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PROMOTING DEMOCRACY THROUGH THE WORK OF THE EU OMBUDSMAN

Abstract

The EU is in an economic, social and political crisis, and there are vital expectations to enhance and restore trust, openness and transparency. The EU bodies which bring the EU and its citizens closer to each other gain even more importance. This paper will demonstrate that alternative dispute-resolution forums, like the office of the EU Ombudsman, have a multidirectional function. It was established to strengthen the fundamental rights of citizens and to enhance a more citizen-friendly EU administration. The analysis highlights the forum's importance in changing horizontal relations between different stakeholders into vertical during its procedure, for instance between EU institutions and EU citizens. The presentation of research explores these relations by analysing complaint cases and the EU Ombudsman-related cases of the CJEU. The paper argues that the right to complain to the EU Ombudsman, who is a direct link between EU institutions and EU citizens, and the potential of changing the above-mentioned functions, can strengthen the trust of Member States' citizens and help them identify as European citizens. The cornerstone of this argument are the relations between the EU citizens, institutions and the Ombudsman.

Keywords: democratization, EU institutions, EU citizens, EU Ombudsman

JEL Classification: K23, K33.

INTRODUCTION

According to the rule of law, a strong and independent judiciary shall possess the power and means to ensure that government officials, even the highest ones, are held accountable under the law. The potential for public participation in the administration can be derived essentially from recognizing that through separation of power, the parliamentary and judicial control do not provide a sufficient counterbalance to public administration (Szamel 1998, 265).

The adoption of the Treaty on the European Union marked a clear transition in the development of the Community from politics to polity (Chryssochoou 2001, 96). Because there is no clear division of power within the Union, the issue of democratic deficit is directly linked to the lack of democratic legitimacy of the Union's institutions. In the EU's institutional system, the European Parliament, along with the Council of the European Union, form the legislative branch, but the two main political decision-makers are the Commission and the Council. The executive Commission can be regarded as part of the 'government' of the Union (next to the Council), but not like the governments

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used in parliamentary democracies. It is partly composed by a bureaucracy of civil servants. The EU bureaucracy means the EU Commission with the administration.

The selection of delegates to the Commission lacks the direct voice and political will of EU citizens. That is to say, the Commissioners are not directly elected by EU citizens. This lack of legitimacy, namely the lack of direct elections, cannot be solved by the European Parliament, a body directly elected by EU citizens, mainly because there are no European demos (people, nation) which could act as a sovereign and give the sense of direct links to the representatives and institutions of the European demos. Also, the European Parliament being a political institution was established because of political reasons. Following the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), the ECSC Common Assembly was expanded to cover all three communities. Members of the European Parliament (MEPs) would initially be appointed by the national parliaments. The fact that it was established as an appointed assembly without a "direct" link to the people is also supported by the fact that Members of the European Parliament were only directly elected from 1979 onwards, due to the1976 Electoral Act. It profoundly changed the institutional position of the European Parliament and was the founding document of a more democratic European Union, as it declares that "citizens of the Union have the right to participate in its democratic life, in particular, by voting or standing as candidates in elections to the European Parliament." (Council Decision, 2018). With the Electoral Act a direct link between the EU Parliament and the citizens had been established, making the EU lean closer to its citizens.

The aim of this paper is to underpin that an EU office, that ensures EU institutions accountability on behalf of its citizens, can take part in the efforts to make the EU more democratic.

THE EU OMBUDSMAN STEP BY STEP

As early as in 1974, at the meeting of the Parliamentary Assembly of the Council of Europe, a Recommendation on the role of the ombudsman and the parliamentary commissioner had already been adopted. The Recommendation emphasised that the citizens' lives are being increasingly governed by the authorities, and while protection of fundamental rights is supervised by the state, interferences of public authorities into the lives of individuals threaten their fundamental rights. Because the usual forms of judicial remedies are not always able to react with necessary speed and efficiency to the problems, and due to the complexity of different fields of the administration, there is a need for another guarantee- one that is simpler, quicker, cheaper and more efficient. This role could be filled by the Ombudsman (Recommendation, 1975).

The Maastricht Treaty was needed in order to provide a better framework for internal policies in the field of justice and home affairs, and a more coherent framework for joint Community action. At the same time, the exercise of the extended powers of the Community and the European Union has in fact made it more urgent to protect individuals across the full spectrum of political and economic life under the rule of law (Bradley and Sutton 1996, 246), which pervades the Union system with varying degrees of emphasis and intensity (Wennerström 2007, 157). According to Dahrendorf, democracy, as the voice of the people - all citizens - sets up institutions that control government and allows it to be changed without violence. In this sense, the demos, the people, are the sovereign that gives legitimacy to institutions of democracy (Dahrendorf 2003, 103).

Thus, the Maastricht Treaty marked a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and at a level closest to the citizens. Transparency is a key requirement of the Union vis-à-vis the proceedings of bodies and offices, and openness is reflected in the relationship between bureaucracy and EU citizens. Strengthening its identity at an international level (in particular by pursuing a common foreign and security policy) and strengthening the protection of rights and interests of the Member States' nationals through the introduction of Union citizenship were among the objectives of the EU. There were two reasons for declaring EU citizenship in the Maastricht Treaty. The first stages of integration offered no role to the citizen, and as the integration continued, it needed to be associated with the identification of citizens. European citizenship had to be introduced because the early period of European integration gave no role to the citizens, and in order to deepen the integration a sort of identification and means of demonstrating a European 'added value' were required (Warleigh 2001, 22). When the concept of EU citizenship was created it was only a frame, and could only have serious consequences for the involvement of the European public in Community affairs once it was well established with civil, cultural and social rights (Duff 1996, 30). Also, citizenship offered a direct connection between the Union and the citizen. The office of the European Ombudsman was established in connection with the European citizenship. Although classical ombudsmen do not have an express mandate for human rights protection and promotion, the violation of human rights by government institutions and bodies by maladministration falls within their mandate, and thus the Ombudsman, as a true classical ombudsman on international or supranational level, uses human rights norms that are part of the applicable legal system and applies them in human rights related cases (Reif 2004). Thus, the *raison d'etre* for setting up the European office (Peters 2005, 699-700) was the aim of strengthening oversight of the EU institutions and making the EU institutions more democratic by setting up a body to which citizens can turn directly (see more Heede 2000, Reif 2004, Biering 2005, Pino 2011).

Although in different ways, the definition of good administrative practices (good administrative behaviour) has been used by the European law since the 1960s, enshrined through activities of the European Court of Justice (Council of the EU 2001, 58). The right to good administrative procedure embodied in the Code of Good Administrative Behaviour has been formulated into the Charter of Fundamental Rights as a right enjoyed by the European citizens: the right to good administration in Article 41, and the right to refer to the Ombudsman in Article 43.[2] The right to complain to the Ombudsman as a new forum formed a new legal redress. It followed the idea that this new forum would contribute to the achievement of an open, reliable and service oriented government (see Söderman 2002). The Code itself includes a codification of general principles of European administrative law, it restates procedural and substantive rights and duties which result from express rules of Community law, and includes rules of administrative practice which are directed by the idea of providing a good service to the public and in principle do not form judicially enforceable rights or rules (Mendes 2009, 7).

The democratic element in the establishment of the Ombudsman appeared in 1998, when an own-initiative inquiry was conducted. The ground for the inquiry was a correct procedure determining the relation between the public officials of Community bodies and institutions, as well as clarifying a good administrative procedure. The ombudsman initiated the investigation because of complaints made in cases where offences could have been avoided with a clear and public record of obligations of Community officials. During the procedure the

[2] The Charter was the first international legal document with explicit declaration of the right to good administration.

Ombudsman stated that the office was set up at the supranational level in connection with the Union's commitment to a democratic, transparent and accountable administration.

Regarding the term maladministration in connection with the Ombudsman, neither in the treaty nor in the statutes can be found any further explanation. The European ombudsman made several clarifications, and under the definition of maladministration we can find a complex set of procedural obligations in relations between the administration and the public, and where these procedural obligations can gradually increase. Since the first annual report of the ombudsman, he has constantly presented the view that three types of errors may give rise to an instance of maladministration, and that they might overlap to some extent. Those errors 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 his activities concerning the field of the protection of fundamental rights promotes the respect of the Charter, and when investigating a possible instance of maladministration he takes into account the rules and principles set out in the Code as well. Next to this, the ombudsman published ethical standards in the form of five public service principles as a guide for the EU public administration, which are: commitment to the European Union and its citizens, integrity, objectivity, respect for others and transparency (see Friedery 2018).

EU INSTITUTIONS AND THE PRACTICE OF THE OMBUDSMAN

The European Ombudsman can be generally categorized as one of the external accountability mechanisms of the supranational EU (Pino 2011, 433). To understand the place of the office in the institutional life of the EU, we shall take a look at the Court of Justice and the European Commission. Before the Maastricht and the Amsterdam Treaty, the Court of Justice took up the task of elaborating 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 fundamental rights and simply referred to the European Convention on Human Rights.[3] However, the latter could have not been enforced versus the EU institutions in such a way as against the Member States. Although the European Commission has proposed that the Community should join the Convention, in March 1996 the European Court of Justice rejected the decision, stating that Article 308 of the TEC did not permit it as the phrase "…if action by the Community should necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures" does not offer sufficient legal basis for the fundamental institutional change that would be a result of accession to the Convention. This situation has led to the development of the Charter of Fundamental Rights.

With the declaration of fundamental (human) rights listed in the Charter, the European Union intended to strengthen its commitment to human rights and outline a general human rights policy. The EU Ombudsman' part in this is that it regularly refers to and uses these

[3] Article 6 of TEU declared "…the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

rights in the complaint procedure. However, the Court clearly set up the borders of the Ombudsman's mandate and activity in several judgments. The Court of First Instance declared that an ‘act of maladministration’ by the ombudsman does not mean in itself, that the conduct constitutes a sufficiently serious breach of a rule of law within the meaning of the case-law. According to the ombudsman, an error of legal interpretation was a form of maladministration, and in a court case the applicant relied on the ombudsman’s non-binding draft recommendation which included the ombudsman’s own legal interpretation of a provision. However, the Court stated that the conclusive interpretation of the law is not within the remit of the ombudsman. We can point out that the Court only limited the Ombudsman’s interpretation of ‘activity’. Beside ruling about parts of the Ombudsman’s procedure, the Court defined its powers when it pointed out that the Court has jurisdiction regarding an action for compensation against the ombudsman. Namely, it can examine the decisions and inquiries taken by the ombudsman and thus has judicial control over them (see M, T-412/05 and Tillack, T-193/04). This is very important because the ombudsman has no jurisdiction to question a decision of an institution or body but as we saw the ombudsman expressed opinions repetitively on the merit of a decision. With action of damages against the ombudsman, the Court has an option to state that even the Ombudsman’s actions can lead to maladministration − for prevention of which the office was established.

The Ombudsman receives and engages in complaints against the Commission in its role as a guardian of the Treaties (TFEU, Art. 258). The Commission has responsibilities regarding correct application of EU law at Member State level, and in this regard the ombudsman supervises the supervisor (Diamandouros 2008, 6). The Ombudsman handles complaints with both procedural and substantive aspects of the Commission’s behaviour. In this regard it uses the Community’s communication that provides for an obligation to register complaints, for certain exceptions to this obligation, and also establishes deadlines for dealing with complaints and informing complainants. The Commission issued this Communication originally in response to inquiries and criticisms of the Ombudsman in relation to these issues. The Ombudsman started own-initiative inquiry against the EU Commission’s infringement procedure based on Article 258. The *ex officio* inquiry was necessary because the office received many complaints in relation to the administrative side of the infringement procedure. Complaining citizens were dissatisfied with the Commission’s handling of their complaints about infringements of Community law by Member States. They concerned the secretive and time-consuming nature of the Article 258 procedure, lack of information about developments and failure to give reasons for closing cases. There were also impressions of high-handed and arrogant behaviour by the Commission, and that the procedure gives room for political fixing. In connection with those various issues, the ombudsman made a further remark in the so-called Thessaloniki Metro case, suggesting that the Commission should consider adopting a procedural code for treatment of complainants in Article 258 cases, consistent with the Charter’s right to good administration (Commission communications 2002 and 2012). Of course, there are examples of good and bad administrative behaviours of the Commission. On one hand, the Ombudsman found in case 773/2011/OV, that contrary to the complainant’s allegation that the Commission failed properly to deal with his infringement complaint, the Commission had sent several substantive replies (Decision of the European Ombudsman 2012a). On the other hand, in case 230/2011/(TS)EIS the Ombudsman pointed out that the Commission is not free from constraints flowing from fundamental rights and principles of good administration during handling of infringement complaints (Decision of the European Ombudsman 2012b). The Ombudsman took the view that the complexity of the issues did not justify the delay incurred in this case. As regards the consistency issue raised as an argument by the Commission, the Ombudsman declared that pursuing a ‘consistent approach’ must not lead to unnecessary delays.

We shall put emphasis on the fact that the Ombudsman's inquiries and conclusions fully respect the Commission's discretionary power recognised by the Treaties and the case-law of the Court of Justice, that is to say, to decide whether or not to refer an infringement to the Court. However, the Ombudsman may also review the substance of the analyses and conclusions reached by the Commission during the investigation of infringement complaints. The Ombudsman may, for example, check whether such analyses and conclusions are reasonable, well argued, and thoroughly explained to the complainants. If the Ombudsman fundamentally disagrees with the Commission's assessment, when stating this she would also point out that the highest authority interpreting EU law is the Court of Justice.

It is not a surprise that the demand for democratically functioning institutions requires accountable officials, even more so in the case of the highest officials. Therefore, the Ombudsman dealt with the rules and procedures the Commission has in place to prevent conflicts of interest regarding current Commissioners. But the activities of ex-Commissioners concern a type of complaints as well, namely, their activities after they have left office for the private sector and *vice versa*. The core of these complaints concerns conflict of interest. Following a number of complaints, the Ombudsman conducted an inquiry about a paid position held by a former EU Commissioner and concluded that the Barroso Commission failed to deal adequately with the former Commissioner's breach of Code of Conduct despite concerns having been raised by the Ad Hoc Ethical Committee (Dee decision of the European Ombudsman 2016).

CONCLUSION

The creation of the Ombudsman's office was a part of a political game. Following the establishment of the Denmark backed ombudsman type, the country in return accepted the provisions of the Treaty which contained substantial legislative powers. Thus, inter alia, the co-decision procedure of the Parliament was also recorded, and the Danes opposed it fundamentally. The establishment of the European Ombudsman provided assurances for Danish citizens who were particularly sceptical of the political union. The new body offered a suitable alternative for the Community to become more open and closer to its citizens, and this ambition could be fulfilled. This is underlined by its relation with the EU institution as we can observe that the work and opinion of the ombudsman play an important part in the development of general principles and rules of the administration. As for the practice, reaching a solution with the institution or body concerned and satisfying the complaint is the primary objective of the ombudsman. This shows the ombudsman as a *médiateur,* as in this role the ombudsman attempts to solve the alleged maladministration. Even a variety of languages naming the head of this office, as *médiateur européen* in French, or *mediatore europeo* in Italian, put emphasis on this role.

We can conclude that the European Ombudsman seems to play a complex role and his procedure cannot only be limited to dispute solving, creating or protecting fundamental rights. Regarding the Ombudsman's role, the Committee of Petitions pointed out in the past: protection of the rights of citizens and improvement of connection between citizens and the Community go hand in hand. And these can strengthen the democratic life of the EU.

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