

Thursday, 30 November 2006,
Conference organised by CEE Bankwatch

Session II. 11:00-12:30. What are the existing accountability mechanisms on the EU level to keep the EIB accountable?

Remarks by Ian Harden, Secretary General, office of the European Ombudsman.

1 Introduction

Let me begin by thanking the organisers of this conference for giving me the opportunity to speak about the European Ombudsman's contribution to ensuring the accountability of the EIB.

First, I shall describe generally what the European Ombudsman is and does and compare the Ombudsman's role with that of the Court (i.e. the European Court of Justice and the Court of First Instance). Then I will provide more specific information about complaints against the EIB.

The term "ombudsman" comes from Sweden, where the first Parliamentary Ombudsman was established nearly 200 years ago. In some countries -- Denmark, for example -- there are legal limits on who can call themselves an ombudsman. In such countries, the term is used only in the original sense of an independent, external mechanism for dealing with complaints against public authorities. In some other countries, anyone can call themselves an ombudsman and one finds the word used to describe all sorts of mechanisms for handling complaints, whether internal or external, public or private, independent or otherwise.

The European Ombudsman is an ombudsman in the original sense. Indeed, it was a Danish proposal (during the negotiations on the Maastricht Treaty) that had most influence in determining the status and functions of the Ombudsman.

The European Parliament elects the Ombudsman. Neither the Council nor the Commission plays any part in the process. The current Ombudsman is Mr P. Nikiforos Diamandouros, who was previously the national ombudsman of Greece. He took office in April 2003.

The Ombudsman has his own staff and his own budget and is fully independent in carrying out his functions.

Article 195 of the EC Treaty provides for the Ombudsman to receive complaints against Community Institutions and bodies. He can also open inquiries on his own initiative. (One such inquiry led the EIB, along with many other Community institutions and bodies, to adopt rules on public access to documents.)

An important limitation on the Ombudsman's mandate is that he cannot deal with a complaint if the alleged facts are, or have been, the subject of court proceedings. This means that someone who wants to challenge a decision has to choose whether to go to the Court, or to the Ombudsman.

In some cases, complaint to the Ombudsman is the only possibility because of limits on access to the Court. I shall develop this point later.

2 Comparison with the Court

Similarities

The Court and the Ombudsmen are both external forms of control.

Both are independent and impartial.

Both have power to see all the relevant documents, including confidential documents.

Both use procedures that are fair. In the Ombudsman's case, the complainant and the institution or body concerned have the opportunity to see and comment on each other's submissions to the Ombudsman. However, strict rules of evidence do not apply and, as I shall explain below, the Ombudsman's procedures are, in general, more flexible than the Court's.

Differences

The most fundamental difference is that, unlike decisions of the Court, the Ombudsman's findings and recommendations are not legally binding. Two other important distinctions flow from this:

First, the Court's judgements are by definition based on legal norms, whereas the Ombudsman also takes into account principles of good administration that are not necessarily legally binding;

Second, the rules governing Court proceedings are stricter and less flexible, in most respects, than those that apply to the Ombudsman's inquiries.

The Ombudsman therefore complements the work of the Court, as regards both the range of situations in which an Institution or body may be called to account and the norms applied in evaluating its behaviour. Let me develop both aspects in greater detail, beginning with the norms.

The review criterion

Article 195 of the EC Treaty provides for the Ombudsman's inquiries to concern "maladministration", but does not define that term.

The Ombudsman has always taken the view that it can never be good administration to act unlawfully, or, to say the same thing another way, an act that is unlawful is also maladministration.

To act lawfully, a Community Institution or body must comply not only with the Treaties and legislation, but also with the general principles of law that are to be found in the case law of the Court, such as proportionality and respect for fundamental rights.

The special contribution of the Ombudsman is that principles of good administration may require Institutions and bodies to do more than just avoid acting unlawfully. For example, they should also act reasonably, fairly and be helpful to citizens.

This is particularly relevant where discretionary powers are involved. For example, the Community law on access to documents (Regulation 1049/2001) applies to existing documents. There is no legal obligation to draw up new documents containing information that someone asks for. The Ombudsman's approach, set out in the European Code of Good Administrative Behaviour, is that it is good administration to provide information when requested to do so, unless the Institution or body concerned can show that it has a good reason not to do so.

Admissibility and procedure

It costs nothing to make a complaint to the Ombudsman and there is no need to be legally represented.

It is possible to complain even if there is no legally binding act of a kind that could be annulled by the Court.

A complaint to the Ombudsman must, however, be preceded by "appropriate administrative approaches". The main purpose of this provision is to give the Institution or body concerned a chance to resolve the problem itself before the Ombudsman becomes involved.

Any citizen of the European Union, any resident of a Member State and any legal person (such as an NGO) with a registered office in a Member State may complain to the Ombudsman. Persons who do not fall within these categories do not have the right to complain. However, in practice, there are two possibilities to deal with their complaints.

The first possibility arises because a complainant does not have to be personally affected by the maladministration alleged. A citizen or resident of the EU can therefore complain about alleged maladministration which affects the interests of other persons. For example, an NGO based in the European Union could complain about alleged maladministration by a Community body, such as the EIB, that affects the interests of people living in a third country.

The second possibility is for the European Ombudsman to open an inquiry on his own initiative. (As I will explain in a moment, the Ombudsman has already used this possibility as regards the EIB).

The Ombudsman's practice in such cases is to give the complainant the same opportunity to see and comment on the Institution or body's answers during the inquiry as if the matter had been dealt with as a complaint.

3 The European Ombudsman and the EIB

Since beginning operations in September 1995, the European Ombudsman has completed 20 inquiries into complaints against the EIB. Most concerned matters such as recruitment, staff problems and tenders rather than the EIB's core business, but two are worth explaining in more detail today.

The managing director of a company based in Ghana alleged mismanagement of a loan which the EIB had granted to the company in the framework of the Lomé Convention. The complainant was not an EU citizen or resident and the company did not have a registered office in the EU. The Ombudsman, however, used the own initiative power to open an inquiry into the subject matter of the complaint ([OI/4/99/OV](#)).

The other case ([1338/98/ME](#)) concerned the EIB's financing of part of an orbital motorway around Budapest. The European Environmental Bureau complained that the planning and construction of the motorway violated the Hungarian Constitution and other Hungarian laws, as well as Community law on the environment. Although the Ombudsman eventually found no maladministration, the case established two important points of principle. First, hypothetical arguments about

whether the complainant could have brought judicial proceedings against the EIB are not decisive when the case has, in fact, been brought to the Ombudsman. Second, the EIB cannot merely point out that it has discretionary power: it must explain and justify its actions and answer cogent criticism. This is the core of accountability.

Perhaps surprisingly, it was not until 2006 that the Ombudsman received similar complaints.

Complaint 244/2006/BM concerns the EIB's agreement to finance the high-speed railway connection between Madrid and the French border (Madrid-Barcelona-Figueres). The complainant argues that the proposed route of the project could have negative effects for the residents of the Barcelona area, including damage to private buildings and environmental pollution, in particular noise pollution, in breach of Community law. The complainant also complained against the Commission in relation to the same matter (798/2006/BM) and the two inquiries are being conducted in parallel.

The Ombudsman also received two complaints from Polish NGOs (1779/2006/MHZ and 1807/2006/MHZ) concerning the environmental impact of projects in Poland financed by the EIB. The first case concerns a project under the National Road Programme 2005/2006 and the second concerns a project for Flood Damage Reconstruction.

The inquiries into the above cases are still on-going and I cannot, of course, predict their outcomes. What they clearly demonstrate, however, is that complaint to the European Ombudsman provides a way in which individuals and NGOs can call the EIB to account for the way that it exercises its core functions.

Thank you for your attention.