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The Role of the European Ombudsman in Dispute Solving

Abstract. The establishment of the Office of the European Ombudsman by the Maastricht Treaty was explicit in connection with the demonstration of the Union, as a complex of democratically functioning bodies. Democratically functioning is in necessary connection with transparency, openness and accountability. Transparency and openness are key requirements set as aims by the European Union in connection with the decision-making procedure of bodies and offices, and between the European bureaucracy and the European citizens.

In every member state of the European Union there are non-judicial and nonlitigious proceedings to settle the community and administrative disputes. The career of the institution of the ombudsman started in the 1700's and at present time one of the most important phases was the establishment of the institution at supranational level.

Keywords: Maastricht Treaty, transparency, bureaucratic, European citizens, right to complain, non-judicial, maladministration

1. Conceptual origin

The origin of the ombudsman can be found in the Old Norse, and the word *umbuds man* means representative. The first preserved use in Swedish is from 1552. It is used in other Scandinavian languages as well, examples are the Icelandic *umbo*, the Norwegian *ombudsman*, and the Danish *ombudsmand*. The ombudsman can be appointed by a government, by a parliament, by international organization, by firms but the ombudsman of a non-governmental organization works for its own members or for the public in general, and does not carry special powers or sanction abilities.

The expression of ombudsman originates from the Swedish usage, from the establishment of the parliamentary ombudsman in 1809. The word ombudsman and its specific meaning had been since adopted by other languages, and ombudsmen have been established by other governments and other organizations.

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too. The aim of this function is to protect the citizens' rights with an institution which is independent from the executive branch of the government's power.

The ombudsman is a government official who is charged with representing the interests of the public by investigating the complaints reported by individuals and addressing them to the responsible authority. The ombud always stands against the state bureaucracy in the case of violation of law (maladministration) as watching the requirements of the good administration, moreover he can criticize—either on functionalism or humanitarian base—the legally failing administration due to the lack of aim because of system sociological reason.¹

The history of the institution's development is following. The Swedish Charles XII, fighting in the Great Northern War, when loosing the battle against the Russian Czar and his troops at Poltava in 1712, had to flee to Turkey and had not returned back to Sweden in over a decade.²

Because the state's administration had fallen into disarray, he wrote a letter to his government initiating the establishment of the office of His Majesty's Supreme Ombudsman. Some argue that the Swedish king was inspired by the practice of the Turkish Emperor's court. There he had learned about the *Diwan al-Mazalim*, the Board of Grievances. The holder of this office was entitled and obliged to check the complaints of the individuals against authorities.³ In practice the *Muhtasib*, who was entrusted by the Sultan with a non-legal review protected those people who were victims of the officials' injustice, discrimination and unfairness. This system worked even before the structures of administration were introduced.⁴

In Sweden the role of the King's Ombudsman was to ensure that judges and public officials acted in accordance with the laws, proficiently discharged their tasks, and if not he could initiate legal proceedings because of dereliction of duty. This could be regarded as the origin of the Ombudsman institution. In 1719, with the Instrument of Government, a new name had been given to this

¹ Majtényi, L.: *Ombudsmann: Állampolgári jogok Biztosa* [Ombudsman. Parliamentary Commissioner for Civil Rights]. Budapest, 1992. 19.

² Sultan Ahmed III pointed out the Karolins' residence in the so-called Karlopolis, which was situated in Bess Arabia, on the riverside of Dnyeszter, between Vernice and Bender. Here had been made decisions regarding the Swedish empire, and the law proposals and nominations (into important offices) had been transported by a courier between Stockholm and Bender.

³ The *Diwan al-Mazalim*, or *Muhtasib* is still existing in some Islamic state. In 1983 an ombudsman, a *Wafaqi Mohtasib* had been instituted in Pakistan.

⁴ Machacek, R.: Law and Justice: Two Sides of the Same Coin, *Law and Politics*, 1 (2001) 571–580.

position, the so-called *Justitiekanslern*, the Chancellor of Justice. Although, he performed important tasks, it only acted on behalf of the royal government. In Sweden after the death of Charles XII, through the following decades there was more or less parliamentary rule, the so-called period of liberty.⁵ In 1766, it was the first time that the parliament had elected the *Justitiekanslern*, but the Instrument of Government of 1776 made the appointment again to a royal prerogative.

The autocratic rule of Gustav III, that ended the half-century long parliamentary supremacy, prompted the Riksdag of the Estates (the assembly of the nobility, the clergy, the bourgeoisie and the peasants) to establish an ombudsman who is independent from the executive power. His son Gustav Adolf IV was deposed with the Instrument of Government in 1809, and divided the power between the king and the parliament. This Instrument of the Government had been adopted in 6th June in 1809 by the Riksdag of the Estates, which became repealed in 1974. This happened after the catastrophic outcome of the Finnish war, when Gustav Adolf had to resign and his place had been reserved by his uncle, Charles XIII. The one from 1809 had replaced the Instrument of Government of 1772, and could be regarded until the newest constitution as the second oldest constitution after the American one. Next to the King's Ombudsman, who had been appointed by the King, the parliamentary ombudsman had been instituted, who had been appointed by the Parliament, and acted on behalf of it.⁶

At this point we must revert to those allegations, which say that the ombudsman institution has Arab roots. As we have seen, in the Islamic legal tradition there is a high officeholder, who had handled the people's complaints lodged to the ruler, and the Swedish king created this institution in Sweden during his Turkish residence, based on the experience collected there. However, as Jacob Söderman⁷ pointed out, this was not the establishment of the ombudsman's office as we know it today. In fact, in many royal courts in Europe, there were high officials dealing with complaint to the king, some of them as the *justitia mayor of Aragon* clearly inspired by the Islamic example,

⁵ According to the laws passed in the Parliament in the years of 1720 and 1723, the cabinet-council assumed authority, which had been responsible towards the Estates, where the nobility was the most influential one.

⁶ The first ombudsman of the Office's in the world was appointed in Sweden, on 1st March of 1810, in the person of Baron Lars Augustin Mannerheim.

⁷ Jacob Söderman was the first ombudsman to be elected in the European Union. He had worked two periods long, and now the second European Ombudsman is Nikiforos Diamandouros.

others clearly set up just for practical reasons. The invention of the Swedish ombudsman idea came into force in a constitutional reform of 1809, when the Swedish legislative body, the *Ständerna* was given the right to elect an ombudsman of justice, after having disputed over that right with the king during almost the whole earlier century.⁸ This new office had the model of that of the Chancellor of Justice. Like the latter, this was to be a prosecutor whose task was to supervise the application of the laws by the judges and civil servants. As in the words of the 1809 Instrument of Government, the Parliament was to appoint a man known for his knowledge of the law and exemplary probity as parliamentary ombudsman. In other words his duties were to focus on protection of the rights of citizen, for example he encouraged the uniform application of the law and indicated legislative obscurities. His work included to take the form of inspections and inquiries into complaints. The complaints played quite an insignificant role at the beginning, and during the first century of the existence of the office, the total number of complaints amounted to around 8000. The legislators introduced into the new constitution a system that would allow the Parliament some control over the executive power. The Standing Committee on the Constitution was therefore charged with the task of supervising the actions of ministers and ensuring the election of the special parliamentary ombudsman to monitor the compliance of the public authorities with the law. The reason for giving the power of appointment to the Parliament was to ensure the independence of the ombudsman's work from the king, the government and the administration.⁹

After this, the Parliament's Act of 1810 contained provisions concerning the auditors elected by the parliament to scrutinise the doings of the civil service, the bank of Sweden, and the National Debt Office. The regulations in Chapter 12 of the Constitution of 1974 later incorporated these three supervisory Riksdag¹⁰ agencies (the parliamentary ombudsmen, the Standing Committee on the Constitution and the parliamentary auditors) into the current system of parliamentary government.

The Office of the Chancellor of Justice still exists, as the ombudsman of the government. The role of the parliamentary ombudsman, which was established in 1809, as we have mentioned earlier, have been preserved with the instrument of government of 1974. Against the public belief, the ombudsman

⁸ Söderman, J.: *Is there a classic parliamentary Ombudsman*. Austrian Ombudsman Board, 20th Anniversary, Vienna, 4 June 1997.

⁹ The European Ombudsman—Report for the year 1995, Office of the European Ombudsman, April 22, 1996.

¹⁰ The name of the Swedish Parliament.

had been instituted by the political experience and not by the Swedish democratic government system, and this institution—gaining a new sense—ave spread all over the world.¹¹

2. The spread of the ombudsman institution

The office started to spread to other states in the twentieth century. It started in 1915, when an independent military ombudsman was established in Sweden. Next was Finland in 1919, when it made provisions in the new constitution for the establishment of an ombudsman. With the introduction of a military ombudsman in 1952 by Norway, and a general ombudsman in 1953 by Denmark, Scandinavia confirmed its historical contribution towards the protection of citizens' rights.¹² The Scandinavian examples and experiences were continued with the controversial establishment of a military ombudsman in the Federal Republic of Germany in 1957.

The recognition of the office increased in the early 1960s, as different Commonwealth and other but mainly European states established such office. Examples for this are New Zealand in 1962, the United Kingdom in 1967, most Canadian provinces, starting from 1967, Israel in 1967, Tanzania in 1968, Puerto Rico in 1977, and Australia at the federal level in 1977 and at the state level between 1972 and 1979. By the middle of 1983 there were only twenty-one states with ombudsman offices at national level, and about six states at the provincial/state or regional level. By 2004 the number of the ombudsman institution had more than quintupled, including states with well-established democracies and states with younger democracies.¹³

In most states of the European Union,¹⁴ the position of the general ombudsman is well known. The function of the general ombudsman was instituted in 1967 by the United Kingdom, in 1973 by France and later in the other Member States. Sweden, Denmark and the United Kingdom as well as Spain preferred the role of the parliamentary ombudsman, while in Germany we see the Petition Committee, and in France the *Médiateur de la République* enjoys consid-

¹¹ Kerekes, Zs.: Az ombudsman intézménye az Európai Unióban és Magyarországon [The institution of the ombudsman in the EU and Hungary]. *Politikatudományi Szemle*, 7 (1998) 138.

¹² Epaminondas, M.: The European Ombudsman. *Eiplescope*, 11 (1994) 2.

¹³ See International Ombudsman Institution <http://www.law.ualberta.ca>.

¹⁴ Denmark, France, Spain, Ireland, the Netherlands, Austria, Portugal, Finland, Sweden, Great Britain.

erable reputation.¹⁵ Ombudsmen function in Germany¹⁶, in the Netherlands and in Portugal too, in the latter the ombudsman coexists with the Committee on Petitions of the Portuguese Parliament. In Belgium the situation is similar, the ombudsman of the Flemish Community and the ombudsman of the City of Antwerp functioning in parallel with the Committee on Petitions of the Parliament. In Luxembourg we can find the Committee on Petitions of the *Chambre des Députés*, and in Italy at regional and at local/municipal level there are ombudsmen too. In France and in the United Kingdom the complainant has to get the assent of a senator or of a Parliament's member, and in Spain an efficient net of regional ombudsmen was developed. In Austria, we can find an organ with three members who have constitutional authorization and independent power to control the administration.

Ombudsman-type offices can have different mandates; there can be various ways for their nomination or performance. The ombudsman is the institution of the parliament, and the parliament has the right to nominate them, except in Great-Britain where the monarch nominates on the recommendation of the Parliament. In France as the only real exception the President of the Republic has this right. Generally, in the European Union ombudsmen get the appointment for four-six years, and it can be renewed with the exception of France.

Common feature of the ombudsmen position is the obligation to supervise the proceeding and maladministration of public servants. Therefore, in general their independence is guaranteed by constitution, and they have immunity everywhere. The states for establishing their ombudsman offices can choose from different kind of models. They often refer to the Scandinavian model, but the Danish and the Norwegian offices are presenting a different model with different mandate. The Swedish and the Finnish ombudsman are established by constitutions and have broad mandate, which comprises not only the whole public administration, state and municipal, but also the supervision of the activities of the courts, meaning here the procedural and administrative sides of their work. The Swedish and Finnish so-called "classical ombudsman" has the power to prosecute or decide that a civil servant should or should not be prosecuted before a court of law, for criminal offences. The Danish one was established in 1953 and the judiciary does not belong to the mandate, concen-

¹⁵ Epaminondas: *ibid.* 2.

¹⁶ In Germany at federal level only specific ombudsmen—data security ombudsman and ombudsman for the protection of members of military bodies—are nominated.

trates especially on the maladministration in public administrative activities.¹⁷ It has no power of prosecution but can initiate proceedings through a prosecutor. The most effective power of the Danish type is the right to publicly recommend the undoing of administrative malpractices and to argue for better solutions. However the broad investigation power and its right as well as the obligation to report its findings in annual or special report to the Parliament, makes it possible for the Members of Parliament to act on certain issues, for example by proposing law amendments.

The main difference between the Danish and the Swedish model is that the Swedish can be regarded as the expansion of a parliament, while in the Danish the legal protection of individuals is more emphatic. The Danish one was the model for the establishment of the European Ombudsman, and this model was mostly followed in the world, first in New Zealand in 1962, and than in other Commonwealth states.

3. The Office of the European Ombudsman

3.1. The establishment of the Office

In 1978, Sir Derek Walker-Smith, a British conservative Member of Parliament stated that the community law was increasingly regulating the lives of average European citizens. Although, he was contented with the safeguard of the civil and political rights by the European Convention on Human Rights, he recommended that appointing a Community Ombudsman could improve the protection of social and economical rights, would allow the investigation of injustice caused by maladministration, and would show the European Economic Community less inaccessible and impersonal. However, Walker-Smith did not suggest that the Community Ombudsman should represent an alternative to judicial review.¹⁸ Taking into consideration the report of Derek Walker-Smith, the European Parliament adopted a resolution aimed at instituting a Community Parliamentary Commissioner for Administration in 1979.¹⁹

¹⁷ Söderman, J.: The ombudsman concept and types of control of maladministration in Greece and Europe, Speech delivered at the University of Athens, 11 November, 1996. 2.

¹⁸ 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.

¹⁹ OJ 1979 C 140/53.

In 1990 Philippe Gonzales wrote a letter addressed to the members of the European Council and he explained his idea to introduce provisions in connection with the European Citizenship into the Treaty on European Union. Following his letter, the Spanish delegation submitted a note on citizenship on 24 September, with the title “The Road to European Union”, within the scope of the Intergovernmental Conference on Political Union. According to the Spanish note, the adoption of a catalogue on special rights of the citizens of the European Union should be accompanied with the establishment of special bodies for safeguarding. The Spanish Delegation proposed that European citizens should get greater protection of their rights within the framework of the Union by submitting petitions or complaints to a European Ombudsman whose function would be to protect and to help safeguard these rights. Moreover, for the European citizens the ombudsman could act through ombudsmen or their equivalents of the Member States. The proposal of the Spanish delegation was backed by Denmark, as here the institution of the ombudsman worked successfully. In the Memorandum of the Danish Government, which was issued on 4 October 1990, they stated that in order to strengthen the democratic basis of Community cooperation, an ombudsman system should be introduced under the aegis of the European Parliament. The Danish memorandum showed the changing European policy of Denmark, because the state was against the intergovernmental conference of the Single European Act in 1985, but the memorandum of 1990 was an obvious yes towards a closer economic and political integration.²⁰ In the autumn of 1990 the Spanish government submitted a new considered plea for the statement of rights, freedoms and obligations of citizens in the new Community, things which were believed belong implicit in the Single Market project.²¹

The institution itself was approved at political level by the meeting of the European Council in Rome. In December 1990, the Head of State and Government of the Twelve stated that consideration should be given to the possible institution of a mechanism to defend citizens’ rights as regards community matters.

²⁰ Biering, P.: The Danish Proposal to the Intergovernmental Conference on Political Union in: The European Ombudsman and the authors: *The European Ombudsman-Origins, Establishment, Evolution*. Luxembourg, 2005. 43.

²¹ Church, C. H.–Phinnemore, D.: *The Penguin Guide to the European Treaties-From Rome to Maastricht, Amsterdam, Nice and beyond*. London, 2002. 228.

The Spanish Delegation on 21 February 1991 submitted a new and more detailed proposal on European Citizenship.²² This envisaged European Citizenship as one of the three pillars of the European Union and the foundation of its democratic legitimacy.²³ The proposal had 10 Articles, where Article 1 to 8 were concerned with the substantive rights of European citizens, Article 9 was concerned with the structure for protecting these rights. According to the proposal, in each Member State a Mediator was to be appointed in order to support the citizens in the defence of their rights before the administrative authorities of the Union and its Member States and to call up these rights before judicial bodies. This should happen on the mediator's account or in support of the person concerned. Besides that, the mediators would also have the task of making available clear and complete information to the European citizens in relation to their rights and the means of enforcing them. At the same time, the Spanish Delegation pointed out in form of a footnote that consideration would also be given to two other possibilities: namely that the above mentioned function would be entrusted to the European Ombudsman, as an independent and responsible organ towards the European Parliament, and that the common action of the national ombudsmen and the European Ombudsman would be reinforced. When setting up the European Ombudsman, it had to be taken into account that the Committee on Petition of the European Parliament, the national ombudsmen and the Committees on Petition of national parliaments function in parallel.

The Luxembourg presidency issued the draft of the Treaty on European Union, the Treaty that established the European Ombudsman. The Treaty limited his jurisdiction because only the maladministration occurring during the activities of the Community institutions or bodies could have been examined, and has given the right to elect subordinated the office to the European Parliament.²⁴ The Maastricht Treaty on European Union has taken into effect in November 1993. The provisions concerning union citizenship can be find in Article 17–22 in the Treaty establishing the European Community, following the Amsterdam Treaty's through the new numbering. By virtue of Article 17 “(1) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be the citizen of the union. Citizenship of the Union shall complement and not replace national citizenship.(2) Citizens of

²² Annex II, The Spanish Proposal for a European Ombudsman, Spanish Delegation Intergovernmental Conference on Political Union, European Citizenship (21 February 1991).

²³ Epaminondas: *ibid.* 3.

²⁴ This is on of the rare possibility where the European Parliament can take an independent decision.

the union shall enjoy the rights conferred by this treaty and shall be subject to the duties imposed thereby.” Articles 18-21 introduce the various rights of European citizens. Article 21 provides for citizens to have the right to complain to the ombudsman, in accordance with Article 194 and 195 of the Treaty. After the establishment of the European Ombudsman, a report made in the frame of the European Parliament’s Committee on Institutional Affairs said, that the ombudsman is intended to give people a mean to defend themselves against administrative abuses, without having to resort to costly legal action, or where legal action is not possible.²⁵ In his response the European Parliament emphasised that the ombudsman is intended to reinforce the European institutions, by providing an effective complaints procedure.²⁶

The decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman duties²⁷ was adopted in 1994, regarding the Treaties establishing the European Communities, and in particular Article 195(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. According to the Statute, the authorization of the Union’s ombudsman is nearly the same as the national ombudsman’s. It must be mentioned, that the Treaty of Amsterdam resulted two changes in relation to the office. Firstly, a new paragraph was added to Article 21, according to which every citizen had the right to write to community institution on his own language and get a response on the same language, so this concerned the Ombudsman office too. Secondly, originally the mandate of the European Ombudsman was limited to the European institutions and bodies, and with the Amsterdam Treaty’s third pillar (the Police and Judicial Cooperation in Criminal Matters) this was widened to other bodies.

3.2. The procedure of the European Ombudsman

A complaint can be referred to the Ombudsman by any citizen of a Member State, or by a person who is living in a Member State, directly or through a Member of the European Parliament. Furthermore, businesses, associations or other bodies with a registered office in the Union can also complain. There are

²⁵ Report A3-0298/92.

²⁶ Resolution A3-0298/92.

²⁷ It was adopted by the Parliament on 9 March 1994 (OJ L 113, 4.5.1994, 15), and was amended by its decision of 14 March 2002 deleting Articles 12 and 16 (OJ L 92, 9.4.2002, 13).

no special requirements with reference to lodge a complaint, but it is necessary to know the identity of the complainant and the accused. It is not necessary for the individual to show any specific interest to lodge a complaint. There is no express *locus standi* restriction in the Treaty or in the Statute of the ombudsman and the tradition is that the right to complain is an *actio popularis* especially in the classical ombudsman version.²⁸ Article 195 (1) of the Treaty establishing the European Community and the Statute lists other conditions regarding the complaints. Pursuant to Article 195 (1), he cannot make an inquiry when in the complaint “the alleged facts are or have been the subject of legal proceedings”. From this formulation it is evident, that in such cases the complainant has no discretionary possibility whether to turn with the complaint to the court or to the ombudsman. According to Article 1 (3) “The ombudsman may not intervene in cases before the courts or question the soundness of the court’s ruling”.²⁹

The complaint’s subject cannot be related to work relationship between a community institution or body and their officials or other servants. However, when the person concerned has exhausted all possibilities for the submission of internal administrative request and complaints, and the time limits for the authorities’ replies have expired, he can turn to the ombudsman. The complaint shall be submitted within two years of the date on which the facts on which it is based came to the attention of the complainant. Moreover, it necessary that before this the complainant has contacted the institution or body concerned and preceded the appropriate administrative approaches.

The complaints can be divided into five groups. The first include the disputes about tenders and contracts. This includes all kind of procurement contracts, as well as contract under which the Commission provides grants or subsidies. The second group concerns the Commission’s role as the “Guardian of the Treaty”, which means enforcing the European law against a Member State that fails to

²⁸ Söderman, J.: *The citizen, the administration and community law*. General Report, FIDE Congress, 1998. 33.

²⁹ In cases where “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 definitively.” Article 2 (7) of the Decision of the European Parliament on the regulation and general conditions governing the performance of the ombudsman’s duties. Adopted by the Parliament on 9 March 1994 (OJ L 113, 4.5.1994, 15), and amended by its decision of 14 March 2002 deleting Articles 12 and 16 (OJ L 92, 9.4.2002, 13).

comply with the law.³⁰ Here complaints concern the subject of confidentiality and the long time of procedure. The third group involves complaints about personnel matters, recruitment procedure and complaint from existing staff. The fourth category concerns lack of openness especially refusal of access to documents. The fifth category finally covers complaints falling within the generic notion of maladministration.³¹ It must be mentioned, that neither the Treaty, nor the Statute defines the term “maladministration”. Clearly, there is 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.³² Furthermore maladministration includes administrative irregularities, administrative omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay and lack or refusal of information. The European Parliament in connection with the ombudsman’s annual report of 1995, asked the ombudsman to precise more the term of maladministration. Following this the ombudsman wrote a letter to the national ombudsmen, for information on whether in their states’ administrative law there is something about maladministration or about the code of good administrative behaviour. After this he gave the following definition in his annual report of 1997: “Maladministration occurs when a public body fails to act in accordance with the rule or principle which is binding upon it.”³³ After this the European Parliament has considered, that the definition together with the further explanation provided in the annual report gives a clear picture.³⁴ Following the proposal on

³⁰ By virtue of Article 226: “If the Commission considers that a member State has failed to fulfil an obligation under this treaty it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observation. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”

³¹ Diamandouros, N.: *The Role of the European Ombudsman*. British and Irish Ombudsman Association Conference, 2005. 2.

³² The European Ombudsman–Report for the year 1995, Strasbourg, Office of the European Ombudsman, April 22, 1996. So the European Ombudsman must take into consideration Article 6 of the Treaty on European Union.

³³ The European Ombudsman–Annual Report for 1997, Strasbourg, 1998.

³⁴ Söderman, J.: *What is a good administration?* The European Ombudsman’s Code of Good Administrative Behaviour, International Seminar “The Ombudsmen and European Union Law”, Bucharest, 21–24 April, 2001. 1.

behalf of the Committee on Petitions the Parliament adopted a resolution welcoming this definition.³⁵

The Office gets many complaints, which cannot be the subject of any inquiry, because they concern the function of the national, regional or local public service of the Member States. The Treaty and the Statute declares unequivocally, that the ombudsman has no authority to take steps in such cases, or in the procedure of international organizations.³⁶ This implies to the case when the authority concerned is liable for the enforcement of community law or community policy. The ombudsman can act strictly in relation to complaints concerning the work of community institutions and bodies, which institutions are listed in Chapter 5 of the Treaty establishing the European Community, and the bodies created by the Treaties and the community legislation. Among the institutions two exceptions can be found: the Court of Justice and the Court of First Instance, where maladministration originating from the area of their judicial power cannot be the subject of inquiry. Also he cannot intervene in cases before the courts or question the soundness of the court's rulings. When the ombudsman has no authority to act, he can give advice to the complainant where to turn, and when it is possible he hands the complaint over to the body concerned.³⁷

3.3. Possibilities of the ombudsman during the inquiries

Similar to the national structure, the European Ombudsman has wide investigative power, but cannot annul administrative decisions. The ombudsman informs the institution or body concerned about the received complaints, and notifies as soon as possible the person lodging the complaint from the steps he has taken. Besides the complaints received, the European Ombudsman can *motu proprio* conduct inquiries, which gives him an advantage contrary to the courts. Therefore, he does not need any particular complaint to open an inquiry, and he uses this possibility when analysing different complaints it may conclude,

³⁵ A4-0258/98 (OJ 1998 C 292/168).

³⁶ 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. Article 2 (1) of the Statute.

³⁷ For example the regulation from the power of the French *Médiateur* has a special provision which gives authorize the *Médiateur* to take over complaints from the European Ombudsman. In this case the filter role of the French Parliament is not working. Numerous national, regional or local ombudsman can take over complaints, without any special provision.

that they refer to a general problem. It must be mentioned that he uses this possibility in cases where maladministration is to be observed, but the complainant has no *locus standi*, because he is not a citizen of the Union, or he does not live in the Union. If he decides to conduct an inquiry, he carries out every examination, which he considers justified to clarify the suspected maladministration and informs the community institution or body concerned. That shows the great value of his discretionary power. The importance of the cooperation can be seen that the institution or body concerned has the possibility to forward any useful comment arising during the inquiry to the ombudsman.

At community level the institutions and bodies are obliged— at the ombudsman's request—to give him any requested information or documents in relation to the case. Cases for exception are when there are duly substantiated grounds for secrecy, without prejudice to the duty of the ombudsman's professional secrecy. The Member States has to make available any information at the demand of the ombudsman that he considers to be necessary. Exception is when such information is covered by rules or decrees on secrecy, or by provisions hindering its being communicated. Those documents, which are classed as secret by law, or regulation, can be accessible only with a prior agreement. Other documents originating from a Member State can be accessible only after having informed the Member States concerned. The Office (the ombudsman and his staff) are required not to reveal information or documents which they obtain in the course of inquiries. The ombudsman has more tools that he can use where he finds that there is an instance of maladministration. But before turning to these tools, he must find a solution with the body to eliminate the instance of maladministration, and which also will satisfy the complainant. This obligation prevails throughout the whole course of the proceedings.

The Office is also trying to promote that the institutions or bodies in question look for an agreement directly with the complainant, and as the experience demonstrate it is quite successful. If a settlement cannot be achieved, the ombudsman submits a proposal to the administration—where it is adequate—for a friendly solution.³⁸ The proposal is often accepted by the institution or body although there is less room for this, because the institutions or bodies settle many cases directly, which clearly demonstrates their readiness to cooperate. We can conclude that 70% of the complaints are lodged against the European Commission, which is understandable in the light of its position as the main European organ that has direct relations with European citizens and inhabitants. When a friendly solution cannot be achieved, there are other means at the ombudsman's disposal. The ombudsman makes critical remark where is no sensible way to redress the

³⁸ This is the *la médiation* in the French ombudsman system.

situation. The idea behind this critical remark is to state an established instance of maladministration and seek to avoid a repetition in the future.³⁹

There are cases where the ombudsman comes to the conclusion that there was no apparent maladministration. However, it would be desirable that the administration improves its behaviour in the future, and in such cases, at the end of the case he submits his suggestion to the administration.

When there is an instance of maladministration that can still be treated, the ombudsman informs the administrative institution or body, and makes proposals. The latter are called draft recommendations. The ombudsman is entitled to publicly submit a special report to the European Parliament, and asks to use its political power to undo the instance of maladministration when the institution or body concerned does not accept the draft recommendation within three months, or does not find an adequate way of undoing the maladministration. According to Article 195 (1) of the “Treaty establishing the European Community” and Article 3 (8) of the “Statute of the European Ombudsman”, the ombudsman publishes annual reports in relation to his work. In the frame of the annual reports he has the opportunity to make more general comments, and can give positive guidance in connection with the good administration.

3.4. The main areas of the ombudsman’s activity

The proceeding of the Office of the European Ombudsman, as an independent and impartial institution, has the following key areas:

- safeguarding fundamental rights;
- ensuring an open and accountable administration;
- improving the service the institution provide;
- guaranteeing respect for the rule of law;
- and protecting staff rights in the institutions.

The Charter of Fundamental Rights has been adopted on the European Parliament summit in Nice, and later the European Parliament, the European Committee, and the European Council published it in a common Statement. According to the Charter, with the formulation of the rights in 50 Articles, the European Union intended to strengthen its commitments toward the human rights, and outlined its general human rights policy. This was a significant step even when the Charter is not legally binding, and gives only a guideline for the

³⁹ Söderman, J.: *The effectiveness of the Ombudsman in the oversight of the administrative conduct of government*. 7th International Ombudsman Institute Conference, South Africa, 30 October 3–November, 2000. 2.

legislation and the application.⁴⁰ The ombudsman promotes the respect of the Charter on the area of fundamental rights. The Charter includes the right to good administration⁴¹ and to determine this exactly, the ombudsman designed the Code of good administrative behaviour. In the Code he formulates what citizen can expect from the European administration, and gives a guideline to the public servants for their proceeding.⁴² Those officials, who follow the Code, can be certain of avoiding the case of maladministration.

The duty of the European institutions is to protect and to promote the principal of transparency. As the Treaty formulates, decisions are taken as openly as possible.⁴³ One determining motive of the realization of transparency and openness is to ensure a broader possibility of people's access to documents. The ombudsman made inquires in connection with the access to documents, and as a result nearly all of the European institutes and bodies adopted and published the rules of access to documents.

Citizens have the right to expect an appropriate functioning of administration. The work of the ombudsman contributed in a great extent to the improvement of services offered, as for example by the use of language where citizen can write on their own language to the institutions or bodies of the European Union, and can expect an answer on the same language, or by the decisions taken by officials citizens can ask for their justifications. Rule of law belongs to the principle of the Union, and during his work the ombudsman called the European Commission's attention to the infringement of the community law, and in this way he contributed to the respect of the *acquis communautaire*. The ombudsman made inquires in cases where the community officials lodged complaints against their employer. The complaints encompassed a wide area, for example he proceeded in cases of unfair dismissal, or social security coverage, and he successfully solved many disputes.

⁴⁰ Rác, A.: Az Európai Unió alkotmányos berendezkedése [The constitutional system of the European Union]. *Állam- és Jogtudomány*, 45 (2004) 244.

⁴¹ Article 41 of the Charter of Fundamental Rights of the European Union.

⁴² The idea of a Code was first proposed by Roy Perry, Member of the European Parliament in 1998. The European Ombudsman drafted the text, following an own-initiative inquiry and presented it to the European Parliament as a special report. The Parliament's resolution on the Code is based on the Ombudsman's proposal, with some changes introduced by Mr. Perry as rapporteur for the Committee on Petition of the European Parliament.

⁴³ "This Treaty marks a new stage in the process of creating an even closer union among peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen." Article 1 of the Treaty on European Union.

3.5. The Committee on Petition and the Ombudsman

The Maastricht Treaty raised the right to complain to the European Ombudsman at community level and parallel to this the right to petition. The latter competence was mentioned in the Treaty establishing the European Coal and Steel Community (Chapter of the Rules of Assembly), and from 1981 in the Statute of the European Parliament. Following this it was created formally in the Maastricht Treaty, as a European citizen's right. A significant difference between the two non-judicial forums is that with petition that relates to a proceeding at community level the citizens can turn with every case to the European Parliament. Instead of this, the ombudsman concentrates expressly onto the work of Community institutions and bodies—exception is the work of the Court of Justice and the Court of First Instance in their jurisdiction. Therefore, the ombudsman has no possibility to supervise the authorities of the Member States, but the right to petition touch upon this too. Example for the cooperative relation between the two institutions is that the Committee on Petition hands over the complaints to the ombudsman when the petition concerns only the maladministration of the offices of community institutions and bodies. The handling over of such complaints must have the assent of the complainant. In the case the complaints in the ombudsman's office can be regarded as petition, thus can be given to the European Parliament. The filing of complaints of the Committee of Petition concerns the application of community law of the Member States' offices and in these cases the Committee sends the petition to the European Committee to get an opinion, where the latter registers it usually under Article 169.

Conclusion

Citizens of Member States of the European Union can realize since the establishment of the European Ombudsman Office, that the Union does not intend to be seen as the set of bureaucratic institutions. The Union believes that it is important for European citizens to have the opportunity to turn to a body with their likely or presumed offence in connection with the European institutions' work. It is also important, that the citizens already have certain experience of the working potential of this body at national level, which strengthens the trust towards this kind of office on the area of the European Union. The success of the national ombudsmen offices predicted the guarantee of serving as an effective mean in relation to the legal functioning of the extremely expanded European administrative procedures. Working together with national ombuds-

men in an even closer way can improve the service provided by the institution. Regarding the future of the Union, in the Draft Constitution of the European Union the European Ombudsman has been mentioned under two titles in Part 1: under Title II of fundamental rights and citizenship, where the rights in reference to European citizenship are listed,⁴⁴ and under Title VI on the democratic life of the Union, where it stresses that the ombudsman shall be elected and not chosen by the European Parliament.⁴⁵ According to these, the ombudsman constitutes the link between the Union's commitments to human and fundamental rights and its democratic commitments and aspirations.⁴⁶

Moreover, because the establishment of the institution can be connected to the idea of the European citizenship, it represents a new form of unity for the Union. The Office can play a role in the demonstration of the benefits of the European citizenship towards the citizens of the Member States, in the intensification of the relation between Europeans and the Union, and in the insistence on Europeanism. Furthermore, in this relation it can be expected giving a realistic picture from the role of the institute in the realization of the idea of the "Union's citizens", as this would play a role in "holding together and keeping" together in the integrating Europe. The European institutes concerned with citizen's complaint refused only in small instances the recommendation of the ombudsman. This shows its increasing importance, whereby the institute occupies its proper place in the system of the European Union. However there is still where to develop, there is the task to inform an even wider circle of citizens, and to enhance the citizen-friendly administration.

⁴⁴ By virtue of Article I-10 (d): "The right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language."

⁴⁵ By virtue of Article I-49: "The 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."

⁴⁶ Diamandouros, N.: *The European Ombudsman and the European Constitution*. Speech given on the 34th Session of Asser Colloquium on European Law on 'The EU Constitution: Best way Forward?' The Hague, 15 October 2004. 5.