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Strengthening the institution of ombudsman in Europe

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Jordi XUCLÀ, Spain, Alliance of Liberals and Democrats for Europe

Summary

Ombudsman institutions play a crucial role in consolidating democracy, the rule of law and human rights. While there is no standardised model across Europe – some countries choose a single-member generalist ombudsman institution, others opt for a number of ombudsmen at regional level or in specialised fields – all share the goal of reviewing maladministration and protecting the rights of individuals.

Council of Europe member States which have not yet set up a national, generalist ombudsman are encouraged to do so, endowing the institution with a broad mandate to investigate individual complaints while taking care that it should not interfere with judicial review of administrative acts, at least for human rights violations.

The ideal ombudsman should be impartial and independent, anchored, where possible, in the constitution and appointed and accountable to parliament, endowed with the power to investigate all bodies of the executive branch, including a right of access to documents and persons held in detention. States should ensure their ombudsmen have the resources to do the job, and take steps to raise their public visibility and create an "ombudsman-friendly" climate.

1. Reference to committee: Doc. 12639, Reference 3787 of 24 June 2011.

Contents **Page**

A. Draft resolution 3
B. Explanatory memorandum by Mr Xuclà, rapporteur 5
1. Introduction 5
1.1. Procedure 5
1.2. The role and definition of the ombudsman 5
1.3. Ombudsman and national human rights institutions (NHRI) 6
2. History and evolution of the ombudsman institution 6
2.1. The ombudsman in Europe 6
2.2. The right to good administration and the European Ombudsman 8
3. The work of the Council of Europe in promoting the institution of ombudsman 9
4. Ombudspersons and the United Nations accreditation system 12
5. Case studies 13
5.1. The Scandinavian (Danish-Norwegian) model: the Danish Parliamentary Ombudsman 13
5.2. The newly established Turkish Ombudsman 14
6. New challenges for the institution of ombudsman 16
6.1. Obligations stemming from OPCAT 16
6.2. Obligations stemming from anti-discrimination legislation 16
6.3. Proliferation of ombudspersons 16
6.4. The impact of the economic crisis on ombudsman institutions 17
7. Conclusion 18

A. Draft resolution[2]

1. The Parliamentary Assembly, referring to its Recommendations 757 (1975) and 1615 (2003), reaffirms that ombudsman institutions, which are tasked with protecting citizens' against maladministration, play a crucial role in consolidating democracy, the rule of law and human rights.

2. The Assembly notes that there is no standardised model of ombudsman in Europe and across the world. Some countries have set up a single-member generalist ombudsman, while others have chosen a multi-institutional system, including regional and/or local ombudsmen and/or ombudsmen specialised in areas such as combating discrimination, minorities' protection or children's rights. Taking into account the variety of legal systems and traditions, it would not be appropriate to advocate a one-size-fits-all ombudsman model.

3. The Assembly nevertheless recalls the Council of Europe's previous work on promoting ombudsman institutions, including its own recommendations and the Committee of Ministers Recommendations Nos. R (80) 2, R (85) 2 and R (97) 14, and calls on its member States to implement them. It also invites them to pay particular attention to the document of the European Commission for Democracy through Law (Venice Commission) "Compilation on the Ombudsman institution" of 1 December 2011.

4. The Assembly calls on the member States of the Council of Europe which have set up ombudsman institutions to:

4.1. ensure that such institutions fulfil the criteria stemming from its Recommendation 1615 (2003), the Committee of Ministers' relevant recommendations and the Venice Commission's work on the ombudsman, in particular as regards:

4.1.1. the independence and impartiality of these institutions, whose existence shall be enshrined in law and, if possible, in the constitution;

4.1.2. the appointment procedure: the ombudsman shall be appointed by parliament and report to it;

4.1.3. their remit, which should cover reviewing cases of maladministration by all bodies of the executive branch as well as the protection of human rights and fundamental freedoms;

4.1.4. their access to documents and investigative powers as well as unrestricted access to all detention facilities;

4.1.5. their access to the Constitutional Court in order to challenge the constitutionality of flawed legislation;

4.1.6. direct access to the ombudsman for all persons, including legal persons, concerned by maladministration cases, irrespective of their nationality;

4.2. review, if need be, their legislation, in light of international and European standards on ombudsman institutions;

4.3. refrain from multiplying ombudsman-type institutions, if it is not strictly necessary for the protection of human rights and fundamental freedoms; a proliferation of such bodies could confuse individuals' understanding of means of redress available to them;

4.4. strengthen the ombudsman institutions' visibility, especially in the media, and promote an "ombudsman-friendly" climate, in particular by guaranteeing easy and unhindered access to the ombudsman institution(s) and providing appropriate information/documentation in this respect, especially where the ombudsman institution does not yet have a long-standing tradition; provide ombudsman institutions with sufficient financial and human resources, enabling them to effectively carry out their tasks, and, if need be, taking into account the new functions assigned to them on the basis of international and/or European law;

4.5. consider seeking ombudspersons' accreditation at the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) in light of the "Paris Principles".

5. The Assembly calls on member States which have established several ombudsman institutions, such as local, regional and/or specialised ones, to ensure appropriate co-ordination of these bodies and individuals' easy and unimpeded access to them.

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2. Draft resolution adopted unanimously by the committee on 27 May 2013.

6. The Assembly encourages member States which have not yet set up a national generalist ombudsman to promptly establish such a body with a broad mandate, allowing individuals to complain about maladministration cases and violations of their human rights and fundamental freedoms, whilst ensuring a clear division of competences between ombudsman institutions and judicial review of administrative acts, which must be available at least in case of violations of human rights and fundamental freedoms.

7. The Assembly recognises the crucial role played by the European Ombudsman of the European Union and the Council of Europe Commissioner for Human Rights in co-ordinating the activities of member States' ombudsmen.

B. Explanatory memorandum by Mr Xuclà, rapporteur

1. Introduction

1.1. Procedure

1. The motion for a resolution entitled "Strengthening the institution of ombudsman in Europe" was forwarded to the Committee on Legal Affairs and Human Rights on 24 June 2011.[3] On 4 October 2011, the committee appointed me as rapporteur.

2. On 21 and 22 November 2011, I attended a seminar on the "The defense of rights and good practices in private management of public services. The role of the ombudsman", in Barcelona, Spain. The seminar was organised by the International Ombudsman Institute (IOI), jointly with the *Cercle d'Economia*, and allowed me to liaise and exchange ideas with ombudspersons and members of their staff from different countries, other officials and academics. On 25 June 2012, the committee held an exchange of views with the European Ombudsman, Mr Nikiforos Diamandouros. I am very thankful to Mr Rafael Ribó, IOI Chairman and Catalan Ombudsman, for his invitation to the Barcelona event, and to Mr Diamandouros for his invaluable comments on the role and state of the play of ombudsman institutions in Europe.

3. I also carried out two fact-finding visits – one on 17 December 2012 to Copenhagen, as Denmark was one of the first countries that established an ombudsman institution and whose model was followed by many other countries, and another one on 4 April 2013 to Turkey (Ankara), where the ombudsman institution was established only recently. In Copenhagen I met with the Danish Parliamentary Ombudsman, Mr Jørgen Steen Sørensen, and two Deputy Directors from the Danish Human Rights Institute – Ms Charlotte Flindt Pedersen and Ms Louise Holck.[4] In Ankara, I had meetings with the recently appointed Ombudsman, Mr Mehmet Nihat Őmeroğlu, and his deputy, Mr Mehmet Elkatmiş, Mr Kenan Őzdemir, Deputy Under-secretary in the Ministry of Justice, MPs and representatives of civil society.[5] On 16 April 2013, I also met with the Spanish Ombudsman, Ms Soledad Becerril Bustamante (*Defensora del Pueblo*), and her deputy, Ms Concepció Ferrer i Casals (*Adjunta Segunda)*.

1.2. The role and definition of the ombudsman

4. The above-mentioned motion for a resolution stresses that ombudspersons serve as intermediaries between individuals and the administration, promoting the respect for human rights and the rule of law. Most Council of Europe member States have set up ombudsman offices. The development of national ombudsman offices with a wide mandate to protect citizens' rights and interests confirms the trend towards a broader recognition that administration in a democratic society is bound by law.[6] However, this trend has not been steady in all Council of Europe member States, as some of them have not set up such institutions yet or have given them only a weak mandate. It would therefore be useful to have a closer look at the problems and challenges that States and ombudsman institutions face in Europe today. That is why I intend to investigate, in particular, the following issues: how best to guarantee ombudspersons' independence; whether the type and scope of their mandate allows them to deal effectively with maladministration cases and human rights protection, whether the proliferation of this type of institutions, at the regional/local level and/or in certain walks of life, has a negative impact on national (generalist) ombudspersons and what may be the impact of the economic crisis on their mandate and functioning.

5. For the purpose of this report, I understand the term "ombudsman" or "ombudsperson" as an institution looking into cases of individuals suffering from "maladministration". The latter is a wide term which includes illegality, violations of human rights, but also, for example, undue delays, failure to give information, rudeness or insensitivity.[7] According to the European Commission for Democracy through Law (Venice Commission), the most widely followed model is that of "an independent official having the primary role of acting as intermediary between the people and the State and local administration, and being able in that capacity to

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3. Doc. 12639.
4. See press release: www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8277.
5. See press release: www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=8555.
6. See Doc. 9878, report on "The institution of Ombudsman", Committee on Legal Affairs and Human Rights, rapporteur Ms Lili Nabholz-Haidegger (Switzerland, Liberal, Democratic and Reformer's Group), at p. 8.
7. But in cases of illegality and human rights violations there must be first and foremost a proper judicial remedy. See "The office of Ombudsman and local and regional authorities", Congress of Local and Regional Authorities of the Council of Europe, CG(21)6 of 27 September 2011, Governance Committee, Report by H. Pihlajasaari (Finland, R, SOC) and Halvdan Skard (Norway, L, SOC), paragraph 3.

monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration".[8] Therefore, in my report I will stick to the characteristics of this institution as described by the Venice Commission, irrespective of the variety of titles used in member States (for instance *Défenseur des Droits* in France, *Difensore Civico* in Italy or *Defensor del Pueblo* in Spain).

1.3. Ombudsman and national human rights institutions (NHRI)

6. The recently coined term of "national human rights institutions" (NHRI) includes ombudspersons, but not all ombudspersons are NHRI. This term also includes other bodies such as independent commissions, equality bodies, police complaints mechanisms and similar institutions.[9] Such institutions contribute to protecting human rights; they have been set up in most countries to protect and promote human rights, following the adoption by the United Nations of the "Paris Principles" in 1993.[10] In the United Nations, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, reaffirmed the NHRI's important and constructive role.[11] On 16 July 2012, the Human Rights Council adopted Resolution 20/14,[12] in which it encouraged member States to "establish effective, independent and pluralistic national institutions or, where they already exist, to strengthen them for the promotion and protection of all human rights and fundamental freedoms for all".[13] As regards more specifically Council of Europe member States, the Brighton Declaration also called upon member States to establish independent national human rights institutions in order to ensure the effective implementation of the European Convention on Human Rights (ETS No. 5) at national level.[14] Since, according to the motion for a resolution, my mandate covers only the institution of "ombudsman", I will not deal with other types of NHRI in my report.

2. History and evolution of the ombudsman institution

2.1. The ombudsman in Europe

7. According to the International Ombudsman Institute, today there are ombudsman institutions (national, regional or local) in nearly 140 countries in the world.[15] The first ombudsman (later called "Chancellor of Justice") was appointed in Sweden in 1709 by King Charles XII and, in 1809, the Swedish Parliament gained the right to elect a parliamentary ombudsman who would protect citizens' rights and would be independent from the executive and the judiciary;[16] this step marked the end of the absolute monarchy. Subsequent ombudsman institutions were established in Finland in 1920, in Denmark in 1955 and in Norway in 1962.[17] Scandinavian ombudsmen are divided into two types: the disciplinary authority model (the Swedish-Finnish model) and the quasi-administrative court model (the Danish-Norwegian model), which spread to other parts of the world and to which I will refer below (see section 6.1 on my visit to Copenhagen).[18] In the Swedish-Finnish model, the ombudsman has a statutory duty to supervise the enforcement of fundamental rights and freedoms. He or she acts as a prosecutor and may bring criminal charges or disciplinary proceedings against individual public officials; thus, he or she focuses on their behaviour and not on the decisions of the public

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8. Venice Commission, Compilation of the Ombudsman institution, 1 December 2011, CDL(2011)079, p. 20.
9. For more information, see in particular the report of the European Union Fundamental Rights Agency (FRA) on "National Human Rights Institutions in the EU Member States. Strengthening the fundamental rights architecture in the EU I", 2010, p. 11, and its more recent publication "Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union", Publications Office of the European Union, Luxembourg, 2012.
10. They were adopted at an international meeting and then endorsed by the United Nations General Assembly and the Council of Europe: www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.
11. Available at: www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en. On many occasions, the United Nations General Assembly has taken a stance on the situation of the NHRI, most recently, its Resolutions 64/161 of 12 March 2010 (www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/161) and 17/9 of June 2011 (www.un.org/ga/search/view_doc.asp?symbol= A/RES/66/169).
12. http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/67/PDF/G1215367.pdf?OpenElement.
13. Ibid., paragraph 5.
14. High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, Section A.9.*c*.i: http://hub.coe.int/en/20120419-brighton-declaration/.
15. See the IOI Wellington Declaration of 13 November 2012, paragraph 2: www.theioi.org/the-i-o-i/about-the-ioi.
16. www.jo.se/en/About-JO/History/.
17. M. Michael Gøtze, The Danish ombudsman. A national watchdog with selected preferences, *Utrecht Law Review*, Volume 6, Issue 1 (January) 2010, p. 34. There are now four parliamentary ombudsmen in Sweden.
18. Ibid.

authorities.[19] In practice, such ombudspersons rather express criticism or put forward recommendations without exercising their formal powers. Sweden and Finland have also established a number of specialised ombudsman institutions, for instance for children, equality or data protection.[20]

8. The establishment of the Danish Ombudsman and subsequent similar bodies in other countries was a response to the increase of public administration functions (including in the social affairs area) after the Second World War and reflected the inadequacy of the control by the judiciary.[21]

9. In the United Kingdom, the Parliamentary Ombudsman was established in 1967; however, this country chose a "weak" model, as its ombudsman operates through an "MP filter".[22] France, which has a well-established system of administrative courts,[23] set up in 1973 its *Médiateur de la République*, who was appointed by the Council of Ministers and to whom access was initially filtered by MPs. Although this institution has evolved over the last few years[24] and the parliamentary filter no longer exists, the current *Défenseur des droits* (Defender of Rights), enshrined in the constitution since 2008, is now appointed by the President of the Republic, subject to the approval of the standing committees of the National Assembly and the Senate.[25]

10. A third "wave" of ombudsman institutions stemmed from the political changes in countries making a transition from an authoritarian system to a democratic one (Portugal in 1976, Spain in 1981 and Greece in 1997).[26] Spain chose the "strong" Swedish model and introduced regional ombudsmen in the provinces, due to its federal system.[27] In central and eastern Europe, Poland was the first country to set up an ombudsman institution ("the Ombudsman for Citizens' Rights"– *Rzecznik Praw Obywatelskich*) in 1988.[28] It was based on the "strong" model; the ombudsman, who is elected by the parliament and "shall guard human and civic freedoms and rights specified in the Constitution and other legal acts",[29] conducts its own investigation into cases. It may, *inter alia,* request to institute disciplinary or other proceedings, in civil and administrative proceedings, take part with the same rights as a prosecutor, or seize the Constitutional Court to challenge the constitutionality of laws.[30] The Polish model, which has often been quoted as a good example,[31] has been followed by other countries in the region, in particular by Hungary in 1990, and in the 1990s by Georgia, Lithuania, Latvia, the Republic of Moldova, Romania, the Russian Federation and Ukraine.[32]

11. Although in many Council of Europe member States the office of the ombudsman is usually based on the Danish model,[33] today, different models and mandates exist depending on the needs of each country. Some deal with violations of fundamental rights, while others focus on maladministration; some are mandated to receive complaints and might mediate between the citizens and the authorities, whilst others have the power to take cases to court.[34] Many member States of the Council of Europe have appointed

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19. Ibid.
20. Ibid., p. 35. In Sweden, the Equality Ombudsman, the Children's Ombudsman and the Swedish Data Inspection Boar; in Finland, the Ombudsman for Equality, the Ombudsman for Minorities, the Ombudsman for Children and the Data Protection Ombudsman.
21. See speech by N. Diamandouros, European Ombudsman, in the Acts of the 6th seminar for Ombudsman from EU member States and EU candidate countries, held in Strasbourg on 16-17 October 2007, *Penser la bonne administration dans l'Union européenne*, EU Publication Office, Luxembourg 2008, p. 22. However, some countries, like Germany, preferred to strengthen their judicial review system, making it quick and accessible.
22. www.ombudsman.org.uk/make-a-complaint/information-for-mps.
23. For a long time, French administrative court judges were recruited from public administration officials, which could raise doubts as to their objectivity. However, in the last few years this trend has been downward following the introduction of other (external) recruitment procedures.
24. See the Institutional Act (Loi organique) No. 2011-333 of 29 March 2011 on the Defender of Rights: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781167 (available in French only).
25. The President of the Republic shall not make an appointment when the sum of negative votes in each standing committee is of at least three fifths of the votes cast by the two committees (Article 13 of the Constitution).
26. See footnote 21, p. 25.
27. For more information: www.defensordelpueblo.es/en/Quienes/Que/index.html.
28. By the Law on the Ombudsman for Citizens' Rights of 15 July 1987, see its English translation: www.brpo.gov.pl/en/content/ombudsman-act.
29. Article 209, Section 1, of the Polish Constitution. In Poland, there is also an Ombudsman for Children's Rights.
30. Articles 14 and 16 of the Law on the Ombudsman for Citizens' Rights.
31. For example, by my interlocutors in the Danish Institute for Human Rights. In the framework of the Eastern Partnership, the Polish Ombudsman Office carries out a co-operation project with ombudsman institutions in Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine; see: www.brpo.gov.pl/sites/default/files/12659746020.pdf.
32. www.ombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1114&Itemid=22.
33. See footnote 7, paragraph 8. This report was prepared on the basis of a questionnaire sent to member States and contains a thorough analysis of the institution of ombudsman in various member States.

ombudspersons at the regional or local level or for a specific field of activity (amongst others Austria, Belgium, Bulgaria, Greece, the Netherlands, the Russian Federation, Spain and the United Kingdom). In the United Kingdom, the government appointed in 1967 the Health Service Ombudsman.[35] In the Netherlands, there is a Municipal Ombudsman for the city of Amsterdam. Besides the Federal Ombudsman (which includes two *Médiateurs fédéraux* – a Flemish-speaking one and a French-speaking one),[36] Belgium has an Ombudsman for the City of Ghent, a Flemish Ombudsman, the *Médiateur pour la Région Wallonne* (a mediator for the Walloon Region), the Ombudsman institutions for the French- and German-speaking communities and the Pensions Ombudsman.[37] Some member States (for example Italy and Switzerland) have only local and/or regional Ombudspersons.[38] In certain member States (for example France and Ukraine), the ombudsman oversees not only general public administration, but also the acts of certain publicly-owned companies (especially utility companies).[39]

12. Some member States still have no ombudsman institution, for example Liechtenstein (because it would be too costly in view of the size of the State and because there are other complaint mechanisms).[40] There is no general ombudsman in Germany, which has a particularly strong and accessible administrative courts system, but there are the Federal Anti-Discrimination Agency,[41] general ombudsman institutions for some *Länder,* and the petitions committees of the Bundestag and the *Länder* parliaments which exercise certain ombudsman-like functions.[42]

2.2. The right to good administration and the European Ombudsman

13. In the last few years, the role of ombudsman institutions has increased, in parallel with the emergence of the "right to good administration", which has arisen out of concerns for equal treatment and the right to have one's affairs handled fairly by public authorities. This new right, which means "the right to have his or her affairs handled impartially, fairly and within a reasonable time" is now also incorporated in the legal order of the European Union (Article 41.1 of the Charter of Fundamental Rights of the European Union[43]) and has to be observed by the European Union's institutions, bodies, offices and agencies. It includes: a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; c) the obligation of the administration to give reasons for its decisions (Article 41.2). It also entails the right to compensation for any damage caused by EU institutions or its civil servants in fulfilling their duties "in accordance with the general principles common to the laws of the member States" (Article 41.3). The European Convention on Human Rights addresses some of these issues in Article 6, which provides for the right to a fair trial, and Article 13, which guarantees the right to an effective remedy.

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34. See footnote 6, paragraph 4. This report groups ombudsman in four essential categories:
"i. parliamentary Ombudsmen charged with oversight of the general administrative activities of government (whether national, regional or local);
ii. parliamentary Ombudsmen responsible for supervision of specific areas of administrative activity or for protecting the interests of specific groups (for example as regards the police, correctional institutions, military services, data protection, education or protection of the disabled/incapacitated);
iii. statutory Ombudsmen responsible for scrutinising centrally regulated but essentially commercial activities (for example legal or financial services or with respect to environmental protection); and
iv. Ombudsmen created by specific agreements to protect and maintain confidence in certain commercial activities (for example with respect to complaints concerning rail services, disputes relating to private insurance contracts or academic grievances within universities)."
35. In England and Wales there are five public services (i.e. generalist statutory) ombudsman institutions: the Parliamentary Commissioner, the Local Government Ombudsman, the Health Service Ombudsman, the Public Services Ombudsman for Wales and the Housing Ombudsman (for social housing issues). For more details see the report of the Law Commission (is an advisory non-departmental public body sponsored by the Ministry of Justice) on "Public Services Ombudsman", published on 14 July 2011, at: http://lawcommission.justice.gov.uk/docs/lc329_ombudsmen.pdf.
36. www.theioi.org/europe/the-netherlands/municipal-ombudsman-amsterdam.
37. www.theioi.org/europe/belgium.
38. See footnote 7, paragraph 17.*b*. For more information, see the web site of the IOI: www.theioi.org/europe.
39. See footnote 6, paragraph 4.
40. See footnote 7, paragraphs 11-13.
41. See www.antidiskriminierungsstelle.de/EN/Home/home_node.html. There is also the German Institute for Human Rights in Berlin, which provides information about the human rights situation within and outside of Germany and: www.institut-fuer-menschenrechte.de/en/about-us/mandate.html.
42. For a list of regional ombudsman-type institutions in the European Union, see: www.ombudsman.europa.eu/atyourservice/regionalombudsmen.faces.
43. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF.

14. Since 1995, European Union citizens assert the right to complain to the European Ombudsman against maladministration by European Union institutions.[44] Completely independent and impartial in his or her duties, the European Ombudsman is elected by the European Parliament to investigate and report on complaints received from EU citizens.[45] To this end, EU bodies and institutions[46] must provide him with all the information he requires within three months. The Ombudsman shall then make recommendations and forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.[47] The European Ombudsman has elaborated public service principles for the EU civil service, which include: commitment to the European Union and its citizens, integrity, objectivity, respect for others and transparency.[48]

15. Through the European Network of Ombudsmen, the European Ombudsman also collaborates with national and regional institutions of the EU member States, and of Iceland, Norway and the candidate countries as well as with the Committee on Petitions of the European Parliament. The Network, set up in 1996, serves as a mechanism for co-operation on case handling between the institutions and as a platform for sharing experience, information and best practices via seminars and country visits by the European Ombudsman.[49]

3. The work of the Council of Europe in promoting the institution of ombudsman

– The Parliamentary Assembly

16. The Assembly has already stressed the importance of ombudsman institutions in its Recommendations 757 (1975) and 1615 (2003), in which it invited member States to establish such institutions. The latter refers to the following 15 key characteristics of a model ombudsman:

– establishment at constitutional level as a qualified and experienced individual,
– guaranteed independence from the subject of investigations,
– exclusive and transparent procedures for appointment and dismissal by parliament,
– prohibition of the incumbent from engaging in other remunerated activities,
– personal immunity from proceedings relating to the discharge of official responsibilities,
– appointment of an identified deputy,
– guaranteed sufficient resources for discharge of responsibilities,
– guaranteed prompt and unrestricted access to information necessary for the investigation,
– internal procedures guaranteeing highest administrative standards in his/her own work,
– public accessibility of information on purpose, procedures and powers,
– application procedures which are easily and widely accessible, simple and free of charge,
– guaranteed confidentiality and, when publicised, anonymity of investigations,
– authority to give opinions on proposed legislative or regulatory reforms,
– requirement that the administration furnish full replies describing the implementation of findings,

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44. 94/262/ECSC, EC, Euratom: Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, of 9 March1994, as amended by decisions of 14 March 2002 and 18 June 2008. The legal basis for the functioning of the EU Ombudsman can now be found in Article 228 of the Treaty on the Functioning of the European Union.
45. He may also act at his own initiative or following complaints lodged through a member of the European Parliament.
46. The Court of Justice and the Court of First Instance, in the exercise of their judicial function, are excluded from the scope of the Ombudsman's powers. The Ombudsman is not empowered to investigate cases of maladministration by national, regional or local governments in the Member States. Neither can he intervene in a case already brought before a court, nor question the validity of a court decision.
47. Article 5 of the Decision of the European Ombudsman adopting implementing provisions, 8 July 2002, as amended by decisions of 5 April 2004 and 3 December 2008.
48. www.ombudsman.europa.eu/en/resources/publicserviceprinciples.faces.
49. See the European Ombudsman's website.

– presentation by the ombudsman of an annual report to parliament.

– Committee of Ministers

17. The issue of the protection of the individual against maladministration was examined by the Committee of Ministers on several occasions, leading to the adoption of the following texts:

– Resolution 77 (31) on the protection of the individual in relation to the acts of administrative authorities,[50] which provides for a list of individual rights available to citizens vis-à-vis public administration;

– Recommendation No. R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities, which provides for a follow-up to the principles laid down in Resolution 77 (31);[51]

– Recommendation No. R (85) 13 of the Committee of Ministers on the institution of the *ombudsman,* recommending member States to appoint an ombudsman at national, regional or local level, empower him/her to initiate investigations and give opinions on questions of human rights, and strengthen his/her authority in other ways so as to encourage effective observance of good administration;[52]

– Recommendation No. R (97)14[53] on the establishment of independent national institutions for the promotion and protection of human rights, which recommended member States to consider establishing effective national human rights institutions, including ombudsman institutions;

– Recommendation No. R (2000) 10 of the Committee of Ministers on codes of conduct for public officials,[54] containing a Model Code of Conduct for Public Officials;

– Recommendation CM/Rec(2007)7 of the Committee of Ministers on good administration,[55] which combined various rights with regard to public authorities into a single right to good administration and clarified its content in a consolidated model Code of good administration.

– Council of Europe Commissioner for Human Rights

18. The mandate of the Commissioner for Human Rights covers co-operating with and facilitating the activities of national ombudsman institutions.[56] The Commissioner's recommendations and opinions, for instance, shall advise governments on establishing human rights protection mechanisms at the national level (for instance, the 2009 Recommendation on Systematic Work for Implementing Human Rights at the National Level, the 2006 Viewpoint on ombudsmen as key defenders of human rights[57] and the 2011 Opinion on National Structures for Promoting Equality.)[58] But the Commissioner is not mandated to deal with individual cases or complaints, as a matter of distribution of competences with the European Court of Human Rights.

– Congress of Local and Regional Authorities of the Council of Europe

19. The Congress of Local and Regional Authorities has also reflected on the role of the ombudsman in defending citizen's rights. In 1999, it called for the establishment of such institutions both at the national and regional/local levels.[59] In October 2011, it adopted a resolution and recommendation on "The office of ombudsman and local and regional authorities".[60] The Congress deplored significant gaps at local and

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50. Adopted on 28 September 1977.
51. Adopted on 11 March 1980.
52. Adopted on 23 September 1985.
53. Adopted on 30 September 1997.
54. Adopted on 11 May 2000.
55. Adopted on 20 June 2007.
56. Resolution (99) 50 of the Committee of Ministers on the Council of Europe Commissioner for Human Rights, adopted on 7 May 1999.
57. Ibid.
58. Paragraph 4.4 of the Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, 21 March 2011. The Commissioner indicated that public authorities charged with promoting equality, which in many cases are embedded in the institution of ombudsman, must be able to enjoy *de jure* and *de facto* independence in terms of their legal structure, processes of accountability and appointment of members as well as their ability to allocate resources, determine priorities and exercise powers
59. Recommendation 61 (1999) on the role of local and regional mediators/ombudsmen in defending citizens' rights, adopted on 17 June 1999.
60. See footnote 7 above.

regional levels and called for additional staff and resources for ombudsman services. The above-mentioned recommendation called on member States to ensure that "ombudsman offices are staffed by people with independence, impartiality and competence, receiving salaries commensurate with their responsibilities, with knowledge of the administrations for which they handle complaints" and "are financially independent and adequately resourced in order to be able to conduct the enquiries necessary to follow up complaints".[61]

– *Venice Commission*

20. The Venice Commission has issued numerous opinions and recommendations on the institution of ombudsman in various countries, including non-member States of the Council of Europe.[62] Its 2011 "Compilation on the Ombudsman institution"[63] provides its overview on this topic and contains guidelines concerning in particular the ombudsman's status, features of his/her mandate, budgetary independence as well as competences and investigation powers.

21. Bearing in mind the variety of texts and definitions concerning ombudsman and national human rights institutions, for the purpose of this report, I decided to focus on some key elements of this institution pointed out in the above-mentioned Venice Commission's "Compilation on the Ombudsman institution" of December 2011:[64]

– Constitutional guarantee for the institution of the ombudsman: its existence and basic principles of its activity shall be included in the constitution in order to protect this institution from political fluctuation;[65]

– Criteria for office: they should not be too restrictive; the primary condition is that the ombudsman is held in high respect/esteem by the public.[66] The ombudsperson "shall not hold any position which is incompatible with the proper performance of his or her official functions or with his or her impartiality and public confidence therein"[67] (such as another public function or membership in a political party);

– Appointment procedure: the ombudsman shall be elected by parliament; if another body is involved in this procedure, its composition should be fixed *ab initio* by law, the procedure should be transparent, and a qualified majority or a broad consensus are important to ensure public trust in the ombudsperson;[68]

– Organisation of the ombudsman institution: "One single ombudsperson or multiple ombudspersons may be more appropriate at different stages of the democratic evolution of States."[69] If there is at least one deputy ombudsperson (for example, for a special field), the distribution of work can be specified in internal rules and it would be appropriate to have him or her appointed either by the ombudsman or by the appointing authority upon recommendation of the ombudsman;[70]

– Independence and status: although there is no European standardised model regarding the status of ombudsman (they are assimilated to the judiciary or public officials), he or she should be given an appropriately high rank, which is reflected in salary levels and should enjoy functional immunity;[71]

– Budget*:* the budgetary independence of the ombudsman institution is of primary importance and it should be included in the global state annual budget. The Venice Commission has proposed some safeguards to guarantee the relative budgetary independence of this institution: its budget could be reduced only in relation to the previous financial year, and only by a percentage not exceeding cuts in the budgets of other branches of power, taking into account such matters as the evolution of the number of complaints; or the ombudsman could be allowed to submit its own proposals for his or her budget separately;[72]

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61. Section 8.*d* and *e* of the recommendation.
62. See also European Commission for Democracy through Law (Venice Commission), Proposals for Future Activities, 6 February 1995, including the Proposal on the Organisation of the Civil Service in a State governed by the Rule of Law.
63. See footnote 8. This document is based, *inter alia*, on a number of opinions drafted by the Venice Commission for countries like Armenia, Azerbaijan, Bosnia and Herzegovina, Kazakhstan, Montenegro, and others.
64. Ibid.
65. Ibid., p. 4.
66. Ibid., p. 6.
67. Ibid., pp. 6-7
68. Ibid., pp. 7-9.
69. Ibid., p. 25.
70. Ibid. p. 24.
71. Ibid., p. 10.
72. *Ibid.*, p. 15.

– Ombudsman's remit: the ombudsman should have the power to control acts of the executive (except for matters of internal functioning of the government), including the Prime Minister or the President (unless the latter's activities are of a political or an exceptional nature, for example declaration of war). He or she should also have the right to appeal to the Constitutional Court in respect of violations of human rights and freedoms[73] and have an unhindered access in private to persons deprived of their liberty. Although the "protection" of human rights and fundamental freedoms is the main task of its institution, the Venice Commission also welcomed legislation including their "promotion" in the Ombudsperson's mandate.[74] He or she should also be vested with investigative powers, such as the right to request all necessary information from any State or municipal body and officials, to be received without delay by heads and other State officials and investigate cases of special public importance on his/her own initiative;[75]

– requirements for lodging complaints: the right to seize the ombudsman should not only be granted to "citizens" but to any "persons" (including foreigners or legal persons).[76]

4. Ombudspersons and the United Nations accreditation system

22. Although my work focuses on the institution of ombudsman and not on NHRIs, it will be useful to refer to the "Paris Principles"[77] and the ICC's (International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights) work on accreditation of national human rights institutions, which provides us with some interesting data. The ICC, through its Sub-Committee on Accreditation (SCA), accredits NHRIs in compliance with the Paris Principles and reviews their accreditation every five years, in accordance with the principles of transparency, rigour and independence.[78] The accreditation process scrutinises how an NHRI operates in practice.[79]

23. The six main criteria for NHRI stemming from the Paris Principles are: 1. a mandate "as broad as possible", based on universal human rights standards and including the dual responsibility to both promote and protect human rights", covering all human rights; 2. independence from government; 3. independence guaranteed by the constitution or by legislation; 4. adequate powers of investigation; 5. pluralism including through membership and/or effective co-operation; and 6. adequate human and financial resources.[80] These criteria, except criteria Nos. 1 and 5, are in line with the above-mentioned general criteria concerning ombudsman institutions. As regards criterion No. 1 concerning the promotion and protection of human rights, there are ombudspersons who have been assigned with broad functions in this respect, too (for example in Spain), besides the traditional function of handling maladministration complaints.

24. The Paris Principles set out minimum standards to be complied with, but they do not dictate any particular model of structure for an NHRI.[81] Certain international legal instruments, such as the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) of 2002 or the United Nations Convention on the Rights of Persons with Disabilities (CRPD) of 2006 refer to these principles, while requiring the establishment of an "independent mechanism" to monitor the implementation of the rights set out therein.[82]

25. According the ICC accreditation system, which includes there types of accreditation status (A, B and C),[83] within the Council of Europe member States there are only 11 ombudsman institutions with the "A" status[84] – meaning compliance with Paris Principles – and six ombudsman institutions with the "B" status – meaning partial compliance with these principles.[85] The following institutions have been accredited with the

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73. And more specifically, "to initiate proceedings for the assessment of the constitutionality of laws, and the constitutionality and legality of other regulations and general acts which govern issues related to the rights and freedoms of all persons", ibid., p. 20. If the Constitutional Court may also control the constitutionality of individual acts, it is advisable to give the ombudsman a right to bring individual cases to the court; p. 21.
74. Ibid., p. 16.
75. Ibid., p. 18.
76. Ibid. p. 22.
77. See FRA, 2012, p. 15 (footnote 9 above).
78. http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx.
79. FRA, 2012, p. 55 (footnote 9 above).
80. See footnote 10.
81. FRA, 2010, p. 18 (footnote 9 above).
82. Ibid., p. 16.
83. "A" Voting member: complies fully with the Paris Principles; "B" Observer member: does not fully comply with the Paris Principles or has not yet submitted sufficient documentation to make that determination; "C" Non-member: does not comply with the Paris Principles.

"A" category: the Republic of Albania's People's Advocate, the Human Rights Defender of Armenia, the Human Rights Commissioner in Azerbaijan, the Ombudsman of the Republic of Croatia, the Georgian Public Defender's Office, the Polish Ombudsman, the Portuguese *Provedor de Justiça,* the Commissioner for Human Rights in the Russian Federation, the Protector of Citizens of the Republic of Serbia, the Spanish *Defensor del Pueblo* and the Ukrainian Parliament's Commissioner for Human Rights. The Austrian Ombudsman Board, the Ombudsman of the Republic of Bulgaria, the Hungarian Parliamentary Commissioner for Civil Rights, the Ombudsman of the "former Yugoslav Republic of Macedonia", the Republic of Slovenia Human Rights Ombudsman and the Equality Ombudsman of Sweden have been accredited with "B" status. The sole "C"-status NHRI are human rights commissions or institutes.

26. Interestingly, most of these institutions are based in central and eastern European countries. As regards Scandinavia, only the Equality Ombudsman of Sweden fully fulfils the Paris Principles, although there are four NHRIs institutions in this country.[86] As noted by the Fundamental Rights Agency of the European Union (FRA),[87] in 2012, out of the 27 member States of the European Union, only three (Poland, Portugal and Spain) have ombudsman institutions which are fully compliant with the Paris Principles, namely typically single-member institutions, appointed by parliament, dealing mainly with individual legal protection and maladministration complaints.[88]

27. Although there are many States within the Council of Europe which lack ICC-accredited ombudspersons, it does not necessarily mean that such States do not have independent institutions of that type. For various reasons, States may have either not sought accreditation or their institutions are no longer accredited.[89] Some States might also be in the process of seeking such accreditation (for example the Cypriot Ombudsman or the Finnish Parliamentary Ombudsman).[90] According to FRA, (EU) member States face the following challenges when seeking ICC accreditation:

– an adequate, sufficiently broad and clear mandate to cover all human rights, including both their promotion and protection;

– a satisfactory level of independence from the government in the selection and appointment of the governing bodies in the allocation of budgets;

– sufficient resources to deal with a broad range of human rights issues.[91]

28. In its Resolution 20/14 of 2012, the United Nations Human Rights Council welcomed "the growing number of member States establishing or considering the establishment of national institutions for the promotion and protection of human rights in accordance with the Paris Principles" and the growing number of national institutions seeking accreditation through the ICC. It was also satisfied with the efforts of those member States that had provided their NHRI with more autonomy and independence, including by giving them an investigative role or enhancing such role. It encouraged NHRIs, including ombudsman institutions, to seek accreditation status.[92]

5. Case studies

5.1. The Scandinavian (Danish-Norwegian) model: the Danish Parliamentary Ombudsman

29. The Danish Parliamentary Ombudsman (*Folketingets Ombudsmand)*, established by an amendment to the Danish Constitution of 1953, is one of the oldest ombudsman institutions in the world and that is why I carried out a fact-finding visit to this country. In Denmark, there are no specialised administrative courts and the ombudsman plays a primary role in protecting the right to good administration.[93] It is based on "quasi-

84. A-status institutions are entitled to vote and hold office in the ICC or its regional groups and enjoy speaking rights and privileges during human rights review procedures. B-status members may participate as observers in the ICC open meetings, but they have no right to vote. C-status institutions may, with the consent of the ICC, participate in its meetings as observers, but they have no other rights.
85. As at 11 February 2013, according to the ICC's chart of the status of national institutions: http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2811%20Feb%202013%29.pdf.
86. FRA, 2010, p. 57 (see footnote 9 above).
87. FRA, 2012, p. 5 (see footnote 9 above).
88. Ibid., p. 20.
89. Ibid., p. 55.
90. Ibid., p. 208.
91. Ibid., p. 56.
92. See footnote 12, paragraphs 7, 8 and 17.
93. For a critical analysis of this institution, see footnote 17, pp. 33 -50.

administrative court model (the Danish-Norwegian model)", that is to say it acts as a quasi-court reviewing public authorities as such and assessing general principles of good administration.[94] Its jurisdiction extents to all parts of public administration (Article 7(1) of the Ombudsman Act).[95] Its opinions are not legally binding, but are expressed on behalf of parliament and may express criticism (which happens in 20% of cases), make recommendations or otherwise state its view of a case.[96] The ombudsman inspects a large number of institutions, such as prisons, psychiatric institutions and social care homes and acts as the National Preventive Mechanism in terms of the United Nations Optional Protocol to the Convention against Torture (OPCAT).[97] There is only one ombudsman in Denmark and it is legally forbidden to use this denomination for other institutions/bodies.

30. During my visit to Copenhagen, I met with the 5th Danish Parliamentary Ombudsman, Mr Jørgen Steen Sørensen, appointed in February 2012, who gave me extensive clarifications concerning the functioning of his office, the appointment procedure, which is based on a political consensus, and the relationship with parliament. The two latter issues are only partly regulated by law and result from an informal scheme of co-operation. The Danish Parliament (*Folketing*) acts as an employer *vis-à-vis* the ombudsman and elects him/her after each general election by majority vote. The position is not advertised and usually, following a political consensus, the Legal Affairs Committee of the Parliament, approaches potential candidates, who should be politically neutral.[98] Every year, the ombudsman submits an annual report to the *Folketing.*

31. During my visit, I particularly welcomed the transparent character of this institution and its accessibility, as citizens/complainants can easily meet with the case-handler or sometimes even with the ombudsman himself. We also discussed the issue of human rights protection: the Danish Ombudsman, which does not have a statutory obligation to protect citizens' fundamental rights, has been rather cautious in referring to international legal instruments on human rights protection, focusing only on the fundamental rights guaranteed in the Danish Constitution. This approach has received some criticism in the doctrine.[99]

32. The Danish Ombudsman receives between 4 000 and 5 000 complaints per year (for a population of around 5.6 million people) and employs nearly 100 staff members[100] (including nearly 60 lawyers). It has no accreditation at the ICC and has not sought it, as it is not a national human right institution tasked with the protection and promotion of human rights, unlike the Danish Institute for Human Rights (which has an "A"-accreditation with the ICC).[101]

5.2. The newly established Turkish Ombudsman

33. For a long time, Turkey was the largest member State of the Council of Europe without an ombudsman-type institution. A milestone was eventually reached with the constitutional revision of 12 September 2010 paving the way for the creation of such an institution, and the Law on the ombudsman Institution of 14 June 2012.[102] In June 2012, the parliament decided to set up the National Human Rights Institution of Turkey.

34. The ombudsman became operational on 29 March 2013, with approximately 250 staff members (including nearly 50 auxiliary staff members) for Turkey's population counting nearly 74 million. As at 3 April 2013, the day before my visit, his office had received nearly 300 complaints.

35. The ombudsman, who is appointed for four years, "will examine, study and make proposals concerning all sorts of acts and actions as well as attitudes and behaviours of the administration within the framework of a human rights-based justice mentality and legality and conformity with the principles of fairness, by creating an independent and effective mechanism of complaint concerning the public services" (Article 1 of the Law on the Ombudsman Institution). The ombudsman and his/her deputies shall be independent and impartial and they shall not receive instructions from other authorities.[103] Any natural or legal person can lodge complaints to the ombudsman, once they have exhausted domestic remedies.[104] In examining complaints, the ombudsman

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94. Ibid., pp. 34-35.
95. Act No. 473 of 12 June 1996 as subsequently amended, available (in English): http://en.ombudsmanden.dk/loven/.
96. Ibid., Article 22.
97. www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.
98. The law only stipulates that the ombudsman should be a law graduate (Article 2, Section 2).
99. See footnote 17, p. 47.
100. http://en.ombudsmanden.dk/.
101. For more details, see its "Statement of compliance with the Paris Principles", September 2012, p. 26.
102. Law 6328. The Turkish authorities kindly provided me with an unofficial translation of this law (text in file within the Secretariat).
103. Article 12 of the Law on the Ombudsman Institution.
104. Ibid., Article 17.

may request any documents from the relevant authorities, assign experts and hear witnesses; his/her investigation shall be finalised within six months.[105] At the end of his/her investigation, the ombudsman can make recommendations to the relevant authorities. Every year the ombudsman presents an annual report to the parliament, through the Joint Committee, composed of members of the Petition Committee and the Human Rights Inquiry Committee.[106]

36. Although these steps were welcomed by the Council of Europe,[107] controversies arose concerning the person who had been appointed by the Turkish Parliament as the first Turkish Ombudsman, Mr Mehmet Nihat Őmeroğlu, due to his alleged close relationships with government circles[108] and his participation, as a former judge of the Cassation Court, in upholding in 2006 the conviction of the Armenian writer Hrant Dink for "denigrating Turkish identity".[109] The appointment of the deputies, most of whom also – so it was noted – have close links to the ruling party, the AKP, was also criticised.[110] All these concerns were raised by the representatives of the civil society whom I met in Ankara and who complained about the government's instrumental approach to this institution. It should also be added that our Assembly colleague, Ms Josette Durrieu (France, SOC) in her very recent report on "Post-monitoring dialogue with Turkey", had stated that these problems "could well undermine the credibility of this new institution, which would be extremely damaging".[111] It is worth mentioning in this context that although Article 10 of the Law on the Ombudsman Institution lists a number of requirements that must be fulfilled by both the (Chief) ombudsman and his/her deputies, including the list of criminal offences for which they should not have been convicted, there is no reference to the criteria of "moral authority", which is contained in certain countries' laws dealing with similar issues.[112]

37. During my visit to Ankara, I met with Mr Őmeroğlu, Mr Mehmet Elkatmiş, one of the five deputy ombudsmen, and the Secretary General of the Ombudsman Office, Mr Mustafa Tutulmaz. I received a warm welcome from his cabinet. We had an open and constructive discussion about possible improvements to the functioning of the Office and I made some suggestions in this respect. I also raised concerns about the scope of the Ombudsman's remit (it was not clear to what extent the acts of the military forces fall within its scope; moreover, the law also excluded acts of the President from the scope of the Ombudsman's remit),[113] the ease of access to this institution (although there was a possibility to lodge online applications, most of the Turkish population, especially in rural areas, has no access to the Internet; although complaints might also be lodged via provincial or district governors' offices, I found this discouraging for potential complainants and was informed by the ombudsman that it was possible to lodge complaints by post, too), the political character of the appointment procedure of the five deputy ombudsmen (which had been appointed by the Joint Committee, composed of members of the Petitions Committee and the Human Rights Inquiry Committee, and not by the Grand Assembly itself)[114] and the lack of competence to seize to the Constitutional Court to question the constitutionality of legal provisions. It was not clear to me neither how the material scope of Article 1 of the Law on the ombudsman Institution was to be interpreted (for example, as regards acts of discrimination), since according to human rights activists it did not cover human rights protection.

38. Although it is certainly too early to assess the efficiency of this newly established ombudsman office, it is worth recalling that in its Resolution 1925 (2013) of 23 April 2013, the Assembly invited the Turkish Parliament "to review the criteria for the selection and election of the ombudsman and deputy ombudsmen so as to ensure the credibility and effectiveness of this newly established institution and its funding".

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105. Ibid., Articles 18-20.
106. Ibid., Article 22.
107. See, in particular, Assembly Resolution 1925 (2013) on post-monitoring dialogue with Turkey, paragraph 12.1
108. See for example, article by Őzgür Mumcu, "Tell me who your ombudsman is", *Hurriyet Daily News*, 30 November 2012: www.hurriyetdailynews.com/tell-me-who-your-ombudsman-is.aspx?pageID=238&nID=35784&NewsCatID=396.
109. See "Post-monitoring dialogue with Turkey", report by Ms Josette Durrieu (France, SOC), Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), Doc. 13160, paragraph 192.
110. Ibid.
111. Ibid.
112. For instance, Article 2 of the Polish Law on Ombudsman or Article 5 of the Ukrainian Law on the Ukrainian Parliament Commissioner for Human Rights of 23 December 1997, available (in English) at: www.ombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1145:law-of-ukraine-qon-the-ukrainian-parliament-commissioner-for-human-rightsq&catid=38:2010-12-15-09-15-51&Itemid=25.
113. Article 5, Section 2, of the Law on the Ombudsman Institution. According to provision "ç", acts "by the Turkish Armed Fores which are purely of military nature" are excluded from the ombudsman's remit.
114. Article 11 of the Law on the Ombudsman Institution.

6. New challenges for the institution of ombudsman

6.1. Obligations stemming from OPCAT

39. The United Nations Optional Protocol to the Convention Against Torture (OPCAT), adopted on 18 December 2002,[115] requires that a domestic torture-prevention mechanism to be established, called "National Preventive Mechanism" (NPM), and in many cases ombudsman institutions have fully or partially taken up this role. Within the Council of Europe area, this has been the case in 21 member States, namely Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Georgia, Hungary, Luxembourg, Montenegro, Poland,[116] Republic of Moldova, Serbia, Slovenia, Spain, Sweden, "the former Yugoslav Republic of Macedonia" and Ukraine.[117]

40. Apart from the question of funding, shouldering this additional task, which implies regular visits to all places where persons are deprived of their liberty, may present new challenges to these institutions. Ombudspersons, which primarily focus on dealing with maladministration complaints, might need to focus on human rights, as well as on a multi-disciplinary and preventive approach.[118]

6.2. Obligations stemming from anti-discrimination legislation

41. Additional tasks may be assigned to ombudspersons on the basis of European legal instruments against discrimination. European Union law, and more specifically, the Racial Equality Directive,[119] the Gender Equality Directive on Goods and Services[120] and the Gender Equality Directive,[121] explicitly requires European Union member States to establish and implement monitoring mechanisms for the promotion of equal treatment on the grounds of gender or racial or ethnic origin.[122] Thus, some NHRIs, including ombudspersons, have also been tasked with the promotion of equal treatment.[123] This has been the case in Austria, Croatia, Cyprus, the Czech Republic, France, Greece, Latvia and Poland. Other States have established new specialised bodies (including ombudspersons) for that purpose (for example, the Gender Equality or Equal Treatment Commissioner in Estonia and the Equality Ombudsman in Sweden).

42. These obligations stemming from EU law are in line with those resulting from the recommendations of the Council of Europe's European Commission against Racism and Intolerance (ECRI), although the latter are not legally binding and focus only on racial discrimination. General Policy Recommendations N°s 2[124] and 7[125] recommend the establishment of national independent specialised bodies to combat racism and racial discrimination at national level.

6.3. Proliferation of ombudspersons

43. As noted by the Fundamental Rights Agency, in some countries which do not have ICC-accredited ombudspersons, but have ombudsman institutions dealing with maladministration cases along with a variety of bodies with different mandates focusing on specific topics, rights or target groups, there might be an overlapping of mandates, especially if there is no co-ordination between such bodies.[126] This might create confusion among potential complainants concerning available remedies and constitute a major obstacle to the

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115. See footnote 98.
116. Concerning the Polish Ombudsman's experience, see "Working as a NPM under OPCAT", presentation by Ms Irena Lipowicz to the 10th World Conference of the International Ombudsman Institute in Wellington, New Zealand, 12-16 November 2012: www.conferpapers.co.nz/wcioi_papers/Irena_Lipowicz_OPCAT.pdf.
117. www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm.
118. M. C. A. Thompson, The role of the ombudsman and prevention of torture under the Optional Protocol to the Convention Against Torture (OPCAT), presentation to the 10th World Conference of the International Ombudsman Institute in Wellington, New Zealand, 12-16 November 2012: www.conferpapers.co.nz/wcioi_papers/Mark_Thomson_Paper.pdf.
119. Council Directive 2000/43/EC, Article 13.
120. Council Directive 2004/113/EC, Article 12.
121. Directive 2006/54/EC of the European Parliament and of the Council, Article 28.
122. FRA, 2012, p. 30 (see footnote 9 above).
123. For a list of such bodies, see at: www.equineteurope.org/-Member-organisations-.
124. ECRI General Policy Recommendation No. 2 on Specialised Bodies to Combat Racism, Xenophobia, Anti-Semitism and Intolerance at National Level, adopted on 13 June 1997, see in particular its Appendix.
125. ECRI General Policy Recommendation No. 7: National legislation to combat racism and racial discrimination, adopted on 13 December 2002, paragraph 24.
126. FRA, 2010, p. 53 (see footnote 9 above).

effective protection of human rights. For example, in the United Kingdom, where five ombudsman institutions operate, there have been many criticisms concerning the unnecessary overlap and complexity of the ombudsman sector.[127]

44. Another problem is also related to the outsourcing and privatisation of public services and a consequent creation of private sector ombudspersons, which additionally blurs the ombudsman institutions landscape. This has in particular been the case in the United Kingdom, following the privatisation in the 1980s of sectors such as water and power supply and telecommunications, and the setting up of private schemes for the solution of disputes (such as the Private Ombudsman for Telecommunication and Energy or the Communications and Internet Services Adjudication Scheme). Other countries followed suit; for example; an Energy Ombudsman has also been established in Belgium and there are private consumer protection "ombudspersons" in Denmark. In such circumstances, it may be even more difficult for citizens to find the appropriate scheme of redress and since the funding of such private dispute-settling bodies is often provided by the industry sector itself, their independence may be doubtful. Without going into further details of this problem, which touches upon more complex issues relating to consumer protection, I agree with the Public Services Ombudsman of Wales, Mr Peter Tyndall, that public services ombudspersons should retain their jurisdiction in such cases.[128]

6.4. The impact of the economic crisis on ombudsman institutions

45. In its Resolution 1651 (2009), the Assembly examined the consequences of the global financial crisis and expressed concern about its economic consequences on "the living conditions of the citizens of Europe and of the world, which could possibly threaten to undermine the very foundations of democracy".[129] There are no doubts that the foundations of democracy, rule of law and human rights would be also affected if the role of ombudsman was diminished through austerity measures. As stressed in Resolution 20/14 of July 2012 of the United Nations Human Rights Council, "the importance of financial and administrative independence and the stability" of NHRI is crucial for the promotion and protection of human rights.[130]

46. The problem of the effects of the economic crisis and austerity measures on the functioning of NHRIs is being closely followed by Mr Nils Muižnieks, Council of Europe Commissioner for Human Rights. During his meetings with NHRIs representatives in 2012, Mr Muižnieks "raised concerns about budget and staff cuts in those bodies and their mergers into bigger entities" and "recommended that governments involve NHRIs at all stages of the budget process to inject a human rights perspective into the responses to the crisis".[131]

47. In May 2012, the Human Rights Commissioner pointed out that in Greece, Ireland, Latvia and the United Kingdom, for example, national human rights institutions have faced cuts to their budget or staff and in Spain and the Slovak Republic regional ombudspersons or decentralised offices had been forced to close.[132] He was particularly concerned that cutbacks in the budgets of various NHRIs could be particularly damaging to the most vulnerable groups – such as children, elderly people, people with disabilities, Roma, migrants, asylum seekers and refugees.

48. Following his visit to Portugal in May 2012, the Human Rights Commissioner noted that the Portuguese Ombudsman had not been "disproportionately affected by austerity measures", that the office continued to "effectively fulfil" its mandate[133] and did not face restructuring or mergers with other institutions.[134] Similarly, during my visits to Copenhagen and Ankara, I was assured by the Danish and Turkish Ombudsmen that their

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127. T. Buck, R. Kirkham and B. Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, 2010, p. 9; Introduction to this book is available at:
www.ashgate.com/pdf/SamplePages/Ombudsman_Enterprise_and_Administrative_Justice_Intro.pdf.
See also the report by the UK Law Commission on "Public Services Ombudsman" of 14 July 2011, footnote 35 above.
128. See his conference paper from the 10th World Conference at the IOI, "Ombudsman and the changing face of public services", p. 12. For more information, see also the paper by B. Thompson, "Must Ombudsmen retain remit over privatized services?". See footnote 118 above.
129. Adopted on 29 January 2009, see paragraph 3.
130. See footnote 12 above, paragraph 17.
131. Annual Activity Report 2012 by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, presented to the Committee of Ministers and the Parliamentary Assembly, Strasbourg, 10 April 2013, CommDH(2013)5.
132. "National Human Rights Structures can help mitigate the effects of austerity measures", Human Rights Comment of 31 May 2012: www.coe.int/t/commissioner/news/2012/120531hrc_EN.asp.
133. Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Portugal from 7 and 9 May 2012, Strasbourg, 10 July 2012, CommDH(2012)22, paragraph 4 of the summary.
134. Ibid. paragraph 65.

institutions were not concerned by budgetary cuts. This is a good sign and I would like to encourage governments and parliaments to engage in this way in spite of economic difficulties. Although, during my visit to Ankara, I expressed concern about the fact that the funds for the first year of the ombudsman's activities were not included in the general budget, but in the reserve budget, despite the statutory financial guarantees,[135] I hope that this was only a provisional measure.

49. It should also be stressed that ombudsman institutions might be underfunded in respect of the new tasks they have been assigned due to their international obligations, such as, for example, the OPCAT, which obliges them to establish a national preventive mechanism, or EU regulations on equal treatment. This was, for instance, the case of the Polish Ombudsman, for which the parliament had not allocated sufficient funds for these purposes in 2011 and 2012.[136] In France, the 2011 merger of the four bodies – the *Médiateur de la République* (Ombudsman), the *Défenseur des enfants* (Ombudsman for Children), the *Haute autorité de lutte contre les discriminations et pour l'égalité* (High Authority against Discrimination and for Equality) and the *Commission nationale de la déontologie de la sécurité* (National Commission for Police Ethics) – into the *Défenseur des droits* resulted in the merging of their budgets without increasing resources for the new authority.[137]

7. Conclusion

50. Despite the heterogeneity of ombudsman institutions, certain features remain common across jurisdictions and legal systems, including their independence and impartiality. The ombudsman should be free to look into any issue, to collect evidence without prior approval from the authorities, and his/her office should be adequately funded to make sure that all complaints are handled free of charge, in an efficient manner and with a minimum degree of formality. "That the Ombudsman shall stand above party politics and not take instructions from anyone must be guaranteed by law and must govern the method by which he is appointed", stressed Mr Thomas Hammarberg, former Commissioner for Human Rights, in his 2006 Viewpoint.[138] He also made it clear that since the realisation of human rights still remains a question of political will, ombudspersons can only make a difference when their integrity is respected by those in power.

51. As stressed by Mr Diamandouros, the European Ombudsman, during an exchange of views he had with the Committee on Legal Affairs and Human Rights in June 2012, the capacity of national human rights institutions and that of ombudsman institutions depends on the state of the implementation of the rule of law and the functioning of democratic institutions. In the early 1990s, a large number of post-communist countries created ombudsman institutions on the basis of the Nordic model, which had existed for nearly 200 years. However, when Sweden or Finland established their ombudsman, the settings were different, which explained why their ombudsmen could, for example, prosecute judges, which would not be possible in a State where the rule of law is still fragile. The state of the rule of law has therefore a considerable impact on the efficiency of the ombudsman institution and the latter can only be reinforced with the consolidation of the former. We should not forget, either, that human rights considerations were at the heart of the process of setting up such bodies in central and eastern Europe and in former totalitarian countries such as Greece, Portugal or Spain. When assessing the evolution of these institutions in the countries which have set up them only recently (including Turkey), the overall state of democracy, the rule of law and human rights should be borne in mind.

52. This does not mean, however, that the state of ombudsman institutions in western Europe is ideal. The mandate of certain ombudspersons is still weak. For instance, in the United Kingdom, there is no direct access to the Parliamentary Commissioner: a complaint to this institution has to be made first to a Member of Parliament, who at their discretion may forward the complaint to the Parliamentary Commissioner.[139] The procedure for the appointment of the French *Défenseur des droits* by the President of the Republic may still raise concerns as to his independence. Several big countries, such as Germany or Italy, do not have national (generalist) ombudsman institutions. One should take into account the various legal traditions and systems, including the position and the efficiency of the (administrative) judiciary. Hence the need to apply European or international standards/recommendations in a flexible manner.

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135. See Article 4, Section 1, and Article 29 of the Law on Ombudsman. The Ombudsman's budget is allocated from the parliament's budget.
136. Summary of "Report on the Activity of the Human Rights Defender" in 2011, Warsaw 2012, p.10: www.rpo.gov.pl/sites/default/files/SUMMARY%20of%20Report%20on%20the%20Activity%20of%20the%20Human%20Rights%20Defender%20In%202011.pdf.
137. Annual Report 2011, p. 63 (in French): www.defenseurdesdroits.fr/sites/default/files/upload/ddd_raa_2011.pdf.
138. T. Hammarberg, "Ombudsmen are key defenders of human rights – their independence must be respected", Commissioner for Human Rights Viewpoints, 2006.
139. Which has already been criticised by the Law Commission in its 2011 report, see footnote 35 above.

53. Even though not all ombudsmen are NHRIs, figures concerning the state of implementation of the latter reflect some interesting trends. As illustrated above, the number of ombudsman institutions with an ICC accreditation remains still very low within the Council of Europe geographical area, despite the international community's efforts to promote the concept of NHRIs and the Paris Principles. In its 2010 report on NHRIs in EU member States,[140] the Fundamental Rights Agency concluded that these institutions did not enjoy sufficient political support in all member States. It pointed out that:

– they were not sufficiently independent and effective (in light of the Paris Principles);

– the existence in many member States of several different independent public bodies with human rights remits contributes to a diffusion of resources and gaps in mandates;

– their weak mandates, from which examination of individual complaints is excluded, often weaken credibility.

54. These findings should be taken into consideration when conducting an in-depth analysis of the situation of the ombudsman in Europe. The proliferation of ombudsman-type bodies is still an ongoing trend (despite some reverse solutions, like in France), which is mainly due to the multiplication of specialised bodies, whose setting up is required by international human rights treaties (for example, OPCAT) or other legal instruments. On the one hand, this may lead to blurring the "ombudsman landscape" and discouraging potential complainants from using the existing remedies, although such a negative trend may be stopped by an enhanced and regular co-ordination between such bodies. On the other hand, a consolidation of such additional tasks within a single ombudsman institution, traditionally dealing with maladministration complaints, may lead to its overloading, especially in case of lack of sufficient resources.

55. Austerity measures in times of economic crisis may hit ombudsman institutions in all member States of the Council of Europe and I agree with the findings of the IOI Wellington Conference of November 2012 opposing any financial restrictions that would limit the ombudsman's independence and "restrict its ability to protect the fundamental rights of all persons".[141] In times of economic crisis, the ombudsman is in the best position to protect vulnerable persons, often in conflict with public administration on employment or social issues; thus, its role is crucial for the protection of fundamental rights.

56. But ombudsman institutions have duties, too. In order to preserve their credibility, ombudsman institutions should react as quickly as possible, observe statutory deadlines and be accessible to all persons having a complaint to make. Good co-operation with civil society and the media, especially for the newly established ombudspersons, is also necessary to enhance their visibility and citizens' access to them.

140. http://fra.europa.eu/en/publication/2012/national-human-rights-institutions-eu-member-states-strengthening-fundamental.
141. See footnote 15 above, paragraph 10.