

BETWEEN A ROCK AND A HARD PLACE: THE OMBUDSMAN BETWEEN ADMINISTRATIVE AND JUDICIAL APPEAL PROCEDURES

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Abstract

In recent years a lot of attention has been paid to enhancing and strengthening the role of the Ombudsman in complaints procedures; an equal (or larger) amount of attention has been given to lowering the threshold of formal – administrative or judicial – appeal procedures or to simply creating more and broader legal protection mechanisms. From a legal point of view a strict distinction has always been made between the complaint of a citizen against ‘unfair’ treatment by the government and the appeal lodged by the citizen against an ‘illegal’ administrative decision. In this context it’s surprisingly easy to think of ‘complaints’ and ‘appeals’ as ‘black’ and ‘white’ categories thereby leaping over the grey area in-between. But it’s exactly this grey area which is of particular interest not only to the citizen – who very often finds such legal distinctions incomprehensible – but also to the legal community – whose primary interest should be fair adjudication.

This paper has a dual focus: on the one hand we wish to study effective adjudication in administrative proceedings, on the other hand we want to examine the position of the Ombudsman vis-à-vis these administrative proceedings. Problems as described above are common to most countries that have well-developed (or over-developed) legal protection mechanisms. Complaints and appeal procedures are not – contrary to popular belief – parallel tracks but rather are separate tracks of legal protection which *can* and *do* intersect at some points in time.

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Introduction

1. In recent years a lot of attention has been paid to enhancing and strengthening the role of the Ombudsman in complaints procedures; an equal (or larger) amount of attention has been given to lowering the threshold of formal – administrative or judicial – appeal procedures or to simply creating more and broader legal protection mechanisms. From a legal point of view a strict distinction has always been made between the complaint of a citizen against ‘unfair’ treatment by the government and the appeal lodged by the citizen against an ‘illegal’ administrative decision. In this context it’s surprisingly easy to think of ‘complaints’ and ‘appeals’ as ‘black’ and ‘white’ categories thereby leaping over the grey area in-between. But it’s exactly this grey area which is of particular interest not only to the citizen – who very often finds such legal distinctions incomprehensible – but also to the legal community – whose primary interest should be fair adjudication. Most regulations concerning complaints procedures stipulate that once a complaint is formalized into an appeal against a certain administrative decision the complaint procedure should halt or be suspended. For instance the Flemish Ombudsman has to cease an investigation into a complaint when he is notified of the existence of an on-going judicial procedure. At the same time the Flemish Ombudsman still receives many complaints which could have been resolved much more efficiently through an administrative appeal procedure; the unfortunate citizen who is unaware of the existence of such an appeal procedure very often loses valuable ‘appeal’ time – if not losing altogether the opportunity to appeal. To a citizen the legal distinction between ‘complaint’ and ‘appeal’ is sometimes perplexing; it can become even more complex when a citizen wishes to complain about the perceived ‘unfairness’ of an appeal procedure... or what if a citizen wishes to complain about its treatment by the ombudsman?

2. This paper has a dual focus: on the one hand we wish to study effective adjudication in administrative proceedings, on the other hand we want to examine the position of the Ombudsman vis-à-vis these administrative proceedings. Problems as described above are common to most countries that have well-developed (or over-developed) legal protection mechanisms. Complaints and appeal procedures are not – contrary to popular belief – parallel tracks but rather are separate tracks of legal protection which *can* and *do* intersect at some points in time.

Part I – Protecting the citizen

1.1. Legal protection – a gradual evolution

a) LEVEL 0 – Information

3. Since the early 1990’s much attention has been spent on the legal protection of the citizen and gradually the right to proper complaint handling has become integrated as a part of *decent administration* (or, with a modern term: *good governance*). In almost all Western countries legislation regarding public services has been adapted in order to meet these new standards.

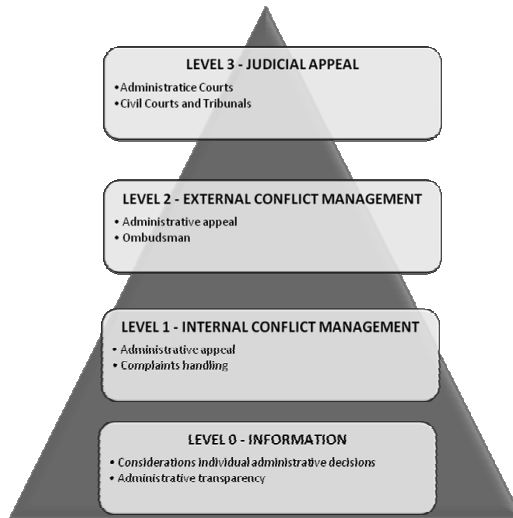


Figure 1

So did Belgian legislation, albeit rather late in comparison with other mostly North-European countries. An important step in this process was the promulgation of a rather fundamental law in 1991 that requires that all Belgian public authorities indicate and explicitly formulate the considerations of fact and law on which their decisions – all individual in scope - were based (Coolsaet and Opdebeek, 1999, p. 327; Jadoul and van Drooghenbroeck, 2005, p.379)¹. This law can be considered as ‘revolutionary’ in the relationship between the public administration and the citizen, not just because it required an underlying justification of individual administrative decisions – this was already a general prerequisite of this kind of decisions –, but because this justification should be expressed clearly and made apparent to the persons to whom such decisions were addressed. From then on, every public authority – from the lowest to the highest, either local, regional or federal – had to step down from its ‘exalted’ position; they were forced to state formally the legal basis on which they acted; additionally, they had to formulate the legal considerations and facts on which their decisions were based, allowing the individual citizen to make up his mind whether or not to file an appeal against the administrative decision.²

4. Another major step in the legal protection process in Belgium was the development of new legislation to guarantee a right of access to “administrative documents”. In 1993, influenced by European law, the Belgian Constitution enshrined the right of each citizen to consult “any administrative document and to be given a copy of it” as

1 This is the law of 29 July 1991 “on formal grounds of administrative decisions”, official gazette of 30 September 1991.

2 This implies that the reasons given must be appropriate (see article 3, law of 29 July 1991); in other words there should be a causal relationship between them and the decision taken: they are not inconsistent with that decision and they are sufficiently explicit and comply with all the rules and all the principles binding on the administration.

a fundamental right.³ On the basis of the Constitution, new legislation on openness of administration has been copied in some way by the regional parliaments, so that now administrations and their agencies of all levels – federal, regional, community and local – are to apply it with respect to the citizens. More specifically, the right of access as it is recognised in Belgium by the various Belgian parliaments has a twofold series of guarantees. First, there are guarantees of active openness. To put it plainly, public services must be **proactive** in the field of administrative transparency. As a very concrete example can be mentioned the obligation since 1993, to identify the civil servant dealing with the matter in any decision that citizens receive, his or her contact details and the administrative and judicial appeals available if citizens wish to contest this decision. Although this improvement may seem slight, in practice it was considerable.

In addition to the guarantees of active openness that have just been mentioned, there are guarantees of passive openness, too. This refers to obligations resting on administrative agencies that come into play only at the citizen's request. In this context it should be noted that citizens have a far-reaching right of access to any administrative document held by the administration⁴. For example, in the field of urban planning, when a local administration intends to issue a planning permission for the construction of a building, it has the legal duty to allow residents to consult the file submitted to the administration. Residents may obtain copies of everything in the file, have their right to request explanations by a competent civil servant or are allowed to consult the file on the spot, remaining for hours on the administration premises in order to do so (Carlens and Verbeeck, 2007).⁵ It is also more fundamentally enshrined in all the fields in which the administration is called upon to act (Schram 2009; Lewalle, 2002, pp.52-146; Renders, 2008). Of course, there are limits to the right of access, especially when national security or private life is at issue. Fundamentally, however, the right of access is exceptionally wide-ranging; this is especially illustrated by the fact that the various Belgian parliaments have made great efforts to improve the quality of the various administrative services in Belgium.

b. LEVEL 1: Complaints and appeals – internally

5. Traditionally, under Belgian administrative law, the most effective legal protection offered to every citizen is the right to lodge an administrative appeal against any administrative decision which may be detrimental to the citizen's interests. Administrative appeals can be subdivided into, on the one hand, "internal appeals", which means that an appeal is launched towards the same administration that has taken

3 See article 32 of the Belgian constitution

4 With respect to the federal administration, see the Law of 11 April 1994 "on the openness of administration", *Official Gazette* 30 June 1994.

5 This 'right of access' can be abused as was demonstrated in the case of X versus the municipality of Blankenberge where a citizen requested all planning permissions and other documents relating to the use of a public park.

the original decision and, on the other hand, “external appeals” whereby the appeal is received by another administrative authority – in most cases this is the competent tutelage authority; this authority is subsequently in the position to suspend or even in some cases to nullify the original administrative decision. The administration held in appeal is only obliged to respond if this appeal procedure is explicitly prescribed by law – the so-called organized appeals. Otherwise the administration can ignore the appeal by the citizen, although – ultimately – the question can arise if such an action would be in accordance with the principles of good governance.

6. All formal kinds of legal protection mechanisms have in common that their procedures are very strict and that they are bound to well-specified, limited time periods. On the one hand, the citizens must be diligent and act within a limited period of time after the concerned decision towards him was made, but on the other hand, he is assured of getting an answer in a limited period of time afterwards, too.

7. In Flanders, the Flemish decree of June 1st 2001 states that each citizen has the undeniable right to complain directly and free of charge about the actions and workings of any administrative institution. A careful internal handling of complaints by administrative authorities is considered to be an important element of good governance and it is therefore rather surprising that this decree came into force about ten years after the first steps were taken to establish a Flemish ombudsman. The field of application of the Complaint Decree is actually broader than that of the Flemish Ombudsman Decree – to the extent that it also applies to institutions that strictly speaking are not administrative authorities, such as private law legal persons or institutions without legal personalities.⁶ All sorts of actions can result in the filing of a complaint by a citizen: e.g. the perception that a case was not handled properly, the behaviour of a member of staff during a (telephone) contact, the reception of faulty or contradictory information, ... The handling of complaints is an informal procedure (contrary to the organised administrative appeal procedure) that is subject to formal requirements, not only to grant citizens the right to complaint handling, but mainly to guarantee a uniform handling of their complaints.

c. LEVEL 2: Complaints and appeals – externally

8. As mentioned above, the most common (external) administrative appeal is the appeal to the tutelage authority. This kind of appeal has to be situated in the context of decentralisation; although decentralised administrative authorities are considered to be autonomous they are still subject to ‘administrative supervision’ and therefore citizens can address the ‘tutelage’ authority which in turn can decide to exercise its supervisory powers but only within the legal context of ‘administrative supervision’.

6 On the other hand, it is more limited because the decree doesn’t apply to institutions not established by the Flemish authorities, but nevertheless charged with tasks that are a part of the Flemish Region’s or Flemish Community’s powers, e.g. co-management tasks of local authorities.

Only when the tutelage authority is granted 'extra-ordinary' powers by act of law can this authority act in supposition of the decentralised authority. Therefore it is important to underline that very often the result of an appeal to the tutelage authority is merely the 're-start' of the administrative decision-making process and not the resolution of the underlying conflict.

9. The creation of Ombudsmen services in Belgium must be seen within a reform movement that has taken place in most western countries after World War II. Before, only Sweden (1809) and Finland (1919) knew this institution. Thereafter, Denmark (1955) and Norway (1962) but also New-Zealand (1962), then the Commonwealth countries and then other western countries followed this example. Apparently there was a world-wide recognized need to offer citizens a right to complain every time they face unreasonable or indecent public actions. The emergence of Ombudsmen can be seen as one among several ways of promoting transparency by the State. These days Ombudsmen services are considered to be part of democratically working institutions and their role can hardly be underestimated (Hubeau, 2005).

In Belgium, there is not one single institution that plays the role of the Ombudsman; lots of services can be considered to play the role of an Ombudsman; even if we limit ourselves to the public ones, there is quiet a long list: The Federal Ombudsman, The Flemish Ombudsman, The French Community Ombudsman, The Walloon Ombudsman, The Children's rights Commissioner, The Pension's Ombudsservice, The Post's Ombudsservice, The Telecom Ombudsservice, The Railway Ombudsman, local Ombudsmen... In this paper we will only discuss the federal, the regional and the local Ombudsservices.

10. The Federal Ombudsman is competent to deal with complaints concerning the federal administrative authorities. There are few exceptions, federal agencies with regard to which the federal ombudsman is not competent to act: one the one hand these are the appellate bodies of the federal administrative power, on the other hand the federal administrative authorities which have their own ombudsman.

The Flemish Ombudsman Service is competent for complaints about any Flemish government agency, e.g. the public transport company *De Lijn*, the family health service *Kind en Gezin*, the Flemish public waste disposal company *OVAM*, or the Flemish public television broadcasting corporation *VRT*. The Flemish government often relies on municipal or provincial authorities, *intermunicipal* companies, or other institutions to exercise its powers. These are the so-called "tasks of joint government". A familiar example is the delivery of building permits by the municipal planning departments. If a complaint concerns one of these services, the citizen can also take it to the Flemish Ombudsman Service.

The Walloon Ombudsman is competent to deal with complaints by any person engaged in litigation with a Walloon public authority. Individual complaints may be lodged by a natural or a legal person. A company, irrespective of its legal form, or an association, may lodge a complaint; however no complaints can be lodged by

a group of people, in particular through a signed petition. As to the working area of this service, its competence is limited to the areas that fall under the purview of the Walloon Region: Town planning permits, Housing aid, Regional taxes and levies, Mains water, Aid to companies, Aid to disabled persons, Aid to energy, Mobility and transport, Environmental permit, Road management, Social housing, Agricultural aids... The role of the Walloon Region's Ombudsman consists of helping any person, natural or legal, who is experiencing difficulties with the Walloon regional authorities. The Ombudsman may intervene if citizens do not agree with an administrative decision that concerns them or if citizens think that the Walloon civil service has made a mistake, and that its judgement is not founded. Once contacted, the Ombudsman will clarify an administrative decision or position, or provide reasons for the need to amend them; either facilitate the dialogue between intervening parties and open doors that lead to reconciliation. In general, its action leads to recommendations for improving the way that the Walloon civil service operates: when a claim is justified and recurrent, the Ombudsman recommends to the authority concerned a solution so as to settle the dispute amicably; when the Ombudsman notes that the stringency of the regulations may entail unfair or inappropriate consequences for the citizen's situation, it makes recommendations to the Walloon Parliament.

11. As mentioned before, all decisions made by local government authorities are subject to what is called general administrative tutelage. This means that provincial governors, acting as agents of the regional government, can suspend a local government's decision when it breaks the law or goes against the general interest; the Regional government can nullify that decision. The tutelage authority can act *ex officio* and after complaint by a concerned person. Of course, there are restrictive deadlines within which the parties must act. So, this tutelage offers a kind of citizen's protection in case of complaint.

According to recent legislation on local government⁷, every local government is to set up an Ombudsman service and a complaints handling system. The latter system is organised at administrative level and is supposed to deal with the greater part of complaints. The setting up of an Ombudsman service on the local level is relatively new in Flanders; only the bigger Flemish cities like Antwerp or Ghent disposed of this kind of service. Since few years it is compulsory for every local government. Furthermore, every local administration is obliged to organise a system of complaints treatment.

d. LEVEL 3: Judicial appeal

12. In accordance with the formal and material rule of law which is the corner stone of every modern state the top of the above-mentioned legal protection pyramid is formed by the right of every citizen to lodge a judicial appeal. A conflict between a citizen and the government is no longer decided *in fine* by the head of state or by

⁷ I.e. the Municipal Decree of 15 July 2005, the PCSW decree of 19 December

another administrative authority but by an independent judicial system – which is traditionally depicted as another pyramid structure. It should be noted that both civil and administrative courts have played an important role in curbing the discretionary powers of administrative authorities. In view of the scope of this paper we however limit ourselves to the role of the administrative courts.

13. The Belgian administrative courts - especially the Council of State which is the highest administrative court in Belgium - have contributed in a considerable way to guarantee good governance of the civil service by raising principles (or requirements) in terms of administrative management. As in most European countries, the (administrative) courts have gradually come to recognise a general right to “good governance”. This principle is a catch-all because – as is well known – it contains in fact many obligations to be observed by the public administration in its relation to the citizen.

Some of these principles – most of them were not written down in any legal text - have fair-play content. The most important of these include the rights of the defence meaning that e.g. people subject to disciplinary proceedings must be able to present their defence, be assisted by the lawyer of their choice, be informed of the charges against them, have access to the administrative file, be summoned to the hearing and be able to request that the witnesses are heard in their presence (De Sutter, 2009, p.184; Renders *et al.*, 2007). The current view supported by the Belgian administrative courts is that even if the applicable legislation does not explicitly provide these principles in its texts, administrations are bound by them and obliged to apply them anyway.

The duty of fair play also contains the more limited principle of what is known as prior hearing or the *audi et alteram partem* principle. Applying this principle implies that, where there is a possibility that the administration will take a decision that will be unfavourable to someone, because of the personal conduct of that person, it will hear that person first or, anyway, prior to the decision. This can be the case with respect to the preventive suspension of a civil servant in the interest of the service⁸ or, again, in the context of an authorisation or subsidy accorded to a private individual or another public authority⁹. If both mentioned principles must be assessed briefly here, one can notice that the prior hearing principle is less binding than the duty to uphold the rights of the defence; in certain circumstances, the former may be disregarded, never the latter (Renders and Bombois, 2006; Jaumotte, 1999, p.660). These principles, too, must be applied *ex officio* by the administrative services, even without written texts obliging them to do so.

15. In addition to the both mentioned principles with a fair play content, - the rights of the defence and the possible prior hearing -, the fair-play principle also requires

8 See in particular Council of State; decision *Navez*, nr 39.104 of 30 March 1992.

9 See in particular Council of State, decision nr 38.893 of 2 March 1992; see also Council of State, decision *a.s.b.l. Enseignement technique de l'Evêché de Liège*, nr 39.233 of 27 April 1992.

the impartiality of the administration, and more specifically that what is known as “objective impartiality”. This also implies in our judicial system, that even the mere appearance of partiality is prohibited (Goffaux, 2006).

Apart from these fair play principles, good governance includes another series of principles or requirements. It requires the administration to take unilateral administrative decisions with full knowledge of the facts, which means that, before it decides, the administrative authority is obliged to gather all the relevant information¹⁰. This means that, in order to be sufficiently informed before taking a decision, the administrative authority is allowed, if necessary, to give the person to whom the decision in question will be addressed, the opportunity to express his or her point of view. This can happen e.g. when the administrative authority intends to adopt a “serious measure”, if a hearing is the only means by which it can be fully informed of the circumstances that it must take into consideration before taking a decision¹¹. In order to be sufficiently informed, the administrative authority can even supplement the information it has by seeking the views of an expert. If, for example, with respect to public contracts the evaluation of tenders requires an assessment of technical and financial elements that the administrative authority itself is not able to conduct, it must seek to obtain authoritative information from experts¹².

16. In addition to these principles, good governance implies another series of principles and requirements, notably principles of legal certainty and legitimate expectations. Legal certainty within the Belgian administrative legal framework means that citizens are to a reasonable extent able to predict the way in which the administration will act. So, keeping in mind this principle, unilateral administrative decisions can never be retroactive. Legitimate expectations, on their turn, involve the citizens’ confidence in the administrative authorities’ decisions or behaviour. Accordingly, an administrative authority that makes the citizen believe that it is acting within the limits of its duties, incurs civil liability with respect to the person with whom it is dealing. Each of the requirements contained in the principle of decent administration is individually guaranteed.

1.2. *Intersecting legal protection mechanisms: a case-study*

17. One of the ways to study possible problems of intersecting legal protection mechanisms is by applying the above-mentioned pyramid structure to a very concrete, well-defined conflict situation. For the purpose of this paper we selected one very particular case-study, namely the conflicts which may arise when pupils / students wish

10 See in particular Council of State; decision *Hodod*, nr 58.328 of 23 February 1996.

11 See in particular Council of State, decision *Meeusen*, nr. 160.824 of 29 June 2006; decision Van der Cammen, nr. 149.250 of 22 September 2005; decision *Union Saint-Hubert F. I.*, nr 29.759 of 15 April 1988; decision *Huart*, nr 38.599 of 28 January 1992.

12 See in particular Council of State, decision *s.a. Integan*, nr 19.671 of 31 May 1979.

to exercise their right to education by demanding a registration into the educational institution of their choice.

At first glance, the conflict situation may seem rather ‘uneventful’: person A wishes to obtain a registration into school X, in case of refusal person A has to decide how far he or she is willing to take this dispute. Every step undertaken can be seen to correspond with a level of the pyramid and inevitably raises the stakes of the dispute. At the highest level of the pyramid the costs are higher but the possible rewards for winning the dispute may also be higher (equals a higher risk factor). From a theoretical point of view it is implicitly understood that a rational person won’t initiate top-level legal protection mechanisms if the inevitable costs are substantially higher than the (uncertain) benefits.

A ‘registration conflict’ however doesn’t always fit into the above-mentioned rational paradigm.¹³ Therefore it’s necessary to dissect this conflict situation and indicate – albeit briefly – the complexities of protecting the education rights of pupils / students as effectively as possible.

18. When observing the ‘registration conflict’ through the looking-glass of legal protection three important distinctions must be made. First of all, is the person requesting the registration an adult or a minor? Secondly, does it concern ‘compulsory’ or ‘non-compulsory’ education? Thirdly, is the educational institution in question ‘public’ (governmental) or ‘private’ (non-governmental).

- *Is the person an adult or a minor?*

In Belgium, as in most countries, minors require legal representation by a parent or a legal guardian in any formal – administrative or judicial – appeal procedure. An important legal protection issue arose specifically in Flanders when in 2002 the Equal Education Opportunities Decree – influenced by the Children’s Rights Charter – stipulated explicitly that parents when choosing a school for their child should always make this choice in mutual agreement with the child as soon as the latter reaches the age of twelve. However because there are no formal legal protection instruments available to a minor this stipulation has remained largely ‘symbolic’. The only option available to a minor is the Children’s Rights Commissioner (Flemish Ombudsman for children’s rights) who however is understandably reluctant to handle complaints involving a dispute between parents and their child (Kinderrechtencommissariaat, 2007).

- *Does it concern primary or secondary education?*

If so, the stipulations of the Flemish Equal Education Opportunities Decree apply which means that specific legal protection instruments are available to the applicants:

¹³ Gaining access to a ‘good school’ is very often a matter of principle; more importantly the benefits should also be calculated on a long-term basis (from a parents’ point of view a good school equals a better-valued education which may increase the chances for obtaining a prestigious higher education degree which in turn may result in a better-paid job and long-term career).

- A local consultation platform (LOP) which can act as a mediator;
- Commission on Pupils' rights which can examine the decision of the school to refuse registration and label the decision as 'unsound'.
- *Does it involve an educational institution organized by the state (i.c. the Flemish Community) or a local authority?*

If so, the administrative court (Belgian Council of State) is ultimately the competent court to judge this conflict. However, if it involves a 'private' school this is considered to be a matter of the civil courts.

19. To summarize, the 'registration conflict' in education matters can involve the following legal protection mechanisms:

- Schools of primary and secondary education are obligated by the Equal Education Opportunities Decree to explicitly formulate the considerations (Zero Level) on which their refusal decisions are based. The legal considerations which may be used, are limited by Decree.
- Governmental Institutions of Higher Education are according to the aforementioned Law of 29 July 1991 required to explicitly formulate the considerations (Zero Level) on which their refusal decisions are based. Non-governmental Institutions of Higher Education have no similar obligation.
- Internal Complaints Handling (First Level) as stipulated by the Flemish Complaints Decree is a requirement for the School Network of the Flemish Community.
- Internal Complaints Handling (First Level) is a requirement for all Flemish municipalities as stipulated by the Municipalities Decree; complaints about municipal schools can therefore be addressed to the administration of the local authority in question. Non-governmental schools are not required to develop an internal complaints handling process.
- Complaints about municipal schools can also be sent to the local ombudsman (Second Level).
- The Children's Rights Commissioner (Second Level): hears complaints made by a minor or by a representative of a minor (only if mandated by the minor) concerning primary or secondary education;
- The Flemish Ombudsman (Second Level): hears complaints about registration problems involving primary, secondary and tertiary governmental education institutions;
- LOP (Second Level) can mediate in some cases on its own initiative – in other cases an explicit request by the parents is required;
- Commission Pupils' Rights (Second Level) can determine the 'soundness' of a registration refusal and refer the matter back to the education institution.
- Civil courts (third level) can take temporary measures to safeguard possible registration into non-governmental and governmental schools.

- Civil courts (third level) can offer compensation for damages if a refusal decision of a school violates a subjective right.
- The Council of State (administrative court – third level) can suspend and/or nullify refusal decisions of governmental schools. Similar decisions of non-governmental schools can't be the subject of an administrative appeal.

20. As illustrated by the example above, a citizen is required at each level of the pyramid (1, 2 or 3) to choose the most appropriate legal protection instrument. This is not always an easy choice to make – every step undertaken threatens to irreversibly change the nature of the conflict. For instance, when a registration conflict becomes more formal by employing the available administrative and judicial appeal instruments the chances of revoking the refusal decision become higher but after possibly winning the battle on legal grounds the relationship between the school and the now-registered pupil's parents will be forever strained and burdened with mutual distrust. On the other hand, if the parents choose to employ more informal legal protection instruments the chances of success are limited and – as the Flemish Ombudsman reported in his annual report of 2008 – the reaction of schools to the involvement of an ombudsman is still sometimes equally problematic.

The selection of an 'education conflict' as a specific case-study allows several legal protection issues to become clear at the same time: most often minors are involved, there is a multitude of possible conflicting interests (schools, pupils, parents, government agencies) and last but not least there is a crucial division between public institutions (governmental schools) and private organisations (non-governmental schools) which affects the availability of legal protection mechanisms and even alters the 'playing rules' – for example, in theory non-governmental schools are not to subject to the 'general principles of good governance'.

Part II - The position of the Ombudsman

21. The legal protection 'maze' is not a uniquely Belgian – or Flemish – phenomenon. Although it must be noted that the dynamic federal structure and the complex distribution of competences adds another dimension to many legal protection issues. Other countries – federal and non-federal – however experience similar problems as can be deduced from even a casual browse through the annual reports of Ombudsman services worldwide. The institute of the Ombudsman very often stands in the middle of the intersection of different legal protection mechanisms. As such an annual Ombudsman report can reveal the complexities of the legal protection maze within a specific country by revealing information concerning the gap between 'received cases' and 'investigated complaints'. Of course, a more in-depth study is required but for the purpose of this paper – and due to confined time limits – a 'first glance' reading and interpretation will have to suffice. The statistics below are therefore – most importantly – not intended as a comparison between countries' Ombudsman services but rather as a tool to illustrate that some of the above described problems are common to most Ombudsman services.

Table 1

OMBUDSMAN Annual Report 2008	(A) Total 'new' cases 2008	(B) Comparison with 2007	(C) Complaints to be investigated/resolved
Belgium (Federal)	5 466	Increase (+3, 98%) 12-year record	3 356
Belgium (Flemish)	5 674	Decrease (-13,67%)	1 591
NMBS (Belgian Railways)	5 644	Increase (+9%) (5-year period increase 232%)	5 518 (Dutch: 4 394 French: 1 124)
Children's rights Commissioner (Flemish)	1 363	Decrease (- 9, 19%)	138
Netherlands (National Ombudsman)	13 073	Slight decrease (- 1,28%)	4 614
Luxemburg	925	Very slight increase (+ 0,33%) ¹⁴	851
Ireland	3 941	Increase (+8%) Second record year in a row	2 787
Childrens' rights - Ireland	810	Increase (+8,4%)	No details
UK (Parliamentary and Health Services)	16 317	(no details)	6 734
Finland (Parliamentary Ombudsman)	4 107	Increase (+6,48%) Record number of complaints	3 134
Australia (Commonwealth Ombudsman)	39 932	Increase (+20%)	19 621
Portugal (Provedor de Justiça)	8 668	Decrease (-13,5%)	(no details)

2.1. A 'complaint' is not always a 'complaint'

22. Reviewing the annual reports 2008 of twelve different Ombudsman services brought – from a comparative point of view – a very crucial problem to the foreground. Each ombudsman has very often its own method of registering new incoming cases and each ombudsman also has its own rules to determine what constitutes a 'complaint' and therefore warrants an investigation.

- Federal Ombudsman Belgium: 5 466 new incoming **cases** of which 4 509 were labelled **complaints** while 957 were considered to be **information requests**;
- Flemish Ombudsman: 5 674 new incoming **cases** of which 5 181 were **complaints** and 493 were merely **information requests**;
- Railways Ombudsman: 5 644 formally registered complaints but approximately 11 000 non-registered **telephonic contacts** were also noted. Although these 11 000 'contacts' included a.o. the occasional venting of frustration, it also included

¹⁴If enquiries were registered (2007: 2 600) a slight decrease could be noted.

- several (no specific number available) *information requests* and *referrals* which the Federal or Flemish Ombudsman would consider to be new incoming cases;
- Children’s rights Commissioner: of the 1 363 registered new ‘cases’ only 629 are categorized as **complaints**, 569 are *information requests*, 62 involve school assignments and 103 are considered to be **notifications** with only a tenuous link with children’s rights (e.g. complaints by young adults 18y – 21y);
 - Netherlands: according to the Ombudsman report 13 073 ‘cases’ were received and 13 102 ‘cases’ were handled in 2008 – of the latter about 4 614 ‘cases’ were **complaints** to be investigated, 1 701 had **no link** to a government agency and 6 787 were *referrals* or *information requests*;
 - Luxemburg: 925 cases were categorized as **complaints** while about 2 400 **information requests** were not counted as new incoming cases – of those 925 complaints 15 were **outside the competence** of the Ombudsman and 4 were **referrals** to another Ombudsman;
 - Ireland: 3 941 **complaints** were received of which 1 154 were **outside the jurisdiction** of the Ombudsman, at the same time 9 498 cases were labelled as **enquiries**;
 - UK: of the 16 317 received cases 2 830 were outside the remit of the Ombudsman and many of them could be categorized as **referrals**;
 - Finland: apart from 3 694 ‘new’ **complaints** the 4 107 registered ‘new’ cases also included own initiatives and other communications, of the 3 720 ‘processed’ complaints in 2008 there were 135 **outside the competence** of the Ombudsman and approximately 55 **referrals**;
 - Australia: of the 39 932 registered **approaches** 19 621 were categorized as **complaints** within the jurisdiction of the Ombudsman.

The number of ‘new incoming cases’ are also not necessarily equal to the number of persons complaining. E.g. the Belgian Railways Ombudsman opened 5 518 new cases in 2008 involving 6 022 complainants because 11 petitions with in total 515 signatures were included. The Portuguese *Provedor de Justiça* on the other hand explicitly distinguishes between ‘individual’ and ‘collective’ cases.

23. As shown above, all these different categories of ‘complaints’ or ‘cases’ and of ‘complainants’ make it extremely difficult – although not impossible – to conduct in-depth comparative research. It definitely raises the question whether or not it would be feasible and also desirable to develop – at least within the countries of the European Union – a uniform ‘measuring system’, especially in view of the ‘general principles of good governance’ which have become more and more part of the general public law system of all EU-countries.

2.2. Raising the bar: ‘inadmissible’ complaints

24. Not all Ombudsman services give detailed information in their annual reports about the inadmissibility of incoming complaints. Sometimes inadmissible and referred complaints as well information requests are comprised into one general category. At

other times these are distributed over so many different categories that it becomes even more difficult to distinguish 'valid' complaints from 'non-valid' complaints.

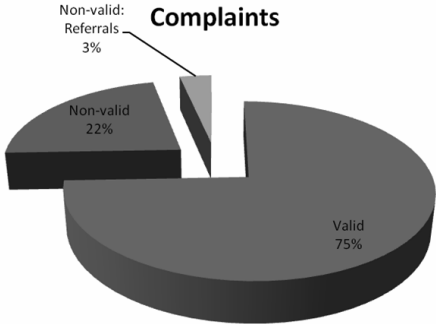


Figure 2 (data for the Belgian Federal Ombudsman)

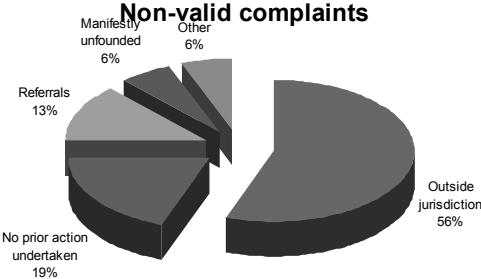


Figure 3 (data for the Belgian Federal Ombudsman)

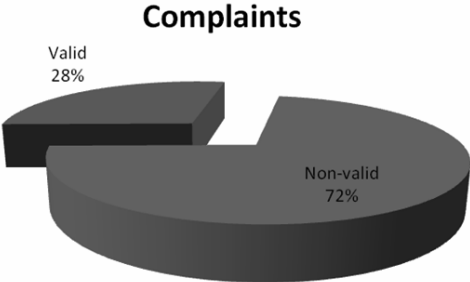


Figure 4 (data for the Flemish Ombudsman)

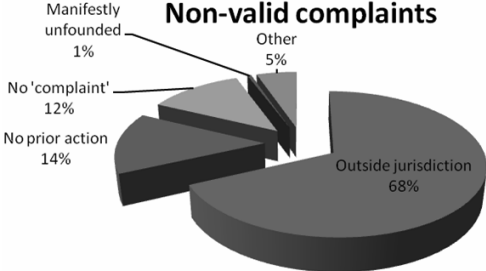


Figure 5 (data for the Flemish Ombudsman)

25. It's in the very nature of the Ombudsman services that they maintain – as much and as long as possible – a low threshold for receiving complaints. That's one of the reasons why when examining the stated reasons for 'non-validity' of complaints the purely 'formal' ones don't score high up on the list. Most Ombudsman services acknowledge 'complaints' in whatever form they are transmitted (e-mail, phone, fax, personal contact, regular mail, ...) and for the investigation to proceed it usually suffices that the identity of the complainant is known and that the broad outline of the complaint subject is clear enough to proceed.

That's why the most common grounds for not investigating a complaint are somehow in essence all connected to the competences of the ombudsman:

- outside the jurisdiction / remit of the ombudsman;
- has to be referred to another ombudsman service;
- premature / no prior action undertaken: has to be referred back to the administrative authority in question for internal complaint handling;
- still pending administrative or judicial appeal procedure.

In some ombudsman reports (e.g. Ireland) the first one – outside the jurisdiction of the ombudsman – can encompass all others.

2.3. *The Ombudsman as 'traffic controller'*

26. In Belgium, the Ombudsman – especially the Flemish Ombudsman – has a very important **dispatching** function. The necessity of having to refer a large number of complaints to other ombudsman services merely illustrates the complexity of the current legal protection maze (Flemish Ombudsman, 2008). As mentioned before the Belgian federal structure and the distribution of competences add another dimension to this problem¹⁵. 26, 6% of all referrals made by the Flemish Ombudsman in 2008 were to either the Federal Ombudsman, the local ombudsman services or to a specific public service Ombudsman (telecommunication, pension etc). On the top of this the large number of referrals back to Flemish administrations (15, 9%) must also be noted because this means that the first level of complaint handling was not properly utilized. It's not clear whether or not the Flemish ombudsman – like for example the UK Parliamentary and Health Services Ombudsman¹⁶ or the Australian Commonwealth Ombudsman – can refer back at its own discretion¹⁷; in some cases the Flemish Ombudsman may request to be kept informed about the progress of the complaint after referral.

15 It's interesting to note that in some cities the Flemish and the Federal Ombudsman have monthly joint consultation moments and that since March 2007 also holds consultations together with local Ombudsman services.

16 The UK Parliamentary and Health Service Ombudsman can decide of its own accord to investigate a complaint even if the citizen didn't first exhaust the local procedure; those cases however are the exception (UK Parliamentary and Health Service Ombudsman, Annual report 2008-2009).

17 In the words of the Flemish Ombudsman: 'under certain conditions a (first level) complaint can straightaway become a 'second level' complaint.

The dispatching function of the Ombudsman can be observed in many annual reports with the exception of course of those Ombudsman services which are connected to one specific public service (e.g. Railways):

- Netherlands: of the 8 488 ‘not investigated’ complaints about 79,96 % were either referrals or information requests (or 52% of all received complaints);
- Australia: 57% of all matters within the jurisdiction of the Ombudsman were referred back to the relevant agency in first instance;
- Finland: 973 not investigated complaints of which 49,64 % were premature (appeal still pending which can be interpreted as a ‘referral’ back to the relevant appeal institution) and 5,65 % actual referrals to other authorities.

Part III Quis custodiet ipsos custodies...

3.1. The Ombudsman’s status in Belgium

27. Under Belgian federal and regional legislation, all Ombudsmen enjoy a special status; the federal Ombudsman e.g. is not a member of staff of the federal parliament. The Ombudsmen's appointment falls under the sovereign appreciation of, respectively, the Federal House of Representatives and of the regional and parliaments. No judge can exercise any control on this decision. Also preparative actions previous to his appointment, escape from any control by the Council of State¹⁸. The ombudsmen enjoy a status identical to that of the counsellors of the Court of Auditors. In a similar way, the regional and local Ombudsmen are not considered to be normal members of staff but all enjoy a special status which just makes them accountable to the representative body.

The federal Ombudsman does not, within the limits of its mission, receive instructions from any authority. They cannot be relieved of their duties due to activities conducted within the framework of their functions¹⁹.

As to the failure of the Ombudsmen’s services, the Law stipulates that the House of Representatives is competent to remove the Ombudsman for serious reasons²⁰. A similar rule is applicable on the regional ombudsmen.²¹ It is up to the parliaments, respectively Federal and regional and French community parliament, to judge whether the reasons are serious enough to remove the Ombudsman. No case so far has been reported that could raise this kind of serious reasons.

3.2. Complaining about the Ombudsman?

28. Not every Ombudsman service includes in its annual ‘performance’ report detailed information about complaints received about the ombudsman itself. Of course, from recent research one could assume that the large majority of the citizens

18 See Council of State, Decision nr. 152.880, 19 December 2005.

19 See article 7, Federal Ombudsmen Act.

20 See article 6, Federal Ombudsmen Act.

21 See article 7, Flemish Ombudsman Decree, article 8, §§1 French Community Ombudsman Decree, article 5, §1 Walloon Ombudsman Decree

complaining to the Ombudsman are satisfied with the services provided by the Ombudsman and have no desire to complain about the Ombudsman: according to a survey by S. VAN ROOSBROEK en S. VAN DE WALLE in 2004 77% of the complainants were satisfied with the way the Ombudsman had dealt with their complaint, although only 50% were also satisfied with the result (van Roosbroek and van de Walle, 2008). The question however remains how Ombudsman services in Belgium deal with complaints about themselves; in other words, shouldn't every Ombudsman be obliged to present – for example in its annual report – details about its own internal complaint handling process? In this respect we could quote the Public Services Ombudsman of Wales who in his report of 2008 wrote: “*It would be incongruous of me to expect bodies in jurisdiction to have effective complaints handling procedures in place for the services that they provide and not to have such a procedure in place for my service.*”²²

29. It would go beyond the scope of this paper to expand any further on this issue and therefore out of necessity limit ourselves to the following observations of Ombudsman services which offer details about their ‘internal complaint handling’:

- *Local Ombudsman of Amsterdam*: 2 complaints about the functioning of the Ombudsman were received in 2007: 1 was inadmissible because it concerned the reasons why the (original) case was not investigated, the other complaint was investigated by the Deputy Ombudsman and concerned specifically the handling of the (original) complaint – this (subsequent) complaint was considered to be partially founded.
- *Public Services Ombudsman of Wales*: 15 complaints about the Ombudsman were received in the previous working year (2008/09), 9 were classified as ‘appeals’ against the case decisions of the Ombudsman service and will be dealt with by the Ombudsman personally – 2 complaints were upheld and letter of apologies were sent.
- *Commonwealth Ombudsman Australia*: In 2007-08 about 234 requests for an internal review of the complaint handling were received, 210 reviews were finalised by the Deputy Ombudsman and in 72% of these case the original outcome was affirmed.

Part IV – Complaints interfering with appeals... and vice versa?

4.1. The Ombudsman service’s nature

30. In this part we try to focus on the possible clash between administrative procedures and Ombudsmen procedures. Indeed sometimes citizens file their complaint at the Ombudsman service whilst an administrative appeal would be much more logical. It must be stressed that Ombudsmen in Belgium have introduced themselves in the new paradigm which sees their services as a way of acting by the public authorities. Some would argue that Ombudsmen are neither *advocate of the*

²²Public Services Ombudsman Wales, Annual Report 2008

people, neither of the administration just because of their mediator's role. They are no judges that investigate conflicts and impose their decision; they rather exercise a "*magistrature d'influence*" by suggesting solutions or by guiding the involved parties to find solutions themselves (Chidiac, 2004a). Ombudsmen's mission is somehow trying to put oil on the wheels; using even the same conceptual categories as those used by the administration and the judge such as the principle of good administration or the principle of proportionality, this is not done in order to draw consequences that lead to an administrative decision with the authority of the decided cause, or to a judicial decision with the authority of the decided cause; it will always be in order to try to conciliate the points of view of the complainant and of the involved administrative services just to make recommendations and proposals. From then on, it is up to the citizen and to the administration to inspire themselves by the results of the work of this "helping third party" (Chidiac, 2004b).

4.2. Ombudsmen's tasks

31. The Federal Ombudsman's mission is threefold:

- 1°) to examine the claims relating to the operation of the federal administrative authorities;
- 2°) at the request of the House of Representatives, to lead any investigation on the functioning of the federal administrative services that it designates;
- 3°) to make recommendations and submit a report on the operation of the administrative authorities, in compliance with Article 14, paragraph 3, and Article 15, paragraph 1, based on the observations made while implementing the duties referred to in 1 and 2, above.

The ombudsmen carry out their duties with regard to the federal administrative authorities referred to in Article 14 of the coordinated laws on the Council of State, except for those administrative authorities endowed with their own ombudsman by a specific legal provision. When the ombudsman's office is assumed by a woman, she is designated by the French term "*médiatrice*" or the Dutch term "*ombudsvrouw*" (in English: ombudswoman). The ombudsmen act collectively²³.

32. The federal ombudsmen can impose binding deadlines for response on the agents or services to which they address questions in the course of their duties. They can similarly make any observation, acquire all the documents and information that they consider necessary and hear all persons concerned on the spot. Persons who are entrusted with privileged information by virtue of their status or profession, are relieved of their obligation to maintain confidentiality within the framework of the enquiry carried out by the ombudsmen. The ombudsmen may seek assistance by experts²⁴.

The regional Ombudsmen try at first to conform the points of view of the complainant

²³ See article 1, The Federal Ombudsmen Act, March 22, 1995

²⁴ See article 11, The Federal Ombudsmen Act, March 22, 1995

and of the service concerned. He, too, can put binding terms to the administrative service to whom he puts questions and he can demand a timely response. When a complaint seems to be founded, the Ombudsman makes recommendations in order to solve the reported problems. Sometimes, he makes proposals in order to improve the functioning of the administrative service concerned. He also reports this to the responsible minister.²⁵

33. When an Ombudsman, dealing with a complaint, is of the opinion that legal or administrative provisions lead to more injustice, he can propose the involved administrative service a solution in order to regulate the complainer's situation; either can he propose to the involved administrative service to take all necessary measures to regulate the complainer's situation in an equitable way or propose to the competent authority to take all measures that are considered to rectify the situation and suggest changes that can seem necessary to adapt legislation. He reports about this to the responsible minister²⁶. Although the Ombudsman is unable to put in doubt the foundation of a judicial decision, he is able to propose measures to the involved administrative service. When an administration does not execute a definitive judicial decision, he is also competent to order the involved service to apply it within a by him imposed deadline; if the administrative service does not execute this order, this non-executing will be noted down in a special report to the parliament that will be published in the Official Gazette.²⁷ Involved administrations must keep the Ombudsman informed about the follow-up of his intervention. It is up to the administration to send an motivated answer to the Ombudsman when it judges that there is no reason to take into account the Ombudsman's proposals. When there is not a satisfying answer within the imposed deadline, the Ombudsman can publish his proposals; on request of the involved administration, he has to publish the answer given to him by this administration. The Ombudsman can publish his decision following this answer, too.

The complainant is regularly kept informed about the follow-up of his complaint²⁸

4.3. Ombudsmen and administrative appeals: a difficult relationship

34. The relation between the Ombudsmen and the administration is an ambiguous one: the Ombudsmen's "raison d'être" is the battle against misadministration or the administration's dysfunctioning; so, Ombudsmen contribute to administrative transparency (Chidiac, 2003). Many citizens are not keen on going to a tribunal or on appealing to the administration for various reasons as there are the deadlines, the specialised language, the written procedure,... and would prefer to go directly to the Ombudsman. This institution is characterised by the absence of formalism,

25 See article 18, §1-4, French Community Decree

26 See article 18, § 5, French Community Ombudsman Decree

27 See article 18, § 6, French Community Ombudsman Decree

28 See article 18, § 8, French Community Ombudsman Decree; article 14, Federal Ombudsmen's Act

the proximity, being free of charge, its oral procedure and its speed of intervention.

35. However, most legislation concerning Ombudsmen services in Belgium stipulates that a complaint at the Ombudsman must be preceded by internal administrative appeals and by all necessary steps at the concerned services in order to get satisfaction²⁹. Other elements that make a complaint admissible are e.g. the identification of the complainant and facts not being passed more than one year³⁰. The notion of precedent administrative appeal is well known in Belgian public law; it is used frequently by the Council of State in order to determine the admissibility of appeals that are introduced at this institution; it is the normal way of proceeding that all administrative appeals available to the citizen must be exhausted. A new notion appearing in the Ombudsmen's legislation is the one demanding "necessary steps towards the involved authorities in order to achieve satisfaction"³¹.

Article 8 of the Federal Ombudsman Act allows any interested person to lodge a complaint with the ombudsmen, in writing or verbally, regarding the activities or functioning of the administrative authorities, but states that, as a preliminary matter, the interested party must contact these authorities in order to obtain satisfaction. It must be clear that the citizen is obliged to lodge administrative appeals when provided and must contact the involved administration when no administrative appeal is provided. This "undertaking steps" is hardly compatible with the rigorous administrative appeal procedures. As the legislation and the preparatory texts are silent about it, it is not clear at all what must be understood by these mentioned "steps". This means that every step that can be proved must be allowed: letters, e-mails, oral interpellations, phone calls, meetings etc. Of course, written contacts will be much easier to prove than others. Also "gracious appeals" can be mentioned here; these are appeals that are not organised – administrative appeals are; as a consequence, the administration is not bound to answer to it or to express a point of view; so this kind of appeal is to include in the "steps" mentioned in the legislation. After all, these preliminary "steps" are obliged in order to avoid that citizens address themselves to the Ombudsman too easily (Leroy, 2000). The same goes for internal, hierarchical appeals and for administrative appeals at the tutelage authority's.

Article 9 of the Federal Ombudsman's Act stipulates that the ombudsmen will refuse to investigate a complaint when the complainant obviously took no steps to approach the administrative authority concerned to obtain satisfaction³². Again, these "no steps" are important terms; the complainant is not expected to write numerous letters to the involved administrative service, he just has to prove that he has taken

29 See e.g. article 15, §2 French Community Ombudsman Decree, 20 June 2002; article 9 Walloon Ombudsman Decree, 22 December 1994

30 See article 16, §1, French Community Ombudsman Decree

31 Article 9, §2 of the Walloon Ombudsman Decree stipulates: "...*démarches nécessaires auprès des autorités intéressées aux fins d'obtenir satisfaction*".

32 A similar sentence is found back in article 10 of the Walloon Ombudsman Decree.

all reasonable steps to clarify his point of view to the administration.

As to procedural provisions, the Ombudsmen, once dealing with a complaint, will inform the administrative authority of their intention to investigate a complaint³³.

36. In their turn, the Ombudsmen can refuse to handle complaints when the facts are clearly unfounded³⁴ and when the complaint is about facts that concern a penal procedure. The Ombudsmen's examination of any complaint is suspended as long as a penal procedure is going on³⁵, or when the facts are subject of judicial appeal or of organised administrative appeal³⁶. Contrary to what is understood by "administrative appeal", under judicial appeal must be understood all appeals brought to jurisdictions; so, in Belgium, this means nullification appeals against administrative decisions that are treated by the Council of State, as well as other appeals brought to other administrative courts and even to other jurisdictions. It is up to the administrative appeal to inform the Ombudsmen of legal proceedings. The Walloon Ombudsman Decree (article 10) adds to this that when an administrative or judicial appeal is lodged, the necessary deadline of this procedure is not taken into account as far as it concerns the *admissibility* of a complaint. This means that the one year deadline to complain – this deadline is found back in all Ombudsmen legislations - , can be shifted forward until the settlement of the administrative or judicial appeal. This means, too, that a judicial appeal can be lodged before complaining at the Ombudsmen's services and that this kind of appeal is no condition at all for the complaint to be admissible. The filing and the examination of a complaint neither suspend nor stop time limits for judicial or organised administrative appeal.

37. As judicial or organised administrative appeals do not match with complaints at the Ombudsmen's services, and as it is obvious now that the complainant must wait for the former disputes to be settled, one could wonder whether it still makes sense to introduce a complaint at the Ombudsmen's office after the administrative or judicial settlement of a dispute. Probably the complainant will not continue its complaint procedure after he has obtained a favourite decision either from the administration either from a judge; in a rare case, he could possibly face a refusal of execution of a judicial or administrative decision, and then get the help of the Ombudsman. So, mostly after getting a negative decision, he will continue to seek his right. It is obvious that the Ombudsmen's space to act will be reduced considerably; even if he concludes that the citizen has not been treated in a decent way, his proposals and recommendations will be welcomed sceptically by the administration that finds itself backed by the administrative or judicial decision.

38. If, in the performance of their duties, the federal ombudsmen note a fact which

33 See article 10, Federal Ombudsmen Act

34 See article 9, Federal Ombudsmen Act

35 See articles 16, § 2 and 17 Walloon Ombudsman Decree

36 See article 13, Federal Ombudsmen Act

could constitute a crime or an offence, they must inform the Public Prosecutor in compliance with Article 29 of the Code of Criminal Procedure. If, in the performance of their duties, they note a fact which could constitute a disciplinary offence, they must inform the competent administrative authority³⁷. The same goes for the regional Ombudsmen³⁸

It is important to notice that the procedure at the Ombudsman is complementary; in the first place a judgement by an Ombudsman can produce the same effect as a decision taken after an administrative procedure, notably the change of the earlier decision. In the second place, terms do play a very important and even a that central role in administrative procedures that the legal certainty and the administration's capability of action is in danger if the Ombudsman, who is dealing with longer terms, would have an unlimited access to this area.

As stated before Ombudsmen's services are second line complaints handlers; this implies that public services provide themselves in an adequate insurance of openness of administration or implementation of information activities. Ombudsmen are no information services and they do not act as appeal bodies if within the framework of passive openness of administration, access to documents has been refused to citizens. Citizens have to know that the involved administration itself is the first line complaints body; of course, it might occur that this service is not well enough organised or it is not clearly enough communicated to the citizen which are the information or appeal opportunities.

Part V – No definite solutions... only provisional conclusions

39. To put it bluntly: when in conflict with an administrative agency a citizen desires only one thing, namely to resolve the conflict preferably in his favour. To achieve this goal a citizen will use all available complaint and appeal procedures... and who can blame him? Precisely therefore it's important that rules are fixed that determine the relationship between the Ombudsservices, the administrative services and the judiciaries. These rules must stipulate under which conditions a complaint at the Ombudsman's service is admissible or what happens to such a complaint when an administrative agency re-examines the question or when a judge has been seized. The main problem however with these 'rules' is that usually the underlying presumption is one of 'exclusivity': it's either a matter for the Ombudsman, **or** for the administrative agency **or** for the judiciary... This presumption in reality ignores the simple fact that appeal procedures may always cross-over into complaint procedures and vice-versa. The question therefore is how to utilize most efficiently the Ombudsman's added value vis-à-vis appeal procedures rather than merely exclude it.

The Ombudsmen's added value lies in the fact that they offer a low-threshold complaint opportunity that promises treatment as swiftly as possible and that must

37 See article 12, Federal Ombudsmen Act

38 See article 20, French Community Ombudsman Decree

meet certain conditions; this means an additional protection against authorities' actions or against enterprises or services that are within the Ombudsmen's area of competence. The treatment of these complaints, the mediation and the connected recommendations are surely offering an additional value both to the citizen as well as – from our point of view – to the administrative authority. This additional value is offered as well by the certain follow up of the citizens' right to complain which leads to a better and more citizen-oriented functioning of the public services and their related services.

40. As discussed above, Ombudsmen are to declare themselves incompetent whenever a case is part of an on-going administrative appeal procedure or a judicial procedure. It can be considered to lift this limitation in order to allow the Ombudsmen to mediate in the case³⁹ or to include the possibility that an administrative authority or the judiciary may request the – continued – involvement of the Ombudsman. This latter option can for example mean that the Ombudsman acts as an impartial 'observer' during an appeal hearing or 'monitors' the overall appeal process.

Finally, the citizen must be aware of the fact that an Ombudsman is neither a 'miracle worker' nor a defender of the citizen's personal interests. He can only mediate and make recommendations that are not forcibly executable; really binding decisions can only be obtained by means of judicial procedures. Research has shown that citizens put a lot of trust in the Ombudsman...this is undoubtedly another reason for an administrative authority to keep the Ombudsman involved. To preserve this high level of trust in the ombudsman, it's however essential that complaints about the ombudsman are to be handled with equal care and consideration. It's the task of the ombudsman to set high standards for administrations with regard to internal complaint handling...it seems only right that these standards are also applied to the Ombudsman himself.

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