European Ombudsman Institute

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THE OMBUDSMAN'S RELATION TO THE COURTS AND TO OTHER PARTS OF THE LEGAL COMMUNITY

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The Ombudsman's Relation to the Courts and to other parts of the Legal Community

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The courts are – or should be – a part of peace-keeping instruments in a legal community, indeed a considerable part, and they represent that part that is increasingly being criticized by Ombudsman Institutions and against which citizens are making increasing complaints to the Ombudsman.

But jurisdiction has another side, for there are also courts that the Ombudsman can utilize for his work. I would like to devote myself firstly to this large area. Then I will move on to the courts whose decisions in a "Montesquieu " system of separation of powers cannot be examined by any other government authority.

The third part will deal with the question of whether institutions, other than those directly concerned with the law – administrative authorities, courts and legal protection institutions in the broadest sense, including the legal profession and legal protection institutions of a particular kind such as the Ombudsman – do not also belong to the legal part of the community. Bearing this in mind, institutions come into focus that produce legally trained professionals, i.e. also, and in particular, the educational process of judges.

On 10th May the newspaper "Zaman", on the basis of a dispatch from the "Political News", Istanbul of the same date, quoted the Parliamentary Human Rights Commissioner Chair Mehmet ELKATMIS from the Turkish Parliament: "Elkatmis emphasized that the ombudsman office is needed because the judiciary is slow to process and is not independent". (OMB_GOV, 10.5.2004)

Yuval Yoaz, Haaretz correspondent, in his contribution of 31st May 2004, quoted the Israeli Ombudsman, Tova Strasberg, regarding complaints against judges: "Some 10 percent of complaints filed to the ombudsman dealing with complaints against judges during the first six months of his activity were found to be justified. Most of the justified complaints regarded unreasonable delays in rulings, some of them were about the judge's way of conducting the trial and a few regarded the judge's conduct while sitting in court".

About 10 years ago I asked an employee if she could remember a case where her human rights had been violated. She promptly answered: "With the doctor and in court".

I. Introductory comments on this subject

1. The ombudsman cannot really be ranked in the system of the classical "Montesquieu" separation of powers – he is an "aliud". In general he is not a part of the parliament, even though he is responsible and answerable to it. So the most important question is: how, in existing legal orders, is the ombudsman related to the powers that be, and their heads, according to the system of separation of powers, and how can he be integrated into this system.

2. Significant experience: at the conference in Chisinau on ombudsmen organized by UNDP the podium was made up exclusively of people from the circle of the judicial system – and therefore also legal protection system – relevant in the countries Alaska, Canada, UK, India and Australia. But a whole series of countries represented in Chisinau already had contacts with European countries with a different legal protection system, above all they were familiar with the concept of a supreme administrative court and a constitutional court. So the participants knew something that the speakers on the podium didn't know. We have to assume that there are different legal protection systems in Europe in which the ombudsman is embedded in a variety of ways.

3. It seems to me that in countries with a distinct legal protection system, with constitutional and administrative courts, people talk more about lawfulness and legality – and its strict observance is of course the prime concern of the ombudsman – and in other countries the talk is more that the ombudsman should be neutral, impartial and politically independent, and should act as a mediator between administration and citizen.

   My impression is that in a system in which the talk is more about the obligation of neutrality and impartiality, the ombudsman is given fewer tools for his work. Both concepts "neutrality" and "impartiality" are –with justified exceptions – an absolute matter of course!

4. In both judicial system groups the "other" is also a matter of course even though the emphasis and reference points are somewhat different. In a country with a legal protection system with administrative courts and a constitutional court the ombudsman will often quite simply demand compliance with legality and doesn't need the method of mediation. Objectivity for him is a self-evident commandment and with the same self-evidence he acts for the citizen whose rights have been violated. The ombudsman doesn't become the personal representative of the citizen, rather he examines the case objectively and impartially, but above all according to the rules of legality, and he strictly observes the legal order.

5. In countries with an administrative and constitutional legal protection system there is less talk of equity and this is also not really anchored as a measure for the work of the ombudsman.

6. Is the work and responsibility of an ombudsman, a human rights ombudsman and a human rights commissioner the same, or is the ombudsman the

institution that has to dutifully observe every infringement of rights, and is a human rights ombudsman and a human rights commissioner (as all 22 ombudsman institutions of the Russian Federation are named) only responsible for extreme infringements of rights? To this question I will give you my opinion later.

7. If an ombudsman has to make a decision according to "law and equity", may he then "leap over the law" if the result of the law is unjust? Or, like the ombudsman who is obligated to legality, does he have to make a suggestion to the legislature that the norm should be changed, and is he then forbidden to make a just decision that deviates from the law, or may he recommend that the authorities disregard the law, and does he have to strictly observe the law and may not propose that the authorities act according to equity?

It would not be easy to standardize the ombudsman system in Europe and it is also not easy to compare the various systems. But the question should be put: how can the efficiency of the ombudsman be inherently increased in each legal system, for the state will hardly be prepared to change a constitution because of an ombudsman matter. The European Ombudsman Institute (EOI) is working on a virtual figure of the "ideal ombudsman" who combines all observable positive factors and who could thus possibly serve the national legislature as an incentive to improve the situation in his own country. But then, because the ombudsman in e.g. 15 countries has the right to submit a norm to the constitutional court to examine legality or constitutionality, would another country with a different legal tradition introduce a constitutional court? But still the figure of a virtual optimum ombudsman could have a very positive effect on further development.

Just a few months ago a dissertation entitled "Regional Ombudsmen in German-speaking Europe" was submitted by lawyer Frederik Manke from Germany to Professor Wimmer and Professor Weber at the University of Innsbruck. It effectively shows that the legal principles valid in the Austrian province of Vorarlberg are the most efficient. The first regional ombudsman of the Russian Federation from Swerdlowsk adopted these provisions translated into Russian in 1987 as a basis. These legal principles are available in German, English, French, Italian, Spanish and Russian under www.OminEurope.info. The provisions for the province of Vorarlberg are largely transferable *mutatis mutandis* on a 1 to1 basis to national and regional ombudsman institutions.

Adoptable for all judicial systems (with and without legal protection by a system of administrative and constitutional courts) – for example – is the provision that the recipient of a formal recommendation made by the ombudsman has to agree with it within a period of 8 weeks or has to provide reasons in writing why he does not agree with the recommendation or has not submitted his agreement in time or within the period stipulated. This is an extremely effective provision because, if necessary, it is a very suitable basis for public medial handling of the matter.

Glancing over the European ombudsman institutions, something I consider very serious is the great difference in the accessibility of the ombudsman. It is not possible with all of these institutions to submit a complaint either by personally appearing at the ombudsman institution or even verbally. With a far too large number of these institutions, in my opinion, it is only possible to submit complaints in writing.

II. With regard to the subject of the conference in a stricter sense: Relationship of the parliamentary ombudsman with the judicial system

The ombudsman cannot be categorized in the system of Montesquieu judicial powers, even though he acts in close proximity to the parliament and legislative authorities. He is something different to execution whether administration or jurisdiction; he has proved his necessity and obviously fills a large gap, for it has been shown that the parliamentary or legislative powers are not always able to, or don't always want to, sufficiently perform their controlling function in terms of their executive powers.

The position of the ombudsman with regard to jurisdiction is two-fold. The call for jurisdiction control is also becoming louder in the old democracies, even if this is for other reasons than in the so-called new democracies. In the old democracies it is a matter of judges criticizing the rights of parties involved in a legal procedure, and above all unreasonably long periods of time waiting for a concrete procedure (dilatoriness on the part of the judge or protraction of proceedings). In countries of transition, on the other hand, the main reason for complaints against jurisdiction is protraction and corruption of judges. As a result, there is a call for examination of jurisdiction by the ombudsman. This is mainly a matter of proper jurisdiction, above all with regard to civil and criminal law.

The second level doesn't involve examination by the ombudsman, but rather the help of the courts with the ombudsman's work and, as a rule, it is a matter of the relationship between the ombudsman and the supreme courts.

A third level of the relationship between the ombudsman and jurisdiction has nothing to do with examination by the ombudsman or exploitation of the courts for the ombudsman, but rather simply empowers the ombudsman to re-start legal proceedings when he has doubts about the results or the course of the proceedings. In this case, the ombudsman can be approached by a party in the proceedings or by an institution that initiates a re-start of the proceedings with the former parties (to compare the enormous helpful competence of the ombudsman in Poland).

There is complete agreement that the ombudsman may, in the course of his activities, under no circumstances, intervene in the decision on the merits – the sentence – of the court. The Swedish and Finnish systems give the ombudsman the authority to examine whether the sentence is based on sufficient facts, i.e. that the ombudsman assesses whether the evidential proceedings have been correctly run and concluded.

The ombudsman should, in any case, have access to courts with specialized tasks. Special courts such as supreme courts in civil and criminal law matters, supreme administrative courts and constitutional courts are, as a rule, courts with a judge's bench; that means that not just one single judge rules, but rather a body of judges. These courts have a high degree of specific factual competence, the ombudsman – who unfortunately is far too often not a specialist, but rather (only) a former politician – is mostly a monocratic body with no comparable expertise. For this reason, he should be authorised to submit questions of particular significance or legal

complication to a competent supreme court with a view to receiving an answer. That means that the ombudsman and other supreme bodies, so-called organs of last resort, should be able to establish contacts in order to be able to take advantage of the other's expertise and factual competence.

As far as the position of the ombudsman with the court is concerned, there are two items which are agreed upon by all ombudsman institutions:

The ombudsman will never approach a court against the will of any person who seeks his advice.

The ombudsman will act as legal representative in court for any person who seeks his advice. His position is different. He interrupts the proceedings and presents the matter to be solved an abstract manner. He alone is party to the proceedings, he can also remain in the background as complainant. In these cases the ombudsman is, of course, no longer impartial, but rather he represents the point of view of legality and acts in the interests of infringements of legality.

Questions of the interpretations of general norms can also lead to a very reasonable relationship between ombudsman and the courts.

When a country is familiar with the system of a constitutional court (and that now means more than 3/4 of the members of the Council of Europe), the possibility exists that this court makes a decision on an ombudsman's disagreement with the administration regarding his field of competence. Endless and constant quarrelling, when no side is willing to give way, whether an ombudsman is responsible for examining a certain matter – these things can be settled quickly by a binding decision by the constitutional court for both sides – if one just has the courage to take advantage of this method of solving conflicts by means of the constitutional court.

Let us consider a clear and concrete situation:
I my self had the honour of serving the people of my country for the longest possible time (two terms of office, in total 12 years). The law on the ombudsman there gives him the competence to apply to the constitutional court to investigate the legality of ordinances. This competence for the aggrieved citizen is really of enormous significance. The result of application in 31 cases of (by the ombudsman) presumed invalidity of the ordinance was, that in 19 cases the related ordinance was totally or partly cancelled. Such tool can really help the citizen.

In a lot of countries the ombudsman has also the right to appeal to a highest (mostly the constitutional court) court because of the presumed unconstitutionality of laws. For example: Spain, Poland, Slovenia, Albania, Russian Federation etc.

For possible relationships between ombudsman and a (usually supreme) court in the form of a central supreme administrative court, a court responsible for civil and/or criminal cases and in the form of a constitutional court the following can be considered.

Interpretation of norms with regard to the application of the ombudsman:

When a lack of clarity arises regarding the content of certain parts of the law, an interpretation by the supreme court is just as likely a possibility as an authentic interpretation by the parliament itself.

Examination of the constitutionality of a law or a certain point of the law.
Examination whether a decree or a certain point of a decree conforms with the law to which it applies.

Clarification and, if necessary, nullification of a certain norm part by the court responsible is preferable to an endless discussion between ombudsman and authorities. The decision made by the court responsible leads to clarity in a binding form. ("Roma locuta – causa finita").

Solving a conflict of competence between ombudsman and administration regarding the sphere of responsibility of the ombudsman on the examination of a certain part of administration or a particular matter.

The conflict regarding the interpretation of a norm arises in the practical work of an ombudsman mostly from dialogue with the administrative authorities that interpret a norm – at least that's how the complaint sees it – to the disadvantage of the person who contacts the ombudsman. The ombudsman will possibly consider the interpretation by the authorities to be contradictory to the constitution, but he will counter with his own – in his view constitutional – interpretation. If the case does not arise that one side is able to convince the other of the correctness of his point of view, it is left to the ombudsman, if he is the person responsible, to bring about a decision by the constitutional court. He will proceed by imputing the interpretation of the authorities and request that the incriminated part of the norm be nullified by the constitutional court. But he will also present his own – in his view constitutional interpretation. If the constitutional court follows the interpretation of the ombudsman, it will not nullify the norm because the presenting ombudsman also has a constitutional interpretation; the administrative authorities have no more room for manœuvre to oppose the arguments of the ombudsman. They will have to concur with the ombudsman's interpretation if they don't want to run the risk that their decision is eliminated in the stages of appeal or in any other way of the relevant legal system. To summarize, this "crowning competence" of the ombudsman can be seen as a means of attaining a legally correct interpretation that exonerates the citizen. If this is not possible, his responsibility leads to an application for examination of the norm, in any case to clarification and, should the norm be nullified as a result of the ombudsman's arguments to eliminate a contradiction, to a higher ranking norm to which the constitution obliges to pay heed.

There has been talk that it depends on how an ombudsman avails himself of his responsibilities and shows his willingness to see or not see grievances. But it will also depend on what capabilities the ombudsman has to see things that he considers worthy of taking action against within his scope of responsibility and authority. The constitution should make provisions that, as one of the uppermost servants of the state – the ombudsman – only a person can be appointed who possesses sufficiently good qualities for the optimum fulfilment of tasks which are also defined by the constitution. If an ombudsman is to be accepted by the people as a confidential person, he has to meet the requirements for this work so that the citizen can place his trust in him. I have observed that the appointment of politicians, for whom no

other function was available at the time, to the position of ombudsman has not been entirely successful or favourable for the ombudsman's image. The administration of justice of the European Court of Human Rights assumes that with regard to a judge even the semblance of his partiality or impartiality (freedom from prejudice) should be avoided. And that shouldn't be the case with the ombudsman? Politicians who are appointed to a well-paid position as ombudsman or who, by taking on this function, are well compensated for retiring from a political career are also, in the opinion of the European Court of Human Rights, not suitable candidates for the function of ombudsman.

An ombudsman first and foremost has to have a great personal knowledge and experience in the field of constitutional and administrative law, otherwise he will hesitate to use even the best tools the ombudsman would be provided with by the legislation. In Sweden in the course of nearly 200 years of experience with the institution ombudsman only the first ombudsman (in 1809) was not a high ranking lawyer.

III.

For a better understanding of both fields in which the ombudsman can have a very useful competence in relation to the courts, I am attaching a graph to these lines showing on the one hand cooperation with (highest) courts and on the other hand the control of courts.

IV.

For many years the activity reports of ombudsman institutions have shown that citizens do complain against jurisdiction. The main emphasis of dissatisfaction is not the same in all countries. The emphasis in old and new democracies appears to be very different. In the group of old democracies it seems that the length of legal proceedings and also the time taken to produce a legal decision is in the forefront. In the so-called new democracies and in countries in transition, complaints against the length of legal proceedings are also accompanied by complaints against non-execution of legally binding decisions, allegations of corruption in courts but also with criminal prosecution authorities and the Janus-faced Department of Public Prosecution who, in its conception in the region of the former Soviet Union, was given an impossible responsibility, namely to represent the interests of both the state and the citizens.

There is no need for discussion regarding the reprehensibility and the criminal relevance of corruption in all countries represented here.

Further points of complaint against jurisdiction, the length of legal proceedings including delayed execution and enforcement of legal decisions are not acts of jurisdiction in the narrow sense and therefore are without doubt a part of the controlling function of the ombudsman institutions.

At this conference we find – as the list of participants shows – above all representatives of the legal protection type "human rights commissioner". That gives

me occasion to move on to the subject of the un-clarified differentiation in responsibilities.

The question of the difference between an ombudsman and a human rights commissioner, in spite of endeavours by the European Ombudsman Institute to initiate discussions on the topic, has never really been thoroughly examined.

Let's consider the formulation of the difference between two qualities of legal norms: the quality of laws in constitutional ranks, and laws below this norm with more difficult possibilities for initiation and amendment. Felix DÜNSER (Ombudsman in Vorarlberg/Austria), in his paper "The regional Ombudsman: an Institution for the Protection of Citizens' Rights", on the occasion of the conference in Barcelona (2.7.2004, "Regional Ombudsman Institutions and the Council of Europe"), cited: "In connection with the European Human Rights Convention, which is applicable in all member states of the Council of Europe, every violation of human rights represents a special and difficult case of an administrative grievance, for which every ombudsman institution is responsible."

So, in the creation of "merely" human rights commissioners instead of ombudsmen, a model of simplified, abridged legal protection can be seen, as this legal protection institution only has to examine complaints and ensure legal protection in the event of a violation of norms that should guarantee a minimum standard of human rights (basic rights, freedom rights, constitutional rights, human rights). Taking as an example the violation of property rights
the difference between the human rights commissioner and the ombudsman becomes clear. Is it a question – depending on the economic and social situation in a particular country – of a "trivial" violation of property rights – is it a case for the human rights commissioner, or "only for the ombudsman"?

The difference between ombudsman and human rights commissioner seems to be that an institution similar to the ombudsman institution should be created, that cannot provide the extensive legal protection of the classic ombudsman institution, but that can at least provide minimum legal protection in the sense of guaranteeing basic and freedom rights.

Another aspect to be considered is the experience that, as an inheritance of the dictatorships in countries in transition towards democracy, there were on average far more serious encroachments made by state bodies against citizens than in democracies that have existed for decades. The human rights commissioner should be a bulwark against serious legal infringements by citizens, but should also be someone who is capable of stabilizing and solving such serious infringements.

The excuse of an unwilling legal protection body in the above cases would be that he is not an ombudsman but only a human rights commissioner. If the diction in laws on the human rights commissioner in young democracies is formulated in such a way that these basic freedoms and human rights are defended, and if it is a matter of course for an ombudsman to examine every violation of rights, every administrative grievance, then there is a diverging picture of ombudsman and human rights commissioner. For the ombudsman there is absolutely no doubt that no citizen's problem with regard to the authorities, or an administrative grievance assumed by him, is too small or too great. It is increasingly becoming international practice that

human rights commissioners call themselves ombudsmen for the sake of simplicity and understanding. That is alright, but only if the human rights commissioner considers his obligations to the citizens the same as those of an ombudsman, and if he does not assume any differentiation in the degree of seriousness of infringements of the law or any grievances.

So, after this short excursion into a rather delicate subject, on which I have a clear view, I would like to go back to the relationship between the ombudsman and the legal community.

The observation, in my judgement, of nearly all ombudsmen that a significant – not to be ignored – number of citizens consider jurisdiction – in particular civil and criminal law – to be arduous gives cause for reflection, whether a complete exclusion of the ombudsman from the responsibility of aid should be maintained even in this area in the long term. The ombudsman is a last, final hope for citizens and that also means that he has to endeavour to explain to the citizen if – and why – he himself is not responsible. That extends to the fact that he also has to try to close the gap in the knowledge of the innocent citizen if he is in doubt that his hope of at last achieving justice in a court of law is not fulfilled; and with the background that the person seeking help simply does not know what an appeal to a court can bring about and what not. One example is that the citizen believes that during civil court proceedings the truth will come out, that the judge is obliged to seek the truth, that it involves a court case in which the allegations of the parties directly involved in the controversy are prominent.

The ombudsman not only has the duty and right to examine grievances presented to him, but also the possibility to deal with such problems in his reports and in the parliament, which come to his attention in the course of his work, but over which he has no authority to solve. I'm thinking of two categories:

a) The ombudsman has no authority to alter norms. But he will animate the person responsible for the alteration.

b) The ombudsman can experience situations and make observations that go far beyond an individual case. He should see himself as a – although a higher ranking – servant to the individual citizen and the community, and be recognized by both. This understanding is lacking considerably in many state institutions, in particular in the civil service, the police and judges.

The conduct of judges subject to complaint usually leads quite quickly to a limit, when examined by the ombudsman, due to a lack of relevant proof. It would be more effective if the ombudsman would plead for training of judges and, in this way, endeavour to bring about a change in consciousness, which is probably also more easily realized than in the cul-de-sac of the presence of – only – an exchange of views in a concrete case.

Cooperation of the courts with the ombudsman has two aspects. On the one hand, in the case of his lack of jurisdiction and at the same time the possible competence of the ombudsman institution, the judge should provide the parties with the relevant information and then refer them to the ombudsman. On the other hand the judge, in the case of misgivings against norms, which cannot be enforced, either by him or by

a higher instance, should not hesitate to refer the case to the ombudsman, for he is certainly not forbidden to include in his report to the parliament observations concerning the entire scope of the judicial system.

Many ombudsmen make very considerable efforts to both make their institution better known to the public as well as to increase the knowledge of human rights. These endeavours are expressed in talks given in schools, evening classes, to students, in communities, legal societies, on radio and television programmes, via the publication of public relations material, sugar sachets in cafés, professional folders and key rings. And what about the cooperation with relevant NGOs? They are just as much a part of the legal community as the judge. The more difficult the situation in which the human rights commissioner works, the more he attempts to look for alliances that try to convey the necessity and sense of his work to the citizens. I refer you to our Georgian colleague who has written a "Report of the Public Defender of Georgia – second Half of 2002" in the chapter "On Violation of Human Rights and Freedoms resulting from judicial Errors and the Need to make Amendments and Additions to the Criminal and Civil Procedural Codes of Georgia", a chapter which comprises 30 pages.

Constricting insights into the problems met by human rights commissioners in their relations to the courts can be read in the 13-page annual report 2002 by Varuch Clovekovich Pravic (Human Rights Ombudsman) of Slovenia and in the 3-page annual report 2003 on the same topic by the three ombudsmen of the Federation of Bosnia and Herzegovina.

The task of the ombudsman is even more important but also even more difficult when an entire profession – the lawyers – has no real love for an institution that provides help free of charge. But my experience is different. If the professionalism of the ombudsman is recognized, then even lawyers turn to him, because he covers a special area in which not many lawyers are well versed.

Who could prevent an ombudsman from revealing problem areas that become known to him by citizens who put their trust in him? Why did an employee say that she felt that her rights had been violated during a visit to the doctor? Because this profession is only taught technically; and students do not learn about the correct handling of patients and their dignity. Human rights, their content, esteem and application have to maintain the value of an unrenounceable attainment of humanity. The ombudsman is not sufficient. But he bears a large part of the burden towards achieving this goal. To achieve it, he has to create alliances and networks in which he an active, regulating member.

The law is present in all areas of life. Every step we take can be legally defined. The legal community is far bigger than we generally assume. However, the contribution that individual institutions in our society can make towards a legal structure varies. All educational institutes play the most significant role: from child care groups to post-graduate courses. The ombudsman can hardly do without their support in the construction of a human rights community.

Dear colleagues, I am acquainted with the work of nearly everyone here and I would like to acknowledge you all. Gain new courage from the work of your colleagues, and

make use of every contact, so that your work is distributed to a broader public and therefore achieves greater success and recognition.

Innsbruck, 2004.06.19

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If – after this conference – further questions arise with regard to this lecture, please do not hesitate to contact me. I look forward to providing you with a detailed answer without delay.

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Verfassungsgericht oder anderes zuständiges Gericht; Constitutional court or other competent court

Interpretation von allgemeinen Normen

Interpretation of general norms (Laws, statuts, acts, ordinances)

Prüfung der Verfassungsmäßigkeit von Gesetzen

Examination of the constitutionality of laws/statuts/acts pruduced by the legislation

Prüfung der Gesetzmäßigkeit von Verordnungen

Examination of the legality of ordinances given by the administration

Entscheidung von Zuständigkeitsstreitigkeiten zwischen OM und Verwaltung; Decision on conflicts between OM and administration about the competences of the OM

Ombudsman-Institution (OM)

GERICHTE / COURTS

Verschleppung eines Verfahrens; Delay of proceedings

Missachtung von Verfahrensvorschriften; Disregard of precedural prescriptions

Verhalten von Richtern Behaviour of judges

Unzureichende Ermittlung des Sachverhaltes; insufficient inquiry of the facts of the case

Verschleppung der Durchsetzung gerichtlicher Entscheidungen; Delay of the execution of decisions of courts

Korruption / Corruption

OM stellt ex officioAntrag und erhält darauf eine binbende Antwort; Mittel zur Suche nach richtiger Lösung eines Falles
OM applies ex officio for a decision and gets a binding decision; means of looking for the correct solution of a case.

OM prüft auf Grund einer Beschwerde; Maßnahme der Kontrolle; OM investigates on the basis of a complaint; act of controle