

The role of the European Ombudsman in the Protection and Promotion of Fundamental Rights

P. Nikiforos Diamandouros
European Ombudsman

XXV Congress of the International Federation of European Law (FIDE), Tallinn, 1st June 2012

Introduction

Ladies and gentlemen,

It is both a pleasure and an honour for me to take part in this Congress and to participate, along with distinguished scholars, judges and practitioners, in deliberations concerning the protection of Fundamental Rights in the post-Lisbon era. I would particularly like to thank Dr Julia Laffranque, Judge at the European Court of Human Rights and President of FIDE, for giving me the opportunity to share with you my views on the role of the European Ombudsman in the protection and promotion of Fundamental Rights.

At the national level, Member States have put in place a variety of non-judicial bodies and structures for these purposes. Some have broad mandates covering all fundamental rights; others are specialised bodies that are competent to deal with a specific right or group of

rights, such as equality, children's rights or data protection. Some of these bodies have a protective role and are empowered to receive and investigate complaints. Others have a promotional role. Some, indeed, combine both functions.

At the EU level, two non-judicial mechanisms are empowered to deal with complaints about violations of fundamental rights: the European Ombudsman and the European Data Protection Supervisor or EDPS for short. The EDPS has a specific mandate, while the Ombudsman's role is a general one that encompasses all fundamental rights.

I should explain that Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman to investigate complaints about maladministration in the activities of the Union institutions, bodies, offices, or agencies. From the very beginning of the Ombudsman's activity, the term "maladministration" has been interpreted so as to include failure to act in accordance with the law, with the principles of good administration, or with fundamental rights. The three aspects I have mentioned are not entirely separate from one another and the entry into force of the Lisbon Treaty has increased the degree of overlap, by giving the Charter of Fundamental Rights the same legal value as the Treaties.

The EDPS and the Ombudsman also have a promotional role in relation to fundamental rights. To complete the picture, I should also mention the Fundamental Rights Agency. The Agency cannot deal with complaints, but its functions make it an important actor in promoting fundamental rights, not only in the Member States but also as regards the Union institutions and bodies.

In the rest of this brief presentation, I shall focus on the role of the Ombudsman in protecting and promoting fundamental rights in the EU public service. My office protects such rights by means of a reactive

mode of operation, that is, by dealing with the complaints that we receive. We also work proactively, both to protect fundamental rights and to promote them, especially by identifying and spreading best practices among the EU institutions. The reactive and proactive approaches are complementary and reinforce each other. I will look at this subject from both perspectives, beginning with the reactive role.

1. The Ombudsman's reactive role

Few of the complaints that the Ombudsman receives concern violations of (allow me to use the expression) "traditional" human rights, such as protection of life, prohibition of torture, or freedom of religion. This is so mainly because the EU institutions do not exercise the classic coercive powers of the national State. There are no Union prisons, for example.

In addition to containing civil and political rights, the Charter also includes "second generation" social and economic rights. However, the proportion of complaints submitted to the European Ombudsman which concerns such rights is lower than that for most national ombudsmen. Once again, the reason for this is that EU institutions do not provide general public services such as education, health and welfare. Such issues tend to arise for us only in staff cases.

Articles 41 and 42 of the Charter guarantee the right to good administration and the right of public access to documents. These provisions, which contain illustrative examples of "third generation" rights, are at the core of the Ombudsman's activity. The Ombudsman, however, is also confronted with an increasing number of complaints raising a wide range of fundamental rights issues, including age and race discrimination, the principle of presumption of innocence, the rights of people with disabilities, the protection of family life and the freedom of speech of EU officials.

A reasonable question to raise at this point is why somebody whose fundamental rights have been infringed might choose to complain to the Ombudsman instead of seeking redress before a court, especially since, unlike a court, the Ombudsman can neither annul unlawful acts nor make legally-binding awards of damages.

Contrary to what you might be inclined to think, however, this is not a weakness of the ombudsman institution, but rather a strength. It is precisely because the Ombudsman does not make legally binding rulings that the institution can go the extra mile and encourage the EU administration to do more than merely avoid a breach of fundamental rights. Let me explain this important point in greater detail.

Reasoning in terms of fundamental rights often requires a balancing exercise between colliding rights, or between a right and a legitimate aim imposing a restriction on that right. When deciding whether a fair balance has been struck, a judge, national or European, has only two options as to the conclusion to be reached: either there has or there has not been a violation; in other words, the behaviour complained against is either legal or illegal.

In contrast, the Ombudsman's inquiries are not limited to questions of pure legality. In fact, the Ombudsman looks for opportunities to help the public administration improve the quality of the services it provides to citizens and other users. Such improvement certainly includes building fundamental rights into its decisions. Put otherwise, the Ombudsman does quite a bit more than simply declare behaviour legal or illegal.

Let me give you an example to illustrate this point.

Last year I received a complaint from an official with a severely disabled child. The Commission granted the complainant the double

dependent child allowance provided for by the Staff Regulations as from the date on which he applied for it, that is, almost two years after he took up his duties. The complainant considered that he should receive it as from the date on which he took up his duties, especially since, when he started working for the EU administration, he provided a medical certificate confirming that his child had been 100% disabled since birth.

My approach was not to address at the very outset the question whether the Commission's approach was legal or not. In my opening letter to the Commission, I emphasised that Article 26 of the Charter guarantees the rights of persons with disabilities and invited the Commission to consider, in light of this Article, whether, given all the circumstances of the case, a more favourable decision would be possible. The Commission followed that suggestion and settled the case to the complainant's satisfaction. In doing so, it also recognised that, as a general practice, it should no longer base the right to the double allowance on the date of application.

By changing its position, the Commission did not necessarily admit that its original decision was legally wrong. In my view, what is important is that the Commission both solved the specific case and changed its general practice in a way that now gives due weight to the context of fundamental rights and to the principle of fairness.

Let me state emphatically that I regard fairness as a key principle of good administration. Among other things, this principle requires that, as far as possible, legal rules should be read and understood on the assumption that the legislator intended to achieve a fair result.

Before I turn to the proactive role, I will briefly mention another reason why some fundamental rights cases might come to the Ombudsman rather than to the Court. Mrs Reding mentioned in the opening session

yesterday that the Commission now receives many thousands of infringement complaints each year that are based on the Charter of Fundamental Rights. She said that many of these complaints fall outside the Commission's competence. When the Commission rejects a complaint on that ground, the complainant could then turn to the European Ombudsman to contest the Commission's assessment of its competence. This has not yet happened, but, if it did, I would look to the case law of the Court for guidance.

2. The Ombudsman's proactive role

With a view to improving the quality of the EU administration and to encouraging full respect for citizens' rights, I have, in recent years, put a lot of effort into making proactivity a top priority in my institution's agenda. Proactivity means (a) taking action to anticipate the needs of citizens and other stakeholders, (b) putting in place policies and procedures capable of channelling behaviour in appropriate ways and (c) preventing problems from arising.

Still in the proactive mode, I recently opened an own-initiative inquiry into how Frontex implements its fundamental rights obligations. Frontex is the EU agency that coordinates the operational cooperation between Member States in the field of border security. An EU Regulation adopted last year provides for Frontex to put in place a fundamental rights strategy, codes of conduct for its operations, and a fundamental rights officer. I have asked Frontex to reply to a number of questions about its understanding and implementation of these obligations. Its replies, which are due by the end of this month, should be of interest to civil society organisations and the European Parliament. They will also give me the opportunity to assist Frontex to adopt the best possible administrative practices in order to demonstrate its commitment to fundamental rights.

Another area where the Ombudsman is proactive is the implementation of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The Convention, which entered into force for the EU on 22 January 2011, constitutes the first human rights treaty that the EU has ratified. As such, it is of utmost importance that the Union live up to the promises it has made to citizens in signing and ratifying the Convention.

In conclusion, I would like to emphasise that citizens need to see concrete results issuing from European integration. It is not enough merely to promise people certain fundamental rights. To be sure we must provide for quick and effective remedies, judicial and non-judicial, when things go wrong. But we, that is, the European institutions, also need to work proactively to achieve the highest standards of administration, so as to ensure that fundamental rights are delivered and respected in practice on an everyday basis. As Ombudsman, I will continue to work towards this objective, on behalf of European citizens, and with an eye to further strengthening the rule of law and contributing to the deepening of democracy in the European Union and beyond.

Thank you for your attention. I look forward to the discussion on this subject.