

The European Ombudsman' activity with regard to public access to environmental information in the context of the Aarhus Convention

Marta Hirsch-Ziembinska ¹

Ladies and Gentlemen,

Thank you very much for having invited the European Ombudsman to take part in this panel, specifically today, in these challenging times when the ombudsman institution proved again to be extremely important to ensure the protection of EU citizenship fundamental rights.

One of these rights is the right of access to documents of the EU institutions, bodies and agencies, provided for in Article 42 of the Charter of Fundamental Rights of the EU². In fact, administrative transparency - including access to environmental information - is one of the main areas in which the European Ombudsman intervenes.

I would like to use this opportunity to share with you the Ombudsman's experience on the implications of access to information in the context of the COVID-19 pandemic.

Before that, I shall however briefly explain what the European Ombudsman is and does, and outline the role that the European Ombudsman plays in relation to environmental issues.

1. The mandate of the European Ombudsman

The European Ombudsman is a "classical" ombudsman institution: that is to say, an external and independent mechanism, for carrying out impartial investigations into complaints against public authorities. The mandate covers the Union's institutions, bodies, offices and agencies, except for the Court of Justice in its judicial role³. The Ombudsman's investigations look for "maladministration", a concept that includes failure to comply with the law, with fundamental rights or with principles of good administration. I would like to emphasise -- because it is not true of all ombudsmen -- that the European Ombudsman deals with issues of substance as well as procedure.

The Ombudsman complements the work of the courts, by offering citizens an alternative way of resolving disputes with the EU administration, which has characteristics that differ from those of a judicial remedy. One of the main differences is that the Ombudsman has no power to make legally binding decisions, but has the power of persuasion.

¹ Principal Adviser on Charter compliance at the European Ombudsman. The views in this contribution are expressed in a personal capacity and do not represent the official position of the European Ombudsman.

² Article 42 of the Charter of fundamental rights of the European Union: "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.*"

³ Article 228 para. 1 of the Treaty on the Functioning of the European Union: "*A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them.*"

You may wonder why someone would bring a case to the Ombudsman rather than the court, given that only the court can give a legally binding decision. There are two main reasons. First, complainants do not need to pay a lawyer to bring a case to the Ombudsman. Second, access to the Ombudsman is governed by different and less restrictive rules than access to the courts. For example, complainants do not have to be adversely affected by maladministration in order to complain to the Ombudsman. In other words, **public interest complaints are possible**, which is of particular importance for NGOs, including, of course, **environmental NGOs**.

2. The Ombudsman's role in environmental cases

I shall now focus on the role that the European Ombudsman plays in relation to environmental matters. This role mostly involves supervising two EU institutions: the European Investment Bank ("the EIB") and the European Commission.

The Ombudsman and the EIB signed a Memorandum of Understanding in 2008. This provides for the EIB to inform the public about the environmental policies and standards that apply to the projects it finances. It also makes clear that the Ombudsman can review the Bank's judgment as regards environmental issues raised by complaints. Another key provision of the Memorandum is that the EIB must provide an effective internal complaints procedure for complainants to use before they come to the Ombudsman. This mechanism proved to be very useful. If the complainant turns to the Ombudsman, the issues involved are clearly defined by the report of the internal complaints procedure and the complainant's arguments as to why the report, or the EIB's response to its findings and conclusions, are not satisfactory.

Environmental complaints made to the Ombudsman also concern the Commission's responsibility for ensuring that Member States fulfil their obligations under EU law. As the so-called "Guardian of the treaties", the Commission can investigate possible infringements of EU environmental law and eventually bring cases to the Court of Justice. Citizens, businesses and NGOs may complain to the Commission about infringements by Member States. If such people are dissatisfied by the Commission's handling of their complaint, there is no judicial remedy available. They can, however, complain to the Ombudsman. The Ombudsman can and does look at the substance of the Commission's decision. That does not mean, however, that we will open an inquiry simply because the complainant disagrees with the Commission's decision. The Ombudsman's role is to review the decision, not to substitute her judgement for the Commission's. What we do, therefore, is to insist that the Commission properly explain the reasons for its decision.

In its 25-years history, (we have just celebrated this anniversary) the European Ombudsman has dealt with a number of complaints concerning **access to environmental information**. After the EU became party to the Aarhus Convention, the complainants to the Ombudsman relied on the Aarhus Convention. Article 43 of the Charter⁴ of Fundamental Rights of the EU guarantees the right to complain to the European Ombudsman. Moreover, the right to complain to the

⁴ Article 43 of the Charter of Fundamental Rights of the European Union: "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role."

Ombudsman is mentioned in Article 8(3)⁵ of Regulation 1049/2001⁶ governing public access to documents in the possession of EU institutions. Requesters may turn to the Ombudsman after having made an administrative appeal (“confirmatory application”). **As regards environmental information, Regulation 1049/2001 applies in conjunction with the Aarhus Regulation⁷.**

In 2018 for instance, the EO carried out an investigation⁸ into the Commission’s refusal to grant access to documents concerning the positions taken by national authorities in a Commission technical committee. This committee deals with the risk assessment of how pesticides affect the bee population – a vital public interest. While the Commission argued that disclosure would jeopardise the on-going decision-making process, the EO considered that the public has a right to know since the issue concerned environmental information - protected by the Aarhus Regulation. Today, the Commission still refuses to grant public access to these documents but has committed to review the relevant process.

Few months ago, we opened three inquiries⁹ related to the disclosure of environmental information by the European Investment Bank (EIB). The inquiries are all based on one complaint by the environmental group, ClientEarth. One inquiry concerns the EIB’s refusal to grant public access to the minutes of meetings in which its management committee discussed the financing of a biomass project. The other two inquiries concern whether the EIB gives sufficient and timely environmental information about projects it finances either directly or indirectly. The complainant argued that the bank’s current practice prevents the public from expressing its views on environmental issues before the EIB takes a decision to finance projects directly and that the bank does not do enough to ensure environmental information is gathered and then disclosed for projects carried out by financial intermediaries. The investigations are ongoing.

3. Administrative transparency during Covid-19 pandemic

I would like now to give you some examples of the European Ombudsman investigations related to the COVID-19 crisis.

None administration, either EU or national, can tackle the pandemic successfully without the cooperation of citizens. Citizens will cooperate if they trust the administration. As the complaints to the Ombudsman clearly demonstrate, there is no trust if there is no transparency.

Therefore, in order to ensure compliance with many hard and restrictive on freedoms COVID-19 measures, it is crucial that public authorities maintain high standards of transparency so that

⁵ Article 8(3) of Regulation 1049/2001 reads as follows: “*Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.*”

⁶ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145, 31.5.2001, p. 43.

⁷ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25. 9. 2006, p. 13.

⁸ More information about Case 2142/2018/EWM can be found here: <https://www.ombudsman.europa.eu/en/case/en/53756>.

⁹ Case 1251/2020/PB, case 1065/2020/PB and case 1252/2020/PB.

EU citizens know **why** and **how** the administrative decisions are taken, and for how long the exceptional measures will last.

In response to the unprecedented situation created by COVID-19, many of the EU institutions, agencies and bodies were required to adopt targeted measures and/or to adapt their working processes to deal with the challenges of the emergency. These ranged from helping to coordinate the public health response in the EU and the approval of dedicated medicines to economic measures to address the social and economic impact of the crisis.

As a guarantor of the European citizens' right to good administration¹⁰, the European Ombudsman is performing an ongoing assessment of the functioning of the EU administration in the context of the COVID-19 crisis. This includes a broad array of initiatives and inquiries taken on the Ombudsman's own initiative, which focus on the **transparency** of the measures adopted by many EU institutions, agencies and bodies in response to the outbreak. I will mention only few of them:

- The European Ombudsman asked¹¹ the European Commission and the Council not to diminish their obligations concerning transparency in the crisis response. She recommended that all decisions related to the pandemic - including those taken under accelerated or emergency procedures - need to be taken as transparently as possible, while temporary measures should be publicised, explained, and regularly reviewed.
- The European Ombudsman also launched an inquiry¹² into the COVID-19 response of the Council, focusing on the Council's decision to derogate, temporarily, from its Rules of Procedure during the crisis, and the implications this has had for its decision-making process and the transparency thereof.
- The European Ombudsman took a strategic initiative¹³ concerning the transparency of measures introduced by the European Investment Bank in response to the crisis, particularly concerning the terms and criteria related to new financing measures for small and medium-sized enterprises. She also asked EMA¹⁴ to provide more information on the transparency and independence of decisions taken in the context of the COVID-19 response.
- The EO addressed a series of questions¹⁵ to the Commission concerning transparency related to its modified working procedures, public procurement, scientific advice and lobbying activities in the context of the crisis.

All these strategic investigations and initiatives undertaken on the Ombudsman's own initiative are ongoing.

Naturally, the European Ombudsman was also involved during this period in handling complaints lodged by EU citizens. For instance, an investigation¹⁶ into the ECB's refusal to grant public access to documents concerning the Corporate Sector Purchase Programme (CSPP) and the Pandemic Emergency Purchase Programme (PEPP) in the context of the COVID-19 crisis.

¹⁰ Article 41 of the Charter of Fundamental Rights of the European Union.

¹¹ Case SI/1/2020/TE.

¹² Case OI/4/2020/TE.

¹³ Case SI/3/2020/SF.

¹⁴ Case SI/5/2020/DDJ.

¹⁵ Case SI/4/2020/PL.

¹⁶ Case 1874/2020/MAS.

We received for instance a complaint about the European Union's alleged failure to communicate effectively to citizens about its response to the COVID-19 crisis. The Ombudsman whose one of the main tasks is to ensure and encourage greater transparency in the EU administration about what it is doing, agreed with the complainant that, in these difficult times, reaching out to citizens and reassuring them that measures are being taken is even more important. For the most part, Member State authorities are responsible for providing daily, tailored information to their citizens about the measures that need to be taken. However, the Ombudsman said, the EU institutions should do all they can to demonstrate to citizens the effectiveness of the measures they are taking.

So far, we have not investigated any complaints concerning specifically the access to environmental information during the COVID-19 crisis.

Conclusion

The Charter of Fundamental Rights of the EU¹⁷ requires that a high level of environmental protection and the improvement of the quality of the environment be integrated into the policies of the Union. But let's be clear: it does not matter how good the Union's policies and laws concerning the environment might be, they will not be effective unless they are properly implemented and enforced.

Proper implementation and enforcement depend above all on what happens at the Member State level. The constitutional architecture of the European Union gives to Member States the preeminent role in the administration of EU laws and policies. Ombudsmen may, and on many occasions they do so already, play a role of an independent environmental watchdog in each Member State, which can investigate whether the national authorities are properly applying and enforcing EU environmental law, and which can receive complaints from citizens and civil society. Their role is crucial in the time of pandemic to control the temporary restrictions on freedoms due to the current health crisis.

The European Ombudsman Emily O'Reilly, as the chair of the European Network of Ombudsmen, is working closely with her national colleagues to ensure the accountability and transparency of decision-making, at the national and EU level.

¹⁷ Article 37 of the Charter of Fundamental Rights of the European Union: “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”