



NOTE: ADMISSIBILITY OF COMPLAINTS TO THE EUROPEAN OMBUDSMAN

Cross-unit taskforce: Brexit's administrative consequences for the European Ombudsman

This note answers to the request from the SG for a brief analysis on:

1. Whether a complaint from an EU(-based) (legal) representative acting for a complainant/client that is not an EU national or resident, is admissible?
2. What the term "registered office" in our statute means?

These questions arose in the context of the impending withdrawal of the UK from the EU (Brexit), but are of relevance to the office more generally. The office does receive complaints from non-EU citizens/residents from time to time. It is important that the European Ombudsman is consistent as regards dealing with such complaints.

1. Admissibility requirements of the European Ombudsman

The admissibility requirements of the Ombudsman are laid down in the Treaties and in the European Ombudsman's Statute ('the Statute'). According to those rules, the Ombudsman is empowered "*to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State*" (Article 228 (1) TFEU).

The Ombudsman was established with the Maastricht Treaty and the right to complain to the Ombudsman was included as part of provisions concerning EU citizenship, which every national of an EU Member State has. EU citizenship came with a set of rights, including the right to "apply to the European Ombudsman" (Article 20 (d) TFEU).

Thus, in the Treaties, admissibility of complaints is linked to EU nationality or residence, and the fact that EU citizenship rights include turning to the Ombudsman, seems to strengthen this link.

The right to turn to the Ombudsman has now become a fundamental right under the EU Charter of Fundamental Rights, linked to the right of good administration (see Articles 41 and 43 of the Charter).

The Statute specifies the admissibility criteria.

In order for a person or legal entity to be eligible to submit a complaint to the EO, he/she/it needs to be:

- a citizen of the EU, meaning a national of an EU Member State;
- a resident (thus, nationals of third countries) of an EU Member State; or
- a legal person having its registered office in an EU Member State. (See part 3 below.)



Besides, for a complaint to be admissible **the complaint must allow the (legal) person lodging the complaint to be identified** (Article 2 (3) of the Statute).²

The Statute does not mention the possibility of submitting complaint through intermediaries, other than through a Member of the European Parliament (Article 2 (2) of the Statute) in which case it is possible that a MEP submits a complaint that concerns a non-EU citizen or company.

2. Admissibility of complaints from EU legal representatives acting for third-country clients

Based on the above considerations, the question that then arises is whether an **EU-based law firm or EU lawyer or any kind of EU representative can file a complaint on behalf of a natural or legal person, not covered by the admissibility provisions laid down in the Statute and in Article 228 TFEU.**

Two situations can be envisaged.

a) A complaint 'on behalf of' a client

An EU lawyer may turn to the Ombudsman stating in the complaint form that it is **on behalf of** a natural or legal person. In such cases where the person/entity represented by the lawyer does not fulfil the admissibility requirements, the Ombudsman may decide that **the complaint is not admissible.**

The reason being that one may take the view that such a complaint circumvents the admissibility requirements.

It is worth considering that the option of redress by turning to the Ombudsman does not require legal representation (contrary to going to the Court of Justice of the EU). Were the Ombudsman to accept that a complaint from a non-EU citizen/resident is admissible due to the fact that it is represented by an EU(-based) lawyer, that would be – at least to a degree – at odds with this notion of not requiring legal representation.

It would also create a potential inequality between non-EU citizens or residents in terms of their ability to turn to the Ombudsman, given that legal representation, as do other forms of representation, can be costly.

If however such a complaint raises more systemic issues of importance to the Ombudsman, then the complaint could be dealt with as an own initiative inquiry.

² Other admissibility requirements are: (i) the complaint must concern a matter of administration (as opposed to a matter that concerns the political choices of an EU institution); (ii) the complaint must have been preceded by appropriate administrative approaches, meaning that the complainant must have tried to resolve the issue with the EU institution, agency or body concerned, before turning to the EO; (iii) 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; (iv) the facts on which the complaint is based cannot be subject to court proceedings.



b) A complaint made by a lawyer

An EU lawyer may decide to **file a complaint, 'in principle', of its own motion**. In such a case, the following considerations arise:

- First, the right to turn to the Ombudsman is a fundamental right under the Treaty and the Charter. The Court of Justice has stated that a fundamental rights and principles in EU law *must be interpreted broadly*, and exceptions to those rights must be interpreted *restrictively*.³
- Second, the Statute is silent as to whether the complainant needs to be 'directly and individually concerned' by the possible instance of maladministration, or whether it needs to have a legal interest in filing a complaint, which is the case for bringing annulment proceedings before the General Court of the EU (Article 263(4) TFEU).
- Third, the Statute requires that the complaint needs to be preceded by '**appropriate administrative approaches**'. However, it does not specify who must have carried out those prior administrative approaches. Thus, the question that arises is those appropriate administrative approaches must have been carried out by the complainant. In this regard, the practice of the Office varies, but it appears that some degree of connection must exist with the complainant, at least to the extent that the complainant should be able to provide documents to prove that prior administrative approaches have been completed.

In light of the above considerations, the answer would demand a **case-by-case analysis**. In light of the broad interpretation that must be given to the right to complain to the Ombudsman, **this right may be restricted only in duly justified circumstances**. In that sense, it is safe to 'restrict' that right when it is **clear that the complaint is made on behalf of the person/legal entity represented by the lawyer**. However, when the complaint is presented as filed by EU lawyer/law firm, without any direct reference to a client, the complaint should, in principle, be admissible provided it was preceded by appropriate prior administrative approaches.

3. The concept of 'registered office'

Registered office is a concept that is included in the Treaties' provision regarding the fundamental freedom of establishment. Article 54 of the Treaty on the Functioning of the European Union states that:

³ See Judgment of the Court of Justice of 17 October 1991, *Commission v Denmark*, C-100/90, ECLI:EU:C:1991:395, para 11; judgment of the Court of Justice of 9 November 2000, *Yiadam*, C-357/98, ECLI:EU:C:2000:604, para 24.



'Companies or firms formed in accordance with the law of a Member State and having *their registered office, central administration or principal place of business within the Union* shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.'

A company's registered office is commonly understood as its official address in the State where it was incorporated and which is registered in the official register. The company's 'real seat', however, refers to the place where the centre of administration and control is located. **Article 54 TFEU shows that the real seat and the registered office need not necessarily coincide under EU law.**⁴

A company's registered office is not a branch, which is a secondary office of the same company, part of the same legal entity.⁵

A subsidiary, on the contrary, is legally independent of the parent company by which it is controlled.⁶ A subsidiary has its own registered office an "autonomy" under EU law. It may occur that a global holding company has subsidiaries in an EU Member State. The fact that the group or holding company may have their own registered office does not mean that that office "replaces" or absorbs" the registered office of each controlled or subsidiary company.

Both Article 228 of the Treaty and Article 2(2) of the Statute refer to a legal person's registered office. The registered office of the legal person is thus that of the legal entity that complains to the Ombudsman. **The practical implication is that if a complaint is filed by any of the subsidiaries of a wider group of companies, with a registered office in the EU then the admissibility is met.**

END OF NOTE

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⁴ The Court of Justice has confirmed this reading in its case law on freedom of establishment. See judgment of the ECJ of 27 September 1988, *Daily Mail and General Trust*, case 81/87, EU:C:1988:456, paras 19 to 21; judgment of the ECJ of 25 October 2017, *Polbud*, Case C-106/16, ECLI:EU:C:2017:804, paras 34.

⁵ See judgment of the Court of Justice of 9 March 1999, *Centros*, C-212/97, ECLI:EU:C:1999:126, paras 19-30.

⁶ Opinion of Advocate General La Pergola of 16 July 1998 in *Centros*, C-212/97, ECLI:EU:C:1998:380, point 15.