



The European Ombudsman. Frontex and Fundamental Rights

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Abstract

The European Union system is characterized by the presence of the European Ombudsman (also known as the Ombudsman), a special figure, strengthened over time, which translates the will to prepare an ever wider protection of the rights recognized by European Union law, not only for European citizens, but also for residents of a member state, whether natural or legal persons. On 1 October 2013 Emily O'Reilly¹ took up the first position at the European Ombudsman and continued the path started by her predecessors in order to support the EU institutions to become more effective, transparent and accountable. This statement of purpose it is based on the binding legal value obtained from the Charter of Fundamental Rights with the entry into force of the Treaty of Lisbon. As far as it is important for our purposes, the extension of the right to good administration in the activities of the European institutions is being strengthened.

Keywords: European Parliament, Unione europea, European Ombudsman, clause of solidarity, Charter of Fundamental Rights, Frontex and fundamental rights.

Introduction

In art. 41 Card (The text says: "The right to good administration." 1. Everyone has the right to have issues that concern them dealt with in an impartial and fair manner and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes in particular: a) the right of every person to be heard before an individual measure that causes harm is taken against him; b) the right of everyone to have access to the file that concerns him, subject to the legitimate interests of confidentiality and professional and commercial secrecy; c) the obligation of the

¹ He was Ireland's Ombudsman and Irish National Information Commissioner (2003-2013), award-winning journalist political editor and television author.

administration to justify its decisions. 3. Everyone has the right to have the Union remedy any damage caused by its institutions or by its employees in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Any person can address the institutions of the Union in one of the languages of the Treaties and must receive an answer in the same language") the right to refer cases of maladministration to European Ombudsman, in the action of institutions, bodies and offices of the Union.

The Code of Good Administrative Conduct specifies that "we speak of maladministration when an institution does not perform a proper action, acts irregularly or acts illegally".(L.Cominelli, European Ombudsman, Union Ombudsman, 2005)Some examples may be: administrative irregularities, injustice, discrimination, abuse of power, lack or refusal of information and unjustified delay. Therefore, the violation of EU law is not necessary, but the opposition to the criteria of transparency, efficiency, justice and fairness in public relations is sufficient. For this reason, it is believed that the complaint to the European Ombudsman (E.Vinci 1992) is configured as a "means of protection of the person being administered", since the complaint may concern general profiles of the action of the European administration or widespread interests.(M. Condinanzi 2006)

Another feature is that the Ombudsman can conduct investigations on his own initiative. Thanks to this ability to act *motu proprio*, it can be concluded that the duty of the Ombudsman is not to provide the complainant with remedial or compensatory protection, but to exercise real control over all divisions of the European Union (with the exception of the Court of Justice in the functions of its judicial.)(C.Sanna ,Art 228, in F. Pocar, M.C. Baruffi , Short Commentary on the Treaties of the European Union, 2014) The activity of the Ombudsman gives security to this Union of ours, as it strengthens the sense of belonging to an increasingly complete organization, curbing the state of dissatisfaction with the European system, which sometimes remains in some of us. An implicit dependence of the Ombudsman on the European Parliament can be established since it is the EP itself that elects him and approves the Statute¹, in the exercise of supervisory activity. The Treaty of Lisbon has underlined the elective nature of the appointment of the Ombudsman, previously appointed only by the European Parliament.(The Court of Justice ruled out that "it is for the Assembly to influence the activity of the Ombudsman" and specified that «the powers available to the European Parliament vis-à-vis the Ombudsman cannot be configured as powers of judicial review" (Court of Justice, 23 March 2004, C-234/02 P, Lamberts v. European Ombudsman and Parliament). This change is aimed at strengthening the independence and autonomy (P. Soave, Art. 228, in C. Curti Gialdino (directed by), European Union Operational Code, 2012) that should characterize the figure of the People's Advocate so that his activity is as effective as possible and close to the citizens. However, this consideration should not lead us to believe that this system

¹ See the articles 24, paragraph 3 and 228 TFEU; 204-206 reg. internal PE cit.

cannot be perfected: precisely because, over time, the Ombudsman has proven to be a leading figure within the Union in ensuring the protection of citizens, it is necessary to continue looking for improvements.

An investigation by the Ombudsman: Frontex and fundamental rights

As part of an investigative procedure activated by the Ombudsman on his own initiative (this is case OI/5/2012/BEH-MHZ, opened by the previous Ombudsman P. Nikiforos Diamandouros, but closed by present), the respect of fundamental rights by the European Agency for the Management of International Cooperation at the External Borders of the Member States of the European Union, known as Frontex (B. NASCIMBENE, A. DI PASCALE, The exceptional influx of people from North Africa and the European Union), was verified. This Agency is responsible for coordinating joint operations with Member States at the external borders and assisting States in returning third-country nationals residing illegally in the territory of the Union.

In the exercise of its activities, Frontex is bound by the Charter of Fundamental Rights of the European Union (this is confirmed by the art. 1, par. 2, of the Regulation: «The Agency carries out its functions in full compliance with the relevant Union legislation, including the Charter of Fundamental Rights of the European Union ("Charter of Fundamental Rights"), the relevant international law, including the Convention Relating to the Status of Refugees signed at Geneva on 28 July 1951 ("Geneva Convention"), the obligations relating to access to international protection.) In particular, that *fini dell'inchiesta, assume rilievo precipuo il principio di non respingimento come diritto fondamentale dei migranti sancito espressamente dall'art. 2, par. 1 bis del Regolamento, ma, più in generale, intrinsecamente correlato al divieto assoluto di tortura* (Art. 4 Charter of Fundamental Rights of the European Union: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". While it should be noted that this prohibition is part of customary law, it should be emphasized that it is enshrined in various conventions, including the 1951 Geneva Convention on the Status of Refugees, expressly referred to in the Regulation, the European Convention on Human Rights (art 3), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.) In substance, the migrant is non possono essere in alcun caso respinti in uno Stato in cui rischiano di subire atti di tortura o trattamenti inumani o degradanti.

In this regard, we recall the judgment of the European Court of Human Rights in the case of *Hirsi and others v. Italy*.(ECtHR, Grand Chamber, 23 February 2012, *Hirsi Jamaa and others v. Italy*, application n. 27765/09. This punishment certainly did not come suddenly. In fact, there have been many warnings and warnings about Italy. Among them, we note the 2010 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Report to the Italian government on the visit to Italy carried out by the European Committee for the

Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009), which condemned the so-called "operations of maritime interception and detention" of migrants, aimed at their mass return to Algeria and Libya, in implementation of the Memoranda of Understanding between Italy and these two countries, without performed no examination of

asylum applications.) The applicants, citizens of the Horn of Africa, complained that they had been rejected on the high seas by the Italian navy and returned to Libya, from where they had left, without being given the opportunity to seek asylum. According to the Court, there was a violation of the article. 3 of the ECHR, as migrants risked suffering inhumane treatment or acts of torture in that state or being returned to their countries of origin, where the risk was even greater.

Next: The Investigation

The Regulation has equipped the Frontex Agency with a system aimed at ensuring respect for fundamental rights in the exercise of its functions.(According to authoritative doctrine, the purpose of the news was to make up for the numerous "critical issues that emerged from the early years of Frontex's operations": A. Liguori , N. Riccui 2012 , to which reference should be made for references to institutional and non-governmental sources that had reported these shortcomings.) Just such a system has been subjected to be examined by the Ombudsman, with primary attention to its practical functioning. On the one hand, during the investigation procedure, a dialogue with various external organizations (the European Ombudsman had invited interested parties to comment on the matter.

The participation of numerous NGOs, such as Amnesty International and Human Rights Watch, should be noted) and with Frontex itself (In concrete terms, the procedure consisted of a debate that was always open to comments from the interested parties. In particular, considering the delicate area covered by the investigation, the Agency for Fundamental Rights of the European Union (FRA) was also involved , who sent a report on the case. This agency was established by Regulation (EC) n. 168/2007 of the Council of 15 February 2007 (GUCE L 53 of 22 February 2007, pp. 1-14). made it possible to bring out the existence and effective operation of a monitoring mechanism with preventive purposes. This consists, among others,(for an analysis of the instruments mentioned below, please refer to the Ombudsman's final decision: Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ.) of a Fundamental Rights Strategy (Article 26 bis of the Regulatio) and a corresponding Operational

Plan, Codes of Conduct (Article 2 bis of the Regulation) and the possibility for the Executive Director to suspend or terminate joint operations and pilot projects in case of persistent or serious violations of fundamental rights. A mechanism for "reporting" any incident is also foreseen. An important contribution comes from the interaction between the Human Rights Officer and the Consultative Forum. Finally, personnel

involved in the Agency's missions should receive specific training, including legal training, in terms of rights protection.

On the other hand, however, the Ombudsman, in the Special Report sent to Parliament (In summary, according to the Ombudsman, there would be at least three hypotheses in which Frontex should be at the forefront of knowing individual complaints: violations of human rights committed by its staff, in relation to which it should deal with the substance of the complaint; violations committed by different others, but identifiable by migrants as «Frontex», for which at least adequate support should be provided to identify the (national) authority competent authority; violations attributable to the coordination of joint operations), points out the lack of a system that can be activated ex post, complementary to the first, which allows migrants to propose individual complaints for violations actually suffered during the guided operations. Contrary to what the Agency itself maintains, the task of creating such a mechanism cannot rest exclusively on the Member States.

Indeed, there are several areas in which Frontex has an effective responsibility, even when the latter has exercised a mere coordination activity . There is therefore an articulation between responsibilities. In this regard, it is certainly not reasonable to place the burden of knowing when an injury is attributable to the Member State rather than to the Agency itself, on migrants, who often find themselves in a particularly difficult situation. In the light of the considerations, for an effective protection of the fundamental rights of migrants, Frontex should provide, when the injury falls within its sphere of control, direct protection with respect to single individual complaints. In any event, it should at least help data subjects to obtain the possibility of an effective remedy before the competent national authorities

According to the Ombudsman, this role could be assigned to the Fundamental Rights Manager, an office already envisaged by the founding Regulation and which art. 26 bis par. 329 falls within the scope of operation of the monitoring mechanism, which was mentioned above. In reality, from the literal wording of this provision it does not emerge in detail what the functions of this office are: the provision, in fact, limits itself to requiring that it has the necessary competence and that its independence is ensured. On this specific aspect, Frontex did not provide an adequate response to the Ombudsman's recommendations, denying any responsibility: for this reason, the Ombudsman himself sent a Special Report to the Parliament indicating his concerns and the need to provide for a better protection of fundamental rights. At the end of this Special Report, the Ombudsman reiterates his recommendation to the Frontex Agency: «The Ombudsman therefore makes the following recommendation to Frontex: Frontex should establish a mechanism for dealing with complaints about infringements of fundamental rights in all Frontex-labelled joint operations. The mechanism should receive complaints from persons who claim to be individually affected, or who complain in the public interest. This role could be entrusted to the

FRO, who should be resourced accordingly. The European Parliament could consider adopting a resolution accordingly»)

Ensuring that EU institutions respect fundamental rights is an integral part of the Ombudsman's mandate. It is precisely on this statement that Emily O'Reilly, in her mandate, opened another investigation on the activities of Frontex on October 20, 2014 (Case OI/9/2014/MHZ, on which see the press release). In this new case, the assessment she intends to make concerns the respect of the basic rights of migrants who subject to forced return measures by an EU member state to their country of origin. The decision to continue monitoring the Agency's activity is necessary, given the public importance of return operations in the context of immigration policy. (The Ombudsman sent a letter initiating the inquiry to the Executive Director of Frontex, where, in addition to justifying the initiative, he raised, among others, a number of questions concerning compliance with the Code of Conduct, which includes the mechanism of individual complaints, highlighted in the previous investigation.)

Conclusions

It is believed that the Frontex agency is the daughter of a "security" policy, aimed more at guaranteeing the security of the European legal space than at regulating in a unitary way a reality that particularly affects the Mediterranean countries (A. Liguori, N. Ricculti 2017). In the light of the Lisbon Treaty, the European Union would have the regulatory tools for create a common policy in this delicate sector¹, but the States still oppose resistance linked to national interests.

"Clause of solidarity", according to the article. 80 TFEU (the need to strengthen European solidarity in the management of migratory flows was reaffirmed in the Stockholm Program of the European Council, which outlined the Union's priorities for the creation of the area of freedom, security and justice for the period 2010 -2014 (OJEU C 115 of 4 May 2010). Based on this standard, in fact, even immigration policies, apart from those related to border controls and asylum, should be inspired "by the principle of solidarity and fair sharing of responsibilities of states, also for the financial plan" (B. Nascimbene A. Di Pascale 2018). An application of this principle can be found in Frontex's activity to help problematic countries for immigration, especially Italy, with operations Hermes and Aeneas for border control and migratory flows².

Requests for more substantial assistance and support have been made by state governments in recent years in the face of the large migratory flow. Moreover, for the above operations, such as the "Triton" operation, which is part of the activities in the central Mediterranean area, with the task of strengthening border surveillance and supporting humanitarian efforts³. It is precisely these Frontex interventions, for

¹ For an overall picture, see the summary sheet on the European Parliament website.

² For details on operations, as well as for updates, please refer to the Frontex website.

³ For further information, see the Memo of the European Commission of 7 October 2014.

which the participation of other EU member states is required, which make the aforementioned principle of solidarity a reality. Therefore, "Triton" can be a further step towards the creation of the European asylum municipality system¹

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¹ On the «Triton» operation, see the decision of Commissioner Cecilia Malmoström of 7 October 2014