

# The Ombudsman Reaching Outside the Public Sector

Rafel Ribó, Síndic de Greuges de Catalunya (Catalan Ombudsman), Spain, and IOI Vice-President, Europe

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*Ombudsmen face new responsibilities in dealing with private companies carrying out public services. It is no longer just the public administration, but also private sector entities that can violate citizens' rights and freedoms, necessitating new approaches to oversight. The Catalan Ombudsman now has the duty to supervise private companies in this regard, and that experience is reviewed here. It would be desirable to have a legal code for such activities, similar to that applied to the public administration, with established obligations and sanctions. Nevertheless, the novelty of this field, as well as the differences between the different legal frameworks, obliges us to be prudent in this respect. Supervision of these entities depends not only on the service being monitored or the organization delivering it, but on the way in which citizens' rights may be affected. Our experience so far has taught us that formal collaboration agreements are useful in establishing the parameters of supervision and intervention.*

### **Introduction: The new socio-economic and legal context**

This matter is especially relevant to the Síndic de Greuges, or Catalan Ombudsman, the institution I represent. That is because the Statute of Autonomy of Catalonia of 2006 gives the Catalan Ombudsman, in addition to the now-standard competencies of supervision of Catalan Public Administration activities in the broadest sense, the duty to supervise private companies that render public services or carry out activities of general or universal interest, or equivalent activity indirectly or under any special arrangement.

Many public services that years ago were provided by public companies, or even by private companies within public concessions, today are offered by private companies competing in the market. There's a real difference to get them through administrative concessions or competing in the market. Those are the companies I'm going to talk about.

This is definitely a result of the new socio-economic and legal context we now live in. That new instruments are and have been in use to render public services is a well-known fact. In our ambit, the main promoter of these new instruments has been the European Union. For some years now, community institutions have promoted liberalization and privatization as new instruments

for the provision of “services of general interest” and “services of general economic interest”.<sup>1</sup>

The main consequence of these liberalization and privatization processes for public activities and services is that the law no longer attributes public services solely to the public administration, and therefore, the public administration is no longer the only passive subject of ombudsperson control; certain liberalized economic sectors have become such subjects precisely due to the activity they carry out. In other words, it is no longer just the public administration, in its public service relations with citizens, that can violate those citizens’ rights and freedoms; now, such rights violations can also be committed within these same relationships by the private sector entities that carry out these sorts of activities.

Thus, the actual intervention must be studied, foregoing a merely subjective or organic approach in which only the figure conducting the action is taken into account. In these new times, supervision will not only depend on the object being monitored or the organization as such, but on the very activity of public service provision in which citizens’ rights may be affected.

In this new context, the ombudsperson can directly supervise those activities that make for an exercise of public service obligations, as they are a matter of providing indispensable services for the satisfaction of citizens’ essential needs and the exercise of their fundamental rights.

### **Institutional Supervision of the Private Sector: An Exclusive Activity of the Ombudsperson?**

#### *Different players involved*

Having established the context in which ombudsperson institutions conduct their activity to defend and guarantee citizens’ rights and freedoms, discussion should turn to whether we are (or should be) the sole guarantors of these rights, or if there are (or should be) other types of controls, perhaps even of a private nature, that can fulfil this supervision duty. Verifying the reality of this situation is relevant, because a scenario in which different non-judiciary rights guarantors co-exist will force us to establish collaborative relations, and even to specify our role, keeping in mind that there may be areas of the private sector in which somebody could think it is not necessary for us to intervene, as they already have their own rights supervision system.

Along these lines, I believe it is opportune to distinguish between the following public and private rights protection instruments:

a. Normal ombudsman tasks: Supervision of the public administration and its activities, or the traditional area of ombudsman action.

b. New parliamentary ombudsman tasks: Supervision of private-sector activity in the management and/or provision or services of general interest. This

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<sup>1</sup> In the Lisbon European Council of March 2000, the heads of state and government not only did they acknowledged the key role of services of general interest, but also asked for an acceleration of liberalization in the gas, electricity, transport and postal service sectors.

would be a new area in which ombudsmen would intervene, resulting from the new judiciary and economic context, especially in the European realm.

c. New public instruments to control: Supervision of private-sector activity by monitoring organizations established by Law in areas in which a service of general interest is provided, and also in sectors with repercussions on relevant economic and social ambits like banking.

d. Private sector creating private control: Supervision of private-sector activity by organizations created on the initiative of the sector itself; for example, could be a Coca-Cola ombudsman.

There can be a co-existence of different forms of rights protection. This protection or what we could call “protection activity” has different meanings. I would now like to provide some examples of this reality in the European context, and wrap up with those most familiar to me, the Spanish and Catalan contexts.

### **Examples of co-existence of organizations devoted to citizen rights supervision**

Let me begin with our hosts, the Swedes. First and foremost, in Sweden there is co-existence of different ombudspersons even in the supervision of public sector activity. Thus, the Parliamentary Ombudsman (*Riksdagens ombudsmän*), the most generalized institution, is aware of the complaints filed against the public administration and its bodies. On another front, and as of January 1, 2009, the Equality Ombudsman (*Diskrimineringsombudsmannen*) works to ensure protection of the right to non-discrimination in any realm and for any reason.<sup>2</sup> Additionally, and still in the public realm, along with the aforementioned ombudspersons there are others such as the Press Ombudsperson, now working on structuring a self-regulation body created by press professionals themselves (Press Council). Citizens can file complaints with this ombudsperson regarding journalistic ethics issues. The complaint could lead to the media organization being obliged to publish the written decision of the Press Council, and if necessary, pay an administrative fine.

As for supervision of the private sector, it is in the hands of other bodies. In the world of business, individual complaints are managed by the National Board for Consumer Complaints, which is also a public body. Its main task is to impartially mediate disputes between consumers and businesses. Complaints filed by consumers result in recommendations handed down by the board. These recommendations are not binding, but the majority of companies comply with them. This board acts in different realms – banking, housing, electrical energy, insurance, travel and others.

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<sup>2</sup> Pursuant to the Discrimination Act, of June 5, 2008, published June 25: (this new Institution takes up the duties that had been carried out by the Equal Opportunity Ombudsman, the Ombudsman Against Ethnic Discrimination, the Ombudsman Against Discrimination on the Grounds of Sexual Orientation and the Disability Ombudsman up to that time).

Another example can be found in the United Kingdom, where there is a general Parliamentary Ombudsman: The Parliamentary and Health Services Ombudsman. Along with this institution there are also other ombudspersons for control of the public sector. There are regional and local ombudsmen, such as the Northern Ireland Ombudsman and Police Ombudsman for Northern Ireland, Wales, Scotland, London.

Nonetheless, for services that have been privatized, such as the postal service, telecommunications or the energy sector, there are other supervisory bodies that involve an exclusion from the Parliamentary Ombudsman's competencies. Along these lines, there is an Energy Ombudsman, established to resolve differences between energy companies – electricity and gas – and their customers. The same system is repeated for telecommunications with the Telecommunications Ombudsman, approved by the regulating body, where complaints can be filed against telecommunications providers who are members of the Ombudsman service.<sup>3</sup>

Some of these bodies are created by law. There are other bodies responsible for the supervision of citizens' rights in the private sector. For example, the Financial Ombudsman Service is an independent body, created by law, whose head is appointed by the British Parliament. Another example is the Pensions Ombudsman, also created by law; its head is appointed by the Secretary of State. The British Pensions Ombudsman receives complaints from citizens relative to this sector of economic activity.

In the highly decentralized state of Belgium, there is a Federal Parliamentary Ombudsman as well as different Ombudsman institutions in the various regions and communities (in addition to local ombudspersons). They all supervise the activities of the public administration in their respective areas of competency. The Pensions Ombudsman for state and private pension affairs works between the lines of public and private sector supervision.

These public-sector control institutions co-exist with other similar bodies that protect the rights of citizens in the private sector, be they providers of services of general interest or providers of other activities.

Among the former private-sector organizations that render universal services, there is a Telecommunications Mediation Service created by law. It works independently, handling free-of-charge complaints filed by the dissatisfied users of any telecommunications provider.

Among the citizens' rights advocates in the private sector in general, there are such examples as the Insurance Ombudsman and the Bank, Credit and Investment Mediation service, conceived as an impartial mediator. This service is chaired by a consumer representative and an ombudsman, appointed by the financial sector.

In Spain, the state-level Parliamentary Ombudsman co-exists with regional Parliamentary Ombudspersons. All of them follow a model oriented to the

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<sup>3</sup> <http://www.otelo.org.uk>. One detail must not be left out: It meets the criteria set by the BIOA: independence from the persons subject to investigation, effectiveness, neutrality and public monitoring.

protection of fundamental rights and public freedoms.<sup>4</sup> Some regional ombudspersons have competencies to supervise the activity of those private organizations that have a specific link to the public administration, for example, through administrative concessions.

Aside from Parliamentary Ombudsperson institutions, Spain has seen the emergence in recent years of organizations to supervise certain public sector areas, and other private organizations to control the private sector. Among the former are the Taxpayer Defender, a body that forms part of the Spanish Treasury and Ministry of Economy, whose aim is to defend the rights and guarantees of citizens in their tax relations with the general state administration. This task is carried out through the resolution of complaints filed by citizens.

In telecommunications, by legal mandate, the Office of Telecommunications User Services has been established within the Ministry of Science and Technology. Two roles have been assigned to this Office: To solve conflicts between telecommunications providers and users, and to inform and serve telecommunications users.

As an alternative to filing complaints with these customer defenders or the Office of User Services, there is also the possibility of addressing the Consumer Affairs Arbitration Board. In this case, the procedure is swift, simple, free and voluntary for the parties.

As for supervision of the private sector that provides universal services or those of general interest, some private companies in recent years have also created their own customer defenders. Fecsa-Endesa, the main distributor of electrical energy in Catalonia, and Telefonica, responsible for universal telecommunications service, established a Customer Defender. This is a figure created voluntarily by these corporations with an aim to offer a second recourse to users who have filed a claim with the company's customer service department and are not satisfied with the response received. They also have the duty of conveying any service improvement recommendations and proposals they may have to corporate management.

These private customer defenders represent another channel whose nature is very different from the Ombudsman, and through which citizens can address the company rendering the service and present their claim, which is always positive. But they have not filled the void some service users discover, when there are issues for which the companies rendering the service do not want to offer more agile or effective mechanisms to file a claim or defend consumers' rights. Thus, from a critical standpoint, the independence and impartiality of private customer defenders can be questioned, as they are appointed by and directly depend on the same company with which they must intervene. They do not offer guarantees of independence. Furthermore, it has been found that corporations do little to publicize the existence of their cus-

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<sup>4</sup> According to the model presented by Dr. G. Kucsko-Stadlmayer, "Framework Presentation: Project on the comparisons of Ombudsman-Institutions in Europe: special reference to Access, Power and Efficiency", from the 22nd Ombudspersons Coordination Seminar, Barcelona, 2007.

customer defenders. Anyone can easily see this by visiting their corporate websites, which either offer no direct link to the customer defender, and if one does exist, it is not easily accessed. Usually, the invoices that citizens receive for these services do not include any reference to the existence of a customer defender or the duties that such a figure may have been assigned.

In the private-sector realm not associated with services of general interest, there are customer complaint resolution offices. For example, the supervisory bodies of the Spanish financial system (the Bank of Spain, the Stock Exchange Commission and the Directorate General of Insurance and Pension Funds) have Claims Offices. Citizens can notify them of any incident derived from their relations with financial agents. Claims can be filed on any action taken by a financial entity that the user feels damaged by, including complaints on incorrect operations, delays, or lack of service from these entities. In these cases, once the complaint has been processed, a report is issued which must feature clear, precise and grounded conclusions on the conduct of the credit institution in the case at hand. This report is merely informative, and is not binding for the parties. The report cannot make economic assessments of any possible damages caused to financial service users, a matter that does enter, on the other hand, the competency of the courts.

### Activity of Ombudsman institutions in the private sector and their investigation competencies: How can we apply our powers and tools to the private sector?

It is true that these new ombudsperson competencies, as in the Catalan case, have a positive impact on citizens' rights, because their supervision is recognized by a public, independent institution in areas where situations of vulnerability sometimes arise. Discussion should also focus on whether the tools and instruments conceived for the supervision of the public administration, which, by definition and with specific exceptions, is not the holder of fundamental rights and therefore cannot oppose certain actions taken by ombudsmen, can simply be transferred to supervision of the private sector, where the use of the same instruments could mean interference in the exercise of certain fundamental rights. I believe that most of them can indeed be transferred. I will now give you some examples from my experience that you can probably extrapolate to your own.

In order to conduct our activities, Parliamentary Ombudsmen have investigative competencies that can constitute different obligations for the Administration; for example, transmission or sending of certain information, access to files, or even allowing ombudsman staff access to their premises. This obligation to the legal entity being investigated, as long as it is provided for by law, is also required of private companies by virtue of the activity they conduct – provision of a service that is universal or of general interest. The fact that a privately owned company offers this type of service means that the system of rights and freedoms that citizens enjoy before public authorities is also applicable to them. Other factors could lead to the conclusion that priva-

tization of public-interest services makes for a loss of rights by citizens, and that is not the goal of these legal instruments. Rather, it is effectiveness in the management of certain services or benefits.

Are there any limits? All of these investigation activities must have legal coverage, and be limited to the objective of their purpose – protection of rights and freedoms. In other words, it is not a general inspection or verification. Further, the inspection powers of ombudspersons are limited to that of the private operator’s specific provision of public service activity. This excludes those activities inherent to business initiative and movements in a free market that do not fall into the category of provision of services of general interest. In these areas, the general guarantee system of fundamental rights would be applicable. For example, even to enter facilities or premises, the express consent of the owner would be necessary, or failing that, judicial authorization.

There is another matter that merits discussion: Determination of the applicable legal code in case of non-collaboration from private sector companies subject to supervision. It would be desirable to have a legal code similar to that applied to the public administration; obligation of collaboration, sanctions established in the legal framework, etc. Nevertheless, the novelty of this field of supervision, as well as the differences between the different legal frameworks, obliges us to be prudent in this respect. Publicity could also be used, including the media, or our Annual Report to Parliament, to disseminate the names of non-collaborating companies as a tool of persuasion, inherent to our *autoritas*. This pressure mechanism can be highly effective in the private sector, where there tends to be intense competition. It could make the investigated company react.

More difficulties could arise from potential application of *criminal* responsibility that some legal codes establish for lack of collaboration among civil servants and agents of the public administration. For example, the Spanish criminal code establishes for such cases a crime termed “obstruction of and disloyalty to the ombudsperson,” but this type of infraction can only be committed by members of the public administration. Within our legal code, other solutions could be the application of penal measures such as that of non-violent resistance or civil disobedience of private citizens. It is a matter still open to debate.

## Collaboration agreements as tools to improve the supervision tasks of the private sector

Formal collaboration agreements are a good way to specify the competencies of ombudspersons dealing with companies providing services of general interest. The parameters of supervision and intervention would be clearer for all parties involved, and legal security would be added to the relations between the ombudsman and companies potentially subject to investigation. Additionally, such agreements could even establish obligations of compliance with certain decisions. This is what our experience has taught us.

For this reason, the institution I represent has signed regulating agreements with companies providing transport, telephone, gas, electricity and water services. I insist that we talk about private companies competing with other companies in the market outside any administrative concession.

These agreements delineate the Catalan Ombudsman’s capacity to supervise the company. They establish agile complaint communication mechanisms and a method of referral to the necessary bodies when the complaints have to do with the companies’ business activities. They establish a joint committee for “agreement follow-up” and solution of urgent situations. They stipulate the inclusion of a section devoted to the company in the Catalan Ombudsman’s Annual Report to Parliament. They cover the company’s relations with public mediation and supervision entities with regard to consumer practices.

### Interventions by the Catalan Ombudsman: Complaints, queries and ex-officio actions

Regulating agreements with my office form the framework in which our activity takes place in these realms, with obvious consideration for the applicable legislation. The intervention areas and methods of the Catalan Ombudsman are outlined as follows:

#### Type of intervention – complaints, queries and ex-officio actions

Most complaints have to do with the non-provision of effective, quality services and utilities considered indispensable for daily life. The statistical breakdown is as follows:

	2007	%		2008	%
<b><u>Queries</u></b>					
<b>Total</b>	16,399			18,003	
<b>Consumer affairs</b>	3,167	19.31		3,511	19.50
<b>Service companies</b>	1,265	39.94		1,316	37.48
<b>Utilities</b>	449			536	
<b>Public transports</b>	743			710	
<b>Postal service</b>	73			70	
<b><u>Complaints</u></b>					
<b>Total</b>	5,299			5,610	
<b>Consumer affairs</b>	415	7.8		444	7.9

<b>Service companies</b>	364	87.0		380	85.6
<b>Utilities</b>	267			245	
<b>Public transports</b>	70			122	
<b>Postal service</b>	27			13	
<b>Ex-officio actions</b>					
<b>Total number:</b>	96			97	
<b>Consumer affairs</b>	7			9	

## Complaint subject matter

### *Telecommunications*

The Catalan Ombudsman's intervention focuses on conflicts related with provision of the universal service of electronic communications. For all other services, the Catalan Ombudsman refers citizens to consumer information and defence organizations, while supervising the activity of these bodies.

Most complaints received are from persons who, for various reasons, do not have access to land lines in different situations, such as scattered residences, isolated housing developments or newly-created or expanding residential areas where the company does not have sufficient infrastructure, or the necessary investment has a high cost in relation to the possible users, or is technically complex.

In other cases, complaints centre on the company's slow response to service faults, taking longer than the time permitted to solve these incidents. These problems are conveyed with special urgency when, due to reasons of their age or medical condition, the citizen's needs require immediate attention.

The institution's mission in these cases is to make sure that the citizens receive service, considering that the principle of technological neutrality is applied in the configuration of the universal service; the contents and quality conditions are established, but not the technical system to be used to provide the coverage. Along these lines, certain ex-officio actions have been opened when it has been found that certain parts of our national territory lack sufficient telecommunications coverage.

### *Electrical utilities*

In this case, universal service means the need to guarantee this utility to all users who request it in accordance with legally established terms, without any minimum or basic content, as is applicable to the telecommunications or postal service sectors.

In light of these terms, universal service is made effective through the imposition of a number of public service obligations manifested in the obligation to provide the utility in conditions of quality, at a reasonable price, and

guaranteeing equal treatment before new requests for electrical utility supply and expansion of services for existing users. In addition to urgently complaints about cuts in electrical supply, either due to non-payment or technical faults, the Catalan Ombudsman has repeatedly reminded the company of the obligations that come with universal service.

#### *Domestic water utilities*

The domestic water utility is a municipally owned public service. The administration is entitled to choose the form of management of this utility that it considers most appropriate, short of privatization of the service. The Catalan Ombudsman has intervened in matters relating to water bills, and in cases of undrinkable domestic water.

#### *Gas*

Unlike other domestic services such as water and telecommunications, which must be universally accessible, natural gas is not legally configured as a service to which that all citizens must have access in their homes, although it is considered an essential service. Natural gas infrastructure and supply, despite advancements, is still far from being able to reach all residences. Concentrating all energy consumption in a single source can have an impact on the price that users must cover, especially when, as occurs in Spain, electricity bills bear a surcharge for excessive consumption. This matter was analyzed in the Catalan Ombudsman's AO (Ex-officio Action) 3646/06.

#### *Our work methods in problems related to the provision of general interest services*

When the Catalan Ombudsman receives a complaint related to the provision of a service of general interest, the first step is to check its admissibility.

Admissibility criteria must be weighted differently in each individual case, since we have found that citizens face real difficulty in filing complaints with certain companies. In light of this situation, the Catalan Ombudsman cannot, for example, say complaints are strictly inadmissible if they have not first been presented to the service providers, as this might accentuate a citizen's situation of vulnerability in a particular case. Once a complaint is admitted for processing and analyzed, it is conveyed to the company providing the service.

In accordance with the collaboration agreements in place between the Catalan Ombudsman and these companies, transmission of the complaint and reception of the response from the service provider, as well as the Catalan Ombudsman's suggestions or recommendations, when relevant, is carried out through e-mail, obtaining a rapid solution to the problem.

It must also be mentioned that these companies have made the commitment to respond to information requests from our office within 10-15 days, depending on the company in question, and they have also committed to resolve urgent matters, such as those relative to technical faults that involve interruption of service, within 48 hours. All of these advancements mean

greater expediency in solving problems that, by their very nature, require swift solutions, as it is a matter of access to basic essential services. An analysis of the level of efficacy in the Catalan Ombudsman's supervision and collaboration ratio with these companies reveals that, on most occasions, once the Ombudsman has sent the complaint to the service provider, the company reacts swiftly and takes the necessary measures to solve the problem, without the need for any further warning or recommendation. On occasion, the Catalan Ombudsman has had to remind these companies of the need to respect citizens' right to access services of general interest, which not only includes the right to the utility, but all the rights that go with the provision of the service. This includes the right to obtain clear, detailed information on amounts consumed, users' rights to make claims on the provision of the service (to respect this right, companies must offer appropriate and sufficient claims channels), or the right to be reliably informed of any service cut, among others.

In addition to resolving citizens' complaints referring to specific individual situations, the Catalan Ombudsman also conducts ex-officio actions related to the rendering of basic services that affect citizens in general. This could apply, for example, to electricity blackouts, or when the scope of new regulations could lead to situations of vulnerability for certain groups, or when there is a legal void regarding citizens' needs. The Catalan Ombudsman also has work groups established with the general-interest rendering companies that signed collaboration agreements. They regularly meet to analyze the results of the collaboration relationship between the two organizations. They also discuss matters of general interest regarding the provision of basic services. Finally, annual reports presented by the Catalan Ombudsman in the Parliament of Catalonia, capture the analysis of problems that have occurred throughout the year in basic electricity, gas, water and telecommunications supply services, as well as the activity of the companies that provide these services. This report is something of an audit of the workings of these private companies as providers of services of general interest from the viewpoint of consumers' and users' rights.

I would like to underline that my office also published a monographic report on broadband Internet access as a right which must be made available to all. This report analyzed different problems related to the rendering of this service. Namely, problems faced by people who have connection contracts, problems related to Internet access in areas of the country where it is not provided, lack of specific regulation in this field, and more.

In this report, we also highlighted the need for improving the legal framework and pointed out that the EU should take a step forward in order to ensure genuine access to information. This will not be feasible unless the legal structure of universal service with respect to telecommunications is altered to include the provision of broadband Internet access as a requirement of universal service. For this reason, this report was conveyed to the European Ombudsman and I asked him to consider making a recommendation in this sense before the European bodies. The European Ombudsman informed my office that the European Commissioner for Information Society had let him know

that my remarks would be analyzed in the framework of the review of the Universal Service Directive.

## Conclusions

1. This is a new field for public ombudsmen.
2. Discussions on this matter should include the relevant legal codes and the potential application of the Ombudsman's various tools and mechanisms.
3. More analysis needs to be done of citizens' rights in these areas and how they should be enforced.