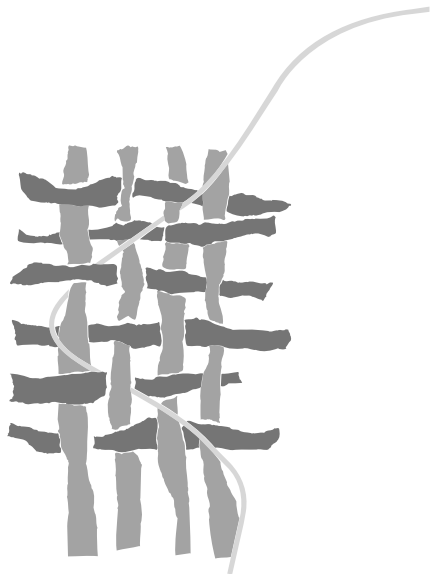
The European Ombudsman

Origins, Establishment, Evolution



Office for Official Publications of the European Communities
Luxembourg

Luxembourg: Office for Official Publications of the European Communities, 2005

ISBN 92-95022-85-8

Printed in Belgium

PRINTED ON WHITE CHLORINE-FREE PAPER

Contents

CHAPTER 2

The Spanish Proposal to the Intergovernmental Conference on Political Union

Carlos Moreiro González

1 Introduction

This study analyses the background, content and legal effect of the Spanish contribution to the Intergovernmental Conference on Political Union (IGC-PU), which adopted the creation of the European Ombudsman in the Treaty on European Union (TEU, 1992).

A favourable climate came about for the creation of this supranational body when two different ideas concerning the process of Community integration came together in the last decade of the 20th century: the federalist perspective of the Belgian, Greek and Spanish governments, and the euro-scepticism of the Danish government.

The task of defining the legal model succeeded in this exceptional political climate, despite the strong reservations of the more supranational institutions, the European Parliament and the European Commission, which were unwilling or unable to see at the time how useful the new body would be in galvanising efficiency and democracy within the context of the European Union's unfolding institutional dynamic.

While the Spanish Government contributed to the eventual success of the creation of the Ombudsman, this was more due to the existence of political will favouring creation of the institution rather than to the legal feasibility of the model set out in the Spanish proposals to the Intergovernmental Conference.

2 The Context of the Spanish Contribution

The proposal was originally influenced by two elements: the political approach to the integration process of Felipe González, the Spanish Prime Minister at the time, and the legal form of the Ombudsman in the 1978 Spanish Constitution.

The Madrid European Council, which called the IGC for the signing of the Maastricht Treaty, set objectives concerning only the economic and monetary integration of the Member States of the European Economic Community [1].

It was soon realised, however, that it was risky to deepen Community institutional action in the economic sphere without a firm political anchorage among the citizens of the Member States. The creation of a "European public space" to transcend the mere notion of the citizen as the one to whom supranational law is addressed assumed its own specific importance during the debate leading up to the beginning of the Intergovernmental Conference [2].

In a letter dated 4 May 1990, addressed to the Irish Prime Minister (President-in-Office of the Council), Felipe González advocated the creation of a "common citizenship" which would make citizens the protagonists in the integration process, even though the rights to be attached to the new Community legal status had not yet been defined [3].

The political climate had already been prepared by the "*aide-memoire*" of 26 March 1990 from the Belgian Government, addressed to the Council, which referred to 'the citizens' Europe' as one of the issues that should be included on the Agenda for the IGC. In general terms, the Belgian Government was referring to free movement, drawing up a declaration on human rights, and exercising the right to vote in local and European Parliament elections [4].

In any case, the very political notion that was essential to the creation of the status of European citizenship constituted, for at least

---

1 26-27 June 1989, *EC Bulletin*, 6-1989, pp. 8-17, Point I.1.11, p. 12.

2 P. Solbes Mira, "La citoyenneté européenne", *Revue du marché commun et de l'Union européenne*, 345, 1991, pp. 168 ff.

3 Text published in *Revista de Instituciones Europeas*, 1990-3, pp. 780-781. The Greek Government issued a memorandum supporting Prime Minister González's letter on 18 May 1990, in which it gave its own proposals regarding the notion of European citizenship and citizens' rights in the future 'European Community'; SI (90), p. 393.

4 SI (90), p. 232.

two reasons, the basis that would later support, if not justify, the creation of the European Ombudsman. Firstly, because much in the same way as this institution is regarded as one of the essential ingredients of contemporary constitutionalism, its acceptance at the supranational level formed part of the constitutionalisation of Europe. Secondly, because, once it was in operation, it would strengthen citizens' confidence in the European Union's institutional mechanisms, by giving them a new channel for monitoring those mechanisms.

Underlying the Spanish proposal was also the legal concept of the Ombudsman coined in Article 54 of the 1978 Spanish Constitution and Organic Law 3/1981 (6 April) on the *Defensor del Pueblo* (LODP), amended by Organic Law 2/1992 (5 March) (*Boletín Oficial del Estado*, 6 March 1992), which, in summary, establish a constitutional body [5] that is independent and exercises monitoring on two fronts (administrative activities and fundamental rights). Since it served as background for what eventually emerged as the Spanish proposal to the IGC, a brief description of its salient features and powers within the Spanish legal order is warranted.

In this sense, Article 9 of the LODP allows subsidiary monitoring of acts of "maladministration", except for the judicial function of the administration of justice (Article 117 of the 1978 Spanish Constitution, and Articles 13 and 17 of the LODP), and acts of the Head of State.

The active legal standing of the Ombudsman therefore enables him to act via claims of unconstitutionality and actions for infringement of fundamental rights and bring civil liability actions (Article 162.1 of the 1978 Spanish Constitution and Article 26 of the LODP respectively).

In addition to the extensive legal capacity recognised in the Spanish legal order, the Ombudsman also has a considerable degree of operational autonomy expressly recognised in Article 6.1 of the LODP. Therefore, although he is appointed by Parliament, he may only be dismissed by the same body for "clearly neglecting to fulfil the obligations and duties of the position" (Article 5.4 of the LODP).

---

[5] Although the Spanish Ombudsman does not have a constitutional function of creating law, the institution is expressly provided for in the Constitution and, through its functions, has an important position in the constitutional system.

However, both in his appearances before the Spanish Joint Congress-Senate Committee and in the annual report to the plenary session of Parliament, his actions are not put to the vote, adopted or rejected, nor are any opinions issued on them.

The Spanish legal order establishes a generous framework for providing subjective and objective access to the Ombudsman. Based on some minimum requirements for legitimacy laid down in Article 15.1 of the LODP, "...any claim made to the Ombudsman by an individual or group of people requesting his intervention in order to obtain clarification of an act or decision of a Public Authority, his agents and administrative authorities" [6] is accepted as a complaint. The complaint or claim must, however, "directly concern" the plaintiff (Article 10 of the LODP), a requirement that does not prevent claims from being made in order to protect so-called "diffuse rights".

This legal framework designed to ensure the strength and effectiveness of the Ombudsman is certainly partly due to the fact that contemporary Spanish constitutionalism places little emphasis on exercising the right of petition in a decentralised State [7].

There was specific internal legislative action with regard to the decentralisation of government administration in order to specify the extent of the Ombudsman's powers [8]. Article 2 of Law 36/1985 (6 November) establishes a system of powers that are "exclusive" and "concurrent" with its counterparts in the Autonomous Communities [9].

It is not difficult to imagine that the transposition of this constitutional system into the Spanish proposal submitted to the IGC was more an act of political will than one of legal realism. The proposal was scarcely viable for several reasons. The first was that the Community institutional system does not exactly reflect the tradi-

---

[6] Ombudsman's Management Report to the plenary session of the Spanish Parliament, 27 September 1984, p. 24.

[7] The bulk of monitoring of the executive by Parliament is done through formal questions in Parliament, appearances, investigation committees and debates on budgets.

[8] According to Article 54 of the Constitution and Article 12.2 of the LODP, the Ombudsman's powers cover "all the activities of the Administration".

[9] The Spanish Ombudsman has the sole authority to monitor the activities of the State Public Administration Bodies that act within the Autonomous Communities. A co-operation system was established enabling these bodies to assist the Ombudsman when asked to do so, and to receive complaints that may subsequently be referred to the Spanish Ombudsman, if they fall within his remit.

tional division of powers in a democratic State, which is the ombudsman's "natural habitat".

The second reason was that the lack of a list of the fundamental and administrative rights of Community citizens meant that there was no objective basis to justify the creation of a "constitutional body" at the supranational level.

Finally, a third reason lies in the decentralised nature of the Community administration, which, as a result, does not have a powerful administrative apparatus that directly and specifically affects the subjective situations of the majority of the citizens in the Member States.

3 The Content of the Contribution

The contribution of the Spanish delegation to the IGC consisted of two main documents: the Note on citizenship submitted just before the start of the IGC, on 24 September 1990 ("The road to European citizenship") [10], and the proposal for a text on European citizenship presented to the Intergovernmental Conference on Political Union on 20 February 1991 [11].

3.1 The Note on citizenship

The Note on citizenship considered complaints to a "European Ombudsman" to be among the mechanisms for guaranteeing the new concept of 'European citizenship' [12] (Point II(e)).

Although it established that citizens should have their specific rights protected through "petitions or complaints" to the Ombudsman [13], this right was not included among the "special basic (or fundamental)" rights of citizens, that is, free movement, free choice of place of establishment and political participation in that place.

The content of the Note sent a clear federal constitutional message that the inclusion of freedom of movement and establishment in the

---

[10] SN 3940/90.

[11] *Revista de Instituciones Europeas*, 1991-1, pp. 405-409.

[12] Defined in point I, paragraph four, as "the individual and inseparable status of nationals of the Member States, who by their membership of the Union are subject to special rights and duties concerning the Union..."

[13] It also establishes that the European Ombudsman may act through the 'Ombudsmen' or equivalent figures in the various Member States.

Treaties was to serve as the cornerstone for the future model of political integration. Consequently, both the creation of an ombudsman and granting citizens access to him were only incidental (or additional) elements, which could well have been lost during the negotiations at the IGC on Political Union, if serious difficulties were encountered in arriving at an agreement among the delegations.

In principle, the Spanish Note received lukewarm acceptance. In its mandatory Opinion of 21 October 1990 [14], the Commission openly supported it (Point III.2), although the list of the fundamental elements that would make up the future Statute of European citizenship made no reference to the right of access to the Ombudsman.

In the same way, in its resolution on the Martin report [15], the European Parliament asked for the political notion of citizenship to be incorporated into the Treaty, without advocating a specific legal articulation of rights and freedoms.

The only record of explicit support for the creation of the Ombudsman was in the Danish memorandum on Political Union of 10 October 1990 [16].

More importantly, the Presidency Conclusions of the Rome European Council (14/15 December 1990), prior to the IGC, set the mood for the future negotiations by taking on board the notion of citizenship and inviting the Conference to look at creating a European Ombudsman [17].

3.2 The proposal for a text on European citizenship

The proposal for a text on European citizenship presented to the Intergovernmental Conference on Political Union (IGC-PU), on 20 February 1991, set out in more detail the legal and operational aspects of the European Ombudsman.

The content of Article 2 of the Proposal was in principle particularly striking, as paragraph 1 stated, firstly, that the Union and its Member States shall respect the fundamental rights recognised by their constitutional traditions and by the European Convention for

---

[14] COM (90) 600 final.

[15] Doc. A3-281/90.

[16] SI (90) 751. Also in the Non-Paper of the Friends of the Presidency Group, SI (90) 963.

[17] *EC Bulletin*, 12-1990; p. 17.

the Protection of Human Rights and, secondly, that the Union takes on (in terms of inclusion in the *acquis*) this Convention [18]. In addition to these statements was the ambitious innovation in paragraph 2 which gave the Union the task of establishing the system whereby citizens of the Union and those who did not have that status "may avail themselves of the rights guaranteed" in Article 2.1 [19].

This provision links with the powers (or scope of competence) given to the European Ombudsman in Article 9 of the Spanish Proposal, which implied an extension or implicit recognition of the capacity of the Ombudsman to monitor the respect for fundamental rights in Community administrative acts. It also extended the subjective scope by granting non-citizens access to the Ombudsman.

However, its general wording (since it does not propose a precise relationship with fundamental rights for citizens of the Union) contrasts with the recognition of specific citizenship rights in Articles 4 to 9 of the same Proposal.

There are various evaluations that can be made of the content of Article 9. The proposed body is defined using three alternatives, one main and two subsidiary ones. Firstly, the text of Article 9 refers to the "appointment" in each Member State of a "Mediator"that would be politically accountable to the European Parliament through "soft law" monitoring, that is, the submission of an annual report. Alternatively, two other possibilities could be considered: the creation of a "European Ombudsman" which could be an independent body of the Union or be accountable to the European Parliament; or the creation of a European "Ombudsman" to reinforce the action of the national "mediators".

---

[18] These statements were certainly difficult to fit in with the Community's legal situation at that time. Firstly, the statement that each Member State would respect the constitutional traditions of the other Member States was ambiguous. Secondly, the statement that the Union "took on" (or adopted) the European Convention was also vague, as this could take place through a classic 'international succession' from the Union to its Member States, or by the Union signing the Convention.

Finally, Article 2 of the TEU included respect by the Union for fundamental rights in very similar terms to those in the Spanish proposal, although it reproduces the content of the Preamble of the Single European Act, in any case excluding Article B of the TEU and Articles 8 - 8E of the TEC from the Statute on citizenship. This provision proved to be more appropriate and was therefore included in the EU's principles and objectives.

[19] It should be pointed out that this wording was subsequently endorsed by the Proposal of the European Parliament to the IGC: Recital G of the Resolution of 14 June 1991 (DOC. PE A3-139/91, *Official Journal* 1991, C 183 p. 362), and document CON-UP-UEM 2010/91, R/LIMITE.

The first model would generally give the national "mediators" appointed in each Member State the broadest capacity to monitor compliance with Community law at the domestic level. Such an ambitious proposal was difficult to implement, particularly considering that not all the Member States have a mediator with national jurisdiction, or that they may not all be aware of the concept of a mediator. Consequently it would have been difficult to reconcile the introduction of this type of body into the constitutional systems of the Member States with the requirement to respect their national identities (Article 6.3 TEU).

This is why the two other alternatives were then produced, without, however, clearly setting out the model, since creating an independent European Ombudsman (with the level of autonomy enjoyed, for example, by the Governing Council of the European Central Bank), and making him accountable to the European Parliament (turning him "*de facto*" into a committee of Parliament) are two quite different things. What would be even more difficult would be to create a residual body whose function would be to "perfect" the work of the national mediators.

The lack of precision characteristic of the model contained in the Spanish proposal is even more paradoxical, if one analyses the actual scope of action of the "Mediator" in each Member State. By stating that "its mission will be to help citizens of the Union to defend their rights under the Treaty", the proposal provides direct authorisation not only to deal with the rights granted specifically in the various Treaty provisions, but also to safeguard the fundamental rights generally granted under Article 2 of the Proposal.

Article 9 also gives the Ombudsman powers to oversee the administration of all the bodies responsible for implementing Community law (..."before the administrative authorities of the Union and its Member States"...), and fully entitles him to take legal action at the national and supranational levels (..."[and] to invoke such rights before judicial bodies, on his own account or in support of the persons concerned"...) [20].

Finally, Article 9 also allows the Ombudsman to deal immediately and specifically with citizens of the Union in order to provide them

[20] See p. 250 below.

with concise and comprehensive information regarding their rights and how to implement them.

The Spanish proposal was rejected by the European Parliament and the Commission, while receiving some support from certain government delegations at the IGC. The European Parliament's opposition derived mainly from the perceived erosion of its powers based on two grounds: the absence of the right of petition from the specific citizenship rights contained in Articles 4-9 of the Spanish proposal, and the possible diminution of the role of the Committee on Petitions following the creation of a European "Mediator" or "Ombudsman".

In this respect, some of the points contained in the European Parliament's Resolution on the operation of the Committee on Petitions in the parliamentary year 1990-1991 [21] are particularly enlightening. Having, in Point 1, affirmed the importance of petitions in the life of the Communities in providing an individual link with citizens, Points 11, 12 and 13 clearly state Parliament's opposition to the creation of a "European Ombudsman" and object, without being specific, to "certain proposals" submitted in this respect to the Intergovernmental Conference on Political Union [22]. Point 10 also highlights the increase in co-operation between the Committee on Petitions and the "ombudsmen and committees on petitions" of the national parliaments, and adds that such co-operation provides "an adequate structure for defending citizens in their relations with the authorities at national, local and Community level". Parliament's position thus entirely discredits both the need to create an "ombudsman" and all three alternatives for doing so contained in the Spanish Proposal.

A degree of support for the European Parliament's apocalyptic view was also to be found in the European Commission. In its proposal of 28 February 1991 [23] for a text on Political Union, the Commission avoided taking a position on the creation of the European Ombudsman. However, as a reaction to the Danish Proposal in

---

[21] Resolution of 14 June 1991 on Report A3-0122/91, *Official Journal* 1991 C 183, p. 448.

[22] For example, Point 11 states that a "European Ombudsman" will reduce the power of Parliament and its committees to oversee the Commission, creating a new structure that would overlap with the Committee on Petitions. And Point 13 states that it would serve only "to undermine the functioning of the institutions".

[23] SEC (91) 412.

March 1991, it advocated establishing a co-operation mechanism among the "ombudsmen" in the Member States regarding the emerging subsidiarity principle (thereby avoiding the creation of a European Ombudsman). Given the more immediate contact which existed between citizens and their national "ombudsmen" and their greater familiarity with the intricacies of their respective public authorities, such a mechanism of co-operation would, in the Commission's view, help increase efficiency in monitoring Community law.

Finally, the draft Treaty presented by the Luxembourg Presidency to the European Council on 28-29 June 1991 and eventually accepted, included the basic features of the Spanish proposal on citizenship but not the model for the *Defensor* (Mediator, Ombudsman) contained in Article 9 of the text [24]. Neither the Dutch Presidency's draft Treaty of 24 September 1991 nor the final text of the Treaty on European Union (signed at Maastricht on 7 February 1992) made substantial modifications in this respect.

In summary, the Spanish proposal had the significant merit of anticipating a model of ombudsman which would have been ideal if implemented at a more advanced stage in the process of political integration. It was a maximalist, but not very pragmatic, proposal in terms of clarifying the Ombudsman's powers and the political context in which it was formulated. This was perhaps the reason for opting for the minimalist proposal advocated by the Danish delegation, which only gave the Ombudsman competence to inquire into possible instances of maladministration in the activities of Community institutions and bodies [25].

4 Conclusion

The significance of the Spanish contribution to the creation of the European Ombudsman in the Treaty on European Union lay, above all, in the fact that it revitalised the idea that the Danes had put for-

---

[24] Text of the Conclusions of the Luxembourg European Council in *Europe Documents*, Nos. 1722-1723 (5 July 1991).

[25] The proposal to introduce a new Article 140A into the Treaty gave it power "[to] receive communications from physical and legal persons residing in a Member State about deficiencies in the institutions' administration".

ward during the last phase of the negotiations on the 1986 Single European Act, but which was not taken on board at the time because the Danish proposal was made very late in the negotiations at the Intergovernmental Conference.

Consequently, it also had the merit of launching the debate regarding the need to create this new body, with more support from Parliament and the European Commission than from the majority of the delegations representing the governments of the Member States.

While it is true that the February 1991 Spanish proposal for a text on European citizenship gave the greatest possible powers to the "Mediator" (or mediators), it is equally certain that it failed to address questions relating to the delicate institutional balance at the Community level. No reference was made to its Statute, to how it would be appointed or elected, to its functional autonomy and to how it would operate as an institution.

All these are highly important details, which were eventually addressed in the Danish proposal. The technical and legal skill underpinning the latter proposal undoubtedly helped ensure the smooth progress of the political negotiations and, in my view, was the necessary catalyst for including in the text of the Treaty the model and specific form of the European Ombudsman that are still in force.