures to be followed where the Ombudsman's enquiries reveal cases of maladministration; whereas provision should also be made for the submission of a comprehensive report by the Ombudsman to the European Parliament at the end of each annual session;

Whereas the Ombudsman and his staff are obliged to treat in confidence any information which they have acquired in the course of their duties; whereas the Ombudsman is, however, obliged to inform the competent authorities of facts which he considers might relate to criminal law and which have come to this attention in the course of his enquiries;

Whereas provision should be made for the possibility of co-operation between the Ombudsman and authorities of the same type in certain Member States, in compliance with the national laws applicable;

Whereas it is for the European Parliament to appoint the Ombudsman at the beginning of its mandate and for the duration thereof, choosing him from among persons who are Union citizens and offer every requisite guarantee of independence and competence;

Whereas conditions should be laid down for the cessation of the Ombudsman's duties;

Whereas the Ombudsman must perform his duties with complete independence and give a solemn undertaking before the Court of Justice of the European Communities that he will do so when taking up his duties; whereas activities incompatible with the duties of Ombudsman should be laid down as should the remuneration, privileges and immunities of the Ombudsman;

Whereas provisions should be laid down regarding the officials and servants of the Ombudsman's secretariat which will assist him and the budget thereof; whereas the seat of the Ombudsman should be that of the European Parliament;

Whereas it is for the Ombudsman to adopt the implementing provisions for this Decision; whereas furthermore certain transitional provisions should be laid down for the first Ombudsman to be appointed after the entry into force of the Treaty on European Union,

HAS DECIDED AS FOLLOWS:

Article 1

1. The regulations and general conditions governing the performance of the Ombudsman's duties shall be as laid down by this Decision in accordance with Article 138e (4) of the Treaty establishing the European Community, Article 20d (4) of the Treaty establishing the European Coal and Steel Community and Article 107d (4) of the Treaty establishing the European Atomic Energy Community.

2. The Ombudsman shall perform his duties in accordance with the powers conferred on the Community institutions and bodies by the Treaties.

3. The Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling.

Article 2

1. Within the framework of the aforementioned Treaties and the conditions laid down therein, the Ombudsman shall help to uncover 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, and make recommendations with a view to putting an end to it. No action by any other authority or person may be the subject of a complaint to the Ombudsman.

2. Any citizen of the Union or any natural or legal person residing or having its registered office in a Member State of the Union may, directly or through a Member of the European Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration in the activities of Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. The Ombudsman shall inform the institution or body concerned as soon as a complaint is referred to him.

3. The complaint must allow the person lodging the complaint and the object of the complaint to be identified; the person lodging the complaint may request that his complaint remain confidential.

4. A complaint shall 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 administrate approaches to the institutions and bodies concerned.

5. The Ombudsman may advise the person lodging the complaint to address it to another authority.

6. Complaints submitted to the Ombudsman shall not affect time limits for appeals in administrative or judicial proceedings.

7. When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed without further action.

8. No complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all the possibilities for the submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90 (1) and (2) of the Staff Regulations, have been exhausted by the person concerned and the time limits for replies by the authority thus petitioned have expired.

9. The Ombudsman shall as soon as possible inform the person lodging the complaint of the action he has taken on it.

Article 3

1. The Ombudsman shall, on his own initiative or following a complaint, conduct all the enquiries which he considers justified to clarify any suspected maladministration in the activities of Community institutions and bodies. He shall inform the institution or body concerned of such action, which may submit any useful comment to him.

2. The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantial grounds of secrecy.

They shall give 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.

They shall give access to other documents originating in a Member State after having informed the Member State concerned. In both cases, in accordance with Article 4, the Ombudsman may not divulge the content of such documents.

Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman; they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be found by their duty of professional secrecy.

3. The Member States' authorities shall be obliged to provide the Ombudsman, whenever he may so request, via the Permanent Representations of the Member States to the European Communities, with any information that may help to clarify instances of maladministration by Community institutions or bodies unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated. Nonetheless, in the latter case, the Member State concerned may allow the Ombudsman to have this information provided that he undertakes not to divulge it.

4. If the assistance which he requests is not forthcoming, the Ombudsman shall inform the European Parliament, which shall make appropriate representations.

5. As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.

6. If the Ombudsman finds there has been maladministration, he shall inform the institution or body concerned, where appropriate making draft recommendations. The institution or body so informed shall send the Ombudsman a detailed opinion within three months.

7. The Ombudsman shall then send a report to the European Parliament and to the institution or body concerned. He may make recommendations in his report. The person lodging the complaint shall be informed by the Ombudsman of the outcome of the inquiries, of the opinion expressed by the institution or body concerned and of any recommendations made by the Ombudsman.

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

Article 4

1. The Ombudsman and his staff, to whom Article 214 of the Treaty establishing the European Community, Article 47 (2) of the Treaty establishing the European Coal and Steel Community and Article 194 of the Treaty establishing the European Atomic Energy Community shall apply, shall be required not to divulge information or documents which they obtain in the course of their inquiries. They shall also be required to treat in confidence any information which could harm the person lodging the complaint or any other person involved, without prejudice to paragraph 2.

2. If, in the course of inquiries, he learns of facts which he considers might relate to criminal law, the Ombudsman shall immediately notify the competent national authorities via the Permanent Representations of the Member States to the European Communities and, if appropriate, the Community institution with authority over the official or servant concerned, which may apply the second paragraph of Article 18 of the Protocol on the Privileges and Immunities of the European Communities. The Ombudsman may also inform the Community institution or body concerned of the facts calling into question the conduct of a member of their staff from a disciplinary point of view.

Article 5

Insofar as it may help to make his enquiries more efficient and better safeguard the rights and interests of persons who make complaints to him, the Ombudsman may co-operate with authorities of the same type in certain Member States provided he complies with the national law applicable. The Ombudsman may not by this means demand to see documents to which he would not have access under Article 3.

Article 6

1. The Ombudsman shall be appointed by the European Parliament after each election to the European Parliament for the duration of the parliamentary term. He shall be eligible for reappointment.

2. The Ombudsman shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledgement competence and experience to undertake the duties of Ombudsman.

Article 7

1. The Ombudsman shall cease to exercise his duties either at the end of this term of office or on his resignation or dismissal.

2. Save in the event of his dismissal, the Ombudsman shall remain in office until his successor has been appointed.

3. In the event of early cessation of duties, a successor shall be appointed within three months of the office's falling vacant for the remainder of the parliamentary term.

Article 8

An Ombudsman who no longer fulfils the conditions required for the performance of his duties or is guilty of serious misconduct may be dismissed by the Court of Justice of the European Communities at the request of the European Parliament.

Article 9

1. The Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union. In the performance of his duties he shall neither seek nor accept instructions from any government or other body. He shall refrain from any act incompatible with the nature of his duties.

2. When taking up his duties, the Ombudsman shall give a solemn undertaking before the Court of Justice of the European Communities that he will perform his duties with complete independence and impartiality and that during and after his term of office he will respect the obligations arising therefrom, in particular his duty to behave with integrity and discretion as regards the acceptance, after he has ceased to hold office, of certain appointments or benefits.

Article 10

1. During his term of office, the Ombudsman may not engage in any other political or administrative duties, or any other occupation, whether gainful or not.

2. The Ombudsman shall have the same rank in terms of remuneration, allowances and pension as a judge at the Court of Justice of the European Communities.

3. Articles 12 to 15 and Article 18 of the Protocol on the Privileges and Immunities of the European Communities shall apply to the Ombudsman and to the officials and servants of his secretariat.

Article 11

1. The Ombudsman shall be assisted by a secretariat, the principal officer of which he shall appoint.

2. The officials and servants of the Ombudsman's secretariat shall be subject to the rules and regulations applicable to officials and other servants of the European Communities. Their number shall be adopted each year as part of the budgetary procedure [1].

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[1] A joint statement by the three institutions will set out guiding principles for the number of staff employed by the Ombudsman and the status as temporary or contract staff of those carrying out enquiries.

3. Servants of the European Communities and of the Member States appointed to the Ombudsman's secretariat shall be seconded in the interests of the service and guaranteed automatic reinstatement in their institution of origin.

4. In matters concerning his staff, the Ombudsman shall have the same status as the institutions within the meaning of Article 1 of the Staff Regulations of Officials of the European Communities.

Article 12

The Ombudsman's budget shall be annexed to section I (Parliament) of the general budget of the European Communities.

Article 13

The seat of the Ombudsman shall be that of the European Parliament (2) [2].

Article 14

The Ombudsman shall adopt the implementing provisions for this Decision.

Article 15

The first Ombudsman to be appointed after the entry into force of the Treaty on European Union shall be appointed for the remainder of the parliamentary term.

Article 16

The European Parliament shall make provision in its budget for the staff and material facilities required by the first Ombudsman to perform his duties as soon as he is appointed.

Article 17

This Decision shall be published in the *Official Journal* of the European Communities. It shall enter into force on the date of its publication.

Done at Strasbourg, 9 March 1994.

For the European Parliament

The President

Egon KLEPSCH

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[2] See Decision taken by common agreement between the Representatives of the Governments of the Member States on the location of the seats of the institutions and of certain bodies and departments of the European Communities (OJ No C 341, 23. 12. 1992, p. 1).

Contributors

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P. Nikiforos Diamandouros is the second European Ombudsman. He was elected by the European Parliament in 2003, to complete the term of the retiring first European Ombudsman, and was re-elected in 2005 for a full mandate. Between 1998 and 2003, he served as the first National Ombudsman of Greece. He is also a Professor of Political Science (on leave) at the University of Athens.

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Jacob Söderman was the first European Ombudsman, serving from 1995 to 2003, when he retired. He was elected in July 1995 and re-elected in 1999. Between 1989 and 1995, Mr Söderman served as the National Ombudsman of Finland. Before being appointed National Ombudsman, He had an extensive career as a Parliamentarian and Minister in Finland.

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