

EUROPEAN OMBUDSMAN AS AN INSTITUTION COUNTERACTING THE IMPROPER ADMINISTRATION

*Agnieszka Kos*¹

Abstract

The article is devoted to the institution of the Ombudsman of the European Union as one of the youngest bodies of the European Union. The main task of the European Ombudsman is to ensure the quality of the Community administration. But this is not his only task. What is also important, it is its role in strengthening the relationship between EU citizens and the EU authorities, creation of standards of good administration, fixing its errors and undertaking interventions against the EU authorities. The activities for the protection of citizens' rights in the context of the institution of the European Ombudsman have two main dimensions: an individual one, or interventions on specific issues, and a general, ie. supervision of EU bodies

Key words: European Ombudsman, citizenship, Lisbon Treaty, complaint, European Network of Ombudsmen.

The legal nature of the Ombudsman

The institution of the European Ombudsman was created by the Maastricht Treaty of 1992. As a part of European citizenship it aims to: improve the protection of citizens in cases of maladministration of Community institutions and bodies, and thus, increase the openness and democratic supervision of the decision-making process and management in the Community institutions². The legal basis of the Ombudsman are based on Articles 20, 24,

¹ PhD, The Witelon State University of Applied Sciences in Legnica, Poland.

² The first proposal to create the office of the Ombudsman within the EU was put forward in the 70s by the Britons. During the work on the Treaty on European Union Spain and Denmark fought most actively for introduction of the institution of the Ombudsman.

228 of the Treaty on the Functioning of the European Union (TFEU) and the Article 43 of the Charter of Fundamental Rights of the European Union.

On the one hand the European Ombudsman³ acts as an external mechanism of control, investigating complaints about maladministration lodged by citizens of the European Union.⁴ From another perspective, it acts as a support for institutions, improving their performance by paying special attention to the widely understood erroneous administration. The Ombudsman investigates complaints about maladministration different, and in particular about unfair behaviour, discrimination, abuse of powers, lack or refusal of information, unnecessary delay, the use of incorrect procedures.

European Code of Good Administrative Behaviour is a vital tool in fulfilling the dual role of the Ombudsman. He uses the Code in the framework of investigation of complaints about maladministration basing adequately on the provisions under which his office is functioning. The Article 41 of the Charter of Fundamental Rights of the European Union points out that the right to good administration of the EU is a fundamental right⁵. Moreover, it becomes a privilege, that good administration is an expression of a properly functioning body.

Actions taken by the Ombudsman manifested his most important feature, ie. independence. Actions are carried out for the general interest of the European Union or private interest of its citizens.⁶ The Ombudsman are not allowed to perform any other administrative duties and engage in other paid or unpaid activity. He fully his tasks in adequate compliance with rules conferred on the institutions and bodies of the European Union by the Treaties. The Ombudsman can not intrude in the competences of other European bodies. Legal basis for the Ombudsman are closely related to the confines of the statutory powers and they must be implemented in full compliance with procedural arrangements.⁷

For the first two years from the entry into force of the Treaty implementing rules for the Ombudsman were not adopted.

³ See: K. Cholawo – Sosnowska, K. Karbowska, A. Wnukowska, *Instytucje Unii Europejskiej*, Warszawa 2005.

⁴ See: www.ombudsman.europa.eu, [07.03.2016].

⁵ See: J. Menkes, *Karta Praw Podstawowych Unii Europejskiej a konstytucja Europy*, „Studia Europejskie” 2001, no 2, p. 20.

⁶ See: M. Sitek, *Instytucje i organy Unii Europejskiej w świetle postanowień Traktatu Lizbońskiego*, Józefów 2010, p. 142.

⁷ See: J. Kowalski, Z. Ślusarczyk, *Unia Europejska*, Warszawa 2006, p. 128.

Appointment of the European Ombudsman

The changes that are a consequence of the enlarging European Union, affect the need for ongoing reform, therefore, the Lisbon Treaty was developed. The Treaty of Lisbon was signed on 13 December 2007. Taking into account the special political, social and economic considerations as well as future expectations of residents of the Community. Member States' leaders reached a consistent agreement on new rules for determining the extent and forms of Union action.⁸

In accordance with the provisions of the Lisbon Treaty the Ombudsman is elected for 5-year term by the European Parliament at the beginning of each parliamentary term. Ombudsman may be every citizen of the EU member state which: has full citizenship, provides a guarantee of independence, has the necessary expertise.⁹ The election is done through a four step procedure.

In the first stage nominations are being proposed, after a call by the President of the European Parliament. Nominations must have the support of at least forty members¹⁰, each member may support only one nomination. The second stage is the hearing of the nominees¹¹, which may be held and is opened to anyone interested in electing the Ombudsman. The third stage involves a secret ballot on individual candidates, which are read in alphabetical order. At least half of Parliament's component Members are present and a single candidacy needs a majority of the votes cast. If no one obtain sufficient support, the second ballot is held, when again all the candidates are put to the vote. If no candidate is elected after the first two ballots, only the two candidates obtaining the largest number of votes in the second ballot may continue to stand.¹²

Ombudsman remain in office until the end of the term. except in the case of his death resignation or dismissal. To hold this office is an honour and a sign of trust in the Ombudsman and his impeccable activity before election for the post. In case of resignation, Ombudsman obligatory exercises his duties until his successor is elected by the Parliament.¹³ In the case of above mentioned situations when incumbent Ombudsman cease to hold his office, his successor shall be elected not later than three months since the inability to exercise the functions of the previous Ombudsman occurred. The

⁸ See: O. Osica, *Ujarzmianie chaosu – przyszłość stosunków zewnętrznych Unii Europejskiej w świetle Traktatu z Lizbony*, „Sprawy Międzynarodowe” 2010, no 2, p. 85.

⁹ However, neither document regulate them in detail.

¹⁰ They should be nationals of at least 2 Member States.

¹¹ However, it is not obligatory.

¹² See: <http://uniaeuropejska.org/europejski-rzecznik-praw-obywatelskich/>, [09.03.2016].

¹³ See: M. Kruk, *System organów ochrony...*, p. 294.

newly elected Ombudsman holds his office until the end of the parliamentary term. The same person may be elected as Ombudsman several times.¹⁴

Ombudsman is a one-person authority, which has at its disposal about 30 persons working in its secretariat. It has also two offices, in Brussels and Strasbourg. Ombudsman prepares annual reports, which assesses the EU administration. In addition, there are also special reports, but they are submitted only in the most important cases.¹⁵

Dismissal of the Ombudsman is possible when he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct detrimental to his office. In this case, the Ombudsman may be dismissed by the European Court of Justice at the request of the European Parliament.

Ombudsman begins his office from taking the oath. The oath shall be submitted before the Court of Justice, what enhance the obligation of the Ombudsman to an independent and neutral performance of his duties, and to respect his commitments during the term and after its end. Ombudsman is obliged to be guided by honesty and prudence in the case of taking certain functions or receiving benefits after his term of office ends.

Ombudsman is independent in his activity, he can not perform other duties or functions. Actions taken by him are in the general interest of the European Union and European citizens. While performing these tasks Ombudsman can not seek or follow instructions from Member States' governments or authorities, what would significantly undermine the independence of the Ombudsman institution.¹⁶ The Ombudsman can not perform other political or administrative function or engage in paid or not paid activities. Tasks of the Ombudsman are based on a number of entitlements conferred by the relevant treaties. The Ombudsman can not enter or interfere with the competence of other institutions or European authorities. He can not participate in judicial proceedings or question the legitimacy of judicial decisions.

Ombudsman receives a salary for the exercise of his duties. His salary, allowances and pensions have the same status, which has a judge of the Court of Justice. Ombudsman has a number of privileges and immunities.¹⁷

The primary task of the Ombudsman is to control abidance of the law. This control is based on cases of mismanagement by the European institutions

¹⁴ See: J. Maliszewska-Nienartowicz, *System instytucjonalny i prawny Unii Europejskiej*, Toruń 2010, p. 112.

¹⁵ See: <http://uniaeuropejska.org/europejski-rzecznik-praw-obywatelskich/>, [07.03.2016].

¹⁶ See: J. Maliszewska-Nienartowicz, *System instytucjonalny...*, p. 114.

¹⁷ See: Articles 12-15 and 18, <http://www.eur-lex.europa.eu>, [20.02.2016].

and bodies. The law does not provide the Ombudsman with a right to control the Court of Justice¹⁸ and the General Court.¹⁹

The first European Ombudsman was Mr Jacob Söderman, who held the office for two terms from 1995 to 2003. The next Ombudsman, Mr Nikiforos Diamandouros, served from 2003 to 2013 when he resigned. Then the post of European Ombudsman was taken by Irish ombudsman Mrs Emily O'Reilly, elected by the European Parliament during its plenary session in July 2013. She increased the visibility of the Ombudsman, focusing on the issues that are important for citizens, such as transparency of lobbying, expert groups, EU agencies (Frontex) and international negotiations (TTIP), as well as the improvement of legislation on the monitoring of irregularities and the European citizens' initiative. After the European Parliament elections in 2014 she was re-elected for another five year term of office and pledged to continue her strategy "Towards 2019", focusing on three objectives: impact, relevance and visibility.²⁰

Citizenship as a guarantee for the benefit of the European Ombudsman

Citizenship is a specific relation between the person and the state. In relation to the Ombudsman this relation is between the citizen of a Member State and the state understood as one of the member state of the European Community. The European Convention on Nationality of 1997, like other instruments of international law confirms the right of every person to have a nationality and the prohibits deprivation of citizenship by the state in relation to its nationals.²¹ According to the Article 17 paragraph 1 TEC "every person holding the nationality of a Member State is a citizen of the Union. Citizenship of the Union does not replace the nationality of the State, but complements it. " Nationals of candidate countries are granted citizenship of the Union since the accession to the EU. In the case of nationals of Member States, the acquisition of this right may occur at birth in one of the Member States.²²

¹⁸ See: A. Wentkowska, *Europejski Trybunał Sprawiedliwości i sądy krajowe: Doktryna i praktyka w stosowaniu prawa wspólnotowego*, Sosnowiec 2005, p. 155.

¹⁹ See: K. Wojtowicz, T. Koncewicz, *Trybunał Sprawiedliwości i Sąd Pierwszej Instancji Wspólnot Europejskich*, Warsaw 2003, p. 250.

²⁰ See: http://www.europarl.europa.eu/ftu/pdf/pl/FTU_1.3.16.pdf, [08.03.2016]

²¹ See: *Obywatelstwo Europejskie, obywatelstwo Unii*, „Biuletyn Ośrodka Informacji Rady Europy” 2000, no 4-5, p. 111.

²² See: A. Wyrozumka, *Jednostka w Unii Europejskiej* [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, ed. J. Barcz, Warsaw 2006, p. 406.

The determination of the citizenship has an impact on the activities of the Ombudsman.²³ The activities of the Ombudsman are complementary to the rights and obligations deriving from the EU citizenship, as well as to the principles of good administration, influencing and strengthening the protection of citizens against the negative effects of bureaucracy and other activities affecting the citizens of the European Union.

The procedure for processing complaints

The complaint to the Ombudsman was established in the Maastricht Treaty (02.07.1992), according to the Article 17 of TEC setting Union citizenship. The intention of the authors of the Treaty was to contribute to the strengthening of democratic control of the Communities' institutions. These important tasks and goals of the European Ombudsman have been realized only partly. As the current activity of the Ombudsman shows, the number of those complaints is relatively small, and this institution is not widely known among EU citizens. However, it is worth to look closer on the structure of complaints due to fact, that in some situations a complaint may be an effective tool of legal protection for person whose *locus standi* in proceedings before the ECJ, and relation to other EC institutions is very limited.²⁴

Ombudsman takes wide-reaching actions on its own initiative or on the basis of the complaint. The complaint can be lodged directly by any natural or legal person, whose registered office or place of residence is within the territory of one of EU Member States. It is not necessary to have the EU citizenship, only right to reside within the territory of the EU is needed. In the case of legal persons it is necessary only to have a registered legal form of business in accordance with the law of the EU or Member State.²⁵

The Ombudsman receives a complaint, if the following conditions are met: it is not anonymous, the complainant precisely indicates the subject of the complaint, a complaint must be made within two years of the date when person became aware of the facts on which the complaint is based, the complainant must have exhausted all the possibilities for internal

²³ See: J. Hołda, Z. Hołda, D. Ostrowska, J.A. Rybczyńska, *Prawa człowieka. Zarys wykładu*, Warsaw 2008, p. 34 and 39.

²⁴ See: <http://www.edukacjaprawnicza.pl/artykuly/artukul/a/pokaz/c/artukul/art/skargado-europejskiego-rzeczniaka-praw-obywatelskich.html>, [08.03.2016].

²⁵ See: J. Sozański, *Prawa człowieka w Unii Europejskiej po Traktacie Lizbońskim*, Warsaw-Poznan 2010, p. 35.

administrative requests and complaints of the Member State, the complaint can not be the subject of the current trial.²⁶

After receiving a complaint which was made in accordance with the procedure, the Ombudsman informs the EU institutions or bodies concerned. Incorrect procedure or form of a complaint has no effect on time limits to the possibility of appeal. The Ombudsman is obliged to inform the complainant about the actions taken.²⁷ The complaint should contain the identity of the person who lodged it, but it is possible to apply for imposition of confidentiality clause to the complaint²⁸. Confidentiality clause is relatively rarely used because most of the cases handled by the Ombudsman has the public nature.²⁹

Carrying out the controls the Ombudsman has a right to request any information necessary to conduct the inspection of the bodies and institutions of the European Union. The EU can apply to the authorities of the Member States to provide concrete information to the bodies or institutions of the EU. The EU bodies and institutions may refuse only if data contains information covered by provisions preventing its disclosure. In case of providing to the Ombudsman information under a non-disclosure clause, the Ombudsman is obliged to keep it confidential.³⁰ In cases of unjustified refusal of information to the Ombudsman, he may inform the Parliament about it. It should be noted that the Ombudsman has the right to permanent access and insight into documents that can be used in the given matters addressed against the Ombudsman.

The Ombudsman submit an annual report to Parliament on his activities. If the Ombudsman obtains information, which may lead to criminal responsibility of individual officers of the European Union, he is mandatory forced to inform the law enforcement agencies.³¹

²⁶ The Ombudsman has the right to decide on the inadmissibility of the complaint or cease to proceed it because of the ongoing or completed legal proceedings whose subject matter concerns the allegations raised in the complaint.

²⁷ Ibid., p. 50.

²⁸ See: M. Jagielski, *Prawo do ochrony danych osobowych. Standardy europejskie*, Warsaw 2010, p. 103.

²⁹ See: P. Sarnecki, *Ustrój Unii Europejskiej i ustroje państw członkowskich*, Warsaw 2007, p. 28-31.

³⁰ See: <http://eur-lex.europa.eu>, [07.03.2016].

³¹ See: M. Sitek, *Instytucje i organy ...*, p. 145.

Complaints about the administration

The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union³² include, among others, the European Commission, the Council of the EU, the European Parliament, the European Medicines Agency and the European Foundation for the Improvement of Living and Working Conditions³³. Only the Court of Justice, the General Court, and the Civil Service Tribunal acting in their judicial role do not fall within his jurisdiction.

The Ombudsman investigates complaints³⁴ about maladministration. Maladministration occurs when an institution fails to act in accordance with the law, do not respect principles of good administration or its activities are related to the violation of human rights.³⁵ The Ombudsman can inform the institution concerned about a complaint. If the contested action or matter is not resolved satisfactorily, the Ombudsman strives to settle the dispute amicably. If the institution refuses to accept the guidelines, the Ombudsman may draw up a report and refer it to the European Parliament. When the complaint does not refer to national, regional or local administration, the Ombudsman should try to help in solving the problem.³⁶

Exceptional situations – lack of competence of the European Ombudsman

In the context of discussed issues, it can not be overlooked that in certain conditions the Ombudsman lacks its competence. One such situation is the action under the Court of Justice, the General Court and the Civil Service Tribunal, performing their judicial functions. The next constitute complaints made against a authorities on local, regional or national level, even when the complaints concern matters related to the European Union and the activities of national courts or ombudsmen. The European Ombudsman is not an appeal body for decisions taken by these instances. The list of exceptions

³² See: S. Sagan, J. Ciechanowska, *Organy i korporacje ochrony prawa*, Warszawa 2010, p. 200.

³³ Ibid, p. 202-204.

³⁴ See: P. Sadowski, *Skarga do Rzecznika Praw Obywatelskich Unii Europejskiej*, „Studia Iuridica” 2006, no 5, p. 7.

³⁵ See: S. Sagan, J. Ciechanowska, *Organy i korporacje...*, p. 183.

³⁶ See: J. Baran, *Skarga do Europejskiego Rzecznika Praw Obywatelskich: wymogi formalne, procedury, statystyki* [in:] *Artykuły naukowe Kancelarii Sejmu, Biblioteki Sejmowej, Ośrodka Informacji i Dokumentacji Europejskiej*, ed. R. Wąsowicz, Warsaw 2008, p. 126.

includes also the cases which have not previously been processed through the appropriate administrative institutions. It also concerns the employment relationship between the institutions and bodies of the European Union and their officials or staff members if the possibility of lodging a complaint provided for in the internal regulations has not been previously exhausted as well as complaints concerning companies or individuals.³⁷

The European Network of Ombudsmen

The Ombudsman of the European Union as the main body of Ombudsmen in the structures of the EU works closely with national and regional ombudsmen throughout the Union. They play one of the most important role in enabling citizens and residents of the EU and the Member States to use appropriate scope of the EU law. Ombudsmen, the European Ombudsman and the Committee on Petitions of the European Parliament create a European Network of Ombudsmen.³⁸ This network covers national and regional ombudsmen and appropriate bodies of EU Members. The close cooperation between the Ombudsman of the European Union and ombudsmen of the Member States takes place in the framework of the European Network of Ombudsmen. It depends on close competence and information connection between ombudsmen throughout the European Union. Their territorial scope covers the entire union, but it does not close the possibility of cooperation of the Ombudsman and his national counterparts from Member States with ombudsmen outside the EU.³⁹ The exchange of knowledge, experiences and observations of Ombudsmen takes place during the seminars, meetings and on the pages of bulletins issued by Ombudsmen.⁴⁰

Conclusions

Analysis of the current practice of the Ombudsman leads to the conclusion that the interest in the right to complaint is relatively modest among the citizens of the European Union. However, the number of pointless complaints

³⁷ See: http://www.europarl.europa.eu/atyourservice/pl/displayFtu.html?ftuId=FTU_1.3.16.html, [09.03.2016].

³⁸ See: I. Malinowska, *Rzecznik praw obywatelskich w systemie ochrony praw i wolności w Polsce*, Warsaw 2007, p. 43.

³⁹ See: S. Sagan, J. Ciechanowska, *Organy i korporacje...*, p. 200.

⁴⁰ *Ibid*, p. 233.

is very important, because it indicates a lack of knowledge of the competence of the Ombudsman. One should not forget that the purpose of the establishment of the European Ombudsman was the desire to improve the image of Community structures in the consciousness of Western European societies, by taking concrete efforts to improve the transparency and predictability of the activities of the EU administration.

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