

Jo?o Sant'Anna: "The European Ombudsman as the guardian of transparency"

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Mr. Sant'Anna took part in the work of Panel 1 - "The European Democracy - Mission Possible?"

Introduction

The principle of transparency - which did not feature very highly on the agenda of the EU administration until a few years ago - has in the meantime acquired substantial importance at the EU level. The Union's institutions have, in the period since the adoption of the Maastricht Treaty, made real progress in terms of transparency. The situation is, however, far from perfect.

A growing number of complaints that the European Ombudsman investigates concern lack of transparency. Many such complaints concern refusal of access to specific documents or pieces of information. But the Ombudsman also receives complaints from citizens, NGOs and other associations about more general lack of transparency in the policy-making and rule-making processes of EU institutions.

The European Ombudsman's concerns include not only ensuring full respect for the rights of natural and legal persons, but also bringing the European Union closer to its citizens. One way of achieving that is through empowering citizens in a system of good democratic governance. Among other things, citizens must be able to scrutinise the activities of public authorities, evaluate their performance and call them to account. That is why transparency is essential and lack of transparency risks leading to alienation, disillusionment and scepticism.

The implementation of the Lisbon Treaty and the Charter of Fundamental Rights will play a crucial role in enhancing transparency in the EU.

The European Ombudsman

The European Ombudsman investigates complaints about maladministration in the European institutions, bodies, offices and agencies, such as the European Commission, the European Parliament

and the Council. Maladministration encompasses all kinds of poor or failed administration, from lack of transparency to late payment for EU projects or simply impolite behaviour by a European public official.

Every year, the Ombudsman receives more than 3000 complaints from citizens, NGOs, companies, associations, interest groups, and other organisations all over the European Union. Any citizen of the Union or any natural or legal person residing or having its registered office in an EU Member State can lodge a complaint with the Ombudsman by mail, fax or e-mail. The easiest way is to complain via the electronic complaint form on his website www.ombudsman.europa.eu. This website also includes an interactive guide to help complainants find the most appropriate redress mechanism for their EU problems.

The European Ombudsman cannot deal with complaints about national, regional or local administrations, even when the complaints concern EU matters. Such complaints should normally be addressed to the national or regional ombudsmen in the Member States, which make up the European Network of Ombudsmen. It is equally important to point out that the European Ombudsman is not an appeals body against decisions taken by national courts or ombudsmen.

In response to pressure from the Ombudsman, many conflicts between citizens or other legal entities and the EU administration have been resolved, age discrimination in recruitment competitions has been eliminated, and the fundamental right to good administration has been included in the European Charter of Fundamental Rights. With reference to this latter development, the Ombudsman drafted the European Code of Good Administrative Behaviour to explain what this right means in practice. The European Parliament adopted the European Code in 2001, and most institutions and bodies have adopted similar codes to govern relations between citizens and the administration.

All of these individual success stories have made for a more open, accountable and service-minded EU administration.

The principle of transparency

Transparency - or openness - ensures that citizens can have the information they need to participate effectively in the political process and to call public authorities to account. For that reason, it is an essential aspect of pluralist democracy.

Transparency implies that public authorities should be proactive in publishing information and in making their decision-making procedures more open. In addition, transparency requires public authorities to react promptly and, as far as possible, positively to requests from members of the public for access to information and documents which have not yet been published. The word "transparency" appeared for the first time in the Maastricht Treaty, but it was the accession of Sweden and Finland to the EU in 1995 and the fall of the Santer Commission in March 1999 that constituted the most important turning points in terms of putting greater emphasis on transparency.

Similarly, the "no" votes in the referenda on the European Constitution in France and the Netherlands in

2005, as well as growing scepticism in other Member States towards the European Union and its institutions, have played a major role in identifying transparency and accountability as indispensable tools to gain the trust of European citizens.

After the "no"-votes in 2005, the Commission launched its "Transparency Initiative", which has four components:

1. increasing the transparency of interest representatives seeking to influence EU decision-making and upholding minimum standards of consultation
2. increasing transparency concerning the use of EU funds
3. ethical rules and standards for public officials
4. public access to documents.

The European Ombudsman has welcomed the initiative, and has followed its development closely. All of the four components are of major importance and are reflected in the complaints the Ombudsman regularly receives concerning lack of transparency.

The Ombudsman and transparency

In 2008 and again in 2009, by far the most common allegation examined by the European Ombudsman was lack of transparency in the EU administration. This allegation arose in almost 40% of all inquiries and included refusal of information or documents. The right of access to EU documents empowers citizens in relation to the flow of information. It enables them to take the initiative to obtain information, in its original context, that has not yet been put into the public domain. The introduction of this right was key to making the EU more accountable to its citizens.

Access to documents held by the EU institutions is a fundamental right under the Treaties and the Charter of Fundamental Rights. There is an EU Regulation - Regulation 1049/2001 -- which gives effect to that right.

If you are refused access to a document, the Regulation gives you a choice of remedy: you may go either to the Court, or to the Ombudsman.

Year after year, lack of transparency or refusal of access to documents has been one of the biggest reasons for complaint to the Ombudsman. The main issues raised in these complaints were:

- excessive delay in dealing with applications;
- the interpretation of the exceptions to access; and
- the requirement that each institution should have a public register of documents to facilitate the exercise of the right of access.

Based on the Ombudsman's experience in dealing with complaints, my view is that the adoption of Regulation 1049/2001 was a real landmark for transparency at the level of the Union. Only a few years

before, the Union institutions had operated on the basis that confidentiality was the rule and that giving access to information and documents was a discretionary exception to that rule. Regulation 1049/2001 enshrines the opposite principle. Openness is the basic rule and secrecy is the exception.

Mindsets and culture, however, change more slowly than laws. Although great progress has been made, the Ombudsman does not consider that the administrative culture of the institutions has yet fully come to terms with openness as a basic principle.

Following complaints he received in this area, the Ombudsman criticised the Commission for failing to set up a comprehensive register of documents, as required under the EU's access to documents rules.

The Ombudsman also criticised the European Parliament for not following transparency rules as regards the disclosure of details of MEPs' allowances. Following this inquiry, the Parliament published on its website general information on MEPs' allowances. This is a development which the Ombudsman applauds.

The Ombudsman also received complaints about lack of transparency in the field of beneficiaries of EU funds. He was greatly encouraged, therefore, by the decision to make data on beneficiaries of EU funds more transparent from 2009. The idea that Member States should disclose information on who receives EU money is certainly a step in the right direction.

In light of the progress that the Ombudsman considers still has to be achieved in this area, he is following with great attention the on-going legislative procedure for revision of Regulation 1049/2001. Such revision presents both a danger as well as an opportunity. The Regulation's contribution to transparency is unfortunately not an *acquis*. That is to say, we cannot assume that any revision of the Regulation will necessarily be an improvement.

On the contrary, the Ombudsman believes it is important to be vigilant to avoid the very real danger of stepping backwards from the existing law, as interpreted by the Courts and as applied by the Ombudsman and the European Data Protection Supervisor. The entry into force of the Lisbon Treaty introduces, as I will highlight hereafter, important modifications as regards the relationship between the Union institutions and citizens. This positive evolution should in any case have a positive impact on the current revision of Reg. 1049/2001. It would be in fact contrary to the announced objectives of the Lisbon Treaty to do anything else but to improve the level of transparency and accountability in the functioning of the EU.

A second aspect of the Ombudsman's work that I will mention concerns the involvement of stakeholders and the public generally in EU policy-making.

There is an increasing trend for EU legislation to provide quite elaborate arrangements for consultation of stakeholders before decisions are made. The number of complaints about consultation of stakeholders and the public in the policy-making process is small at present, but I expect it to become a growth area

in the future, especially after the Lisbon Treaty entered into force, because of the Treaty general commitment to public debate, open dialogue and broad consultation.

The Lisbon Treaty and the Charter of Fundamental Rights

As I have mentioned before the entry into force of the Lisbon Treaty introduces important modifications as regards the relationship between the Union institutions and citizens.

In the first place, the Lisbon Treaty notes, already in its 7th recital, the desire of Member States to "enhance further the democratic and efficient functioning of the institutions". This is in turn reflected in the inclusion of an entirely new Title II in the Treaty on the European Union laying down "Provisions on Democratic Principles".

Article 9 requires the Union to "observe the principle of equality of its citizens, who shall receive equal attention from its institutions"

Article 10 underlines that "every citizen shall have the right to participate in the democratic life of the Union" and that "decisions shall be taken as openly and as closely as possible to the citizen".

Article 11 enshrines the right of consultation and participation by requiring EU institutions "to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" and "to maintain an open, transparent and regular dialogue with representative organisations and civil society".

These same general concerns are again expressed in the TFEU, namely in Article 15 which charges the institutions to "conduct their work as openly as possible" as a means to "promote good governance and ensure the participation of the civil society".

The Treaty also provides for a stronger voice for European citizens. Thanks to the "Citizens' Initiative", one million citizens from a number of Member States will have the possibility to call on the Commission to bring forward new policy proposals. The implementation of the Lisbon Treaty and of a legally binding Charter of Fundamental Rights should therefore mark a further step forward in terms of more transparency and openness in the functioning of the European Union and in its democratic accountability.

Conclusion

In a democracy, transparency and good governance involve the empowerment of citizens. Indeed, transparency is an essential aspect of good democratic governance. It is transparency that makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance and call them to account. Transparency also allows citizens to make effective use of their other political rights, especially the freedom of speech, and to participate in public activities.

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I would like to emphasise that the complaints that citizens have chosen to address to the European Ombudsman demonstrate that citizenship of the Union is a reality, not merely an aspiration.

Furthermore, the existence of the European Ombudsman helps give citizenship a dynamic quality.

Citizens can and do use their right to address the European Ombudsman not only as a way to seek redress for individual injustice, but also to seek greater transparency. In turn, transparency makes it possible for citizens to scrutinise the activities of the Institutions, evaluate their performance and call them to account. It also allows citizens to participate meaningfully in public activities and to make effective use of other political rights, especially freedom of speech.

In other words, by enhancing citizens' rights and citizen participation at the European Union level, the European Ombudsman is contributing to the gradual unfolding of the democratic process and to the consolidation of a political order at the supranational level.

By creating the citizenship of the Union, the Maastricht Treaty committed the Union not only to respecting a list of rights, but also to enhancing the legitimacy of the functioning of the Union's institutions through political participation by citizens. The European Ombudsman is one mechanism that citizens can use for this purpose and he is also an active agent seeking to encourage citizens to make use of their political rights and helping them to do so.

By encouraging greater transparency, ensuring fair and effective consultation procedures and by promoting high standards of administration, the Ombudsman can ensure that the public administration is well placed to listen to and involve European citizens.

In other words, the European Ombudsman is one of the actors in a long learning process about how to legitimate governance at the Union level.