

# The EU public's participation in the EU environmental matters: the impact of the EU Ombudsman<sup>1</sup>

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**Abstract:** The paper analyses the EU citizens' participation in environmental matters at EU level with the "help" of the EU ombudsman. In the EU administration two union institutions, the European Investment Bank and the European Commission have different environmental matters where during their procedure the public can participate with turning to the EU ombudsman and make complaints, e.g. concerning the Commission's responsibility for ensuring that Member States fulfil their obligations under EU law.

**Key words:** European public, European Ombudsman, European Commission, Art. 258 procedure, European Investment Bank, environmental matters, access to documents

## 1 INTRODUCTION

The office of the European ombudsman was established in connection with European citizenship by the Maastricht Treaty. European citizenship was needed to introduce because the early period of European integration gave no role to citizens and for the deepening of integration a sort of identification and means of demonstrating a European 'added value' were required<sup>2</sup> and offered a direct connection between the Union and the citizen. Arising from the European citizenship, any European citizen or any natural or legal person residing or having 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 EU institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. Complainants do not have to be adversely affected by maladministration in order to complain to the Ombudsman, *actio popularis* is possible, which is of particular importance for non-governmental organisations. Also, the EU Ombudsman can initiate an inquiry if the matter concerns important general issues. Classical ombudsmen do not have an express mandate for human rights protection and promotion, however, the violation of human rights by government institutions and bodies as maladministration falls within their mandate and thus the European ombudsman as a true classical ombudsman in international or supranational level uses human rights norms that are part of the applicable legal system and applies them in human rights related cases.<sup>3</sup>

## 2 THE INSTITUTIONS AFFECTED WITH ENVIRONMENTAL COMPLAINTS

In the Maastricht Treaty, the role of the Ombudsman was primarily envisaged in relation to procedural rights, but was also seen as an additional help in enforcing first and second generation rights, even though the protection of these rights is more directly achieved through national courts, the Court of Justice of the European Union and the European Court of the Human Rights.<sup>4 5</sup> However, already in 1996 the Ombudsman had third-generation cases, such as the Commission's failure to initiate infringement proceedings based on Article 258 (ex-Article 226) in the Newbury Bypass-case<sup>6</sup> and the French nuclear experiment-case in Polynesia. These cases were initiated by citizens' complaints. Regarding the EU institutions, two EU institutions, the European Investment Bank and the European Commission is related to environmental complaints handed to the EU Ombudsman.

### 1.1. European Commission

Most of the environmental complaints that are handed to the European Ombudsman are against the Commission. They are made by citizens or, more often, by non-governmental organisations, which have complained to the Commission against a Member State. These complaints are linked to the Art. 258 procedure.

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<sup>2</sup> Warleigh, A. Purposeful Opportunists? EU Institutions and the Struggle over European Citizenship in Bellamy, R. -- Warleigh, A. Citizenship and Governance in the European Union, s. 22.

<sup>3</sup> REIF, L. C. Reif, Linda C.: The Ombudsman, Good governance and the International Human Rights System, s. 386.

<sup>4</sup> Gregory, R. – Giddings, P. Citizenship, Rights and the EU Ombudsman in Bellamy, R. - Warleigh, A. Citizenship and Governance in the European Union, s. 78.

<sup>5</sup> Before the Maastricht Treaty, the Court of Justice took up the task to elaborate community law on human rights, and developed jurisprudence that fundamental human rights are general principles of community law. Although the Maastricht Treaty enshrined the human rights as general principles of community law, it had not listed the fundamental rights of citizens: only Article 6 of the Treaty declared that the Union shall respect the fundamental rights and simply referred to the European Convention on Human Rights.

<sup>6</sup> Complaint 206/27.10.95/HS/UK and others (Newbury Bypass), complaint 132/21.9.95/AH/EN (M40 Motorway), *Annual Report* 1996, s. 66, 75.

See also Kunzlik, P – Jacobson, B. Article 169, the Ombudsman and the Parliament, 6 *European Environmental Law Review*, s. 46.

### *The Article 258 procedure*

The Article 258 procedure begins when the Commission is first alerted to a possible infringement. The Commission itself monitors the process of transposition of Directives into national law. However, the Commission relies mainly on complaints from citizens to alert it to possible infringements in the application of the law by public authorities in the Member States.

When the Commission learns of a possible infringement it registers the case and carries out a preliminary investigation. If there is a case to answer, the Commission then sends a letter of formal notice to the Member State. This specifies what the State is alleged to have done wrong and sets a time limit for the submission of its observations. After the time limit has expired, the next step is for the Commission to deliver a reasoned opinion. The opinion sets a time limit for compliance by the Member State. If the Member State does not come into compliance before the expiry of the time limit in the reasoned opinion, the Commission may refer the matter to the Court of Justice. The word "may" is important, because it means that the Commission is not obliged to refer every infringement to the Court. The case law of the Court confirms that the decision to refer or not is discretionary. The Court has also said that individuals cannot oblige the Commission to adopt a particular position. Nor can they bring an action against the Commission if it refuses to refer an infringement to the Court.<sup>7</sup>

### *The role of citizen in the Article 258 procedure*

The above description makes clear that the Commission's possibility to refer an infringement to the Court of Justice arises only after an administrative procedure which involves several stages: registration, preliminary investigation, letter of formal notice and reasoned opinion. The traditional view is that these procedures concern only the Commission and the Member States. According to this view, the citizen is not a party and has no rights in the administrative procedure. In fact, the citizen is considered as an informer. In its Fourteenth Annual Report on monitoring the application of Community law, the Commission expressed this traditional view as follows: The citizen is not party to a procedure which cannot in any case change his personal situation, but he plays a valuable detection and information role.

It is understandable that the infringement procedure was seen in this way when the Community was first established. At that time, it was not so different from other international organisations. There were no citizens. Natural persons have only gradually been recognised as subjects of the new Community legal order. Since then, the Maastricht Treaty has established the citizenship of the Union and the right of citizens to petition the European Parliament, including about infringements of Community law by Member States. The Maastricht Treaty also established the office of European Ombudsman, to whom citizens may complain about maladministration in the activities of Community institutions and bodies. The Treaty of Amsterdam added that decisions in the Union should be taken as openly as possible and, most recently, the Charter of Fundamental rights has enshrines the right to good administration.

A new era in the relationship between the Commission and the Ombudsman began in 1997 when the European Ombudsman launched an own-initiative inquiry into the Commission's procedure under Article 258 (ex-Article 226). He considered the ex officio investigation well-timed because he had received many complaints about the administrative procedure of the Commission in the role as guardian of the Treaty. Complaints to the Commission mainly concerned delays in the processing of complaints managed by the Commission, the provision of information (at the stage of the procedure) and the failure to give reasons (where the Commission considered that the Member State had not infringed Community law). The launch of the own-initiative inquiry was already raised in the 1996 Annual Report when it concluded, following two inquiries against the European Commission - the United Kingdom M40 motorway case and the Newbury Bypass case - that the Commission had failed to take action. By exercising good administrative procedures, it may itself decide to establish procedural rights<sup>8</sup> and a type of administrative procedure such as the Commission normally informs the participants in the proceedings about the reasoned decision.<sup>9</sup>

The Commission invites citizens, businesses and NGOs to complain to it about infringements by Member States. If such people are dissatisfied by the Commission's handling of their complaint, there is no judicial remedy available. They can, however, complain to the Ombudsman. Following criticism and suggestions from the Ombudsman, the Commission agreed to certain procedural guarantees for infringement complaints, and summed up in a communication.<sup>10</sup> By complaining to the Commission, citizens hope to activate the so-called "infringement procedure", through which the Commission, as the "Guardian of the treaties", can investigate allegations that a Member State is failing to fulfil its obligations under EU environmental law and, eventually, bring cases to the Court of Justice.

The complainants turn to the EU Ombudsman when they are dissatisfied by the Commission's handling of their complaint against the Member State. In most cases, they are unhappy because they think the Commission is not pursuing the case vigorously enough, or because the Commission has closed the case on the grounds that there is no infringement.

These kinds of complaint showed that the infringement procedure had several deficiencies from the standpoint of complainants in environmental cases:

- it is not intended to provide a remedy for the complainant;

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<sup>7</sup> See Case C-191/95 *Commission v Germany* [1998] ECR I-5449, para 46; Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case 87/89 *Sonito v Commission* [1990] ECR-I 1981; Order of the Court of First Instance in Case T-182/97 *Hubert Ségaud and Monique Ségaud v Commission* [1998] ECR II-0271.

<sup>8</sup> Decision on complaint 206/207.10.95/HS/UK and others against the European Commission. The European Ombudsman: *Annual Report for 1996* (Luxembourg: Office for Official Publications of the European Communities 1997) 66.

<sup>9</sup> Decision on complaint 132/21.9.95/AH/EN against the European Commission. The European Ombudsman: *Annual Report for 1996* (Luxembourg: Office for Official Publications of the European Communities 1997) 73.

<sup>10</sup> Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law (2002)/Communication of the Commission to the Council and the European Parliament: updating the handling of relations with the complainant in respect of the application of Union law (2012)

In the communication, updating the handling of relations with the complainant in respect of the application of Union law, the European Commission explains the administrative measures for the benefit of the complainant with which it undertakes to comply when handling her/his complaint and assessing the alleged infringement.

- it does not provide for the investigation of infringements that have been brought to an end; and
- the complainant is not treated as a party in the procedure;

We shall point out the different workload of the EIB and the Commission: the European Investment Bank finances a limited number of projects, but the Commission could potentially receive complaints about every project or situation with environmental implications in the Member States. The following two cases were the very first ones of the European Ombudsman that concerned environmental matters.

### *The Nuclear test in French Polynesia*

The Ombudsman received a relatively large amount of complaints related to the nuclear tests that the French government announced in June 1995 it would start in French Polynesia. The complaints in substance put forward that the Commission had been passive in this respect. The complainants consider that the Commission has not correctly enforced Community law as to the nuclear testing in French Polynesia. Although most complaints do not specify which legal provisions have been breached, it may be considered that they all denounce the failure, from their point of view, of the European Commission to apply Article 34 of the Euratom Treaty to the current series of nuclear tests carried out by France. The Commission debated this matter on several occasions in September and October 1995 and at its meeting of 23 October 1995 it concluded that the specific conditions under which the last tests in French Polynesia were taking place led to the conclusion that these tests did not give rise to a perceptible risk of significant exposure of workers or of the population to ionising radiation and that, consequently, the provisions of Article 34 did not apply. "Annexed to the comments of the Commission there was a list of the 25 main documents on which the Commission based its conclusions. The comments were transmitted to the complainants who mostly chose not to comment on the Commission's position.

THE DECISION The Ombudsman found that there was no justification for the allegation that the Commission had been passive in the matter. Furthermore, he stated that he did not find on the basis of the elements put forward by the complainants that the Commission had exercised its powers wrongly or incompletely. Thus, as he had not found any instance of maladministration in the action of the Commission, the Ombudsman decided to close the cases.<sup>11</sup>

### *The Newbury Bypass-case*

The complainants alleged maladministration by the European Commission in deciding not to open infringement proceedings against the United Kingdom under Article 169 of the EC Treaty. They took the view that the UK government had breached Community law by failing to carry out an environmental impact assessment of the Newbury Bypass road in Berkshire, England.<sup>12</sup> In order to deal with them as effectively and promptly as possible, the complaints were treated jointly. The Ombudsman considers that, as a matter of good administrative behaviour, the Commission should have informed the registered complainants of its decision before, or at least at the same time as, announcing the decision publicly through a press release. There may have been practical reasons why this was not possible in this particular case. If so, the Commission should at least have explained those reasons to the complainants.<sup>13</sup>

## **1.2. The European Investment Bank**

The Ombudsman and the EIB signed a so-called Memorandum of Understanding that provides for the EIB to inform the public about the environmental policies and standards that apply to the projects financed by the EIB. According to this the EIB constructs an internal complaints procedure for complainants before they can turn to the Ombudsman. Therefore, the European Investment Bank introduced the so-called Complaints Mechanism Operating Procedures that has the resources needed to carry out inspections and take evidence.

An example of the EIB involvement in environmental matters concerned the way the European Investment Bank handled a complaint about a project it financed in Madagascar for nickel-cobalt mining and processing. The complainant was concerned about the time taken to deal with his complaint. The complainant also raised concerns about whether the project had been monitored in terms of respect for environmental, health and safety requirements in an independent manner. The Ombudsman found maladministration as the EIB took six years to finalise its investigation into the complaint. While some of the shortcomings identified have been addressed as part of the review of the EIB's Complaints Mechanism, the Ombudsman

<sup>11</sup> Decision on complaints 34/21.7.95/PMK/EN, 148/28.9.95/BL/ES-DE, 215/07.11.95/FJRC/ES, 242/20.11.95/DS/UK-EN, 243/20.11.95/JF/UK-EN, 244/20.11.95/RSS/UK-EN, 246/22.11.95/JML/UK-EN, 247/22.11.95/HW/UKEN, 248/22.11.95/DT/UK-EN, 250/22.11.95/GMA/UK-EN, 251/22.11.95/MG/UK-EN, 285/14.12.95/HNDG/PO-PO, 294/3.1.96/AB/UK-EN, 296/3.1.96/PS/UK-EN, 297/3.1.96/FDN/UK-EN, 299/12.1.96/APW/UK-EN, 301/13.12.95/PB/UK-EN, 323/4.1.96/JM/UK-EN, 326/8.1.96/WMC/UK-EN, 329/8.1.96/CG/UK-EN, 341/8.1.96/JB/UK-EN, 342/8.1.96/RN/UK-EN, 343/8.1.96/CRJ/UK-EN, 344/8.1.96/MD/UK-EN, 345/13.12.95/PM/UK-EN, 351/11.1.96/PLT/UK-EN, 352/10.1.96/DP/UK-EN, 353/10.1.96/RW/UK-EN, 368/16.1.96/MO/UK-EN, 369/16.1.96/DH/UJ-EN, 370/16.1.96/RB/UK-EN, 375/18.1.96/LF/UK-EN, 379/26.1.96/PE/UK-EN, 380/25.1.96/AS/UK-EN, 386/22.1.96/AH/UK-EN, 399/31.1.96/J&J/UK-EN, 410/7.2.96/EHW/UK-EN, 440/20.2.96/AW/UK-EN against the European Commission, EUO: Annual Report 1996, s. 22

<sup>12</sup> See more Warleigh, A. Understanding European Union Institutions, s. 156.

<sup>13</sup> Decision on complaints 206/27.10.95/HS/UK, 211/03.11.95/JC/UK, 226/13.11.95/J./UK, 229/14.11.95/PAD/UK, 303/03.01.96/COW/UK, 327/08.01.96/RW/UK, 335/08.01.96/AK/UK, 358/15.01.96/EC/UK, 359/16.01.96/J./UK, 360/09.01.96/SJ/UK, 361/09.01.96/JB/UK, 362/15.0.96/JB/UK, 363/15.01.96/MN/UK, 364/03.11.95/J./UK, 377/31.1.96/M/UK, 378/25.1.96/JB/UK, 382/24.1.96/CW/UK, 383/24.1.96/J./UK, 403/01.02.96/TA/UK, 71/4.3.96/PC/UK, 487/14.3.96/BARF/UK, 488/14.3.96/PB/UK, 514/25.3.96/DB/UK, 515/25.3.96/PJW/UK, 526/27.3.96/DAW/UK, 562/18.4.96/DD/UK, 607/24.5.96/BB/UK against the European Commission, EUO: Annual Report 1990, s. 58

made a recommendation to avoid problems in the future. The Ombudsman also found issues in how the EIB monitors projects and made a corresponding recommendation.<sup>14</sup>

### 3 THE MATTER OF COMPLAINTS

#### 3.3 Access to documents

Since the first annual report, the European Ombudsman had constantly represented the view that three types of errors may give rise to an instance of maladministration and these may even to some extent partly cover each other. These types can be identified as a failure to comply with a legal norm or principle, failure to prevail the principle of good administration and failure to respect human and fundamental rights.

The European ombudsman with activities concerning the field of the protection of fundamental rights promotes the respect of the Charter and when investigating the possible instance of maladministration he takes into account the rules and principles set out in the Code, too. The ombudsman conducted own-initiative inquiries regarding the Charter and the specific rights were used in handling of submitted complaints. Yet before the Charter became legally binding, the ombudsman stated that the violation of the rights in the Charter constitutes maladministration.

We should mention the opinion of the Court of First Instance when stated that the principle of sound administration does not, in itself, confer rights upon individuals except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of Fundamental Rights of the European Union.<sup>15</sup>

Access to EU documents and related transparency cases form a great proportion among the inquiries. To facilitate the handling of these cases, the Ombudsman decided to introduce a new Fast-Track procedure for these complaints, meaning individuals can potentially get the documents they are looking for within weeks, rather than months. Many environmental cases concerned the Commission's refusal to grant public access to documents, e.g. the infringement proceedings against Hungary regarding works on the Paks II nuclear power plant. In this case, the Ombudsman inquired into this issue and proposed that the Commission reassess its refusal. The Commission accepted the proposal and granted the complainants full access to two, and wide partial access to the remaining documents. However, the complainants did not consider that the case was resolved by the partial disclosure of documents as they argued that the Commission had failed to identify all documents falling within the scope of their access requests. The Ombudsman then asked the Commission to check if there were additional documents and, if so, to assess whether they could be released, and agreeing, the Commission identified three more documents. However, it refused to give access to the public. Because the Ombudsman found the Commission's decision not to disclose the newly identified documents to be reasonable, considered that the Commission has settled the substance of the case and closed the inquiry, but criticized the significant delay that amounted to maladministration.<sup>16 17</sup>

### 4 CONCLUSION

Although in different ways, the definition of good administrative practices (good administrative behaviour) had been used by the European law since the 1960s, enshrined through the activities of the European Court of Justice.<sup>18</sup> When looking at the subject matter of cases we can observe that they vary from gender, age, disability another kind of discrimination to professional certification, nationality, language, employment, health care or environmental issues. The cases show that the ombudsman successfully refers to the rights set out in the Charter against the main institutions, too. The European ombudsman as a non-judicial forum when using the Charter and the decisions of the Court of Justice – which applies among others the European Convention on Human Rights and the United Nations human rights treaties for its decision– during investigations, helps next to the judicial way to enforce human rights law. The commitment to the binding nature of the Charter in the Lisbon Treaty reflects the gradual understanding that citizens should be placed at the heart of the European issues which shows the success of the European Ombudsman as well.

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<sup>14</sup> Recommendation of the European Ombudsman in case 146/2017/DR on how the European Investment Bank handled a complaint about breaches of environmental, health and safety requirements in a project it financed

<sup>15</sup> Case T-193/04 Hans-Martin Tillack v. Council.

<sup>16</sup> Decision in cases 1227/2017/THH and 1715/2017/THH on the European Commission's refusal of access to documents concerning its infringement proceedings against Hungary relating to works on the Paks II nuclear power plant.

<sup>17</sup> Commission in 2017 November last year closed the infringement case against Hungary regarding the compatibility of the Paks II nuclear power plant project with EU public procurement legislation.

<sup>18</sup> The principle of good administration is enshrined in Court of Justice judgement of 31 March 1992 in Case-255/90 P, Burban (1992) ECR I-2253 and Court of First Instance judgements of 18 September 1995 in Case T-167/94 Nölle (1995) ECR II-2589, and 9 July 1999 in Case T-231/97 New Europe Consulting and others (1999) ECR II-2403. See Council of the EU: Charter of Fundamental Rights of the EU. Explanations relating to the complete text of the Charter. December 2000. Office for Official Publications of the European Communities, 2001. 58.

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