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VARUH ČLOVEKOVIH PRAVIC

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# UPORABA AARHUŠKE KONVENCIJE V INSTITUCIJAH EVROPSKE UNIJE – IZKUŠNJE EVROPSKEGA VARUHA ČLOVEKOVIH PRAVIC

**Povzetek** V pričujočem prispevku avtor predstavi izkušnje varuha človekovih pravic v zadevah, ki se nanašajo na uporabo Konvencije o dostopu do informacij, udeležbi javnosti pri odločanju in dostopu do pravnega varstva v okoljskih zadevah na ravni Evropske unije. S predstavitvijo primerov ustreznih preiskav, poizvedb nacionalnih varuhov človekovih pravic in proaktivnega dela varuha je v tem prispevku predstavljen predlog, da je glede dostopa do pravnega varstva na ravni Evropske unije evropski varuh za človekove pravice sprejemljiva alternativa sodiščem Evropske unije. Nadalje, čeprav je mandat varuha omejen na institucije in organe Evropske unije, avtor predstavi mnenje, da lahko vključitev varuha človekovih pravic prinese oprijemljive koristi tudi na nacionalni ravni.

**Ključne besede** Evropski varuh človekovih pravic, Aarhuška konvencija o dostopu do informacij, udeležbi javnosti pri odločanju in dostopu do pravnega varstva v okoljskih zadevah, Uredba 1049/2001, Uredba 1367/2006, postopek za ugotavljanje kršitev (258. člen Pogodbe o delovanju Evropske unije)

## Uvod

Na podlagi 228. člena Pogodbe o delovanju Evropske unije je evropski varuh človekovih pravic pooblaščen, da sprejema pritožbe državljanov Unije, ali fizičnih ali pravnih oseb s prebivališčem ali statutarnim sedežem v eni od držav članic, o nepravilnostih pri delovanju institucij, organov, uradov ali agencij Unije.[1] V odgovoru na povabilo Evropskega parlamenta, da ponudi predlog, s katerim bi opredelili nepravilnost pri delovanju, je varuh v Letnem poročilu za leto 1997 ponudil naslednje: *Do nepravilnosti pride, če javni organ ne deluje v skladu z načelom ali pravilom, ki je zanj zavezujoč.* Tako Evropski parlament kot tudi Evropska komisija sta sprejela to opredelitev, ki jo varuh sedaj uporablja v svojih preiskavah.

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[*] Mnenja, izražena v tem prispevku, ter morebitne napake so mnenja in napake avtorja in ne obvezujejo evropskega varuha človekovih pravic. Zahvaljujem se Katrin Müller van Issem in Raluci Trasca za njuni mnenji in pripombe glede prejšnje različice prispevka.

[1] Zaradi zgoščenosti sloga se bo v preostalem delu besedila besedna zveza “ustanove in organi Unije” nanašala na “ustanove, organi, uradi in agencije Evropske unije”.

V pričujočem prispevku bom poskušal podati kratek in informativen pogled na to, kako se je izkazala uporaba Konvencije o dostopu do informacij, udeležbi javnosti pri odločanju in dostopu do pravnega varstva v okoljskih zadevah (Aarhuška konvencija) v nekaterih preiskavah o pritožbah, ki jih je opravil varuh človekovih pravic. Večina preiskav varuha človekovih pravic s področja okoljskega prava Evropske unije se nanaša na postopek za ugotavljanje kršitev, ki ga Komisija sproži zoper državo članico v skladu z 258. členom Pogodbe o delovanju Evropske unije (postopek za ugotavljanje kršitev), ali na dostop do dokumentov, ki sta si jih v okviru tega postopka izmenjali Komisija in zadevna država članica. Vendar pa Komisija ni edina institucija na ravni Unije, ki se lahko znajde v položaju, ko mora uporabiti Aarhuško konvencijo, kot bodo pokazali nekateri primeri, ki se nanašajo na Evropsko investicijsko banko (EIB).

Mandat varuha človekovih pravic je omejen na preiskovanje aktivnosti institucij in organov Unije. Zato upravne aktivnosti nacionalnih, regionalnih ali lokalnih organov države članice Evropske unije niso v njegovi pristojnosti. Vendar pa se lahko, kar bo pokazal ta prispevek, varuh za človekove pravice znajde v položaju, ko lahko pozitivno prispeva k pravilnemu izvajanju Aarhuške konvencije na nacionalni ravni, bodisi tako, da zagotovi, da Komisija pravilno obravnava pritožbe o kršitvi, ki so jih vložile fizične ali pravne osebe, ali pa tako, da sodeluje z nacionalnim varuhom za človekove pravice.

**Aarhuška konvencija in pravo Evropske unije**

Evropska skupnost (nekdanja) je pristopila k Aarhuški konvenciji februarja leta 2005.[2] Konvencija je bila prenesena v pravo Unije na dveh ravneh, to je na ravni države članice in na ravni Unije.

Na ravni Evropske unije združuje Uredba 1367/2006[3] tri stebre Aarhuške konvencije v en sam pravni predpis. Upoštevati velja dejstvo, da se glede dostopa do okoljskih informacij uporablja Uredba 1049/2001[4] o dostopu javnosti do dokumentov Evropskega parlamenta, Sveta in Komisije. Uredba 1367/2006 razširja obseg Uredbe 1049/2001, saj širi obveznost dostopa do okoljskih informacij na vse institucije in organe Skupnosti. Pravila in izjeme glede dostopa do dokumentov, ki izhajajo iz Uredbe 1049/2001, se tako razlagajo vzporedno z določbo Uredbe 1367/2006. Vendar pa je treba

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2 Sklep sveta 2005/370/ES o sklenitvi Konvencije o dostopu do informacij, udeležbi javnosti pri odločanju in dostopu do pravnega varstva v okoljskih zadevah, v imenu Evropske skupnosti, Uradni list [2005] L 124, str. 1.

3 Uredba (ES) št. 1367/2006 Evropskega parlamenta in Sveta o uporabi določb Aarhuške konvencije o dostopu do informacij, udeležbi javnosti pri odločanju in dostopu do pravnega varstva v okoljskih zadevah v institucijah in organih Skupnosti, Uradni list [2006] L 264, str. 13.

4 Uredba Evropskega parlamenta in Sveta (ES) št. 1049/2001 o dostopu javnosti do dokumentov Evropskega parlamenta, Sveta in Komisije , Uradni list [2001] L 145, str. 43.

omeniti, da je Uredba 1049/2001 trenutno v postopku zakonodajnega pregleda. Komisija je podala predloge, s katerimi bi "novo" Uredbo 1049/2001 približali Uredbi 1367/2006.[5]

Uredba 1367/2006 uvaja tudi možnost zahteve, da institucije in organi Skupnosti opravijo notranjo revizijo upravnih aktov ali upravnih opustitev. To bi okoljskim nevladnim organizacijam, ki izpolnjujejo niz pogojev omogočilo, da svoj primer predložijo Sodišču Evropske unije. S tem v zvezi lahko omenimo, da so se zahteve glede pravnega interesa (*locus standi)*, določene v nekdanjem 230. členu Pogodbe o ustanovitvi Evropske skupnosti, pogosto izkazale kot nepremostljiva ovira za pritožnike, ki so vložili tožbo na sodišča Evropske unije. Vendar pa ima pritožnik, ko je opravljen postopek notranje revizije upravnih aktov, omenjen v 10. členu Uredbe 1367/2006, pravico, da izpodbija sklep, s katerim se je takšen postopek zaključil.[6] Trenutno poteka v okviru Odbora za izvajanje Aarhuške konvencije preiskava na temo pravnega interesa (*locus standi*) okoljskih organizacij pred sodišči Evropske unije in njihovega dostopa do pravnega varstva.[7] A se okoljska nevladna organizacija, ki je izkoristila možnost in zahtevala postopek notranje revizije upravnih aktov, ni dolžna obrniti na sodišča Unije.[8] Medtem ko so, v primerjavi s sodišči Unije, odločitve evropskega varuha človekovih pravic pravno nezavezujoče, so njegovi argumenti in ugotovitve, pogosteje kot ne, zadosti prepričljivo sredstvo, ki vodijo do spremembe stališč v posameznih zadevah, kot tudi v storitveni kulturi institucij in organov Unije. Poleg tega velja dodati, da evropski varuh za človekove pravice ne preverja izpolnjevanja zahtev, ki bi bile podobne oz. bi ustrezale *zadostnemu interesu* ali *kršitvi pravic* iz 9.(2) člena Aarhuške konvencije. Ta opažanja in dejstvo, da se preiskava, ki jo opravi evropski varuh človekovih pravic, praviloma zaključi v enem letu, dajejo težo argumentu, da je kot sredstvo za dostop do pravnega varstva v okoljskih zadevah na ravni Unije evropski varuh človekovih pravic lahko sprejemljiva in uspešna alternativa.

Na nacionalni ravni velja Aarhuška konvencija za države članice (ki so morebiti tudi same neodvisno ratificirale konvencijo) predvsem preko Direktiv 2003/4/ES (dostop do informacij)[9] in 2003/35/ES (udeležba javnosti)[10]; obe direktivi vsebujeta tudi določbe o dostopu do pravnega varstva.

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5 Predlog je dostopen na: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=196983

6 Glej tudi zadevo T-37/04 *Região autónoma dos Açores, odstavek 93.* Zbirka odločb [2008] str. II-103.

7 Glej tudi zadevo ACCC/2008/32 na http://www.unece.org/env/pp/compliance/Compliance%20Committee/32TableEC.htm

8 Na primer, po zaključku postopka notranje revizije upravnih aktov, se je pritožnik v zadevi 696/2008/(WP)OV (preiskava v teku), odločil, da se obrne na evropskega varuha človekovih pravic.

9 Direktiva 2003/4/ES Evropskega parlamenta in Sveta o dostopu javnosti do informacij o okolju in o razveljavitvi Direktive Sveta 90/313/EGS, Uradni list [2003] L 41, str. 26.

10 Direktiva 2003/35/ES Evropskega parlamenta in Sveta o sodelovanju javnosti pri sestavi nekaterih načrtov in programov v zvezi z okoljem in o spremembi direktiv Sveta 85/337/EGS in 96/61/, Uradni list OJ [2003] L 156, str. 17.

**Primeri zadev, ki jih je v zvezi z Uredbo 1367/2006 obravnaval evropski varuh za človekove pravice**

Številne zadeve, ki se dotikajo Uredbe 1367/2006 in jih je preiskal evropski varuh za človekove pravice, so se nanašale na dostop do informacij, posebej še informacij, povezanih s postopkom za ugotavljanje kršitev v zvezi s kršitvami okoljskega prava Evropske unije. V sodbi v zadevi T-191/99 *Petrie*[11] je Splošno sodišče odločilo, da bi Komisija lahko zavrnila dostop do dokumentov, ki jih je v postopku za ugotavljanje kršitev izmenjala z državami članicami na podlagi zaščite interesa preiskave, omenjene v 4(2). členu Uredbe 1049/2001. Čeprav 6(1). člen Uredbe 1367/2006 vsebuje domnevo,

da je pri razkritju okoljskih informacij prevladujoči javni interes izpolnjen za določene vrste izjem, pa izrecno izključuje preiskave o možnih kršitvah prava Skupnosti. Medtem ko imajo države članice pravico, da pričakujejo, da bo Komisija upoštevala zaupnost preiskav, se vendar zdi smiselno domnevati, da Komisija ne bi nasprotovala, če bi države članice same objavile zadevne dokumente. Pravzaprav naj bi Finska takšne dokumente praviloma javno objavila.

Gornji pristop lahko najbolje ponazorimo z nekaterimi nedavnimi zadevami, ki jih je obravnaval varuh človekovih pravic. V zadevi 443/2008/JMA, ki se je med drugim nanašala na dostop do dokumentov, ki jih je Komisija poslala španskim organom v okviru postopka ugotavljanja kršitev v zvezi z izpusti v vode, ki se stekajo v rečno ustje Pontevedra Estuary. V luči sodne prakse in določb Uredbe 1367/2006 je varuh zavzel stališče, da je Komisija upravičeno zavrnila dostop do zahtevanih dokumentov. Ker pa od Komisije ni bilo mogoče dobiti dostopa do zahtevanih dokumentov, je varuh za človekove pravice pritožniku svetoval, naj preuči možnost, da v skladu z nacionalnimi predpisi pridobi dostop do dokumentov od španskih organov. Podobno se je v nedavni zadevi, ki se je nanašala na dostop do dokumentov iz postopka za ugotavljanje kršitev, ko se je pritožnik opiral na Uredbo 1367/2006, varuh za človekove odzval proaktivno in ob začetku preiskave pisal zadevnim državam članicam, da bi preveril, ali bi se strinjale z objavo ustreznih dokumentov.[12]

Evropska komisija ni edina institucija, ki je vezana na uporabo Uredbe 1367/200. Evropska investicijska banka v skladu s svojim poslanstvom pogosto financira projekte, ki se nanašajo na okolje. Glede na njeno poslanstvo, t.j., da zbere pomembno količino sredstev na kapitalskih trgih, ki jih nato pod ugodnimi pogoji posodi državam članicam Evropske unije in partnerskim državam, ter da podpre in razvija cilje politike Evropske unije. V zadevi 948/2006/BU[13] je nevladna organizacija zaprosila Evropsko investicijsko banko, da bi pridobila dostop do pogodbe o financiranju projekta modernizacije železniške proge na Slovaškem. Evropska investicijska banka je zahtevek zavrnila in se pri tem oprla na svoja notranja pravila o dostopu javnosti do dokumentov. Naknadno je sprejela nova pravila, ki so izrecno določala, da pogodb o financiranju ni mogoče (v celoti ali deloma) razkriti.[14]

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11 Glej zadevo T-191/99 *Petrie in drugi proti Komisiji*, Zbirka odločb [2001] str. II-3677.

12 Zadeva 1861/2009/JF, preiskava je še vedno v teku.

13 http://www.ombudsman.europa.eu/cases/decision.faces/en/3131/html.bookmark

14 V tem kontekstu omenimo, da Uredba 1367/2006 predlaga, da bi zaupne pogodbe, sklenjene med ustanovami in organi Unije ter bančno ustanovo, spadale med izjeme zaradi zaščite poslovnih interesov, določenih v Uredbi 1049/2001. Odbor za izvajanje Aarhuške konvencije je v zadevi ACCC/C/2007/21, ki se je nanašala na Evropsko investicijsko banko, prišel do podobnih ugotovitev v zvezi z udeležbo javnosti. Ugotovil je, da se v pravnem smislu odločitev finančne ustanove, da zagotovi posojilo ali drugo obliko finančne podpore, ne šteje za odločitev, ki dopušča aktivnost v smislu 6. člena Konvencije. http://www.unece.org/env/pp/compliance/Compliance%20Committee/32TableEC.htm

Pritožnik je med drugim zastopal stališče, da je bila zavrnitev razkritja informacij v nasprotju z Aarhuško konvencijo. Takrat, ko je pritožnik vložil svoj zahtevek, Uredba 1367/2006 ni bila v veljavi. Varuh človekovih pravic je presodil, da je Evropska investicijska banka upravičeno zavrnila dostop do dokumentov na osnovi predpisov, ki so bili veljavni ob vložitvi zahtevka. Vendar pa je varuh predlagal, da bi v prihodnje Evropska investicijska banka lahko preučila možnost, da bi vzpostavila stik z nacionalnimi oblastmi in tako preverila, ali obstaja možnost, da se pogodbe o financiranju, za katere so državljani zahtevali dostop za vpogled v njihovo vsebino, v celoti ali deloma razkrijejo.

Poleg ukvarjanja z zadevami, ki se nanašajo strogo na preiskave, sta evropski varuh človekovih pravic in Evropska investicijska banka celo podpisala memorandum o soglasju. Glavne točke memoranduma o soglasju določajo, da mora Evropska investicijska banka obveščati javnost o politikah, standardih in postopkih, ki se nanašajo na okoljske, družbene in razvojne vidike njenih politik, in da Evropska investicijska banka vzpostavi in učinkovito vodi sistem notranjih pritožb. Hkrati bi delovanje pritožbenega mehanizma Evropske investicijske banke varuhu za človekove pravice zagotovilo izhodiščno točko za pregled tega, kako Evropska investicijska banka napram zadevnim strankam izpolnjuje svoje obveznosti. Dodajmo, da je Evropska investicijska banka nedavno sprejela revidirano Politiko o preglednosti, s katero potrjuje zavezo, da bo ravnala v skladu z Uredbama 1049/2001 in 1367/2006, ter da sprejema dejstvo, da se pritožbe zoper banko lahko vložijo tudi na Odboru za izvajanja Aarhuške konvencije.[15]

**Zadeve, ki se nanašajo na Direktivi 2003/4/ES in 2003/35/ES**

Kot smo že omenili, je bila Aarhuška konvencija prenesena v Direktivi 2003/4/ES in 2003/35/ES, ki ju morajo države članice izvajati. Če državljan ali okoljska nevladna organizacija zavzame stališče, da direktiva ni bila pravilno prenesena ali se ne uporablja pravilno, lahko vloži pritožbo o kršitvi na Evropsko komisijo. Obseg pregleda, ki ga varuh za človekove pravice opravi v teh zadevah, je odvisen od tega, ali gre za postopkovne razloge (kot je registracija pritožb) ali vsebinske razloge (odločitev Komisije glede (ne)obstoja kršitve prava Unije), pri čemer je revizija, ki jo opravi varuh človekovih pravic, omejena na preiskavo, ali je Komisija zagotovila smiselno obrazložitev tega, kako je Komisija uveljavila svojo diskrecijsko pravico.[16] V zvezi s postopkom je rezultat prizadevanj varuha, da zagotovi upoštevanje dobrih upravnih praks pri obravnavanju pritožb o kršitvah, Sporočilo Komisije o odnosih s pritožniki v zvezi s kršitvami (Sporočilo 2002).[17] S sporočilom iz leta 2002 se je Komisija zavezala, da bo pritožbe o kršitvah obravnavala v skladu z nizom postopkovnih pravil. V zadevi 1628/2008/TS[18] se je litovska okoljska nevladna organizacija pritožila Komisiji, da Litva ne izpolnjuje določb Direktiv 2003/35/EC in 2003/4/EC. Pritožnik je očital, da Komisija ni registrirala njegovih dopisov kot pritožbe

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15 Politika o preglednosti Evropske investicijske banke, februar leta 2010: http://www.eib.org/attachments/strategies/transparency_policy_en.pdf

16 Za podrobnejšo analizo pristopa varuha ob preučevanju vloge Komisije kot skrbnika mednarodnih pogodb, obsega in poglobljeno analizo revizije ter povezave z delom nacionalnih varuhov, glej *Evropski varuh človekovih pravic in uporaba prava Evropske unije v državah članicah(ali original?*, avtorja P. Nikiforos Diamandouros, Review of European Administrative Law, 2008, Vol. I, št. 2, str. 5.

17 Sporočilo Komisije Evropskemu parlamentu in Evropskemu varuhu človekovih pravic o odnosih s pritožniki v zvezi s kršitvami prava Skupnosti (KOM/2002/0141 končno).

18 http://www.ombudsman.europa.eu/cases/decision.faces/en/4261/html.bookmark

o kršitvi. Potem ko je varuh začel preiskavo glede pritožbe 1628/2008/TS, je Komisija v skladu s Sporočilom iz leta 2002 registrirala dopise pritožnika kot pritožbo o kršitvi z namenom preiskati, ali je Litva direktivi pravilno prenesla v notranje pravo in obvestila nevladno organizacijo o korakih, ki jih je opravila v preiskavi.

Poizvedba Q5/2008/PB, ki jo je posredoval danski varuh za človekove pravice, je prav tako dober primer, kako lahko evropski varuh za človekove pravice v okviru svojega mandata prispeva dodano vrednost k delu nacionalnih varuhov, ko ti obravnavajo zadeve, ki se nanašajo na pravo Unije in zadevno državo članico. Poizvedbe so vprašanja o uporabi in tolmačenju prava Evropske unije, ki jih člani Evropske mreže varuhov človekovih pravic lahko zastavijo evropskemu varuhu človekovih pravic, ki bodisi zagotovi neposreden odgovor ali posreduje vprašanje pristojni instituciji ali organu Evropske unije (v večini primerov je to Komisija). Poizvedba danskega varuha človekovih pravic se je nanašala na tolmačenje Direktive 2003/4/ES v zvezi z zavrnitvijo danske osebe javnega prava, da državljanu zagotovi informacije o učinkih gradbenega razvoja. Oseba javnega prava je zavrnila objavo notranjega memoranduma in poročila *iz načelnih razlogov*. Danski varuh za človekove pravice je v bistvu želel prejeti obrazložitev, ali je (i)bila zadevna informacija zajeta v definiciji "*okoljska informacija*" iz 2(1). člena Direktive 2003/4/ES in tako krita na ta način, in ali (ii) je oseba javnega prava lahko zavrnila dostop do informacije iz *načelnih razlogov*. Komisija je pripravila natančno in dobro argumentirano mnenje, v katerem je potrdila, (i) da je bila informacija, za katero je državljan zaprosil, dejansko "*okoljska informacija*" in da (ii) bi organ lahko zavrnil zahtevano informacijo, če bi bili podani pravilni in ustrezni razlogi, da pa takšna zavrnitev nikakor ne bi mogla biti *načelne narave*. Danski varuh je bil hvaležen za podporo evropskega varuha za človekove pravice in je slednjega obvestil, da je osebi javnega prava priporočil, da ponovno premisli o svojem stališču.

**Zaključek**

Delo varuha človekovih pravic ima pravno dimenzijo, ki se navezuje na preiskave pritožb, vsebuje pa tudi politično in proaktivno sestavino, ko se varuh zavzema, da se sprejmejo učinkoviti pravni okviri za zaščito pravic zainteresiranih tretjih strank (npr. Memorandum o soglasju z EIB ter Sporočilo 2002). Uredba 1367/2006 je za institucije in organe Unije zavezujoča. Ko pritožnik očita, da ti niso ravnali v skladu z direktivo, predstavlja to primer nepravilnosti, ki ga evropski varuh človekovih pravic lahko preišče. Pritožba varuhu človekovih pravic je lahko alternativa sodnim postopkom, ko gre za uveljavljanje pravic iz Uredbe 1367/2006, v nekaterih primerih pa celo preferirana možnost uveljavljanja pravnega varstva. Čeprav je mandat varuha človekovih pravic omejen na preiskovanje upravne dejavnosti institucij in organov Unije, lahko njegove preiskave o obravnavanju pritožb o kršitvah vodijo do pozitivnih učinkov na nacionalni ravni. Prav tako varuh za človekove pravice vselej pripravljen sodelovati z nacionalnimi varuhi za človekove pravice in ponuditi rešitve, ki bi jih ti lahko ocenijli kot koristne v okviru njihovega območja pristojnosti.

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European Ombudsman

# THE APPLICATION OF THE AARHUS CONVENTION BY THE EUROPEAN UNION'S INSTITUTIONS - THE EXPERIENCE OF THE EUROPEAN OMBUDSMAN

**Abstract** The present contribution highlights the Ombudsman's experience in cases related to the application of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters at the European Union level. By highlighting examples of relevant inquiries, queries of national ombudsmen, and the Ombudsman's proactive work, this contribution makes a proposition that the European Ombudsman is a viable alternative to EU courts in terms of 'access to justice' at EU level. Furthermore, even though his mandate is limited to the institutions and bodies of the European Union, it is submitted that the Ombudsman's involvement can also produce tangible benefits at national level.

**Keywords** European Ombudsman - Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Regulation 1049/2001 - Regulation 1367/2006 - Infringement proceedings (Article 258 TFEU)

## Introduction

Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman 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 administrative activities of the Union institutions, bodies, offices or agencies.[19] In response to an invitation of the European Parliament to propose a definition, the Ombudsman, in his Annual Report for the year 1997 offered the following: *Maladministration occurs when a public body fails to act in accordance with a principle or a rule binding upon it.* The European Parliament and the European Commission have both accepted this definition, which the Ombudsman now applies in his inquiries.

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* The opinions expressed in this draft as well as any mistakes are those of the author and do not engage the European Ombudsman. I would like to thank Katrin Müller van Issem and Raluca Trasca for their opinion and comments on an earlier version of the draft.

[19] For the sake of succinctness, the institutions, bodies, offices and agencies of the European Union will be referred to as "Union institutions and bodies" in the remainder of this text.

In the present contribution, I will attempt to provide a brief and informative outlook on how the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) has featured in some of the Ombudsman's inquiries.

Most of the Ombudsman's inquiries involving EU environmental law concern the Commission's infringement proceedings against Member States pursuant to Article 258 TFEU (infringement proceedings) or access to documents exchanged between the Commission and the Member State concerned in the framework of such proceedings. However, the Commission is not the only institution at Union level likely to be called upon to apply the convention, as some of the cases concerning the European Investment Bank (EIB) demonstrate.

The Ombudsman's mandate is limited to investigating the activities of Union institutions and bodies. Therefore, the administrative activities of national, regional or local authorities of the EU Member States are outside of his mandate. Nonetheless, as this contribution will show, the Ombudsman may find himself in a position, in which he is able to make a positive contribution to the correct implementation of the Aarhus Convention at national level, either by ensuring that the Commission properly deals with infringement complaints submitted by natural or legal persons, or by collaborating with a national ombudsman.

**Aarhus Convention in European Union Law**

The (former) European Community acceded to the Aarhus Convention in February 2005[20]. The convention has been transposed into Union law at two levels, i.e., at the Member State level and the Union level.

At the European Union level, Regulation 1367/2006[21] incorporates the three pillars of the Aarhus Convention into a single legal act. Note should be taken of the fact that, as regards access to environmental information, Regulation 1049/2001[22] on access to documents of the Council, the Commission and the Parliament applies. Regulation 1367/2006 widens the scope of Regulation 1049/2001, since it extends its obligation to make environmental information available to all Community institutions and bodies. The rules and exceptions for access to documents of Regulation 1049/2001 are thus interpreted in parallel with the provision of the Regulation 1367/2006. However, it is useful to note that Regulation 1049/2001 is currently undergoing a legislative review process.

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20 Council Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ [2005] L 124, p. 1.

21 Regulation (EC) No 1367/2006 of the European Parliament and of the Council 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 [2006] L 264, p.13.

22 Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, OJ [2001] L 145, p. 43.

The Commission has put forward proposals that would align the 'new' Regulation 1049/2001 more closely with the Regulation 1367/2006.[23]

Regulation 1367/2006 also establishes the possibility to request an internal review of administrative acts or administrative omissions by Community institutions and bodies, which would entitle environmental NGOs, complying with a set of criteria, to bring their case to the Court of Justice of the European Union. In this context, it might be relevant to note that the requirements for *locus standi* in

the former Article 230 of the EC Treaty have often proved an insurmountable obstacle for applicants to the courts of the EU. However, once the internal administrative review procedure mentioned in Article 10 of Regulation 1367/2006 has been complied with, the applicants are entitled to challenge the decision closing such a procedure.[24] An examination on the issue of *locus standi* of environmental organisations before Union courts and their access to justice is currently pending with the Aarhus Convention Compliance Committee.[25] However, an environmental NGO, which has made use of the internal review procedure, is not bound to turn to the Union courts.[26] Whilst, in comparison to the Union courts, the decisions of the European Ombudsman are not binding, more often than not, his arguments and findings are persuasive in bringing about a change in individual cases, as well as in the service culture of Union institutions and bodies. Moreover, it is worth adding that the European Ombudsman does not apply a test similar to *sufficient interest* or *an impairment of right*, referred to in Article 9(2) of the Aarhus Convention. These considerations as well as the fact that an inquiry by the European Ombudsman is usually concluded within a year, lend weight to the argument that the European Ombudsman can be a viable alternative as a means of access to justice in environmental matters at Union level.

As regards the national level, the Aarhus Convention applies to the Member States (who might themselves have ratified the convention independently) notably, by means of Directives 2003/4/EC (access to information)[27] and 2003/35/EC (public participation);[28] both directives contain also provisions on access to justice.

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23 The proposal is accessible at: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=196983

24 See also Case T-37/04 *Região autónoma dos Açores*, paragraph 93. ECR [2008] p. II-103.

25 See Case ACCC/2008/32 at http://www.unece.org/env/pp/compliance/Compliance%20Committee/32TableEC.htm

26 For instance, after completing the internal review procedure, the complainant in case 696/2008/(WP)OV (inquiry pending), decided to turn to the European Ombudsman.

27 Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC, OJ [2003] L 41, p. 26.

28 Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ [2003] L 156, p. 17.

**Examples of cases dealt with by the European Ombudsman concerning Regulation 1367/2006**

Many of the cases touching upon Regulation 1367/2006 examined by the European Ombudsman concerned access to information, in particular information related to infringement proceedings concerning violations of EU environmental law. In its judgment in Case T-191/99 *Petrie*[29], the General Court ruled that the Commission could refuse access to documents exchanged during infringement proceedings between itself and the Member States on the grounds of protecting the interest of investigations mentioned in Article 4(2) of Regulation 1049/2001. Whereas Article 6(1) of Regulation 1367/2006 provides that an overriding public interest in disclosure of environmental information can be presumed to be fulfilled with respect to certain types of exceptions, it explicitly excludes investigations into possible infringements of Community law. However, while Member States have the right to expect that the Commission will observe the confidentiality of the investigations, it nonetheless appears reasonable to assume that the Commission would not object to the Member States releasing the relevant documents themselves. As a matter of fact, it appears that, as a general rule, Finland makes all such documents publicly available.

The above approach is perhaps better illustrated by some of the Ombudsman's recent cases. In case 443/2008/JMA, which concerned, *inter alia*, access to Commission documents sent to the Spanish authorities in the framework of an infringement procedure relating to water discharges flowing into the Pontevedra Estuary. In light of the case-law and provisions of Regulation 1367/2006, the Ombudsman took the view that the Commission was entitled to refuse access to the requested documents. However, since obtaining access to the requested documents was not possible from the Commission's side, the Ombudsman advised the complainant that he could consider obtaining access from the Spanish authorities in accordance with their national rules. Similarly, in a recent case concerning access to infringement proceeding documents, where the complainant relied on Regulation 1367/2006, the Ombudsman opened an inquiry and proactively wrote to the Member States concerned in order to verify whether they would agree to release the relevant documents.[30]

Of course, the European Commission is not the only institution obliged to apply Regulation 1367/2006. Given its mission, the EIB is often likely to finance projects, which pertain to the environment. Its role, in essence, is to raise significant volumes of funds on the capital markets, which it then lends on favourable terms to EU Member States and partner countries so as to further EU policy objectives. In case 948/2006/BU,[31] an NGO applied to the EIB for access to a finance contract concerning a railway modernisation project in Slovakia. The EIB rejected the application by relying on an exception in its internal rules on public access to documents and subsequently adopted new rules, which explicitly provided that finance contracts could not be disclosed (totally or partially).[32]

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29 See Case T-191/99 *Petrie and others v Commission*, ECR [2001] p. II-3677.

30 Case 1861/2009/JF, the inquiry is still pending.

31 http://www.ombudsman.europa.eu/cases/decision.faces/en/3131/html.bookmark

32 In this context, it might be useful to note that Regulation 1367/2006 suggests that confidentiality agreements concluded by Union institutions and bodies in a banking capacity to fall within the exception of protecting commercial interests provided for in Regulation 1049/2001. The Aarhus Convention Compliance Committee, in case ACCC/C/2007/21 concerning the EIB, came to a similar finding with regard to public participation. It found that a decision of a financial institution to provide a loan or other financial support could not be

The complainant argued *inter alia* that the refusal to disclose the information was contrary to the Aarhus Convention. Regulation 1367/2006 was not applicable at the time of the complainant's request. The Ombudsman considered that the EIB was entitled to reject access on the basis of the rules applicable at the time of the request. However, the Ombudsman suggested that in the future, the EIB could consider contacting the national authorities so as to ascertain the possibility of total or partial disclosure of the finance contracts to which citizens request access.

Looking beyond the strictly inquiry-related dimension, the European Ombudsman and the EIB also signed a Memorandum of Understanding (MoU). The main points of the MoU provide that the EIB should inform the public about the policies, standards and procedures applicable to the environmental, social and developmental aspects of its policies and that the EIB implements an effective internal complaints mechanism. In turn, the operation of the EIB complaints mechanism would provide the starting point for the Ombudsman's review on how the EIB discharged its

obligations to parties concerned. It might be useful to add that the EIB has recently adopted a revised Transparency Policy, affirming its commitment to comply with Regulations 1049/2001 and 1367/2006, and accepting that complaints against it may be brought also to the Aarhus Convention Compliance Committee.[33]

**Cases concerning Directives 2003/4/EC and 2003/35/EC**

As mentioned earlier, the Aarhus Convention has been transposed into Directives 2003/4/EC and 2003/35/EC, which the Member States should implement. If a citizen or an environmental NGO take the view that a directive has not been correctly transposed or applied, they can submit an infringement complaint to the European Commission. The scope of the Ombudsman's review in these cases depends on whether issues of procedure (such as registering of complaints) or substance (Commission's decision as to the (non-)existence of a violation of Union law), where the Ombudsman's review is limited to an examination of whether the Commission has provided a reasonable explanation as to how it had exercised its discretion.[34] In terms of procedure, a result of the Ombudsman's efforts to ensure the observation of good administrative practices in the handling of infringement complaints is the Commission's Communication on relations with the infringement

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legally regarded as a decision to permit an activity in the sense of Article 6 of the Convention. See http://www.unece.org/env/pp/compliance/Compliance%20Committee/21TableEC.htm

[33] The EIB Transparency Policy, February 2010: http://www.eib.org/attachments/strategies/transparency_policy_en.pdf

[34] For a closer analysis of the Ombudsman's approach to examining the Commission's role as the Guardian of the Treaties, the scope and depth of his review as well as the links to the work of national ombudsmen, see *The European Ombudsman and the Application of EU Law by the Member States* by P. Nikiforos Diamandouros, Review of European Administrative Law, 2008, Vol. I, No 2, p. 5.

complainants (2002 Communication).[35] With the 2002 Communication, the Commission committed itself to handling infringement complaints in accordance with a set of procedural rules.

In case 1628/2008/TS,[36] a Lithuanian environmental NGO complained to the Commission about Lithuania's failure to comply with Directives 2003/35/EC and 2003/4/EC. The complainant alleged that the Commission failed to register its correspondence as an infringement complaint. After the Ombudsman opened his inquiry into complaint 1628/2008/TS, the Commission, in accordance with the 2002 Communication, registered the complainant's correspondence as an infringement complaint with a view to investigating whether Lithuania had properly transposed the directives and informed the NGO of the steps taken in its investigation.

The query Q5/2008/PB submitted by the Danish Ombudsman is also a good example of how the European Ombudsman, within the limits of his mandate, can contribute an added value to the work of national ombudsmen when they deal with cases concerning Union law in their respective Member States. Queries are questions on the application and interpretation of EU law that members of the European Network of Ombudsmen can ask the European Ombudsman, who either provides a direct answer or forwards the query to a competent EU institution or body (in most cases this is the Commission). The query of the Danish Ombudsman concerned the interpretation of Directive 2003/4/EC with regard to the refusal of a Danish public body to provide a citizen with information on the impact of building development. The public body, as "*a matter of principle*", refused to release an internal memorandum and a report.

The Danish Ombudsman, in essence, wished to receive explanations as to whether (i) the relevant information was covered by the definition of "*environmental information*" in Article 2(1) of Directive 2003/4/EC and (ii) access to information could be refused "*as a matter of principle*". The Commission provided a thorough and well-argued opinion, which confirmed that (i) the information asked for was indeed "*environmental information*" and that (ii) a public body could refuse to provide requested information, if appropriate and relevant reasons were given, but that such a refusal could certainly not be *a matter of principle*. The Danish Ombudsman was grateful for the support of the European Ombudsman and informed the latter that he had recommended to the public body concerned to re-visit its position.

**Conclusion**

The Ombudsman's work has a legal, inquiry-related dimension as well as a political, proactive component, when he endeavours for effective legal frameworks to be put in place to protect the rights of interested third parties (e.g. MoU with EIB or the 2002 Communication). Regulation 1367/2006 is binding on Union institutions and bodies. Therefore, when a complainant alleges that they have failed to abide by it, this constitutes an instance of maladministration that can be examined by the European Ombudsman. In particular, the European Ombudsman can be viewed as

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35 Commission's communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM/2002/0141 final)

36 http://www.ombudsman.europa.eu/cases/decision.faces/en/4261/html.bookmark

an alternative avenue to courts when enforcing the rights in Regulation 1367/2006, and in some cases even as the redress of choice. Moreover, even though his mandate to carry out inquiries is limited to the activities of the Union institutions and bodies, his inquiries into handling of infringement complaints can lead to positive effects for citizens and NGOs at national level. Finally, the Ombudsman always welcomes the opportunity to cooperate with the national ombudsmen and to provide them with contributions that they might consider useful in their respective field of competence.