

THE European Ombudsman: Defending Democracy and Human Rights Amidst the Crisis in Ukraine

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ABSTRACT

The European Ombudsman is appointed to combat cases of European “maladministration” towards European citizens. He is seen as the promoter of good Community administration, with a concern for transparency in the democratic and institutional functioning of Europe, involving citizens as directly as possible. A survey of the main minutes and decisions taken by the European network of ombudsmen (May 2022–October 2023) following Russia’s invasion of Ukraine reveals three major issues on which the Ombudsman is establishing himself as a soft power institution within the European Union: the reception of refugees within the European Union, the transparency of the EU Council’s decision-making process in relation to sanctions against Russia, and participation, through his referral, in monitoring Ukraine’s progress in terms of democracy, the rule of law, and the fight against corruption.

Keywords: *Ombudsman, Ethics, European Union, Democracy, Rights*

INTRODUCTION

The position of ombudsman, also known as “mediator” or “rights defender,” now exists in over 120 countries worldwide. In countries where the ombudsman is more than just a puppet post, he or she is one of the essential guarantors of the rule of law. Their *raison d’être* is to help protect citizens from possible malfunctioning of the public service and to prevent potential abuse of power by the administration.

At the EU level, the European Parliament elects the Ombudsman for the duration of its legislature, i.e., five years. His role is to promote democracy (Friedery, 2020) and guarantee transparent, ethical European administration (More O’Ferrall, 2019). He acts both as ombudsman for the EU as a whole and as coordinator of the European Network of Ombudsmen, which brings together ombudsmen from all EU member states and beyond, including EU candidate countries such as Moldova, Albania, Serbia, and Ukraine.

At a time of war in Ukraine, this strategic position, held since 2013 by Ireland’s Emily O’Reilly, deserves a special spotlight.

The unprecedented crisis that has shaken Europe since the start of the war in Ukraine has once again put the issue of democracy and fundamental rights at the top of the European political agenda, and for two reasons:

1. The Russian invasion is a clear violation of these rights.
2. This invasion accelerates the idea of seeing states currently on the fringes of the European political space (Ukraine, Moldova, Georgia, etc.) join the Union on the condition that these countries eventually reach the required level of respect for human rights, freedom, and democracy.

The role of the European Ombudsman in light of these crises is, therefore, legitimate. This is why; first, we present the role of the Ombudsman as mediator and coordinator of the European Network of Ombudsmen, whose usefulness we will question. We then look at the Ombudsman’s activities since the start of the war in Ukraine. We also look at the Ombudsman’s prospects for action in the aftermath of the war in Ukraine and in light of the future membership promised to the countries of the European Political Community, conditional on respect for human rights and democracy. Finally, we compare the European Ombudsman with National Human Right Institutions (NHRIs) underscoring the complementary roles of these institutions.

LITERATURE REVIEW

A brief history of the Ombudsman and its gradually extended prerogatives

The European Ombudsman was born “in the texts” in 1992, within the framework of the Maastricht Treaty, before finding its first operational expression in 1995, when the first of them, Finnish Jacob Söderman, was elected by the European Parliament. He held this post until 2003 when the Greek Nikifóros Diamandoúros, who was replaced in 2013 by Emily O'Reilly, succeeded him for ten years.

Created at the same time as European citizenship, which was also institutionalized by the Maastricht Treaty, the European Ombudsman is intended to reinforce this notion of supranational citizenship, as researcher Hélène Michel explains: “The possibility for citizens to refer matters to the Ombudsman is not simply a matter of increasing the citizen’s protection vis-à-vis the European administration. It is part of a more general perspective, on the one hand strengthening the legitimacy of institutions by giving citizens the right to call European institutions to account, and on the other reducing the distance between these institutions and citizens” (Michel, 2018, p. 120).

It should be noted that the term “European Ombudsman” refers both to the person in charge of the function and to the entity that this person manages (75 people, with a budget of around 13 million euros).

Despite a relatively low number of complaints (750 per year on average, a third of which are directed against the European Commission, the remainder concerning lesser institutions, and often formulated by citizens with a professional link to Europe) in relation to the size of the European political arena, the Ombudsman has gradually extended his symbolic and political influence as an instrument of “transparency” and support for the exercise of European citizenship (Oberdorff, 2013).

The 2021 reform has considerably contributed to the “institutionalization” of its political legitimacy, as it has extended its prerogatives: its function is no longer exclusively defensive, as it can use the strategic initiative inquiry mechanism, which aims to proactively identify areas of importance considered strategic (Raulet-Descombey, 2022). For example, in early 2024, the European Ombudsman launched a strategic initiative to ensure sufficient transparency in the European Commission’s use of artificial intelligence.

The European Ombudsman’s mandate covers “the entire EU administration, with the exception of the European Parliament in its political role and the Court of Jus-

tice of the European Union in its judicial role. The European Ombudsman does not investigate the political actions of European deputies or the decisions of the Court” (O’Reilly, 2023).

The Ombudsman is European in that it focuses on EU institutions and supranational in that it is the supranational version of an initiative that originated in Scandinavia under the name of Ombudsman (Bousta, 2007).

The influence of the Swedish “version” is evident since it aimed to challenge the excesses of power of the royal administration on behalf of individuals without calling into question the decisions of the Crown. Today, this institution exists in almost all EU member states, albeit with slightly differing competencies from one country to another; the European Ombudsman plays the role of coordinator between these various national ombudsmen (Hofmann, 2017).

This need for coordination has arisen because the European Ombudsman can only investigate cases of maladministration at the level of the European institutions, with which European citizens have minimal direct contact. On the other hand, European citizens may be subject to an excess of power on the part of a national administration due to the application of a European law by the Member State where they reside. Such situations call for cooperation between the European and national levels of citizen/administration mediation.

In 1996, the European Network of Ombudsmen was set up with the aim of exchanging best practices and carrying out investigations in a spirit of harmony when these concern issues that may affect both national and European levels of maladministration - and all this in a horizontal perspective, neither binding nor hierarchical, between the European Ombudsman and national ombudsman institutions (Inglese & Binder, 2018).

To date, the Network comprises some 95 offices in 36 European countries, including EU and non-EU member states, as well as candidate countries such as Ukraine.

On this point, it should be remembered that guaranteeing respect for democracy, the rule of law and, consequently, the fundamental rights of citizens is one of the conditions for accession to the Union by candidate countries. This conditionality has been all the more critical given that successive enlargements, since the mid-1980s with Spain and Greece in particular, then in the early 2000s with the post-Communist countries of Central and Eastern Europe, have often involved states that were in the process of or had just completed, a democratic transition - a transition that their entry into the EU has helped to consolidate (Schneider & Tucny, 2002).

Today, the institution of the Ombudsman, present in Ukraine, and the quality of its work are explicitly part of the assessment forged by the European Commission as part of the examination of Ukraine's candidacy for the EU (European Commission, 2022)¹.

The discursive relationship between the defense of the values of freedom, democracy, and the rule of law and the War in Ukraine is, therefore, twofold, as expressed in substance by President Volodymyr ZELENSKY in numerous speeches, including his address to the European Parliament on March 1, 2022:

There is an expression, 'Ukraine chooses Europe'. That is what we have been striving for, and that is where we have been and are still headed. I would very much like to hear you say to us that Europe now chooses Ukraine. [...] We are fighting for our rights, for our freedoms and for our lives... Now we are fighting for our survival, and this is our highest motivation, but we are also fighting to be equal members of Europe. We have proven our strength. We have proven that, at the very least, we are the same as you are. So prove that you are with us."

Russia is attacking Ukraine because Ukrainian citizens are turning towards Europe, aspiring to the same values, and it is because Ukrainian citizens are fighting for these values that they are destined to be supported by Europe and to join the European project. Furthermore, it is in this capacity, as well as with regard to its competencies as a guarantor of the rule of law at the European level and European coordinator of the mediation institutions of its member countries, including Ukraine, that the role of the European Ombudsman can itself reflect this double discursive relationship.

METHOD

Ombudsman's action since the beginning of the war in Ukraine

In this research, we aimed to examine the role of the European Ombudsman in addressing key challenges arising from Russia's invasion of Ukraine. We have therefore conducted a detailed analysis of the main minutes and decisions of the European Network of Ombudsmen from May 2022 to October 2023 (see Appendix 1).

¹ See European Commission. (2022). *COM (2022) 407 final: Communication from the Commission to the European Parliament, European Council, and Council, Opinion of the Commission on Ukraine's application for membership of the European Union*. "The Ombudsman Institution - the Commissioner for Human Rights of the Ukrainian Parliament - is designated as the National Human Rights Institution and accredited with 'A' status by the World Alliance of National Human Rights Institutions as being in full compliance with the Paris Principles."

The selection criteria for these minutes and decisions were based on their relevance to the response of European institutions to Russia's invasion of Ukraine. The documents should reflect the European Ombudsman's active involvement or direct recommendations. The analysis was limited to documents publicly available through official EU channels and related reports.

More specifically, the categorization into three dominant themes emerged inductively from the analysis of the selected materials:

- (1) the reception of refugees within the EU, documents highlighting the role of the Ombudsman in ensuring compliance with European principles of fair treatment and access to resources for refugees displaced by the war.
- (2) the transparency of the EU Council's decision-making process in relation to sanctions against Russia, decisions and discussions emphasizing the Ombudsman's oversight regarding the transparency and accountability of sanctions imposed on Russia.
- (3) Ukraine's prospective EU accession, records examining the Ombudsman's contribution to monitoring Ukraine's progress on democracy, the rule of law, and anti-corruption measures in light of its candidacy for EU membership.

RESULTS

On May 10, 2022, at the European Network of Ombudsmen Conference in Strasbourg, Emily O'Reilly stressed that her main aim was to define "how we [European Ombudsmen] can best support and monitor the EU's efforts to offer shelter and protection to all those forced to leave their homes and families in Ukraine." The role of the European Ombudsmen is thus to ensure that refugees enjoy their rights, mainly "access to healthcare, employment, housing, education, and social support," in the member states to which they have fled, while warning of the risk of human trafficking.

The European Ombudsman is seen as "a soft power institution within the European ecosystem" (O'Reilly, 2023). Concerning the sanctions imposed on Russia, the European Ombudsman has focused on ensuring that European citizens can consult documents relating to these sanctions at the Commission. In June 2022, the European Ombudsman asked the EU Council to proactively make available documents relating to the adoption of sanctions against Russia in order to assess the transparency of the EU Council's decision-making process on these sanctions, but this was refused.

The European Ombudsman was also approached by a European citizen following the European Central Bank's refusal to grant public access to documents relating to the implementation of sanctions against Russia. The Ombudsman consulted the documents in question and assessed the ECB's response, which justified the refusal because full disclosure would undermine the protection of the public interest regarding the Union's financial, monetary, or economic policy and international financial relations. Following his investigation, the Ombudsman concluded that there had been "no maladministration by the European Central Bank."

As for the question of Ukraine's accession to the EU, Emily O'Reilly has publicly questioned whether membership is conditional on respect for the rule of law on Ukrainian territory: "Does the EU have the strategic patience to wait for the transformation of Ukrainian institutions that the government has promised as part of its anti-corruption reforms? Alternatively, will the desire to quickly create a coherent geopolitical counterweight to Russian and Chinese hard power mean turning a blind eye to institutional shortcomings?"

These institutional shortcomings, if accepted as they stand in order to speed up the accession process, will be put to the test by the possibility for any European citizen to appeal to the Ombudsman. This is already the case, as illustrated by the decision handed down on August 18, 2022, concerning the refusal of the European External Action Service (EEAS) to give the public access to a document concerning the suspension of political parties in Ukraine (Case 952/2022/MIG).

DISCUSSION

The Ukrainian Ombudsman: a special case?

Ukraine's accession to the EU would strengthen the weight of the European Ombudsman in assessing the country's necessary institutional transformation. All the more so as the Ukrainian Ombudsman institution's independence from political power does not appear to be total at this stage. For example, when Ombudswoman Valeria Lutkovska's term ended in 2017, it took the Ukrainian Parliament almost a year to appoint her successor. During that time, the international community expressed concern about the lack of transparency and ultra-politicization of the appointment. Two of the three candidates were members of Parliament (the ombudsman's electoral body). However, the legal provisions were relatively vague on this subject since they were supposed to be ineligible for this election unless they resigned their mandate – which Lyudmila Denisova did, once finally elected to the post in March 2018.

At the end of May 2022, three months after the start of the invasion of Ukraine, Lyudmila Denisova was dismissed by Parliament. She had been publicly criticized, not least by a number of humanitarian associations, for her handling of the crisis, and in particular for her communication concerning the sexual crimes allegedly committed by Russian soldiers against children. However, these same associations were moved by the way in which her mandate was interrupted, even though nothing in the Constitution or ordinary law provided for such a provision.

This procedure could only be justified by the imposition of martial law, given the exceptional circumstances. It was nonetheless denounced by the UN Human Rights Monitoring Mission in Ukraine as a “violation of international law.” To our knowledge, representatives of European institutions, including the European Ombudsman, have not publicly denounced Denisova’s dismissal. Nevertheless, the swift appointment of the new ombudsman, Dmytro Lubinets, in June 2022, shows that Kiev attaches great importance to this position, particularly in view of its bid for EU membership.

A comparative analysis of the European Ombudsman and similar crisis management institutions provides valuable insights into their respective roles in addressing the war in Ukraine. Particularly, a comparison between the European Ombudsman and National Human Rights Institutions (NHRIs) reveals both shared objectives and distinct mandates. While both aim to protect human rights and promote democracy, their operational focuses diverge.

As discussed, the European Ombudsman primarily ensures that EU institutions respond to the crisis effectively, emphasizing adherence to human rights and democratic principles. This includes as mentioned in our article overseeing the reception of refugees within the EU, advocating for transparency in the EU Council’s decision-making processes regarding sanctions on Russia, and monitoring Ukraine’s prospective EU accession. Conversely, NHRIs focus on protecting and promoting human rights across all phases of conflict. They engage directly with affected populations, providing critical support to refugees and displaced persons through hotlines, awareness campaigns, and monitoring efforts. As part of the European Network of National Human Rights Institutions (ENNHRI), NHRIs have also participated in high-level meetings aimed at discussing and developing best practices to address challenges arising from the conflict (European Network of National Human Rights Institutions, n.d.). This brief comparison underscores the complementary roles of these institutions, with the European Ombudsman addressing systemic and institutional governance and NHRIs engaging in localized, human-centered responses.

CONCLUSION

We can now conclude on future enlargements and the future importance of the Ombudsman. In the wake of the war in Ukraine, the Ombudsman's prospects for action need to be examined from two angles. On the one hand, guaranteeing respect for democracy, the rule of law, and, consequently, the fundamental rights of citizens are among the conditions for accession to the European Union by candidate countries. This is the case, for example, of the Caucasus countries applying for EU membership: Georgia in the short term, Armenia in the medium term, and Azerbaijan possibly in the long term. This institutional transformation conditions EU aid to member countries (e.g., Hungary and Poland). In this context, the European Ombudsman is a soft power institution.

On the other hand, in a world in tension and faced with Russian and Chinese powers, the question of the EU's geopolitical orientation arises. As part of their EU accession process, the institutional shortcomings of the candidate countries, if accepted as they stand in order to strengthen the EU's geopolitical counterweight against these two great powers, will then be put to the test by the possibility for any European citizen to refer a matter to the Ombudsman.

In this way, the Ombudsman's influence within Europe's borders would be strengthened, and he could claim a more significant role than his current one, which is limited to a discursive and prescriptive stance.

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Appendice 1 - Minutes listed and available on the Ombudsman website (e.g: <https://www.ombudsman.europa.eu/en/opening-summary/en/158540>)

1	How the EU Council ensures transparency decision-making on sanctions against Russia	CASE SI/3/2022/LDS	OPENING Friday June 03, 2022 DECISION Wednesday February 15, 2023	Council of the European Union
2	Conference of the European Network of Ombudsman 2022. Introductory remarks by the European Ombudsman	SPEECH Emily O'Reilly	DATE Tuesday May 10, 2022	CITY Strasbourg - COUNTRY France
3	Decision concerning the refusal of the European Central Bank (ECB) to grant public access to documents relating to emergency and preparedness measures in connection with Russia's invasion of Ukraine	CASE 1327/2022/SF	OPENING Monday July 18, 2022 DECISION Monday September 12, 2022	European Central Bank
4	Decision concerning the refusal of the European External Action Service (EEAS) to grant public access to a document concerning the suspension of political parties in Ukraine	CASE 952/2022/MIG	OPENING Wednesday May 11, 2022 DECISION Thursday August 18, 2022	European External Action Service
5	Speech at Warsaw University - The European Ombudsman in the geopolitical age: protecting fundamental rights and responsibility	SPEECH Emily O'Reilly	DATE Wednesday September 27, 2023	CITY Warsaw - COUNTRY Poland
6	Nominations for the European Ombudsman for Good Administration Award 2023	EVENT DOCUMENT	DATE Tuesday May 02, 2023 DATE Wednesday June 28, 2023	CITY Brussels - COUNTRY Belgium
7	Report - European Network of Ombudsman Annual Conference 2022	EVENT DOCUMENT	DATE Tuesday May 10, 2022 DATE Thursday April 28, 2023	CITY Strasbourg - COUNTRY France
8	Garden reception at the Irish embassy	SPEECH Emily O'Reilly	DATE Friday September 09, 2022	CITY Brussels - COUNTRY Belgium
9	World Summit of Ireland - keynote speech: The Future of Europe	SPEECH Emily O'Reilly	DATE Tuesday October 24, 2023	CITY Dublin - COUNTRY Ireland
10	Current trends and major developments in ethics, lobbying and evolving donor practices - keynote address at Georgetown University, Washington, D.C.	SPEECH Emily O'Reilly	DATE Tuesday September 27, 2022	CITY Washington D.C. - COUNTRY United States