

The experiences of national equality bodies in combating nationality-based discrimination: the experience of the Greek Ombudsman

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Ensuring freedom of movement by amending the relevant legal framework has been at the centre of discussion during this seminar. Shifting the focus from legal issues to experiences of national equality bodies, please allow me as an introductory point the hypothesis that free movement of nationals of Member states as one of the main objectives of the European Economic Community since its foundation in 1957 is currently under doubt.

However crucial free movement may be to the European Union Citizenship under the Treaty of Maastricht 1992, and the present Treaty, stating the rights and obligations stemming from it (art 17-21 TEC), it seems to reflect an institutional euphoria challenged by difficult times. Is free movement still being considered as an enriching process, a process of mixing talents, and cultures, towards a common European identity and a sense of EU collective welfare?

At present, the widening north-south divide, starting from economic disparities -partly due to inherent weaknesses of the European construction- seems to lead to a deeper fragmentation of the EU, to a backward process, to the awakening of old stereotypes and defensive attitudes. The EU is becoming less a common framework than an object of dispute, torn between countries and populations “deserving” or “non-deserving” to be part of it in a strict economic sense.

As economic conditions are deteriorating, internal migration in the EU becomes more significant. And the idea of borders may acquire a different meaning and role in times of economic difficulties and rising levels of unemployment, despite the existing EU secondary legislation.

As an Ombudsman, I insist to rely on facts, on actual experience. And experience shows that there is resistance to free movement rights beyond what legal rules prescribe. And therefore, free movement rights remain an unfinished business. I shall refer to aspects of this resistance from my experience and show what the Ombudsman can do in counterweight. Although the number of complaints to the Ombudsman regarding these issues remains limited, they reflect problems faced by large categories of EU workers.

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The Greek Ombudsman’s mandate since its statutory law in 1997 (law 2477/97) up to the present (Law 3094/03), has always been defined as “*protecting citizens’ rights, combating maladministration and preserving legality*”. This constitutes a quite large mandate encompassing all legal rules and principles, including EU and international law and constitutional rules and principles. The Ombudsman’s mandate covers the protection of rights and legal interests of all persons, irrespective their nationality, by means of a specific provision of the law.

Thus, the implementation of EU law and the transposition of Directives into domestic law has always been a matter for the Greek Ombudsman’s recommendations since the beginning of its operation in 1998,

contributing thus to the actual implementation of the *acquis communautaire*. Furthermore, the non-discrimination liberal principle of the Greek post-dictatorship Constitution (1975) facilitated the Ombudsman's mediation from the start, against arbitrary treatment of any person on the basis of race, nationality, language, religious or political belief (art.5 para.2 Constitution). In 2001 the statutory independence of the authority was sanctioned by an amendment to the Constitution (art.103 para.9, art.101A). In 2005 (Law 3304/2005) the Greek Ombudsman was assigned the role of the National Equality Authority combating discrimination under the Race (Dir 2000/43/EC¹) and Framework Directives (Dir 2000/78/EC²) in the public sector. In 2006 it was entrusted with the promotion of the principle of equal treatment of men and women in the private and public sector³, in employment and labour (Dir 2006/54/EC⁴). The Ombudsman monitors also gender equality in accessing goods and services in the public sector only⁵ (Dir 2004/113/EC).

On nationality based discrimination in general, I would like to clarify two points:

a) There is a legal margin for the Greek Ombudsman's intervention even in fields falling outside the scope of the relevant EU Directives⁶, when discriminatory treatment occurs, on the basis of the Constitution or other legal instruments, such as the ECHR, the International Covenant on civil and political rights etc.

b) Concerning discrimination based on race or ethnic origin, it has to be noted that the Greek Ombudsman is skeptical about the exclusion clause of discrimination based on nationality in the Race Directive (art. 3 para.2 Dir.2000/43/EC), which facilitates in some instances cases of indirect ethnic or racial discrimination.

The Greek Ombudsman's promotion of the non discrimination principle is based on assistance to victims through providing advice and disseminating information, issuing independent reports and conducting independent surveys. The Ombudsman does not bring cases to the Court⁷, its recommendations require a justified answer by the administration and are often followed by the competent public bodies.

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On the basis however of a clear rule of freedom of movement of workers within EU, what are the prevailing factors that favour nationality based discrimination, requiring the Greek Ombudsman's intervention?

¹ Discrimination on the basis of racial or ethnic origin in employment, labour, healthcare and social welfare, education, goods and services

² Discrimination the basis of religion or belief, disability, age and sexual orientation in employment and labour.

³ Monitoring gender equality in the private sector workplace, the Ombudsman is invited to participate in meetings between employers and employees at the Labour Inspectorate and to exercise its competence towards a reconciliatory solution in the dispute. It is also entitled to carry out its own investigation on the cases and draft a Findings Report, proposing to the Labour Inspectorate the imposition of a fine on the employer, when it reaches the conclusion that there has indeed been a breach of gender equality legislation.

⁴ Including since 2012 self employed persons (Dir 2010/41/EU).

⁵ By Law 3769/2009

⁶ i.e. police treatment that does not fall under the provision of "access to services which are available to the public" (art.3 para.1.h Dir 2000/43/EC, discrimination on racial or ethnic origin)

⁷ The Ombudsman's mandate excludes matters pending before the Court, with the exception of violations of the principle of equal opportunities and equal treatment of men and women in employment. In these cases, the Ombudsman deals with matters pending before courts, judges or prosecutors, up to the first hearing, or the prosecution, or until the court or competent judicial authority has ruled on the request for interim relief.

Working in a different country means that a person needs to be integrated into a different and often complicated world of regulations directly or indirectly linked to the labour market and the organized professions. Apart from the legal complexities, which may be visible at first and often second sight, this experience brings migrants in touch with deeper structures of this society and polity. These include the structure and importance of interests and interest groups, eventual informal processes and the knowledge of how to work the system.

In many cases regulations have been shaped for nationals and indirectly or even accidentally exclude other EU citizens; furthermore, bureaucratic procedures and barriers, perceptions of what to expect from the domestic administrative system, in terms of output but also in terms of time length, accountability and rights of appeal, constitute factors affecting the reality of free movement rights. The issue therefore is not the implementation of European regulations strictly-speaking. It is rather the *adjustment capacity, the responsiveness and flexibility* of a national administrative system; its readiness to identify problems and barriers to labor mobility and even more to remedy to the situation.

Factors affecting administrative responsiveness can be grouped in the following categories:

1. Administrative capacity

Lack of knowledge and experience with these –still rather exceptional- issues may explain the lack of adjustment capacity. Further, there might be reluctance of public employees to take the initiative and responsibility to solve the issue in conformity with European legislation. They thus create a bigger issue than the initial, by requesting the position of higher level authorities (e.g. Legal Council of the State) or a court decision.

2. Vested interests. Preservation of prerogatives or more generally of the status quo.

Vested interests are often involved either in shaping the general criteria or in the individual decisions concerning the recognition of professional qualifications. These interests may be protected by the existing legislative framework while inertia works in their favor. Delay or administrative incapacity may just hide what is really at stake. The obstruction power of vested interests might be the explanation.

3. Attempt to avoid secondary negative effects of EU legislation.

This might be an intentional but inappropriate reaction to a real problem, a reaction in a spasmodic way or at least with a short term view, expressed by raising further obstacles to the enjoyment of rights, especially when financial resources are primarily the issue.

In what follows, I shall highlight some examples of these explanatory factors, drawing on the experience of the Ombudsman.

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Nationality as an obstacle for recruitment: the status of municipal citizen

Recruitment for part time employment in municipalities was linked to the status of citizen of a certain municipality. This was an indirect discrimination against EU citizens because the municipal registrar was linked with Greek citizenship. In the past, the Greek Ombudsman had intervened and presented his

arguments, encouraging the administration to request the opinion by the Legal Council of the State (2007)⁸. It was then clarified that for EU citizens this registration should be replaced by the status of resident in the area of the municipality. However, the problem re-appeared on another occasion, because the Independent Authority that supervises the competitive recruitment procedure was not aware of this solution. In this case, it was clear that the public employees handling the issue were reluctant to take any initiative and responsibility to solve it in conformity with European legislation. A clear legislative provision solved the problem.

Professional qualifications acquired outside the national territory: Access to regulated professions

This constitutes the field that most cases on nationality-based discrimination against EU nationals occur. And as Equality bodies, we should not forget that Dir.2005/36/EC on free movement and recognition of professional qualifications applies also to third country members of the family of EU nationals and political refugees. All Member States are responsible for regulating access to specific professions by requiring possession of certain professional qualifications, which can be obtained within the national territory. This process however may constitute a hindrance to the free circulation of professionals within the European Union. As it is obvious, the recognition of professional qualifications to a holder of a foreign title is a complex procedure which requires examination case by case. The competent authority in Greece for the recognition of professional qualifications is the Council for the Recognition of Professional Qualifications (SAEP), a multi-faceted administrative body seated at the Ministry of Education. The Ombudsman's investigation revealed delays in designating the members of the aforementioned Council as well as substantial disagreements between the members of the Council, due to uncertainty as to the adequacy of education that had been delivered in other member-states and the pressure put on the Administration by the representatives of corresponding professional organizations participating as members in the Council.⁹

Some indicative Ombudsman cases of access to regulated professions include the following:

- *Recognising prior professional experience of language teachers*

EU citizens wishing to work as language teachers in public high schools may apply to be included in the priority list for recruitment on a yearly contract. The ministry of education refused to take into account the years of prior service (teaching) in the education system of other EU countries, arguing that this service extended before the year of recognition of professional qualifications. This position stemmed from confusion between the years of prior service and the recognition of diplomas from other countries, which in the Greek system is assimilated to the granting of the diploma and produces legal effects only *ex nunc*. Thus EU citizens would lose all benefit from their prior professional activity.

⁸ The Greek State Legal Council has stated (50/2007) that if it is required that the status of citizen of a certain municipality as a condition for the access to some work positions, this status concerning citizens of EU states should be substituted by the status of the residence in the area of the municipality.

Law 4057/2012, Art 9 §26-29 replaced the condition of status of citizen of a certain municipality with the condition of permanent resident status in the area of the municipality in order to be awarded points for recruiting advantage to municipalities. The Greek legislator followed the jurisprudence in this point. Special Report, 2009. <http://www.synigoros.gr/resources/docs/188554.pdf>

⁹ The paradox is that the cases brought to the Ombudsman mainly concern Greeks who are holders of foreign titles and return to the country. It seems that the system of administrative recognition of professional qualifications tends to protect the rights of nationals not only at the expense of EU citizens but also at the expense of Greek nationals having studied and/or worked abroad.

What is particularly interesting in this case is that a rule which applies to Greek nationals (most of whom have never exercised their right to professional mobility) produces indirect discriminating effects with regard to EU law (article 48 -new art. 39- of the EC Treaty).

Having argued that prior professional experience cannot be nullified by a formal element i.e. the date of the official recognition of professional qualifications, the Ombudsman's recommendation was shared by the Legal Council of State. There has also been similar jurisprudence of administrative courts and the Supreme Administrative Court.¹⁰ One may see that the Ombudsman has a role in pushing for the implementation of free movement EU legislation, but also for the clarification of a series of specific questions arising in concrete cases. The Ombudsman represents an institutional means to defend one's rights in this area, avoiding the time- and money-consuming judiciary procedures, unless as a means of last resort.

- *Conditions to operate a language school excluding indirectly EU nationals*

In a different case, a UK citizen was required to have a diploma of English as a foreign language in order to operate a language school. However, this diploma, by definition is not awarded to British citizens. The requirement was clearly geared towards Greek citizens and indirectly excluded him as an EU national from this professional activity. The administration did not appear willing to adjust when the Ombudsman pointed out that the criteria used did not conform to the jurisprudence of the ECJ.

- *Offset professional training of tourist guides in Greece*

The aforementioned Council SAEP ordered an offset training to the School of Guides of Tourist Training Organisation for those possessing a tourist guide's professional qualification in EU member states. However, these Schools did not operate for two years. The Ombudsman recommended that access to the tourist guide profession should not be hindered by prerequisites that the administration was unable to meet and the Ministry of Education agreed to change the relevant measures.

- *Conditions to offer voluntary veterinary work*

A Dutch veterinary was refused to offer voluntary work in Greece because he was asked to submit a certificate of good knowledge of Greek language. The Greek Ombudsman and subsequently the Legal Council of State stated that this precondition lay outside the provisions of the relevant legislation and of Dir. 2005/36/EC and the administration withdrew the language certificate requirement.

Unemployment Registration of EU nationals

It seems that not only access to employment but also to unemployment revives stereotypical obstacles to EU nationals from domestic bureaucracy.

¹⁰ <http://www.synigoros.gr/resources/docs/180862.pdf> and <http://www.synigoros.gr/resources/epistolh-stp-prouphresia-ekpaideytikwn--3.pdf> (in Greek)

A circular by the Manpower Employment Organisation demanded for the Registration of EU nationals as unemployed to submit a certificate of stay as EU nationals or a permanent residence permit. The Ombudsman stated that this precondition was contrary not only to Dir2004/38/EC stating that certificates of stay of EU nationals cannot be raised as preconditions for enforcing a right and as obstacles for concluding administrative procedures. It was also violating the freedom of movement principle according to the EC Treaty that is not subjected to any administrative permit. The Administration followed the Ombudsman's recommendation.

Permanent residence as a condition for pension supplement

Coordination of social security systems aims at facilitating the free movement of citizens in the EU. Most social allowances do not depend on the residence, but on employment.

The pension supplement is a non-contributory benefit to complement the pension under certain conditions. In order to prevent eventual abusive take-up, the Greek social security services required from potential beneficiaries from neighboring countries (especially Bulgaria), not just to prove residence, but to hold a *permanent residence* card; the latter is subject to a minimum condition of 5 years of residence (or less in some categories of beneficiaries). However, permanent residence is not a condition for access to social security benefits according to the relevant European Regulation 883/2004¹¹. In the view of the administration, the legal basis for this practice was the rule that (according to EC Directive 38/2004 as opposed to Regulation) the right of permanent residence should not impose a burden on the welfare system of the country of residence.

The Ombudsman requested that the administration follows the rules set by the Regulation. It proposed that in order to prevent the possibility of abusive take-up of the pension supplement, the administration should use the tools provided for by the Regulation and raise the issue before the Administrative Committee for the Coordination of social security systems, instead of breaching the letter as well the spirit of European legislation. It is understandable that the issue has gained in importance now that the country goes through difficult times, since it potentially leads to a waste of resources, increases deficits and leads to further cuts for those who are in real need.

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These are examples of the issues the Greek Ombudsman faces; they confirm that legal harmonization is an important and necessary condition but not sufficient per se for the exercise of free movement rights within the EU. Various obstacles remain, either as remnants of a domestically-centered past, or as a result of resistance of domestic structures. We encountered several forms of protectionism, and we cannot ignore a sense of insecurity stemming from the economic crisis that revives past attitudes. At a time when stereotypes are on the rise as a means to protect more and more fragile living standards, the Ombudsman's role is to shed light on inequalities to the people and irrationalities to the administration's behavior. By

¹¹ According to Regulation 883/2004 on Old-age pensions (art 58), 1. A recipient of benefits to whom this Chapter applies may not, in the Member State of residence and under whose legislation a benefit is payable to him, be provided with a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance or residence equal to all the periods taken into account for the payment in accordance with this Chapter. 2. The competent institution of that Member State shall pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due under this Chapter and the amount of the minimum benefit

ways of reporting to the Parliament, communicating to the Press, networking to NGOs and creating informed opinions and allies within the public administration, we delegitimize and sometimes reverse stereotypes that directly or indirectly compromise the idea and actual implementation of free movement rights. Keeping in mind that what is at stake is clearly more than the exercise of free movement rights. It is the perception of Europe, the common European space, as an ideal still worthy fighting for.