

Access to environmental information and access to justice in the context of the Aarhus Convention from the perspective of the European Ombudsman

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Ladies and gentlemen, honourable delegates,

Thank you very much for having organised this meeting and for having invited me to address you on behalf of the European Ombudsman.

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 and a few thoughts on access to environmental information and access to justice from the Ombudsman's perspective.

I. The mandate of the European Ombudsman

Some of you may not be familiar with the role of the European Ombudsman. Therefore, I would like to briefly outline the basis for the Ombudsman's involvement in this area.

The Ombudsman's mandate is set out in Article 228 of the Treaty on the Functioning of the European Union. This Article lays down that the Ombudsman's role is to investigate "maladministration" in the activities of (other) EU institutions and bodies². The Ombudsman may intervene based on complaints or on her own initiative.

The Ombudsman has considered that administrative transparency, including in environmental matters, constitutes one of the pillars of good administration. It covers requests for access to documents as well as requests for information. The Ombudsman has dealt with a number of complaints concerning access to environmental information and relying on the Aarhus Convention.

¹ Legal Officer at the European Ombudsman. The views expressed in this contribution are expressed in a personal capacity and do not represent the official position of the European Ombudsman.

² Article 228 TFEU: "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. In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings."

It is also worth mentioning that in the EU context, access to information has a constitutional - fundamental rights dimension. Articles 41 – 42 of the EU Charter of Fundamental Rights guarantee the right to good administration, the right to receive a reply where citizens request information and the right of access to documents.

From a remedial perspective, Article 43 of the Charter guarantees the right to complain to the European Ombudsman. Moreover, the right to complain to the Ombudsman is specifically mentioned in Article 8(3)³ of Regulation 1049/2001⁴, which is a statute 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 Regulation⁵.

Let me now turn to the Ombudsman’s involvement and contribution in this area.

II. Early access to environmental information

The Ombudsman’s approach has been that **the interests of the Aarhus Convention – both access to environmental information and access to justice – are best served when environmental information is provided without there being any need to use available remedies**. In other words, the access to justice pillar of the Aarhus Convention should be a measure of last resort where the Administration has wrongly denied access to environmental information. The Ombudsman strives to promote good administration so that people need to activate the access to justice pillar in exceptional cases only.

a) Proactive dissemination of environmental information

The European Ombudsman encourages the creation of public registers in which institutions disclose relevant environmental information proactively. Proactive disclosure enables people to obtain the environmental information they seek and at the same time avoids any unnecessary administrative burden resulting from requests for access and appeals. Specifically, in the context of the Aarhus Convention, the Ombudsman led several inquiries concerning the European

³ Article 8(3) 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.*”

⁴ 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

⁵ 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.

Investment Bank and its loan agreements/finance contracts⁶. As a result, the EIB introduced a public register in which it publishes relevant environmental information⁷.

b) Speedy disclosure of environmental information upon request

The Ombudsman further seeks to promote an administrative culture that allows requests for information – including environmental information - to be assessed fairly, correctly and speedily without there being any need to appeal.

III. Barrier-free access to justice

Judge Kateřina Šimáčková, Judge of the Czech Constitutional Court, once wrote that **the most unfair judgments are those that were never delivered because the individual was not aware of the remedy or did not have the means to use it**⁸. This remark also applies to administrative decisions that never got challenged because the person concerned did not know whom to turn to or the hurdles were such that they discouraged him/her from challenging the decision or simply made it materially impossible to do so.

a) Information on remedies

The Ombudsman requires the EU institutions to inform requesters of available remedies in the administrative decision or the letter informing them of the (full or partial) rejection of their request. In accordance with Article 19⁹ of the European Code of Good of Administrative Behaviour, authored by the European Ombudsman, this information should include the available judicial remedies, as well as the right to complain to the European Ombudsman. The Ombudsman carried out one inquiry on this issue in the context of the Aarhus Convention, which concerned the European Investment Bank¹⁰.

⁶ Complaint 948/2006/BU, complaint 1807/2006/MHZ, complaint 2145/2009/RT, own-initiative inquiry OI/3/2013.

⁷ See decision closing own-initiative inquiry OI/3/2013, 25 June 2014, in particular paragraphs 19-29, 39-47.

⁸ *Nejnespravedlivější rozsudky*, 1 July 2011: <http://jinepravo.blogspot.fr/2011/06/nejnespravedlivejsi-rozsudky.html> (last seen on 6 February 2018).

⁹ Article 19 of the European Code of Good Administrative Behaviour reads as follows: “1. A decision of the institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, and the time-limits for exercising them. 2. Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 263 and 228 of the Treaty on the Functioning of the European Union.”

¹⁰ Decision on complaint 948/2006/BU, 28 September 2007, paragraphs 2.1-2.5.

b) Administrative appeals

The Ombudsman encourages the availability of administrative appeals/internal hierarchical remedies so that administrative decisions can be *fully and speedily* reviewed at an early stage, without there being any need for external remedies to be sought. Regulation 1049/2001 on public access to documents provides for an administrative appeal and for rather short time limits for decisions on such appeals (15 working days).

c) Easily accessible and effective external remedies

Wherever environmental information is not provided, citizens should have easy access to effective external remedies.

Access to justice typically implies access to courts. EU citizens may challenge administrative decisions before the EU judiciary. However, filing an action before the Court of Justice of the European Union may be discouraging for various reasons: restrictive admissibility requirements, short time limits for bringing an action, the complexity of court proceedings before an international court, compulsory legal representation, the risk of having to bear the costs if the action does not succeed, the average length of proceedings ...

Therefore, it is important that alternatives to court proceedings, such as ombudsmen or information commissioners, exist and are easily accessible.

The European Ombudsman represents such a remedy. It is very easy to complain to the Ombudsman. There are no formal requirements and rather liberal admissibility requirements. Complainants do not need to be legally represented and do not need to demonstrate any specific interest or nexus. The procedure is cost-free for the complainant and complaints may be submitted in any of the EU's 24 official languages. The Ombudsman's website provides an interactive guide helping complainants to submit their complaints online.

The procedure before the Ombudsman is also quite fast. In 2017, the Ombudsman took a further step in order to speed up the handling of freedom of information requests and launched a specific fast-track procedure for such cases. The Ombudsman undertakes to decide whether to open an inquiry within 5 working days of receipt of the complaint and aims to decide on the case within 40 days of receipt of the complaint. During this time, the Ombudsman may consult with the institution concerned or carry out an inspection of documents. The outcome may be a recommendation to grant full or partial access immediately.

While the European Ombudsman may issue recommendations, her decisions are not legally binding. Thus, the successful outcome of the Ombudsman's inquiries depends on the cooperation of the institutions concerned.

Thank you for your attention. I wish you a pleasant and productive meeting.