THE PROCUREMENT OMBUDSMAN: AN EFFECTIVE NATIONAL PROCUREMENT MECHANISM?

-Enhancing the Accountability of Procuring entities –

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1. Introduction

The most heard aspiration of tenderers in Europe, according to research, is a low-threshold and independent mechanism in addition to the national court system.[1] Besides correcting insufficiencies in procurement procedures, the mechanism tenderers would like to see created, should also provide information about procurement to those who request it.

In the Netherlands, seven major players in the building sector, the Ministry of Transport ('Rijkswaterstaat') and the inframanager of the Dutch railway network 'Prorail' launched the idea for setting up an 'Ombudsman' to mediate in public procurement conflicts. This initiative underlines the need that both tenderers and contracting entities feel for an easily accessible redress mechanism in procurement matters.

The call for a procurement 'watchdog' in the Netherlands is not new and has been debated in literature. In particular after a large building fraud scandal (the 'Bouwfraude' in Dutch), several organisations pleaded for an industry watchdog. A government enquiry into the fraud concluded, amongst other things, that in the building scandal the public procurement rules had often been ignored or breached. However, up until now the Dutch government has ignored calls for an independent monitoring mechanism. Two large contracting authorities recently took the initiative and appointed an independent Ombudsman to scrutinize the procedures and handle complaints of tenderers.

1.1. Europe's need for an procurement watchdog

[1] *Hebly, J.M., De Boer, E.T., Wilman, F.. "Rechtsbescherming bij aanbesteding" Uitgeverij Paris, Zutphen: 2007, p.124*

The European Commission (hereinafter: '***Commission***') encourages Member States to create national procurement watchdogs. Since its influence in the area of public procurement at a national level is limited, the Commission emphasizes that problems of individuals should be tackled on a national level.[2]

According to the Commission, these procurement watchdogs could:

"*…play a key role in improving procurement systems: they could provide useful advice to contracting entities, check procurement practices to promote efficiency and ensure that mandatory reporting requirements were in place to enable Member States to supply any necessary statistical data to the Commission*."[3]

In the Green paper "Public procurement in the European Union: Exploring the way forward"[4] the Commission points out that several Member States have systems for monitoring public procurement in place. In Sweden, for example, the national Competition authority also monitors public procurement laws.[5] This independent authority handles individual complaints and prevents behaviour giving rise to complaints. However, in a lot of countries, such as the Netherlands, these mechanisms are still lacking.

1.2 Need for national a procurement mechanism

In addition to the arguments provided by the Commission, there are several other reasons that support the idea of national procurement mechanisms. As mentioned, the independent mechanism can provide information on procurement. This is useful for tenderers in that specific country, but also for tenderers from a foreign country. Tenderers could for instance request information on procedures or the possibilities open to them in order to complain about errors in procurement.

Furthermore, for most tenderers it is a big step to commence legal proceedings, as they are hesitant to "*bite the hand that feeds you*". It is also very costly, especially for small and medium sized enterprises. An independent redress mechanism should therefore function as a an alternative to legal proceedings.

[2] *European Commission Green Paper, "Public Procurement in the European Union: Exploring the way forward", adopted on 27th November 1996, p.16.*

[3] *Idem.*

[4] *Id..*

[5] *Id., p.17.*

1.3 Research question

To summarize the above: there is a need for a national procurement redress mechanism. In the Netherlands, two procuring entities and the seven major players in the building sector created such a procurement mechanism in the shape and form of an Ombudsman.

The aim of this article is to discuss whether an Ombudsman is an effective redress mechanism in procurement disputes that can satisfy the need that tenderers have for an independent mechanism. In order to examine the effectiveness of Ombudsman institution, a usability test has been developed. This test will be explained in paragraph two.

The choice has been made to look at the European Ombudsman-institution to examine the effectiveness of an Ombudsman. Most countries all over the world have an institution similar to an Ombudsman, however there are different ombudsmen.[6] The classical Nordic Ombudsman, who mainly guards legality and the rule of law, differs from the human rights Ombudsman, who monitors the implementation of human rights. The EU Member States all have their own type of Ombudsman due to the differences in national administrative law.

Reasoning behind this choice is that the European Ombudsman has features of the two classic models, the Nordic Ombudsman and human rights Ombudsman, and incorporates many national traditions of the European Member States. It is therefore a better illustration to use this model as a national procurement mechanism, as more national constitutions can relate to it. Moreover, the institution of the European Ombudsman was founded on the four criteria that are generally recognized to be imperative for the proper functioning of an ombuds-mechanism: (1) fair procedure, (2) effectiveness, (3) independence and (4) accountability to the public.[7]

[6] *For an overview of the Ombudsman in six different continents, see Gregory, R., Giddings, P. (eds.) "*Righting wrongs: the Ombudsman in six different continents*." IOS Press, Amsterdam: 2000.*

[7] *Diamandouros, P.N. "The European Ombudsman and te EU Constitution." in Curtin, D., Kellerman, A.E., Blockmans, S. (eds.),* The EU Constitution: The Best Way Forward? *(2005), at p.265.*

2. Usability test

To evaluate the effectiveness of an Ombudsman mechanism, a usability test is designed to identify the essential elements for a proper functioning of an Ombudsman. The objective of the usability test is to examine the extent to which a review mechanism can be used by individuals that participated in procurement procedures. Although this test is usually used in a business environment, in a legal context the usability test can provide an insightful analysis and overview of the use of the Ombudsman. This test is only used in this article on a theoretical level.

In a business environment this test is used to examine the usability of a particular tool or other man-made objects. In particular, the usability test is frequently used in the context of computer science to test software and websites. As a result of the dramatic changes in the use of computers and their users, the computer industry is pressured to meet the needs of various users from all backgrounds and ages. A usability test enables developers to identify product errors and areas that could be improved.

2.1 Explanation of the test

In order to make a procuring entity more accountable to its various users, it is suggested that an Ombudsman could be appointed who is able to achieve certain usability elements (e.g.: extensive access, independence). The objective of the usability test is to examine the extent to which a review mechanism can be used by individuals and groups. It enables observers to measure the extent to which a product (*in casu* the Ombudsman) can be used by specified users (tenderers) to achieve specified elements (e.g.: extensive access for all interested parties, independence).

One can identify the usability of the review mechanism by examining the set of specified elements (measurable usability elements). These elements will form a set of measurable usability elements: access for tenderers, scope of mandate, compliance, and problem-solving character, independence, effectiveness of outcome and monitoring power. The scaling of an element will be measured according to the extent to which it has been realized by the Ombudsman and will be illustrated in a scaled table (see below, ***Figure 1***). Conclusions on overall Ombudsman usability can then be drawn based on the satisfaction ratings and on the extent to which the mechanism can be improved.

Figure 1: 'The Usability test'

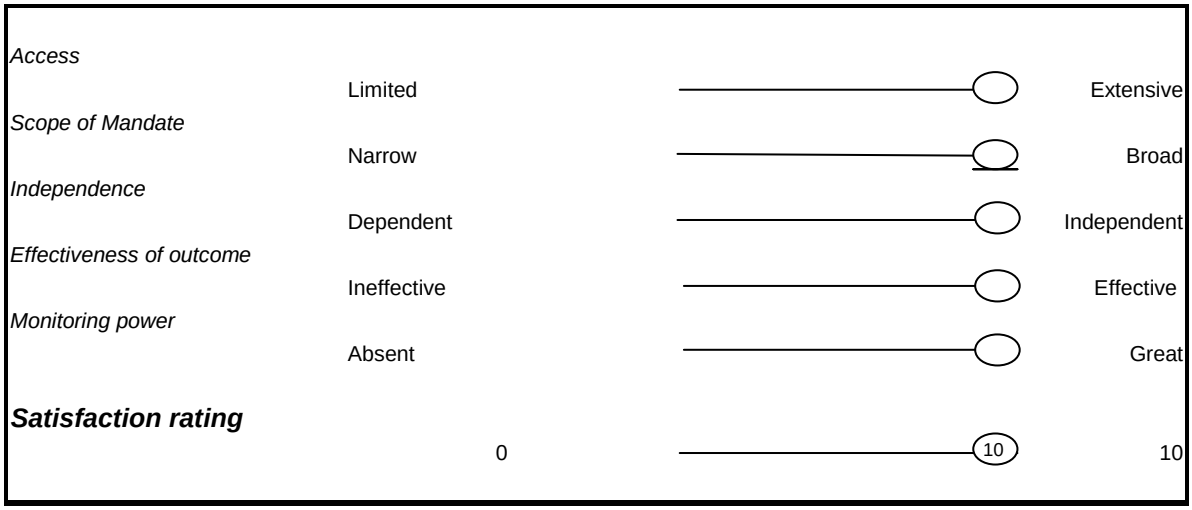


Figure 1 above illustrates a mechanism that would be perfect as it achieves all the specified elements to their maximum scaling. The usability test will be graded with an overall satisfaction rating depending on the scaling of each feature and considering improvements for each element. Through this test the usability of the Ombudsman can be measured in order to answer the research question posed at the beginning of this paper: whether the Ombudsman is an effective redress mechanism in public procurement disputes.

2.2 Explanation of each usability element

In order to examine the effectiveness of the Ombudsman-institution, several usability elements have been selected on the following grounds.

Extensive 'access' for tenderers to the Ombudsman is critical, as the whole purpose of the exercise is to enable tenderers to complain about a procuring entities' acts and omissions. Therefore, the Ombudsman should be accessible to tenderers through a user-friendly procedure.

The 'scope of mandate' is decisive for the input of complaints in the mechanism. An Ombudsman needs a broad mandate that includes all

the relevant processes and procedures of decision-making, not only a selected few 'core' procedures.

The 'independence' of the Ombudsman is crucial to the mechanism's effectiveness and the trust complainants have in it. This characteristic is also stressed by the Commission in its Green Paper:

"*In order to be effective (and recognized as such) an authority such as this would need to be genuinely independent*…"[8]

An Ombudsman cannot offer any legal remedies or enforceable judgements. It is therefore necessary to look at other parameters to compare the outcomes of disputes adjudicated by the Ombudsman and assure that the non-enforceable outcome is implemented by the parties involved. Firstly, the outcomes will be examined on the basis of their effectiveness. The 'effectiveness of the outcome' is pivotal for its remedial regime. The European Court of Justice also considers that effectiveness is fundamental for remedial remedies. It is established case-law that Member States' courts must offer an effective remedy to individuals.[9]

Secondly, the power to monitor the implementation of the outcomes should and will be evaluated under 'monitoring power.' These monitoring checks ensure that the remedy recommended by the mechanism is also implemented by the contracting authority in question.

At the end of the 'usability test' the author will give the examined mechanisms an overall 'satisfaction rating'. Considering the results of the test, the mechanisms are given a grade on the scale of zero, representing unsatisfactory, to ten, representing highly satisfactory. This grade will illustrate the usability of the Ombudsman.

3. European Ombudsman

The Ombudsman mechanism handles requests of affected individuals with an informal and flexible approach. [10] The first 'modern' Ombudsman was installed in 1809 in Sweden to oversee the parliament and supervise the Swedish public administration.

[8] *Supra note 2, p. 17.*

[9] *For more on the principle of effectiveness and the European Court of Justice, see Prechal, S. "EC Requirements for an Effective Remedy" in Lonbay, J., Biondi, A. (eds.) "*Remedies for Breach EC Law*" (1997), at p. 4.*

[10] Idem, at p. 449.

3.1 Ombudsmania[11] strikes the European Union

During 'Ombudsmania' in the second half of the twentieth century in Western Europe, the idea of a European Ombudsman was raised.[12] However, it took until 1991 for the (then) EC Treaty text on the European Ombudsman to be approved, when in Maastricht it was linked with the newly-launched term 'European citizenship'.[13] The proposed responsibility of the Ombudsman was to "*…assist citizens of the Union in defending their Union rights.*"[14] The European Union was the first international organization that adopted an Ombudsman into its institutional framework. Introducing this new institution was anchored in the discussion regarding the growing power of the Union and the insufficient links between the Union and its citizens. The Ombudsman had to establish a link between the citizen and the Union.[15] In 1995 Jacob Söderman first fulfilled this newly created position. The Ombudsman institution emphasized the commitment of the Union to democracy and a transparent and accountable administration.[16]

3.2 European Ombudsman's Function

The European Ombudsman has a dual function[17] to react *ex ante* and *ex post* to certain problems of European citizens. In its first function, the Ombudsman provides an alternative redress mechanism for citizens alongside the ECJ and the European Parliament Committee on Petitions.[18] Following a citizens' complaint the Ombudsman can decide to start an inquiry. In its second function, the Ombudsman can

[11] *Ombudsmania refers to the mushrooming of the Ombudsman concept in Western Europe, see Peters, A. "The European Ombudsman and the European Constitution"* Common Market L aw Review *(2005), 42 (3), at p.698.*

[12] *Idem, at p. 699. For the first European Ombudsman proposal, see O.J. 1979 C140/153 Resolution on the appointment of a Community Ombudsman by the European Parliament.*

[13] *For a brief overview of European citizenship, see Zwaan, de, J. "European Citizenship: origin, content and perspectives" in D. Curtin, A.E. Kellerman, S. Blockmans (eds.),* The EU Constitution: The Best Way Forward? *(2005), at pp.245-264.*

[14] *Marias, E.A. "The European Ombudsman", in E. A. Marias (ed.),* The European Ombudsman *(1994), at p.74.*

[15] *In several documents this reason is mention, for instance in Europe, special edition 16 December 1990.*

[16] *Leino, P., "The Wind is in the North; The First European Ombudsman (1995-2003)"* European Public Law *(2004), 10 (2), at pp. 334-335.*

[17] *Peters, op. cit., at p.711.*

[18] *Idem, at p.741.*

initiate an inquiry on its own initiative in order to increase the accountability of the Union and encourage good administration.[19]

The power to start an inquiry of its own initiative can be used without any suspicion of wrongdoing by an institution. However in general the Ombudsman refers to various received complaints.[20] This own-initiative power is rarely exercised.

In the *Frank Lamberts vs. European Ombudsman* case, the Court found that this dual role allows the Ombudsman to consider 'public interest' in a settlement for a citizen's specific interest.[21] The dual function is reflected in the four functions that Söderman, the first European Ombudsman, assigned to the position: functioning as an effective means of redress for citizens, promoting good administration, encouraging friendly settlements and supporting effective implementation of citizens' rights and transparency in the work of the Union.[22]

3.3 Playfield of the Ombudsman

The mandate of the European Ombudsman is enshrined in article 228 Treaty on the functioning of the European Union ('***TfEU***'). Many terms are open to interpretation (e.g. maladministration, activities) which results in a broad mandate. This makes it difficult to precisely ascribe the duties to the Ombudsman. Heede divides the mandate of the Ombudsman into four components[23]: a party entitled to file a complaint (rules on standing), complaints regarding an activity of the Union institutions or bodies, instance of maladministration and the exception of the ECJ or the CFI acting in their judicial role. In the following section these components will be further elaborated.

In contrast to the ECJ, only the cumulative criteria of nationality and residence restrict access to the European Ombudsman. Nationality restricts non-EU nationals from approaching the Ombudsman, and residence prevents individuals residing outside the EU from complaining. However, the Ombudsman accepts complaints from European nationals residing in the EU or legal persons with their registered office in a Member State. The residence criterion is interpreted broadly, as actual presence in a Member State is required and the complainant does not need a legal document for his

[19] *Leino, op. cit., at p.335.*

[20] Heede, K. "*European Ombudsman*: *redress* and *control* at *Union level*" Kluwer Law International, The Hague: 2000, at p.143.

[21] *Case T-209/00,* Frank Lamberts v. European Ombudsman *[2002], paras.57 and 77.*

[22] *Leino, op. cit., at p.336 and European Ombudsman Annual Report 1995, at pp. 10-11, available at; <http://www.ombudsman.europa.eu/report/en/default.htm#19951999> .*

[23] *Heede, op. cit., at p.116.*

residence.[24] Also towards legal persons a flexible approach on access is taken. The European Ombudsman does not even examine whether a legal person has legal personality.[25] For example, a Spanish city council and the Spanish Greenpeace division have both previously been granted access to the European Ombudsman.[26]

The complaint must concern an activity of a Union institution or body, which also includes inactivity.[27] The mandate of the European Ombudsman is broader and further clarified, due to the abolishment of the pillar structure. The mandate includes "*…all the Union institutions, bodies, offices, and agencies*"[28].

The (in)-activity complained of must concern an instance of maladministration, which occurs "*…*when a public body fails to act in accordance with a rule or principle which is binding upon it."[29] For instance, maladministration is considered to be a violation of fundamental rights, an avoidable delay or a refusal to provide information. On the basis of this definition the Ombudsman needs to review whether an activity is in accordance with a 'rule or principle'.

This means that the Ombudsman first looks at the rules, and second conducts an objective review on non legal principles, such as access to information, acting without undue delay, or keeping proper records. [30] This illustrates that various interpretations of maladministration are possible and that it is its flexibility that enables it to be adapted to different demands.

Exceptions to the mandate of the European Ombudsman are the Court of Justice and the General Court acting in their judicial roles. This exception prevents the Ombudsman from reviewing judicial decisions of the Courts. For instance, rules on public access regarding the judicial activities of the Courts cannot be addressed by the Ombudsman. The Ombudsman himself established a similar limitation of his powers, namely not to intervene with the European Parliament's work.[31]

The above mentioned components outline the framework of the European Ombudsman's mandate. A complaint within the scope of the mandate must however pass a second test of five other

[24] *Heede, op. cit., at p.117.*

[25] *Idem, at p.120.*

[26] *See Complaint 555/96,* Annual Report *1997, pp.218-220 and Complaint 427/96, E.O.* Annual Report *1998, at pp. 191-198.*

[27] *Heede, op. cit., at p.120.*

[28] *Heede, op. cit., at p.121.*

[29] *E.O. Annual Report 1997, at p.22.*

[30] *Idem, at pp.147-148.*

[31] *E.O.Annual Report 1997, at p.27.*

admissibility criteria. Figure 2 summarizes the admissibility criteria for the complaint.

Figure 2: The criteria as set out by the Statute of the Ombudsman are that;

1 the author and the object of the complaint must be identified (Art.2.3 of the Statute of the Ombudsman)
2 the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling (Art. 1.3)
3 the complaint must be made within two years of the date on which the facts on which it is based came to the attention of the complainant (Art. 2.4),
4 The complaint must have been preceded by appropriate administrative approaches to the institution or body concerned (Art. 2.4)
5 in the case of complaints concerning work relationships between the institutions and bodies and their officials and servants, the possibilities for submission of internal administrative requests and complaints must have been exhausted before lodging the complaint (Art. 2.8).

Source: European Ombudsman Annual Report 1997

The first admissibility criterion is the strict time limit of two years from the date of the facts.[32] The identity of every complainant is notified to the alleged institution and it is therefore crucial to identify the author of each complaint in order to do so.[33] No right of privacy is granted to the author unless the Ombudsman starts an inquiry of his own. A second criterion is that a case is not currently or has not yet been before a court. Note that the term 'case' is interpreted strictly: "*...when the facts are similar the Ombudsman must not investigate, even when the parties to the dispute differ*"[34]. A third criterion is that the complainant must first approach the institution he wishes to complain about before he can complain to the Ombudsman. This criterion ensures that the Ombudsman does not have to intervene in a decision making process [35] and does not have to decide in hypothetical cases.[36] The last admissibility criterion is that internal organizational disputes must exhaust the internal organizational remedy scheme before complaining to the Ombudsman's institution.

[32] *Article 2 (4) Statue of the European Ombudsman 1994, O.J. L113, 4th of May, 1994, at pp.15-18.*

[33] *Heede, op. cit., at p.134.*

[34] *Idem, at p.137.*

[35] *For example; Complaint 1136/37, Annual Report 1997, at p.28.*

[36] *For example; Complaint 1056/96, Annual Report 1998, at pp.172-177.*

There is no guarantee that a complaint which has passed the second test will become the subject of an inquiry by the Ombudsman The 'no ground rule' provides the Ombudsman with the discretion to make the decision to start the inquiry process.[37] According to article 195 EC Treaty the Ombudsman can only "*...conduct inquiries for which he finds grounds*…". However, the Ombudsman only uses this rule in insignificant cases and cases that have previously been investigated by other investigators.[38]

3.4 European Ombudsman Procedure

After lodging a complaint, the complainant will receive a notification from the Ombudsman with the registration number of the case.[39] Firstly, the Ombudsman will examine if the complaint falls within its mandate and secondly, it will decide on the admissibility of the complaint.[40] If the Ombudsman finds that there are sufficient 'grounds' to open an inquiry, then the complaint reaches the second stage.[41] The Union institution as well as the complainant will be informed about the inquiry.[42] A three month period is given to the accused institution to respond to the complaint.[43] The response is sent to the complainant, who has the opportunity to submit his reactions to the Ombudsman within one month.[44]

At this stage, the institution itself has the opportunity to reconcile with the complainant. Some complaints are withdrawn at the end of this stage because the complainant is satisfied with the reasons given by the institution. These two types of complaints are also classified as "no ruling". The remaining complaints are filtered by the Ombudsman, who can decide, upon new facts arising from the responses, to continue the inquiry or to close the case.[45] After notifying both parties of the continuation of the inquiry, the Ombudsman will commence its own investigation.

The investigatory powers of the Ombudsman are fairly broad. For instance he is entitled to inspect files of the institution in order to

[37] *Heede, op. cit., at pp.140-142.*

[38] *Idem, at p.141.*

[39] *Decision of the European Ombudsman adopting implementing provisions, art. 2, para. 2 (8th of July 2002), available at; <http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm>.*

[40] *Idem, art. 3, para.3.*

[41] *Id., art.4, para.1.*

[42] *Id., art.4, para.2.*

[43] *Id., art.4, para.2. Note that the Ombudsman can extend this three month period.*

[44] *Id., art.4, para.3.*

[45] *Art. 4, para.5 Implementing Provisions.*

verify its response[46] or he can require employees of the institution to provide evidence.[47] Outcomes of the inquiry are either "no instance of maladministration" or "instance of maladministration occurred". In the latter, the Ombudsman will try to seek a friendly solution with the institution, if the complaint can be remedied.[48] When a friendly solution cannot be reached, the Ombudsman can either close the case with a critical remark[49] or in more serious cases with a draft recommendation.[50]

A critical remark will be informally followed up by the Ombudsman as a check to ensure the institution gave an adequate response. If a draft recommendation is prepared, the institution has three months to notify the Ombudsman of the measures taken to implement the recommendation.[51] When the institution has not responded within three months or its measures are not considered sufficient by the Ombudsman, a special report will be sent to the European Parliament where it will have a political follow-up.[52]

3.5 Outcomes of Ombudsman Inquiry

The Ombudsman can be qualified as a method of alternative dispute resolution or as a more quasi-judicial mechanism. Similarities can be found with a judicial procedure: time limits apply, independence of the executive, the creation of own case-law through repeating the same formulas and so forth.[53] These similarities are seen by critics as a "legalistic approach" of the Ombudsman towards its function and therefore diminishes its role as alternative dispute resolution.[54] However, there are also plenty of differences with courts such as: the gratuity of the service, speediness, flexibility, a broader range of activities and no legal interest.

Five different outcomes are possible from the Ombudsman's inquiries: no ruling, no maladministration, a friendly solution, a critical remark or a draft recommendation. As previously mentioned, cases closed under the heading "no ruling" can be settled by the

[46] *Idem, art. 5, para. 2.*

[47] *Id., art. 5, para. 3.*

[48] *Id., art. 6 and art. 3 (5) Statue of the European Ombudsman, O.J. 113 of 4 May 1994 (henceforth Statue of the European Ombudsman).*

[49] *Art. 7 Implementing Provisions.*

[50] *Idem, art. 8.*

[51] *Art. 8, para. 3 Implementing Provisions.*

[52] *Idem, art. 8, para. 4.*

[53] *Peters, op. cit., at p.716.*

[54] *Idem.*

institution or can be dropped by the complainant. If maladministration is found, the Ombudsman will try to seek a friendly solution with the institution. It allows the institution and complainant to settle with the proposed solution, which is written in a recommendation. Note that the Ombudsman does not mediate in this process, therefore few cases are closed in this manner. When a settlement is not reached, the Ombudsman can opt for a critical remark or a draft recommendation.[55]

In cases where an instance of maladministration can no longer be remedied and the maladministration has no general implications, the Ombudsman will make a critical remark to the institution.[56] As noted before, since 2002 critical remarks have an informal follow-up, meaning that the institution informs the Ombudsman of "*...how they have taken critical remarks into account in their activities*."[57] The strongest weapon of the Ombudsman is the draft recommendation, which is used in cases where the maladministration can be remedied or where maladministration has serious or general implications.[58] A special report to the Parliament follows when the institution's response is not satisfactory, however these reports are rarely sent.[59]

The Ombudsman only provides suggestions for a possible solution, thus the outcomes are not legally binding upon the institutions. The effectiveness of the outcomes is extremely dependent on the willingness of the Union institution involved.[60] National Ombudsmen have different characteristics,[61] which enable them to provide more effective outcomes. Firstly, in several Member States national ombudsmen have additional powers if the outcomes of their inquiries are not respected. For instance, the Danish Ombudsman can refer a case to a court and recommend free legal aid for the complainant. Danish courts will usually follow this advice and the legal reasoning of the Ombudsman. Secondly, national ombudsmen can profit from media coverage which can lead to public pressures on the legislator. However, the European Ombudsman lacks such 'pressure tools' for compliance.

[55] *Art.6 (3) Implementing Provisions.*

[56] *Idem, art. 7 (1).*

[57] *Speech by the European Ombudsman, Mr. Jacob Söderman to the Committee on Petitions concerning the presentation to the European Parliament of his Annual Report for 2002, 24th of March 2003, available at; <http://www.euro-ombudsman.eu.int/speeches/en/2003-03-24.htm>.*

[58] *Art. 8 (1) Implementing Provisions.*

[59] *Heede, op. cit., at p.187.*

[60] *Leino, op. cit., at p.363.*

[61] *Karkowska, U. "Concept, Function and Effectiveness of the European Ombudsman (I)" in Gries, T., Alleweldt, R. (eds.),* Human Rights within the *European Union (2004), at pp. 190-191.*

Furthermore, there is no 'EU media' that can lead to public pressure, as according to Weiler there is no European 'demos' to respond.[62]

The outcome of this mechanism is regarded as soft law,[63] since it has no place in the Union's legislative hierarchy.[64] In spite of the soft law character, the outcomes of the Ombudsman have been significant. Bonner describes the Ombudsman as a 'soft law laboratory'[65] and demonstrates the effectiveness with an example from the Article 228 TfEU procedure. This procedure enables the Commission to bring a Member State before the ECJ when it has failed to fulfil an obligation of the Treaty. The main source of information in Article 228 TfEU procedures is provided by individuals; however, these complainants have no procedural rights in these cases.[66] Due to the efforts of the Ombudsman new safeguards were established, such as the duty to inform the complainant on the closure of a case, the providing of a reasoning for the decision, and the invitation of a complainant to express his views on the case.

Another example that illustrates the effectiveness of the soft law outcomes emerges from the transparency field. In 2005, almost a quarter of all the cases where maladministration occurred dealt with a lack of transparency.[67] After two own initiative inquiries by the European Ombudsman nearly every Union institution adopted rules regarding the public access of documents.[68] Although the outcomes of the Ombudsman's inquiries are non-binding upon institutions and regarded as soft law, these examples illustrate that they can be effective.

[62] *Idem.*

[63] *Note that the notion of soft law is highly controversial. On this see for instance, Klabbers, J. "The Redundancy of Soft Law" Nordic Journal of International Law 1996, 65 (2), at pp. 167-182.*

[64] *Leino, op. cit., at p.363.*

[65] *Bonnor, P.G. "The European Ombudsman: a novel source of soft law in the European Union" European Law Review (2005), 25 (1), p. 41 (henceforth 'The European Ombudsman').*

[66] *Idem, at pp.47-48.*

[67] *E.O. Annual Report 2005, at p.161.*

[68] *Harden, I. "The European Ombudsman and the Right to Access to Documents" in Swiss Institute Comparative Law, European Integration: History and Perspectives (2001), at p.135 (henceforth 'The European Ombudsman and the Right to Access to Documents'). See also Harden, I., "The European Ombudsman's Efforts to increase Openness in the Union", in Deckmyn, V. (ed.), Increasing Transparency in the European Union? (2002), at pp.123-145. (henceforth 'The European Ombudsman's Efforts to increase Openness in the Union').*

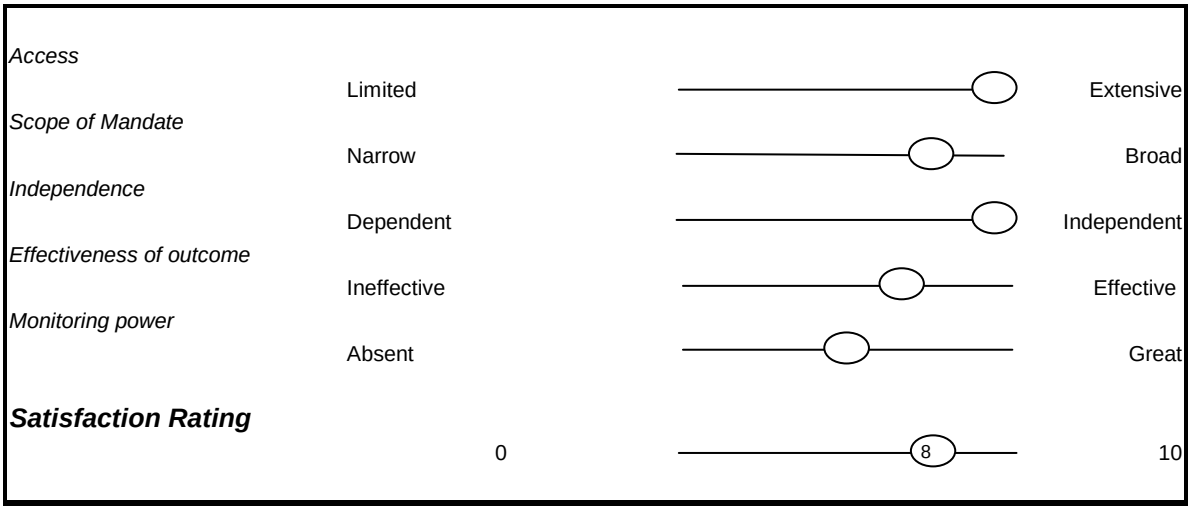
3.6 Usability of the Ombudsman mechanism

In Figure 4 the 'Usability test' evaluates the Ombudsman as a redress mechanism.

'Access' for tenderers to the Ombudsman is scaled as extensive. The Ombudsman hardly places any restrictions on the rules of standing. Even complainants who are not affected by the complaint have access to the Ombudsman. This means that a complaint can be lodged by:

"*Any citizen of the Union or any natural or legal person residing or having its registered office in a Member State of the Union...*"[69]

Figure 4; "Usability test on the European Ombudsman"



Fear of a flood of requests as a consequence of the broad standing rules does not play a role at the Ombuds-institute. Indeed, via the no-grounds rule and by combining identical complaints the Ombudsman can regulate the amount of complaints and prevent the institution from being flooded. Due to the informal procedure the Ombudsman can process more complaints than, for example, a court can.[70]

[69] *Article 2 (2) Statue of the European Ombudsman.*

[70] *Bradlow, 'A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions', op. cit., at p.30.*

The ‘scope of the mandate’ is scaled as rather broad An advantage of this imprecise mandate is the flexibility and possibility to adapt and is even vital to the Ombudsman as it differentiates its function from that of a judge. However, further clarification of its precise mandate is encouraged.

‘Independence’ is, as mentioned before, imperative for the proper functioning of any Ombudsman mechanism. Johnson sees it as an essential element of the Ombudsman:

> “*Independence means the ability to investigate, review, and decide on issues being reviewed without interference, actual or perceived.*”[71]

To achieve this independence, Johnson argues that the Ombudsman should report to Parliament instead of a Minister, Prime Minister or President.[72] Therefore, part of the Ombudsman’s independence is secured as the European Ombudsman reports annually to the European Parliament.[73] However, there are also other methods of establishing independence. The European Ombudsman cannot fulfil another function due to the ‘principle of incompatibility’.[74] And the Ombudsman is appointed by the Parliament, in order to guarantee the independence from the ‘executive’ (i.e. Commission).[75] As illustrated, several methods are used to ensure the independence of the European Ombudsman. This results in a rating of ‘independent’.

Regardless of their non-binding character, the outcomes of the Ombudsman’s inquiries are scaled as quite effective. Soft laws can, for instance, establish new procedural safeguards for citizens. Yet strengthening the function will only improve its effectiveness, for example through granting the Ombudsman (more) remedial powers. The Ombudsman has limited ‘monitoring powers’ to ensure the implementation of its proposed remedies. Its monitoring role can be included in its proposed solution to the parties and the Ombudsman can also informally follow up on critical remarks. However, the Ombudsman lacks more effective ‘pressure tools’ such as a legislator and media. The monitoring powers are therefore scaled as not fully existent.

[71] *Johnson, H. “Ombudsman -Essential Elements” in Hossain, K., Besselink, L.F.M., Selassie Gebre Selassie, H., Völker, E. (eds.),* Human Rights Commision and Ombudsman Offices: National Experiences throughout the World *(2000), at p.787.*

[72] *Idem.*

[73] *Article 195 Treaty of EC.*

[74] *Rzeźnik, J. “Concept, Function and Effectiveness of the European Ombudsman (II)”, in Gries, T., Alleweldt, R. (eds.),* Human Rights within the European Union *(2004), at p.200.*

[75] *Peters, op. cit., at p.713.*

From the overall findings of the 'usability test', it can be concluded that the Ombudsman is a highly attractive mechanism to adopt as a national procurement redress mechanism. The model has proven to be adaptable in almost every constitutional environment, as illustrated by the existence of approximately 120 ombudsmen in country offices, international financial institutions and the European Union. It is easily accessible for individuals and groups with a broad range of complaints, to which the Ombudsman offers effective solutions. It is important to note that the redress mechanism still needs to grow, amongst other things improving the effectiveness of its outcomes. However, if this institution were to grow more powerful, it could provide a good redress mechanism for tenderers. The satisfaction rating is therefore graded as an eight.

4. A future national public procurement Ombudsman

In the former chapter, the usability test illustrated that the Ombudsman institution is a highly attractive mechanism to adopt as a national procurement redress system. Hereinafter, a national procurement Ombudsman ('***Procurement Ombudsman***') is modelled that would be available in addition to the court system in order to provide tenderers a low threshold possibility of redress in public procurement disputes.

4.1 Characteristics of the Procurement Ombudsman

The Ombudsman will have two main missions, namely (1) to function as an information centre and (2) to mediate in disputes between tenderers and contracting authorities.

It is suggested that requests for information be separated from the redress/complaints system. Access for information must be as broad as possible to ensure that foreign tenderers can request all the information they need. The information can be requested before the procurement procedure or during this process. These questions can vary from simple questions where certain documents can be requested to technical questions about the procurement process itself. For the latter questions, it is suggested that these questions can only be asked during a certain stipulated period of time in the procurement procedure.

Furthermore, the Ombudsman will also provide for a complaint system where tenderers can file complaints against contracting authorities. The purpose of this system is not to have a prompt decision to stop the procurement procedure. Judicial procedures are

far more effective for those decisions. The purpose of the Ombudsman is to correct maladministration of contracting authorities, especially those who are notorious violators.

Often due to commercial or other reasons, maladministration's in procurements procedures are not challenged in court. This does not encourage the contracting authorities to obey the procurement rules and provide every tenderer a fair chance at the contract. The Ombudsman can in these cases on its own initiative or through a complaint, investigate the maladministration that occurred and take appropriate action(s). This could provide a preventive effect to correctly organise the procurement procedure. Especially, if the media can lead to public pressure.

Tenderers are granted wide access to the Procurement Ombudsman. Nationality and residence cannot restrict the access, as this is critical to international procurement. The complaints system will be limited to tenderers who have been or could have been affected by the maladministration of a procuring entity. This limitation would prevent the Procurement Ombudsman from being flooded with complaints.

The Procurement Ombudsman will primarily solve problems for tenderers affected by maladministration of the procuring entities. It will thus function as a mediator, giving friendly advice and encouraging the entity to adopt a solution. The inquiry to review if an instance of maladministration occurred could be opened on the basis of a complaint or of the Ombudsman's own initiative.

A broad mandate should be granted to the Procurement Ombudsman, since a flexible notion of maladministration is imperative for its proper functioning. Defining maladministration should be done by the Ombudsman and not another body. The notion should remain flexible, as it could be changed by the Ombudsman. This would enable it to integrate the various trends to which procurement law is subjected.

Independence would be a crucial factor for the Procurement Ombudsman. Part of the European Ombudsman's independence, as described above, is established because it is appointed by, and annually reports to the European Parliament. The Procurement Ombudsman should be transplanted into a national political system, where its independence would be secured. It is beyond the scope of this paper to discuss the transplantation of the Ombudsman model into a national system in depth.

Another important condition to ensure the independence of the Procurement Ombudsman is to somehow guarantee its autonomous position and attitude. Indeed, no organ should be able to influence the

Ombudsman and the Ombudsman itself should ensure it retains a certain amount of independence. The Procurement Ombudsman should preferably be a notable person in procurement law.

4.2 Ombudsman Procedure

The Procurement Ombudsman would focus on problem-solving and can only conduct a compliance review to a limited extent. A complaint could be lodged with the Procurement Ombudsman by any natural or legal person who has been affected or could have been affected by maladministration of a procuring entity. The complaint would concern an activity or inactivity of a procuring entity. Once the complaint is received, the Procurement Ombudsman would have to decide whether the complaints falls within its mandate and is admissible, in other words the Ombudsman would have the discretion to decide whether there are sufficient grounds to start an inquiry.

During the inquiry the Ombudsman should have adequate powers to investigate, which in turn would enable him to be more independent. The result of the inquiry would establish whether maladministration has occurred. If the answer to this is affirmative, the Ombudsman either closes the inquiry with a friendly solution, critical remark or a draft recommendation. All these outcomes of the Procurement Ombudsman are legally non-binding.

It is crucial to its functioning that these outcomes do have proper effects on the behaviour of procuring entities. In another words, the procurement watchdog should have teeth to be able to effectively counter maladministration by procuring entities. If a procuring entity fails to take appropriate measures, for instance, a special report with this draft recommendation should be sent to the national parliament or other national institution by the Procurement Ombudsman's office.

5.Conclusion

Tenderers in public procurement have a need for a national procurement redress mechanism that is easily accessible, as an alternative to legal procedures. In this article the appointment of a Procurement Ombudsman as a national procurement mechanism is proposed. In order to examine the usability of an Ombudsman-institution, an analysis of the European Ombudsman was done through a 'usability test'. The outcome of the 'usability test' is that it is highly attractive to create an Ombudsman-institution as a procurement redress mechanism.

To recapitulate, a future national Procurement Ombudsman could be modelled as follows. The Ombudsman would hold procuring entities accountable for maladministration and would function as a mediator between procuring entities and tenderers. If the procuring entity fails to act in accordance with the procurement rules which is binding upon it, the Procurement Ombudsman would encourage the entity to settle on a friendly solution, act upon a critical remark or take action in line with the draft recommendation. The tenderer would have an easily accessible and independent redress mechanism with a flexible mandate. Despite the non-binding character of the outcomes, the Ombudsman would offer effective results.

The Procurement Ombudsman should also play an important role in providing information and answering questions of tenderers. Not only is this significant for tenderers in that specific country, it can also facilitate foreign tenderers for whom national procurement laws and systems are not familiar ground.

The need for a national redress mechanism needs to be addressed. In this article, a possible solution is proposed to address this need, namely a national Procurement Ombudsman. It would extend the possibilities to remedy maladministration in procurement procedures and would make procuring entities more aware of their actions.

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