

IOI-EUROPE CONFERENCE THE OMBUDSMAN IN AN OPEN AND PARTICIPATORY SOCIETY

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Andreas Pottakis, Greek Ombudsman

The Ombudsman in his/her relations to access to information and to transparency

Dear colleagues, ladies and gentlemen,

I would like to thank our hosts and organizers of this extremely interesting conference, Catherine and Guido, for doing me the honour of extending an invitation to state the experience of the Greek Ombudsman on this very topical issue of access to documents and transparency.

I would also like to take the opportunity and congratulate them for the completion of 20 years of successful operation of the Belgian Federal Ombudsman institution.

At the very outset, allow me to state that my reflection on the topic of this session includes not only the rights – and crucially, the tools for upholding them- of the Ombudsman in securing access to documents deemed necessary for the enquiries the office undertakes, but also those afforded to third parties –the complainants as well as any other interested party- to access documents collected, assessed or produced by the Ombudsman himself. Further, I intend to focus on measures to promote the transparent functioning of the Ombudsman's institution.

Before embarking, though, on the aforementioned analysis, a few notes on the scope of the Greek Ombudsman's competences and mandates are in order.

I. THE JURISDICTION OF THE GREEK OMBUDSMAN

The Greek Ombudsman has jurisdiction over services of

- a) the public sector,
- b) local and regional authorities,
- c) other public bodies, state private law entities, public corporations, local government enterprises and undertakings whose management is directly or indirectly determined by the state by means of an administrative decision or as a shareholder.

Statutory restrictions on the scope of the Ombudsman's jurisdiction include government ministers and deputy ministers for acts pertaining to their political function, religious public law bodies, judicial authorities, military services with regard to issues of national defense and security, the National Intelligence Service, the services of the Ministry of Foreign Affairs for matters related to the conduct of the Country's foreign policy or international relations, the Legal Council of State and independent authorities with regard to their main function. The Ombudsman is prohibited from investigating cases, which concern state security. Moreover, issues pertaining to the service status of public officials also do not fall under his jurisdiction¹.

Under the Institution's special mandate to protect and promote the rights of children as well as the principle of equal treatment, the Greek Ombudsman also has jurisdiction over matters involving private individuals, physical or legal persons.

Finally, the Greek Ombudsman has since 2014 been recognised as the National Preventive Mechanism under the Optional Protocol of the UN Convention Against Torture (OPCAT), while since mid-2017 it also operates as the National Mechanism for the Investigation of Arbitrary Behaviour of security agents (police, coast guard, fire brigade) and penitentiary staff. The latter mandate has granted the Ombudsman with quasi-inquisitive competences, and operates thus under enhanced confidentiality protocols.

II. ACCESS TO DOCUMENTS

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a. RIGHT OF THE OMBUDSMAN TO ACCESS DOCUMENTS

When investigating a case, whether after having received a complaint or on an own initiative motion, the Ombudsman may request public services to provide him with any information, document or other evidence relating to the case, and may examine individuals, conduct on-site investigations and order an expert's report.

During the examination of documents and other evidence, which are at the disposal of public authorities, the fact that they have been classified as secret may not be invoked, unless they concern issues of national defense, state security and the country's international relations. It has to be noted, that while invoking reasons of state security or national defence may prohibit the Ombudsman from gaining access to information and/or documents vital for an ongoing investigation, it is an action that raises the stakes –at a political level- of the investigation carried out by the Authority; it is for this reason that government has been extremely reluctant to make use of this clause in order to refuse access to information and/or documents to the Ombudsman.

All other reasons and general confidentiality clauses existing in the legislation –including, inter alia, the medical secrecy, tax/revenue confidentiality etc cannot be pitted against the Ombudsman.

¹ Art. 3 par. 1 & 2 of Law 3094/2003.

Although the obligation of all public services to “facilitate the investigation” of the Ombudsman ‘in every possible way” is explicitly stipulated in law, it probably comes as no surprise to anyone that ever so often bodies under investigation exhibit a certain level of reluctance to share documents and/or disclose information that might compromise their position. In order to ascertain that the obligation on the part of every public body is duly respected, a number of instruments are available to the Ombudsman’s toolkit, by statute.

First, the Ombudsman may, during the investigation of cases, request the assistance of the Public Administration's Body of Investigators-Inspectors or other auditing bodies of the Administration².

Secondly, non-cooperation with an investigation by a public service shall make the object of a special report from the Ombudsman to the competent Minister³.

Thirdly, the refusal of a public official or administration member to cooperate with the Ombudsman during an investigation constitutes a disciplinary offence of breach of duty, and for administration members, a reason for their replacement.

If during the course of the investigation, it is established that there has been unlawful behavior on the part of a public official, civil servant or member of an administration, the Ombudsman shall submit the report to the competent body and may call for disciplinary action against the person responsible or recommend the adoption of other measures, if the person responsible is not subject to disciplinary control. The Ombudsman may define a reasonable time limit, in view of the circumstances, at the expiry of which, if no action has been taken, he may himself order the control. The Ombudsman may also in serious cases call, by means of a document addressed to the competent body, for disciplinary action against the responsible public official or civil servant for the above omission in exercising the indicated control. If it emerges from the reports of the Ombudsman that a public official or civil servant, for the second time within a three-year period, has obstructed the progress of an investigation or refuses without serious reason to cooperate in the solution of a problem, the penalty of definitive dismissal may be imposed⁴.

Finally, an officer or employee who refuses to cooperate with the Ombudsman in order to impede or prevent the investigation is punished by imprisonment of up to two (2) years. Criminal prosecution is only exercised when a report is submitted by the Independent Authority to the competent Prosecutor⁵.

In particular under the mandate of protection of children’s rights and his capacity as the national equality body, tasked with the monitoring of the application of the principle of

² Art. 4 par. 5 Law 3094/2003

³ Art. 4 par. 5 Law 3094/2003

⁴ Art 4 par. 11 Law 3094/2003

⁵ Art 4 par. 10 Law 3094/2003

equal treatment irrespective of race, color, national or ethnic origin, birth, religion or other belief, disability or age, age, marital status, sexual orientation, identity or gender characteristics, as well as equal treatment of men and women, the Ombudsman may request documents or other evidence of the case under investigation by a private party, individual or legal entity, on a duly reasoned request. These data are provided in so far as the legislation on the protection of personal data is not infringed. The Ombudsman is required to ensure the privacy and professional secrecy of individuals and not to disclose any information that may make them identifiable. If a private party, whether an individual or a legal entity, refuses to provide the above information, the Ombudsman may request the assistance of a public service or professional association, as the case may be, and the Public Prosecutor's Office.

b. RIGHT TO ACCESS OMBUDSMAN DOCUMENTS

The Office of the Ombudsman's staff have a duty of confidentiality with regard to documents and evidence which come to their knowledge in the context of an investigation and which are classified as secret according to the provisions in force, or are exempted from the right of access to administrative documents, in accordance with article 16 of the Code of Administrative Procedure and all other relevant provisions⁶.

On completion of the investigation, if required by the nature of the case, the Ombudsman shall draw up a report on the findings, to be communicated to the relevant Minister and authorities, taking due account of ensuring that sensitive personal data are protected, as the relevant legislation provides. In any case, the Ombudsman has a duty to inform the person concerned about the progress of the investigation of his/her case.

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III. ENHANCING TRANSPARENCY WITHIN THE OMBUDSMAN INSTITUTION

Operating in a transparent manner is a *conditio sine qua non* for an institution like the Ombudsman.

All decisions of the Ombudsman are posted online, on the “Diavgeia”⁷ platform, and are thus freely available to be accessed by all.

Further, the implementation of the Ombudsman’s annual budget is posted on the institution’s website, and is updated on a monthly basis, giving thus the opportunity to every interested party to assess the manner in which the Authority is disbursing its resources.

In order, further, to enhance the transmission of information on the operations of the Greek Ombudsman, two new initiatives are currently in the final stage of implementation; first, a quarterly case-book, where seminal cases handled by the Ombudsman are to be published on the Authority’s website, summarizing the merits of the case, the intervention of the

⁶ Art. 4 par. 9 Law 3094/2003.

⁷ “Διαύγεια” (“diavgeia”) stands for “lucidity”

Ombudsman and the conclusion/results brought about after the Authority's intervention. This publication will complement on the one hand the Ombudsman's annual report, submitted in March each year to the Speaker of Parliament and discussed according to the House Rules and published in a special edition of the National Stationery Office, where the work of the Authority is summarily explained, the most important cases in the year presented and the recommendations for the improvement of the public services and the adoption of the necessary legislative measures formulated, and on the other all special reports drawn up during a year, communicated to the relevant Minister and presented to the Prime Minister and the Speaker of the House. Secondly, the annual action plan of the Authority is to be made publicly available online, on the website of the Authority, allowing thus for more transparency on the Ombudsman's priorities, but also better accountability on the institution's performance.

IV. CONCLUDING REMARKS

Having unrestricted access to documents vital for the successful undertaking of an investigation is essential for an Ombudsman's office. Commanding the necessary instruments in the institution's toolkit to ensure that the duty of all those under the jurisdiction of the institution to facilitate the Ombudsman's investigations cannot be overestimated. Even if used rarely –and they should be used prudently- such instruments, as the ones available to the Greek Ombudsman, can prove extremely effective, even as a deterrent to nonresponsive parties.

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At the same time, the Ombudsman institution should set the paradigm for a service operating with due respect to upholding the transparency principle. The Authority's work has to be readily and at frequent intervals available to the public, while the execution of the institution's budget should be accessible in real time. It is a matter of enhanced accountability that in turn strengthens the Ombudsman's legitimacy.