The European Ombudsman and Good Administration in the European Union

Nikos Vogiatzis

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To conclude, a couple of necessary disclaimers. An effort was made to generally consider developments until the end of August 2016, and all remaining errors are, of course, the responsibility of the author.

NV, Liverpool, 2017.

Summary

This book explores the work of the European Ombudsman and her or his contribution to holding the EU institutions to account, through an examination of complaints on maladministration, own-initiative inquiries and other proactive efforts. It considers the Ombudsman's current institutional and constitutional position and her or his 'method' of dealing with complaints, and unravels the depth of subject matters that fall under the Ombudsman's remit. A separate chapter focuses on transparency and access to documents. The last part of the book critically reflects upon the present mandate and practice of the Ombudsman and discusses a number of possible proposals for improvement.

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CHAPTER 1

Introduction: The Office of the European Ombudsman in Its Third Decade of Operation

Aims of the Book

The office of the European Ombudsman entered its third decade of operation in 2015. Created by the Maastricht Treaty and commencing its supervisory work in September 1995, it has experienced considerable growth in terms of complaint-handling or proactive initiatives. The Ombudsman receives and examines complaints or conducts own-initiative inquiries on maladministration in the activities of the EU institutions, bodies, offices and agencies.[1] To date, the office has seen three office-holders: Jacob Söderman, Nikiforos Diamandouros and Emily O'Reilly, all former national ombudsmen in their respective countries (Finland, Greece and Ireland).

This book explores the work of the European Ombudsman with a view to ascertaining how the office has improved the quality of the EU administration. In addition, it critically reflects upon the current mandate to identify challenges, and then proposals that would enable the Ombudsman to make a stronger contribution to accountability and democracy in the

[1] See Art 228 TFEU. The Lisbon Treaty accords with the Maastricht version (Art 138e EC) in that the Court of Justice of the European Union does not fall under the Ombudsman's scrutiny when acting in its judicial role. Article 138e EC referred, however, to the—then—'Community institutions or bodies'; in this sense, the scope of the Ombudsman's mandate is broader post-Lisbon, as will be shown in Chap. 2.

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EU. When the first European Ombudsman set up the office in September 1995, the EU was clearly in a different stage of development. The same can be said about the office of the Ombudsman. Indeed, the Ombudsman is not anymore the cautious 'beginner' of the early nineties and is increasingly being perceived as an important actor in EU administrative law and governance. Sufficient time has elapsed since the inauguration of the office to assess the Ombudsman's performance and contribution. As Emily O'Reilly put it following her election by the European Parliament: '[t]wenty years after the Office of the European Ombudsman was created under the Maastricht Treaty, it is time to re-think its focus, with an eye to enhancing its impact and visibility'.[2] In this context, the ultimate aim of this book is to contribute to this discussion.

To provide such an overview of the work of the office, the book analyses the European Ombudsman's method: how has the latter managed to achieve tangible results and provide redress to complainants in a large number of areas of administrative activity? This method has included both proactive initiatives, such as own-initiative inquiries, as well as responding to specific complaints, which naturally constitutes the area where most resources are invested. Insofar as the critical assessment of the mandate is concerned, the book identifies the limitations or challenges of the present mandate, and then attempts to discuss proposals for improvement.

As an accountability mechanism, the Ombudsman *is* related and *has contributed* to the EU's democratisation. To give one example, the Ombudsman is generally considered one of the most prominent EU actors pushing for greater transparency (and this contribution is explored in a separate chapter of the book). Likewise, when acting proactively with a view to safeguarding individuals' rights or the principles of good administration (the drafting of a European Code of Good Administrative Behaviour—ECGAB—is a suitable example here), the Ombudsman is bringing citizens closer to the administration. The Ombudsman's work in areas such as openness, transparency, participation and efficiency,[3] and the publication of non-binding principles of good administration which go beyond the institutions' legal obligations are not the only reasons why authors

[2] See Press release 14/2013, 'Emily O'Reilly begins work as European Ombudsman' (2013) available at: www.ombudsman.europa.eu/en/press/release.faces/en/51921/html.bookmark

[3] All of which constituting principles of good governance, alongside the principle of accountability, according to the famous European Commission, 'European Governance: A White Paper' COM (2001) 428 final, 10.

have observed the Ombudsman's potential to render EU *governance* more accountable. Indeed, 'life beyond legality' also means softer instruments of redress, absence of *locus standi* requirements, own-initiative inquiries, in brief, conducting work and undertaking initiatives that the Court cannot undertake.[4] That being said, the European Ombudsman's method is primarily characterised by an approach based on law. This involves not only regular reliance on the case-law of the Court, but also occasional attempts to interpret the law when the Union judiciary did not have the opportunity to clarify a matter. Simultaneously, it has been made clear by the Ombudsman that maladministration is broader than illegality—the content of the aforementioned ECGAB is indicative of this approach.

European Ombudsman cases or initiatives are increasingly being cited by accounts discussing the EU administration, accountability[5] and the rule of law.[6] Simply put, there is growing interest to identify 'what the Ombudsman had to say' on a specific area of EU administrative activity. The book shows that the multi-dimensional work of the Ombudsman has been, at times, rather ambitious. This account also unravels the plethora of principles or arguments related to the notion of 'good administration' via a closer examination of cases decided by the office. In fact, it is the Ombudsman's generally positive record to date, and the measurable outputs that have been produced in the area of EU law and governance that justify the exploration of her or his potential to further improve accountability and democracy. What makes the European Ombudsman a particular, but no less interesting institution[7] (for those willing to look beyond enforceability, of course) is the almost inevitable balancing exercises that have to take place within at least two dualities. On the one hand,

[4] See Mark Dawson, *New governance and the transformation of European law: Coordinating EU social law and policy* (Cambridge University Press 2011) 292–297; see also (with regard to the EU agencies) Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) ch 9. More generally, on how ombudsman institutions 'build good governance in public administration' see Linda Reif, *The Ombudsman, Good Governance and the Human Rights System* (Martinus Nijhoff 2004) ch 3.

[5] See, among others, the seminal article by Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542; Herwig Hofmann and Alexander Türk (eds) *EU Administrative Governance* (Edward Elgar 2006).

[6] See, for example, Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697, at 723.

[7] Unless otherwise stated, the term 'institution' throughout the book does not refer to Article 13 TEU; after all, the European Ombudsman does not feature therein.

a potentially very broad field of activities, clearly going beyond legality (that is particularly so in the EU as the Ombudsman has endorsed a broad definition of maladministration), has to be balanced with non-enforceability (which could occasionally mean reputational consequences for the office if the institutions refuse to comply). On the other, the provision of meaningful redress to individual complainants has to be balanced with the promotion of broader public interests and, more generally, improvements in the standards of the EU administration, often further to identification of systemic problems.

Insofar as the proposals for reform of the mandate are concerned, which constitute the last part of the book, it may be wondered what *more* could the European Ombudsman really achieve towards the improvement of the EU's democratic credentials. After all, it is an institution with limited resources and staff. To view the powers of the EU institutions and bodies as a static phenomenon would, of course, disregard the various chapters in the evolution of the institutional structure and/or the administrative system of the Union.[8] To take the obvious example (and the institution often perceived as closely associated with the Ombudsman), the European Parliament in the early days of European integration was perhaps considered a forum of symbolic value. And yet, owing to the progressive accumulation of power throughout the treaty reforms, the Parliament is now in most areas the 'co-legislator', and simultaneously the centre of scholarly attention when discussing the democratic performance of the Union. Moreover, the aim of the book is to provide *pragmatic* proposals; it is well known that institutional reforms in the EU usually take years of preparation, negotiation and implementation. This is why many of the proposals advanced here concern the *practice* of the office within the confines of the existing mandate. Equally important, it is emphasised that a reform of the mandate and practice of the Ombudsman can only be 'part of the parcel', in that such a reform alone cannot of course 'cure' the EU's democratic shortcomings. It could also be the case that some observators are (still) sceptical about ombudsman institutions in general, if not unwilling to look beyond the inability of public sector ombudsmen to produce

[8] See, for example, Carol Harlow, 'Three phases in the evolution of EU administrative law' in Paul Craig and Gráinne de Búrca (eds) *The evolution of EU law* (Oxford University Press 2011) 439; Michael Bauer and Jarle Trondal, 'The administrative system of the European Union', in Michael Bauer and Jarle Trondal (eds) *The Palgrave Handbook of the European Administrative System* (Palgrave 2015) 1; on the evolution of the 'Community method' Renaud Dehousse (ed) *The 'Community method': Obstinate or obsolete?* (Palgrave 2011).

binding decisions. Yet it is widely understood that extra-judicial redress mechanisms do matter, and in this sense ombudsman institutions, despite their different origins, aims and mandates,[9] perform an indispensable constitutional function[10] which complements the judicial avenue.

In this context, the book makes a twofold contribution to the broader literature on EU law and governance. First, it offers a much needed insight into the depth of the work of the European Ombudsman and her or his method, more than 20 years since the establishment of the institution. In so doing, it examines her or his role not only from the perspective of EU administrative law, for example the monitoring of the requirements of the right to good administration under Article 41 of the Charter (a right which was adopted further to the Ombudsman's initiatives), but also from the perspective of good administration and good governance, for example the principles of good administration as they appear in the ECGAB, own-initiative inquiries, inter-institutional collaboration, relations with peers within the European Network of Ombudsmen, citizens' participation and involvement of civil society. The book unravels the varied level of responsiveness of the European administration to citizens through the lens of Ombudsman inquiries. By exposing the main areas under investigation, as well as the Ombudsman's arguments and the responses of the institutions in some detail (this is done, in particular, in Chaps. 4 and 5, and to a lesser extent in Chap. 6), this account also aims to provide the reader with an overview of the subject matters that the Ombudsman can investigate and, consequently, of the areas that citizens, legal persons, and civil society actors can complain to the Ombudsman. Related to this, citizens and stakeholders will find out more about the Ombudsman process and the available instruments that can be used with a view to achieving successful outcomes. In the author's view, perhaps with the exception of the better-known transparency and access to documents cases, several further areas of supervision are not—yet—widely known. The insufficient awareness of the Ombudsman's mandate has also to do with the fact that the latter cannot consider complaints at the domestic level, even when national authorities are implementing EU law.

Second, by moving beyond the examination of the Ombudsman's present mandate and considering proposals for reform, the book effectively

[9] See, for example, Reif (n 4).

[10] On this point see Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate 2011).

claims that the need for further democratisation of this supranational edifice means that it is necessary to advance proposals for reform which do not exclusively cover the most prominent EU institutions. Where these proposals should be based on? The book relies on the shortcomings or limitations of the existing mandate, as they unravel throughout the subsequent chapters. For example, in Chaps. 4 and 5 it will be shown that, despite numerous achievements, the Ombudsman has not been as effective as he or she might have wished in specific sensitive complaints. Thus, this book is not a comparative exercise across the member states[11] in order to find some common or minimum denominator. As already mentioned, the particular features of the EU's institutional and administrative design (including multi-level governance and the proliferation of networks[12]), let alone the absence of a traditional, tripartite, separation of powers, would not leave much scope for such normative comparative exercise. Simultaneously, nonetheless, it is accepted that the broader confines of ombudsman institutions, despite their differentiations in terms of mandate and function, set the outer limits of these proposals. To provide an obvious example, it is clear that a public sector ombudsman office, including when operating at the supranational level, should not be granted enforceable powers as this would affect the very nature of the institution. In this sense, where references to certain features of domestic similar bodies are made in this book, these should be viewed as a valuable, but by no means definitive (in terms of providing a threshold for comparison), exercise in order to discuss possibilities or limitations. At the same time, for a *pragmatic* reform to be advanced, the Union's constitutional framework cannot be ignored. It is necessary to take into account, for instance, the principles of conferral and subsidiarity to assess to what extent they may impose limits on a possible extension of the mandate.[13]

[11] For such exercise see, for example, an interesting study in Gabriele Kucsko—Stadlmayer, *European Ombudsman-Institutions: A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea* (Springer 2008).

[12] See, for example, Harlow (n 8) 443; Bauer and Trondal (n 8). On the challenges involved in shared management between the Commission and the national administrations see also Paul Craig, *EU administrative law* (Oxford University Press 2012) 79, focusing on the Common Agricultural Policy and the Structural Funds.

[13] See Arts 5(2) and 5(3) TEU. See also Annual Report 2006, 16 and the discussion in Chap. 6. Where references are made in this book to 'Annual Reports', these concern the *European Ombudsman's* Annual Reports.

The book mainly relies on decisions produced by the office (what may also be termed as 'ombudsprudence'[14]), Annual Reports, press releases and other publications available on the Ombudsman's website. Where appropriate, the discussion is complemented with excerpts from interviews with members of staff of the Ombudsman's office,[15] and other documents.[16] Most of these interviews centred on the scope (and limits) of the mandate; thus, they are mainly cited in Chap. 6.

Overview of the Chapters

To fulfil the above aims, the book is structured as follows. Chapter 2 explores the institutional and constitutional position of the European Ombudsman and the scope of the existing, post-Lisbon mandate. The discussion begins with the establishment of the office by the Maastricht Treaty and its evolution. Particular reference is made to Article 228 TFEU, the Ombudsman's Statute,[17] as well as the Implementing Provisions.[18] This prompts further reflections on the Ombudsman's office own administrative set-up, which has the aim to increase effectiveness and efficiency while making optimal use of the available resources. Reference is also made to the relations between the Ombudsman and other EU and national authorities, and the interaction between the Ombudsman and citizens or civil society organisations. The chapter then briefly presents two achievements of the office in the area of EU administrative law and governance, namely the inclusion in the Charter of a right

[14] The term refers to the cases dealt with by ombudsman institutions; it is preferable to the terms 'case-law' or 'jurisprudence' as public sector ombudsman institutions do not produce legally binding decisions.

[15] The interviews were conducted in February 2012; the 'semi-structured interview' was used.

[16] Most notably documents related to consultations organised by the Ombudsman before the publication of the first 'Strategy for the mandate'; these are briefly presented in the beginning of Chap. 6.

[17] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted by Parliament on 9 March 1994 (OJ L 113, 4.5.1994, p. 15) and amended by its decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25).

[18] Decision of the European Ombudsman adopting Implementing Provisions, available at: www.ombudsman.europa.eu/en/resources/provisions.faces

to good administration,[19] and the drafting of the ECGAB.[20] In addition, the Ombudsman's treatment by the Union judiciary is discussed. The chapter concludes by pointing out that the European Ombudsman is a distinct actor when compared to the Court, Parliament, but also to similar offices in the member states.

Chapter 3 explains the link between the role of the European Ombudsman and democracy in the EU. It begins with an exploration of the relationship between ombudsman offices and democracy in general: indeed, ombudsman institutions are accountability mechanisms with potential to increase citizens' participation. The next section views the European Ombudsman as part of the EU's democratisation debate. By way of introduction, it briefly revisits the discussion on the democratic challenges of the EU, before focusing on the reasons behind the establishment of the Ombudsman, and the presence of the right to complain to the Ombudsman among the rights of European citizenship. Next, it discusses how the Ombudsman contributes to strengthening democracy. The promotion of a broader understanding of European citizenship, as well as the Ombudsman's direct accessibility/interaction with citizens are mentioned. Importantly, the right to complain to the Ombudsman is open to EU residents as well. Simultaneously, it is underlined that there are limits to the nature and scope of the Ombudsman's contribution to democracy, and these should always be taken into consideration. Lastly, the chapter examines the Ombudsman's legitimacy, independence and *own* accountability, necessary conditions in order for the Ombudsman to perform her democratising mission in the EU. On legitimacy, particular reference is made to the Ombudsman's election by Parliament, and to citizens' views via a Eurobarometer survey. On independence, the delicate relationship with the European Parliament is examined.

The purpose of Chap. 4 is to shed light on the European Ombudsman's method. Thus, it examines in detail the work of the Ombudsman via an analysis of cases primarily stemming from the Annual Reports 2008 to 2015—the latest published Annual Report. The Ombudsman's supervisory realm clearly extends to the totality of the EU administration,[21]

[19] See Art 41 of the Charter of Fundamental Rights.

[20] The latest version can be accessed at: www.ombudsman.europa.eu/en/resources/code.faces#/page/1

[21] Post-Lisbon, the European Council, the European Central Bank (added to the list of Article 13 TEU as 'institutions'), and Common Foreign and Security Policy (CFSP) matters (in light of the abolition of the pillar structure) fall under the Ombudsman's mandate.

but *not* to the national authorities implementing EU law, and touches upon a plethora of subject matters and areas. The broad definition of maladministration endorsed by the first office-holder certainly contributed to this expansion in the scope of inquiries. As mentioned earlier, the Ombudsman primarily relies on an approach based on law to ensure, as much as possible, compliance. Simultaneously, it is consistently emphasised that maladministration is *broader than illegality* (as it includes, e.g. the principles of good administration that go beyond the right to good administration under the Charter). These subject matters and areas include: the Commission's role as the guardian of the Treaties, competition, institutional and policy matters, conflict of interest, human rights, the awards of tenders and grants, and selection procedures (e.g. by the European Personnel Selection Office). The signing of Memoranda of Understanding with other EU bodies facilitates inter-institutional collaboration. In this context, the work of the Ombudsman with a view to rendering the EU administration more accountable and responsive has been significant. By doing so, the Ombudsman contributes towards the embedding of principles of good administration and good governance, and the strengthening of the EU rule of law. Nonetheless, there is an additional angle to the Ombudsman's efforts: when certain sensitive cases reach the office, the EU institutions can be less willing to comply with the Ombudsman's well-reasoned and sound decisions. In this sense, Chap. 4 also unravels the limits of the present mandate via an exposition of a number of (non-exhaustive) cases.

Chapter 5 is a case-study on inquiries related to transparency and access to documents. It begins with a brief introduction to the 'world' of EU transparency, an area no doubt closely associated with citizens' participation, accountability and legitimacy. Of particular relevance to the Ombudsman's work has been the adoption of Regulation 1049 on access to documents.[22] The impact of the European Ombudsman is demonstrated through an exposition of proactive initiatives (which include, but are not limited to high-profile own-initiative inquiries), as well as through the analysis of complaints concerning transparency and openness. Clearly, one of O'Reilly's main priorities is to render the EU administration more transparent. That being said, and in accordance

[22] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145.

with the findings of the previous chapter, in certain cases with significant constitutional implications the Ombudsman was not as effective as he or she might have anticipated, in order to safeguard the compliance of the EU institutions with the EU rule of law and good governance. The problem is aggravated even more in complaints against the intergovernmental institutions. Again, the limitations of the present mandate are underlined.

Chapter 6, no doubt the lengthiest in this contribution, revisits the current mandate and practice of the European Ombudsman, in line with the above considerations. Thus, the proposals are based on the limitations of the present mandate, the need to strengthen democracy while considering the existing constitutional framework and occasionally the practice of other ombudsman institutions—but only when such practice seems fitting within the EU architecture. In this context, much of the discussion concerns a reform of the present practice (including undertaking new initiatives),[23] rather than an assignment of new competences to the Ombudsman. It is acknowledged that a normative account is inevitably based on a number of premises/preconditions which may not be universally accepted; in this sense, the chapter may be seen as an exposition of the various dimensions of the Ombudsman's role, and an invitation for further reflection on the way forward. The chapter touches upon several aspects of the Ombudsman's mandate, practice or institutional policy/presence: the available tools that the Ombudsman possesses in order to ensure compliance; the 'geographical scope' of the mandate,[24] including the Ombudsman's inability to supervise alleged instances of maladministration when national authorities are implementing Union law; the distinction between matters political and matters administrative, including the relations with Parliament's Committee on Petitions; the Ombudsman's contribution to the new Title on the 'provisions on democratic principles' (Articles 9–12 TEU); and the possibility for the Ombudsman to become an EU institution under Article 13 TEU—a question that the author leaves open. The book therefore does advance a certain empowerment of the Ombudsman, but having due regard to the existing institutional reality. Inherent in this exercise is

[23] A reform of the practice suggests that the current legal framework is sufficient and therefore the Ombudsman should merely consider an amendment of her or his existing strategy vis-à-vis certain of the EU institutions, bodies, offices and agencies.

[24] The term 'geographical scope of the mandate' stems from an Interview with the former Secretary-General, 14.02.2012 (on file with the author).

the tenet that the complex,[25] multi-level[26] and at times rather opaque field of EU administration, reflecting a plethora of interests and preferences expressed via extended debates at diverse fora, usually amounts to years of negotiation and preparation before institutional change occurs.

The concluding Chap. 7 revisits some arguments made in previous chapters and provides additional reflections on the role and evolution of the European Ombudsman within the EU administration and, more generally, the EU's political and legal framework. With regard to the proposals contained in Chap. 6, it also briefly examines the kind of institutional support that would be required in order for these ideas to be taken forward. The last part of that chapter, starting from the premise that any possible reform of the Ombudsman's mandate, however ambitious or modest, could not by itself improve democracy in the EU, argues that strengthening the position of the Ombudsman is an avenue that needs to be combined with other plans and mechanisms in order to achieve improvements in democratic terms. Such proposals may concern both the national and the EU levels.

The EU's Crises and the Ombudsman

Undeniably, the EU is presently facing a plethora of crises. Debates on democracy and technocracy, austerity and solidarity, migration, EU membership—among others—feature almost daily at various domestic, European and international fora, and this is likely to persist in the foreseeable future. The EU needs a strong level of legitimacy to survive these challenges, and it is precisely its fading legitimacy that contributes to accentuating these crises. It is not surprising, then, that many of the proposals reflecting upon the future development of the Union centre, yet again, on the question of democratisation and citizens' participation.

[25] See, in this regard, the contributions in Didier Georgakakis and Jay Rowell (eds) *The field of Eurocracy: Mapping EU actors and professionals* (Palgrave 2013). The editors argue (on p. 6) that complexity refers not only to institutional arrangements, but also to 'to the sociological and professional diversity of the different actors who "make Europe work" on a permanent and daily basis'.

[26] Compare an insightful 'typology of administrative tasks' in Herwig Hofmann, Gerard Rowe, and Alexander Türk, *Administrative law and policy of the European Union* (Oxford University Press 2011) 57–63, explaining that the 'tasks of public administration in the EU are multifaceted, polycentric, and joint, to be performed largely within a framework of multidimensional cooperation' (on p. 57).

And indeed, the 'EU democracy' question is an apposite lens to at least try to explain some of these challenges and think about solutions. Another way to put it would be that the crises are eventually deeply political, too. This is not the place to ascertain the merits or prospects of these proposals. To return to the scope of this contribution, there is no doubt that instruments such as the Ombudsman, which bring citizens closer to the EU and hold the EU administration to account, have a role to play in this discussion. It would be naive to think that the Ombudsman's office can provide a 'magical solution' to these problems; however, the Ombudsman and other, less prominent (or increasingly prominent, as will be demonstrated throughout this book) EU actors, should be part of the debate. Thus, the present account is based on a citizen-centred understanding of the EU,[27] where the European Ombudsman's mandate does matter and has perhaps additional potential.

[27] See Annual Report 2008, 10, where the—then—Ombudsman pointed out: 'I often say that the way an institution reacts to complaints is a key indicator of how citizen-centred it is'.

CHAPTER 2

The Institutional and Constitutional Position of the European Ombudsman

Introduction

This chapter examines the institutional and constitutional position of the European Ombudsman within the EU architecture. The Ombudsman's supervisory activity is primarily delineated by the Treaties, the Statute, and the Implementing Provisions. Moreover, the Court of Justice of the European Union has had the opportunity to clarify the nature and competences of the office, as well as the conditions under which the Ombudsman may be subject to judicial review. Of particular relevance are also certain achievements of the institution, most notably the drafting of a European Code of Good Administrative Behaviour (ECGAB) and the inclusion in the Charter of a right to good administration.

The chapter is structured as follows. First, some background is provided to the establishment and evolution of the office. Following this, the post-Lisbon competences of the European Ombudsman are presented.[1] Next,

[1] For further accounts discussing the European Ombudsman's mandate post-Lisbon see, for example, Ian Harden, 'European Ombudsman' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1121; Alexandros Tsadiras, 'The Ombudsman' in Paul Craig *EU Administrative Law* (Oxford 2012) 739. Among the pre-Lisbon accounts compare also Katja Heede, *European Ombudsman: Redress and Control at Union Level* (Kluwer 2000); Paul Magnette 'Between parliamentary control and the rule of law: the political role of the Ombudsman in the European Union' (2003) 10 *Journal of European Public Policy* 677;

N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, European Administrative Governance,
DOI 10.1057/978-1-137-57395-7_2

some reflections are provided on the relationship between the European Ombudsman and other EU and national authorities, as well as the interaction between the Ombudsman and citizens/civil society organisations. The Ombudsman's office own administrative set-up is considered next. Subsequent sections explore two well-known contributions of the office: the creation of the ECGAB and the inclusion in the Charter of a right to good administration. In addition, the case-law of the Court concerning the Ombudsman is discussed.

Establishment and Evolution

The establishment of an Ombudsman further to the Maastricht Treaty could be viewed as an achievement: after all, it was an idea that was being discussed for 20 years.[2] The creation of this institutional novelty for the EU was fuelled by the prospects of an incomplete political Union, whereby European citizenship would be established containing a number of rights, and also by discussions of 'competence creep', democratic deficit, and the need to bring citizens closer to the EU.[3] In this context, it is arguable that the establishment of a European Ombudsman primarily originated in the need to strengthen democracy, and not in a desire to improve the administrative efficiency of the EU. This point is returned to in the next chapter.

Still, the creation of an Ombudsman was not met with enthusiasm by the European Parliament, owing to fears that its monopoly to defend citizens' rights would be seriously affected.[4] The former Committee on the

Anne Peters 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697; Päivi Leino, 'The wind is in the North: The first European Ombudsman (1995–2003)' (2004) 10 *European Public Law* 333; Nikos Vogiatzis, 'Communicating the European Ombudsman's Mandate: An Overview of the Annual Reports' (2014) 10 *Journal of Contemporary European Research* 105—focusing on the Annual Reports between 1995 and 2010.

[2] Jean-Pierre Jarry, *The European Parliament and the establishment of a European Ombudsman: Twenty years of debate 1974–1995* (European Parliamentary Research Service 2015).

[3] On this latter point see, for example, Myrto Tsakatika, 'Claims to legitimacy: The European Commission between continuity and change' (2005) 43 *Journal of Common Market Studies* 193.

[4] Weiqing Song and Vincent Della Sala, 'Eurosceptics and Europhiles in accord: The creation of the European Ombudsman as an institutional isomorphism' (2008) 36 *Policy & Politics* 481, at 482.

Rules of Procedure and Petitions undeniably had its share of responsibility for the delay in implementing the proposal for the creation of a 'Community ombudsman'.[5] During the pre-Maastricht period, the proposal was mainly defended by Spain and Denmark, but for different reasons. For the former, the EU's legitimacy and proximity to citizens was the objective; for the latter, the rationale was to control the EU executive, and notably the Commission.[6] It is beyond the purposes of this book to offer an assessment of where exactly the European Ombudsman should be placed among the various models of ombudsman that have been proposed in the literature.[7] It is generally accepted, however, that the Danish scheme was influential in the design of the European Ombudsman. Because of the broad definition of maladministration endorsed by the office (a point discussed below), the European Ombudsman does examine complaints raising human rights issues, despite not being a human rights ombudsman as such.

The appointment of the first Ombudsman was anything but an easy process. The task was assigned to the Committee on Petitions, which initially shortlisted six candidates.[8] The particularity of the process is explainable: the Treaty did not provide further details concerning the appointment. Eventually, further to a fresh round of nominations,[9] Jacob Söderman, formerly the Finnish Ombudsman, was elected by Parliament as 'Ombudsman of the European Union' in July 1995. He served until 2003, and was succeeded by Nikiforos Diamandouros, formerly the national ombudsman

[5] See Jarry (n 2).

[6] Song and Della Sala (n 4) 484.

[7] On which see, generally, Leino (n 1) 338–339; Heede (n 1) 79–112; Gabriele Kucsko–Stadlmayer, *European Ombudsman-Institutions: A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea* (Springer 2008); Mary Seneviratne, *Ombudsmen: Public services and administrative justice* (Butterworths 2002) 12–16; Linda Reif, *The ombudsman, good governance and the international human rights system* (Martinus Nijhoff 2004) 25–54. Alongside Leino, Diamandouros also observed that, historically, the establishment of ombudsman institutions occurred further to three primary waves focusing on *legality*, *maladministration* and *human rights*, while (rightly) adding that often such categorisation does not correspond to rigid and distinct models of ombudsman; see Nikiforos Diamandouros, 'The principle of good administration in the recommendations of the European Ombudsman' (2007) Speech at a seminar in Sofia, Bulgaria, available at: www.ombudsman.europa.eu/speeches/en/2007-09-17.htm

[8] Konstantinos Magliveras, 'Best intentions but empty words: The European Ombudsman' (1995) 20 *European Law Review* 401, at 408–409.

[9] Jarry's account (n 2, at 31–34) captures how the events unfolded.

of Greece. Further to Diamandouros' decision to retire in October 2013, Emily O'Reilly is the current office-holder. Formerly the national Ombudsman of Ireland, she was elected in July 2013 and re-elected in December 2014 for a five-year term. Article 228 TFEU translated the initially established practice into a Treaty rule: it refers to the *election* (rather than the *appointment*) of the Ombudsman by Parliament. This direct election by the European Parliament takes place in plenary session.

As is the case with every newly established body, the first years of the Ombudsman's operation were effectively a quest to define the limits of the mandate, and to assess how the reactions of some EU institutions could be accommodated.[10] The progressive shift of the Ombudsman towards a more pertinent constitutional actor has not gone unnoticed.[11] The Ombudsman's team has expanded[12] (although resources are always a concern), the internal structure of the office has been re-designed, and the communication policy and Internet presence have been areas of considerable investment. Importantly, the Ombudsman now fully uses the opportunity to undertake several initiatives (i.e. to act proactively) in order to improve the quality of the EU administration. Many of these developments are explored in this and subsequent chapters. Suffice to note here that the European Ombudsman is probably the most active forum of extra-judicial, 'administrative' accountability[13] in the EU.

The Legal Framework Concerning the Ombudsman's Operation and Powers

General Features

The mandate of the European Ombudsman is primarily defined by the Treaty and the Statute,[14] while the office has also adopted Implementing

[10] See further on this point Vogiatzis (n 1) and the various accounts in *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005).

[11] Magnette (n 1); Peters (n 1).

[12] That expansion was often mandated by practical reasons, e.g. the 2004 enlargement of the Union.

[13] The term 'administrative accountability' is by Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, at 456.

[14] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted by Parliament on 9 March 1994

Provisions, which have recently been revised to codify established practices.[15] Articles 20(2) and 24 TFEU provide that the right to complain to the Ombudsman is one of the rights of Union citizenship; that right also features in the legally binding, post-Lisbon,[16] Charter of Fundamental rights.[17]

Article 228(1) TFEU is the starting point for the Ombudsman's mandate:

> A European Ombudsman, elected by the European Parliament, shall be 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 concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them.
>
> In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.
>
> The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

Several points are worth underlining. The Ombudsman can receive complaints from natural and legal persons. The nationality of a member state—EU citizenship—is not relevant; suffice to demonstrate EU residence at the time of the instance of the alleged maladministration. Tsadiras

(OJ L 113, 4.5.1994, p. 15) and amended by its decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25) (hereinafter the 'Statute').

[15] Decision of the European Ombudsman adopting Implementing Provisions, available at: www.ombudsman.europa.eu/en/resources/provisions.faces (hereinafter the 'Implementing Provisions').

[16] See Art 6(1) TEU.

[17] See Art 43 of the Charter.

notes that the right is open to irregular migrants as well.[18] Conversely, EU citizens not resident in the EU at the time of the alleged maladministration do have the right to contact the Ombudsman. If the complainant is not entitled to access the Ombudsman (not being an EU citizen or resident), the Ombudsman is willing to open an own-initiative inquiry (see below). Such decisions are made on a case-by-case basis—but no complaint is 'rejected solely because the complainant is not an authorised person'.[19] For example, an own-initiative inquiry was launched in 2010, when the Ombudsman received a complaint from a Norwegian citizen not residing in the EU, concerning an application for a post at the European Union Police Mission for the Palestinian Territories.[20] The Ombudsman also clarified that the office can open own-initiative inquiries regarding alleged maladministration in the European Investment Bank's lending activities outside the EU, thereby contributing to its accountability.[21]

The vast majority of complaints stem from individual citizens.[22] Such figures verify the 'citizen-centred'[23] direction of the institution. As to the language regime, the Ombudsman can receive complaints in any of the official EU languages and responds accordingly.[24] When submitting the form, the complainant can opt for confidential treatment of her or his case.[25]

It should be emphasised that the Ombudsman's remit does not extend to national authorities, even when they are implementing Union law. If a complaint concerning a national authority is submitted to the Ombudsman, the latter will probably transfer it to the competent national ombudsman, the Commission, or the Petitions' Committee of the

[18] Tsadiras (n 1) 743, with reference to Case 972/24.10.96/FMO/DE/DT, where the Ombudsman explained that what matters is the person's physical presence in the territory of the Union.

[19] Annual Report 2004, 36.

[20] Case OI/1/2010/(BEH)MMN. The Ombudsman found that the abovementioned entity had committed maladministration as regards the content of the vacancy notice, but had not exceeded its discretion (and therefore not discriminated against the complainant) when eventually deciding not to recruit a third-country national (ibid., points 56–78).

[21] Annual Report 2006, 36.

[22] According to Annual Report 2014 (on p. 17), 87% of inquiries closed by the Ombudsman originated from individual citizens, while only 13% from companies, associations or other legal entities. No such figures are available in the 2015 Annual Report.

[23] Annual Report 2009, 8.

[24] See Art 13 of the Implementing Provisions.

[25] Art 2(3) of the Statute.

European Parliament. The Ombudsman's inability to deal with complaints concerning the national level is mainly examined in Chap. 6. To be sure, had it been otherwise, there would be a clear possibility of 'jurisdictional' disputes with national or regional ombudsmen. In this respect, it is useful to remember that, in principle, the instances of centralised European administration are the exception as EU law is mainly implemented and enforced by the national authorities.[26]

Post-Lisbon, the Ombudsman scrutinises the activities of the Union's institutions, bodies, offices and agencies. Thus, institutions now included in Article 13 TEU (the European Council and the European Central Bank) can be held to account by the Ombudsman. This is no doubt a positive development. Also, given that the pillar structure has been abolished, nothing prevents the Ombudsman from reviewing activities in Common Foreign and Security Policy and Common Security and Defence Policy, where the possibilities for judicial review are rather limited.[27] With regard to the proliferation of EU agencies, Chaps. 4 and 5 will illustrate the Ombudsman's considerable work therein.

The CJEU is excluded from the Ombudsman's scrutiny when acting 'in its judicial role': its mission as the ultimate guardian of the EU rule of law is therefore confirmed.[28] Likewise, the Ombudsman cannot conduct inquiries if legal proceedings have already been initiated or terminated.[29] Further, the Ombudsman's Statute makes clear that the Ombudsman cannot 'question the soundness of a court's ruling'.[30] These provisions protect the coherence and consistency of EU law. Nonetheless, nothing prevents the Ombudsman from dealing with complaints which raise new legal issues, on which the Court did not have the opportunity to provide answers. From a procedural point of view, complainants should be aware that contacting the Ombudsman does not 'affect time-limits for

[26] See, for example, Peters (n 1) 703.

[27] That being said, the CJEU could occasionally interpret narrowly its jurisdictional limitations in CFSP; see, for example, Case C-439/13 P, *Elitaliana* v *Eulex Kosovo*, EU:C:2015:753, in particular para 49.

[28] See Art 19 TEU.

[29] Art 2(7) of the Statute. As Harden observes, this applies to any court—for example, 'contractual proceedings in a national court bar the Ombudsman from investigating the same facts'; see Ian Harden, 'When Europeans complain: The work of the European Ombudsman (2000) 3 *Cambridge Yearbook of European Legal Studies* 199, at 230.

[30] Art 1(3) of the Statute.

appeals in administrative or judicial proceedings'.[31] Interestingly, the Ombudsman *does* have the power to supervise the administrative activities of the European Parliament.

The Ombudsman submits an Annual Report to the European Parliament, which is presented at the Petitions' Committee. The Reports are available on the Ombudsman's website and are essentially an overview of the work of the preceding year. The Annual Reports should also be seen as an opportunity for the Ombudsman to exercise pressure, to present her work to European citizens and to justify her strategies and goals.[32]

The Maastricht Treaty was silent on the notion of maladministration. In 1996, when asked by Parliament to define maladministration, Jacob Söderman adopted a purposefully vague—and thus wide—approach when stating that 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'.[33] The definition was subsequently endorsed by Parliament and has become the point of reference when the Ombudsman explains to the EU institutions the ambit of her mandate. The reason for that approach was that 'the open ended nature of the term is one of the things that [distinguish] the role of the Ombudsman from that of a judge'.[34] Consequently, the Ombudsman frequently points out that the concept of maladministration is wider than illegality; what might escape judicial review could still fall under the Ombudsman's scrutiny.[35]

Article 228 TFEU refers to the *activities*—not acts—of the EU institutions, bodies, offices and agencies. A good indicator here is Article 3 ECGAB, which explains the material scope of application of the (non-binding) Code: 'This Code contains the general principles of good administration which apply to all relations of the institutions and their administrations with the public, unless they are governed by specific provisions'. For the relations between the EU institutions and their officials the Staff Regulations[36] apply.[37] Despite the broad notion of maladministration

[31] Art 2(6) of the Statute.

[32] On the usefulness of Annual Reports see also the discussion in Chap. 4.

[33] Annual Report 1997, 22–23.

[34] Ibid.

[35] See, for example, Annual Report 2008, 29.

[36] See: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1962R0031:20140101:EN:PDF

[37] Art 3(2) ECGAB. The application of the Staff Regulations does not mean that the Ombudsman is not competent to deal with a complaint stemming from an EU official.

endorsed by the Ombudsman, there are at least two types of activity[38] that the Ombudsman will not interfere with, in addition to the judicial function of the Court: review of the substance of legislation, including the merits of legislative proposals submitted to the European Parliament[39]; and decisions of a political nature.[40]

Further Discussion on Admissibility and Own-Initiative Inquiries

The complainant does not need to demonstrate 'a personal interest' in order to submit an admissible complaint. The fact that European citizens benefit from 'no *locus standi* requirements at all',[41] and can also raise issues of public interest, distinguishes the Ombudsman from the Court, rendering the office a flexible and user-friendly mechanism.[42] Before deciding on whether or not a complaint is admissible, the Ombudsman verifies whether it *falls under her mandate*: this is the first step.[43] Complaints falling outside the mandate could include matters concerning national authorities or the judicial activity of the Court. Under O'Reilly, the procedure for complaints outside the mandate has been simplified. An initial assessment will be made by the 'Process management and inquiries Unit' (formerly the 'Registry'), and generally an agent responsible for these complaints will respond to the complainant via letter or email. The next step is to consider whether the complaint, while falling inside the mandate, is still admissible. The complaint is inadmissible if 'the object is not identified'; the 'alleged facts are or have been the subject of legal proceedings'; the Court has decided on that matter; the deadline to contact the Ombudsman, which is 'within two years of the date on which the facts on which it is based came

[38] But see also Ioannis Dimitrakopoulos, 'Is an illegal Community act necessarily an instance of maladministration, in the sense of Article 195 EC?' (2009) 2 *Review of European Administrative Law* 45, exploring additions to that 'list'.

[39] See Case 875/2011/JF, point 20.

[40] See Annual Report 1995, 9. Petitions addressed to Parliament are included therein. The challenges involved in categorising an activity as 'political' are considered in Chap. 6.

[41] Ian Harden, 'What Future for the Centralized Enforcement of Community Law?' (2002) 55 *Current Legal Problems* 506. See also the Opinion of Advocate General Trstenjak in Case C-331/05 P, *Internationaler Hilfsfonds e.V.* v *Commission*, EU:C:2007:191, para 59.

[42] See, for example, Case 1017/2010/MMN, point 11: '[N]either the Treaty … nor the Statute … establish as a condition for the admissibility of complaints that the complainant should be directly concerned by the instance of alleged maladministration'.

[43] See Art 3(1) of the Implementing Provisions.

to the attention of the person lodging the complaint',[44] has expired; 'prior administrative approaches' and 'internal remedies in staff cases' have not been exhausted.

The Implementing Provisions specify, first, that the determination as to whether the complaint is within or outside the mandate and then admissible is made *by the Ombudsman* and, second, that the Ombudsman may request that additional information be provided by the complainant before making such a decision.[45] Thus, poorly drafted complaints may be found inadmissible only after the Ombudsman's efforts to actually crystallise the nature and identify the author of the complaint.[46]

Alongside the examination of complaints, the European Ombudsman has the strategic option to act independently and proactively by opening an own-initiative inquiry. Those inquiries typically deal with *systemic problems* within the EU administration. Indeed, the own-initiative inquiry empowers the Ombudsman to fulfil a more system-improving mission, to 'control the administration in general, to enhance its accountability'.[47] Until recently, the Ombudsman was of the view that this tool should be used cautiously to safeguard its effectiveness. Own-initiative inquires would be launched when several complaints on a similar matter had been received. A departure from this approach was marked with the arrival of O'Reilly as she announced that the office will use own-initiative inquiries more strategically so as to render her work more relevant to the 'major concerns of ordinary European citizens and residents'.[48] The appointment of an own-initiative investigation coordinator,[49] and the establishment of a Unit focusing on systemic inquiries, evidence this new approach.

'Grounds for Inquiries'

The Ombudsman conducts inquiries when he or she 'finds grounds': this obviously implies a significant degree of discretion as to whether or not an otherwise admissible complaint will be pursued further. Some of the 'no grounds' responses, on the part of the Ombudsman, entail a certain

[44] Art 2(4) of the Statute.
[45] Art 3(1) of the Implementing Provisions.
[46] Annual Report 2011, 14–15.
[47] Peters (n 1) 711.
[48] Annual Report 2014, 7. In 2014, 17 own-initiative inquiries were opened, a significant increase in comparison with previous years.
[49] Ibid.

degree of pragmatism: in order to avoid raising unjustified expectations to European citizens, if there is no 'reasonable prospect that an inquiry will lead to a useful result', the Ombudsman will close the case on a 'no grounds' basis.[50] Another possibility for a 'no grounds' complaint is when the matter has already been submitted to Parliament's Committee on Petitions, 'unless new evidence is presented'.[51] The discretion the Ombudsman enjoys when deciding to start an investigation is confirmed by the Implementing Provisions, too.[52]

It is to be wondered how broad the Ombudsman's discretion should be, especially when the complaint is well-substantiated. On the one hand, it could be argued that this may be the other side of the coin of a generally flexible mechanism: as citizens may prefer the Ombudsman over the Court relying on her or his flexibility, similarly the Ombudsman should be empowered to be selective when she or he practically considers that she or he cannot be of any meaningful assistance to complainants. On the other, though, it could equally be claimed that the Ombudsman's discretion in otherwise admissible cases should generally be limited: as the Ombudsman has also acknowledged, the broad scope of maladministration distinguishes the extra-judicial mode of redress from the judicial process, which may often come with substantial *locus standi* requirements for private applicants. Thus, sometimes the Ombudsman may be citizens' only possibility for redress. In addition, the Ombudsman has consistently stated that in a polity governed by the rule of law EU institutions should be answerable to citizens, including when they exercise discretion. If the Ombudsman is to lead by example, the above suggests that the Ombudsman's discretion should not be limitless, too.

Instruments for Redress

According to Article 228 TFEU, if an instance of maladministration is established, the EU institution concerned should be contacted by the Ombudsman in order to express its views within three months. In practice, the Ombudsman will contact the institution before forming a preliminary

[50] Annual Report 2010, 16.

[51] Ibid.

[52] Art 3(3) of the Implementing Provisions provides that the Ombudsman 'shall decide whether there are grounds to inquire into an admissible complaint. If the Ombudsman considers that there are no grounds to conduct an inquiry, the Ombudsman shall close the file on the complaint'.

assessment on maladministration. If the Ombudsman identifies the misconduct she tries to establish a dialogue with that institution. A widespread tenet within the office is that the first choice for the Ombudsman is to find a friendly and mutually acceptable solution.[53] This is clearly unsurprising for an ombudsman institution—flexible and fast redress is always preferable. The Statute and the Implementing Provisions verify that if possible, the friendly solution should aim to 'eliminate the instance of maladministration and satisfy the complain[an]t'.[54] If the attempt to find a friendly solution proves unsuccessful, the Ombudsman possesses three legally non-binding tools: critical remarks, draft recommendations and finally, the submission of a special report to the European Parliament. O'Reilly appears to prefer the terms 'solution' (instead of 'friendly solution') and 'recommendation' (instead of 'draft recommendation'). It should be underlined that the Ombudsman benefits from considerable discretion when selecting the appropriate non-binding instrument. Alongside the above, 'further remarks' or (as they have recently been renamed) 'suggestions for improvement' may be issued where the Ombudsman considers that the EU entity had not committed maladministration, but the quality of administration could still be enhanced.

Critical remarks are used when the Ombudsman understands that 'it is no longer possible for the institution concerned to eliminate the instance of maladministration' or when the instance of maladministration 'has no general implications'.[55] In addition, a critical remark can be issued if the Ombudsman considers 'that a draft recommendation would serve no useful purpose'.[56] It is also employed when the Ombudsman has addressed her draft recommendations, the institution has not responded satisfactorily but the Ombudsman does not consider that the case should be pursued further. It follows that a critical remark of this sort may not always be implemented by the institution concerned, leading the Ombudsman to find alternative ways to express dissatisfaction or disappointment. In 2010, for example, in light of the Commission's 'unsatisfactory replies' to 10 out of 32 critical remarks, the Ombudsman noted that 'there is still major

[53] See, for instance, Annual Report 2010, 6: 'It is always better if the Ombudsman does not have to issue a critical remark or proceed to the stage of a draft recommendation in order to secure improvements. It is much better if cases can be settled by the institution itself or if a friendly solution can be accepted'.

[54] Art 3(5) of the Statute and Art 5 of the Implementing Provisions.

[55] Annual Report 2012, 32.

[56] Ibid.

work to be done, by the Ombudsman and the institutions themselves, in persuading officials that a defensive approach to the Ombudsman represents a missed opportunity for their institution and risks damaging the image of the Union'.[57]

The 'draft recommendations' are the next available instrument: the Ombudsman produces a number of recommendations which address the instance(s) of maladministration, anticipating that these could be accepted. In principle, unlike critical remarks, the instances that require this sort of action do have general implications and the instance of maladministration can be eliminated.[58] Within three months, the institution must respond with a 'detailed opinion',[59] which can potentially end the inquiry if the content of the Ombudsman's recommendation is accepted and the measures in order to implement the proposed draft are described in detail in the response.

If the Ombudsman considers that the opinion of the institution is not satisfactory, she has the faculty to submit a special report to the European Parliament, describing the facts of the case and the proposed recommendations.[60] The special report is essentially the maximum that can be done: it is a 'last resort' action. As is the case with critical remarks and draft recommendations, the special report is not legally binding, which means that it is up to the European Parliament to decide if (and what type of) further action is required. Since the establishment of the office and throughout its years of operation, the Ombudsman has taken the view that special reports should not be used frequently, but only for important matters and when Parliament can meaningfully assist the Ombudsman.[61] Despite this, it is noteworthy that quite a few years have passed since the last special report.[62]

Although the Ombudsman has taken useful steps (notably via the Annual Reports) to explain when each one of these instruments is selected, these explanations are rough guidelines. The flexibility of the Ombudsman and

[57] Annual Report 2010, 6.

[58] Annual Report 2012, 34. Again, the Ombudsman enjoys discretion in the selection (or not) of the draft recommendation.

[59] Art 3(6) of the Statute.

[60] Art 7(3) of the Implementing Provisions.

[61] See Annual Report 1997, 32.

[62] Which was on Frontex and submitted in November 2013; see OI/5/2012/BEH-MHZ and the discussion in Chap. 4.

the non-enforceability of her decisions practically mean that the choice of the instrument might ultimately be decided on an *ad hoc* basis.

Broad Investigatory Powers

The European Ombudsman enjoys full independence and broad powers in relation to access to documents and—generally —EU information. The scope of the Ombudsman's independence is a matter returned to in the next chapter. As regards the wide investigatory powers, the Ombudsman may require institutions, offices, agencies or member states' authorities to provide her with documents and information[63]; she may also 'inspect relevant documents' and obtain copies[64]; she 'may require officials or other servants […] to give evidence'[65]; or 'commission any studies or expert reports that he or she considers relevant to the inquiry'.[66] Concerning access to confidential documents,[67] the Ombudsman agrees 'in advance with the institution or body concerned the conditions for treatment of classified information or documents and other information covered by the obligation of professional secrecy'.[68] Moreover, the Ombudsman can request national authorities to provide (via the Permanent Representations) any additional and necessary to her inquiries information. Such information *has* to be provided, unless it is covered by laws on secrecy, in which case access *may* be granted to the Ombudsman if the latter agrees not to divulge it.[69]

It has been observed that the Ombudsman normally uses 'horizontal' (across institutions) rather than 'vertical' (across Member States' authorities) investigative powers and, what is more, the preference is for complaints to be assessed on the basis of 'factual data and written observations', rather

[63] Art 3 of the Statute and Art 4 of the Implementing Provisions.

[64] Art 4(3) of the Implementing Provisions.

[65] See Art 3(2) of the Statute and Art 4(6) of the Implementing Provisions. From the formulation of Art 3(2) of the Statute ('must testify at the request of the Ombudsman'), it follows that the process is mandatory, solely subject to the 'relevant rules of the Staff Regulations, notably their duty of professional secrecy'.

[66] Art 4(11) of the Implementing Provisions.

[67] Sensitive documents in accordance with Article 9 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 (hereinafter 'Regulation 1049').

[68] Art 3(2) of the Statute.

[69] Art 3(3) of the Statute.

than via visits *sur place*, testimonies, expert studies and file inspections.[70] In this respect, it is remembered that the Ombudsman's resources are not limitless. The former European Ombudsman (presumably comparing the EU administration with other administrations) acknowledged that the work of the Ombudsman's office is aided considerably by the fact that the knowledge of EU law and the overall quality of the staff working for the EU institutions is very high.[71]

The complainant is procedurally protected in various ways. She has the right to access her file or receive a copy, except for confidential documents[72]; also, as already mentioned, the complainant may request that her or his complaint be dealt with confidentially.[73] In addition, she may request a review of the Ombudsman's decision that the complaint falls outside the mandate, that there are no grounds to open an inquiry, 'and of any finding in a decision closing an inquiry with the exception of a finding of maladministration'.[74]

The Ombudsman was recently denied for the first time access to inspect a document related to the implementation of the EU-US Terrorist Finance Tracking Program.[75] The complaint was against Europol, but effectively the 'veto' was exercised by the US authorities, leaving the Ombudsman with no other option than to close the case without a conclusion on the question of possible maladministration.[76] The Ombudsman expressed her concerns to the European Parliament and the Commission, pointing out that such obstacles prevent her from exercising her role in the democratic scrutiny of the EU.[77]

[70] Tsadiras (n 1) 750.

[71] 'Table ronde: Le Médiateur européen: 10 ans d'activité' in Symeon Karagiannis and Yves Petit (eds) *Le Médiateur européen: Bilan et perspectives* (Bruylant 2007) 137, at 160 (comments by Nikiforos Diamandouros).

[72] Art 9(5) of the Implementing Provisions.

[73] Art 2(3) of the Statute.

[74] Art 10 of the Implementing Provisions.

[75] Case 1148/2013/TN.

[76] Indeed, the Ombudsman acknowledged that 'Europol did its utmost to convince the US authorities of the necessity for the Ombudsman to inspect the document concerned'; ibid., point 9.

[77] See the Ombudsman's response to a letter by the Commission at: www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58891/html.bookmark

Transferring Complaints and Collaboration Within the ENO

When a complaint falls outside the mandate, the Ombudsman *may* (but is not obliged to) advise the complainant to contact another authority,[78] and the same range of discretion applies to her power to *transfer* the complaint. Practically, the Ombudsman is generally keen to provide advice for alternative means of redress, not least because such a stance raises the profile of the institution.[79]

The European Ombudsman collaborates with national and regional similar offices within the European Network of Ombudsmen (ENO), the establishment of which should be viewed as one of the significant achievements of the EU office. The Implementing Provisions mention the Ombudsman's faculty to collaborate with similar bodies in Member States, 'including through the European Network of Ombudsmen'.[80] Although the *modus operandi* of the Network (including its challenges) is extensively discussed in Chap. 6, suffice to note here that the emergence of a network of this sort was probably mandated by the Ombudsman's lack of competence to deal with complaints against national authorities concerning the implementation of Union law.

Inter-institutional Relations, Mission Statements, and the Link with Citizens and Civil Society Organisations

The Ombudsman's inter-institutional relations will be further unravelled in subsequent chapters. Some initial remarks can be made here. The Ombudsman has established regular contacts with the EU institutions that serve two inter-connected purposes: to familiarise the institutions with the concept of good administration, and to facilitate respect of the Ombudsman's recommendations.[81] However, it would be misleading to think that all institutions respond to the Ombudsman's critical findings in a homogenous fashion. The exchanges between the Ombudsman and the Commission during the first years of operation concerning infringement proceedings[82] are indicative

[78] Art 2(5) of the Statute.
[79] See also the relevant discussion in Chap. 6.
[80] Art 12 of the Implementing Provisions.
[81] Annual Report 2010, 60.
[82] See—now—Art 258 TFEU.

of the underlying tensions that did occur.[83] Although the relations with the Commission have improved, the Council is often still reluctant to accept the Ombudsman's findings in constitutionally sensitive cases.[84] The new institutions under Article 13 TEU, the European Council and the European Central Bank, cannot easily produce a high volume of complaints due to their limited interaction with European citizens. The European Parliament is the institution that elects the Ombudsman, and therefore the challenge for the latter is to pursue the same rigorous standard of scrutiny on complaints concerning Parliament's activities. While the above may be read as implying that the Ombudsman's everyday work is a world of tensions, the inter-institutional reality is that in most cases the Ombudsman manages to collaborate reasonably well with the institutions under investigation.[85] The second European Ombudsman adopted a more reconciliatory language vis-à-vis the EU institutions, expressing disappointment in the form of 'missed opportunities', rewarding compliance with the inclusion of a 'star case exemplifying best practice' in the Annual Reports, or stressing the need to find win-win solutions that will enhance the legitimacy of the EU administration.[86] As subsequent chapters will show, this approach frequently produces tangible results—but not always. After all, the desirable level of proximity (in light of non-enforceability) or distance (in light of independence) with the administration is a delicate exercise that possibly troubles every public sector ombudsman.

Perhaps more time is required to assess how O'Reilly will approach this exercise. It is clear, though, that augmenting the visibility and impact of the office are priorities. The increase in the use of own-initiative inquiries is certainly an important step in this direction. This determination is evidenced in the new Strategy for the mandate, which covers the period 2014–2019. While paying tribute to the achievements of her predecessors, she also pointed out that '[m]y role and ambition now is to bring the European Ombudsman on to the next level of influence, relevance, and effectiveness'.[87] It is interesting to note O'Reilly's mission statement, too: 'Our mission is to serve democracy by working with the institutions of the

[83] On this point see Vogiatzis (n 1). Those exchanges concerned *inter alia* the Ombudsman's insistence to interpret Union law and/or the scope of the Commission's discretion in infringement proceedings.

[84] See the discussion in Chaps. 4 and 5.

[85] See further Tsadiras (n 1), in particular 761.

[86] Vogiatzis (n 1) 120–121.

[87] European Ombudsman, 'Strategy of the European Ombudsman: Towards 2019' (2014) at 2 (contained in the Foreward).

European Union to create a more effective, accountable, transparent and ethical administration'.[88] The mission statement drafted by Diamandouros in 2009 for the first 'Strategy' (2010–2014) read as follows: 'The European Ombudsman seeks fair outcomes to complaints against European Union institutions, encourages transparency and promotes an administrative culture of service. He aims to build trust through dialogue between citizens and the European Union and to foster the highest standards of behaviour in the Union's institutions'.[89] A conceptual shift is discernible, in that O'Reilly brings to the fore the link between the ombudsman and democracy, and accentuates concepts and principles such as accountability and transparency.

The relationship between the Ombudsman and civil society organisations or individuals is constructive, if not marked by interdependence. With regard to civil society, as Bonnor observed, these organisations, beyond obtaining redress, are also interested in promoting general interests; simultaneously, every ombudsman is crucially assisted by civil society in that she is provided with input.[90] From the perspective of civil society actors, accessing the Ombudsman is probably essential for pursuing their aims, given the occasionally high threshold to standing before the Court or the strained relations with the Commission that some of these actors might have.[91] The Ombudsman also collaborates with civil society in order to disseminate information relevant to her priorities, frequently via the joint organisation of seminars or conferences.

With regard to complainants whose expectations are sometimes less realistic than those of NGOs more experienced in EU decision/policy-making, disappointments may not always be avoided. However, citizens who are generally familiar with the institution consider the Ombudsman a friendly and accessible avenue defending their rights, but acknowledge that the desirable result might not always be achieved. Again, public sector ombudsman institutions operate under the delicate balance between low admissibility thresholds and non-enforceability. In this sense, whenever complainants can choose between the judicial and the extra-judicial

[88] Ibid., 5.

[89] European Ombudsman, 'Strategy for the mandate' (2010) at 6.

[90] Peter Bonnor, 'When EU civil society complains: civil society organisations and ombudsmanship at the European level' in Stijn Smismans (ed) *Civil Society and Legitimate European Governance* (Edward Elgar 2006) 141. This 'input' is information concerning administrative malfunctions, frequently of a systemic nature.

[91] The European Ombudsman's fruitful collaboration with NGOs particularly in the area of transparency and access to documents is explored in Chap. 5.

avenue, they need to think carefully about the implications of that choice. Still, the very high percentage of complaints from individuals is a positive sign for the European Ombudsman, and a valuable source of alleged malfunctions in the EU administration, too.

The Ombudsman's Office Own Administrative Set-Up

Naturally, the internal structure of the Ombudsman's office has seen many changes since the establishment of the institution. Many of these changes were mandated by the enlargements of the Union, and informed by the accumulated experience throughout the years of operation.

Figure 2.1 shows the structure of the office as of July 2016. Some observations are of relevance. The Secretary-General, Beate Gminder, 'is responsible for the overall management of the office and for ensuring overall coordination and implementation of the Ombudsman's strategy'.[92] The investment in the communication policy is evident: there is a 'Communication Unit' which includes a press officer and a social media officer. The 'inquiries units' deal with the legal aspect of complaints and conduct investigations; Unit 5 has the additional responsibility to process and register the complaints. There is a specific Unit now for own-initiative or strategic inquiries. More generally, the new 'organigram' reflects the need for efficiency and simplification in decision-making under the constraints imposed by resources: the Heads of Unit undertake now a 'middle management role' and 'report directly to the Secretary-General'.[93] As before, the Ombudsman's Cabinet advises her on the implementation of her 'vision, strategy and objectives'.[94] Members of the Cabinet also 'represent the Ombudsman externally and draft speeches and articles on behalf of the Ombudsman', while managing the latter's 'agenda, correspondence and records'.[95]

[92] See The Ombudsman's Team, available at: www.ombudsman.europa.eu/en/atyourservice/team.faces. Beate Gminder had previously worked for the Commission. She succeeded Ian Harden, who served as Secretary-General from August 2006 until his retirement in July 2015. Between 1996 and 2006 he held several posts within the European Ombudsman's office.

[93] European Ombudsman, Annual Management Plan 2016, 5.

[94] Ibid.

[95] Ibid. In the Annual Reports it is also mentioned that in 2006, a 'staff retreat' activity took place, which included a self-assessment exercise. The purpose was to '[develop] and [strengthen] the understanding of the institution's values and mission, and to [promote] their effective delivery'; see Annual Report 2006, 31–32. Quite naturally, internal evaluations or reflections are regularly being organised; see, for example, Chap. 6 on the consultations before the adoption of the Strategies.

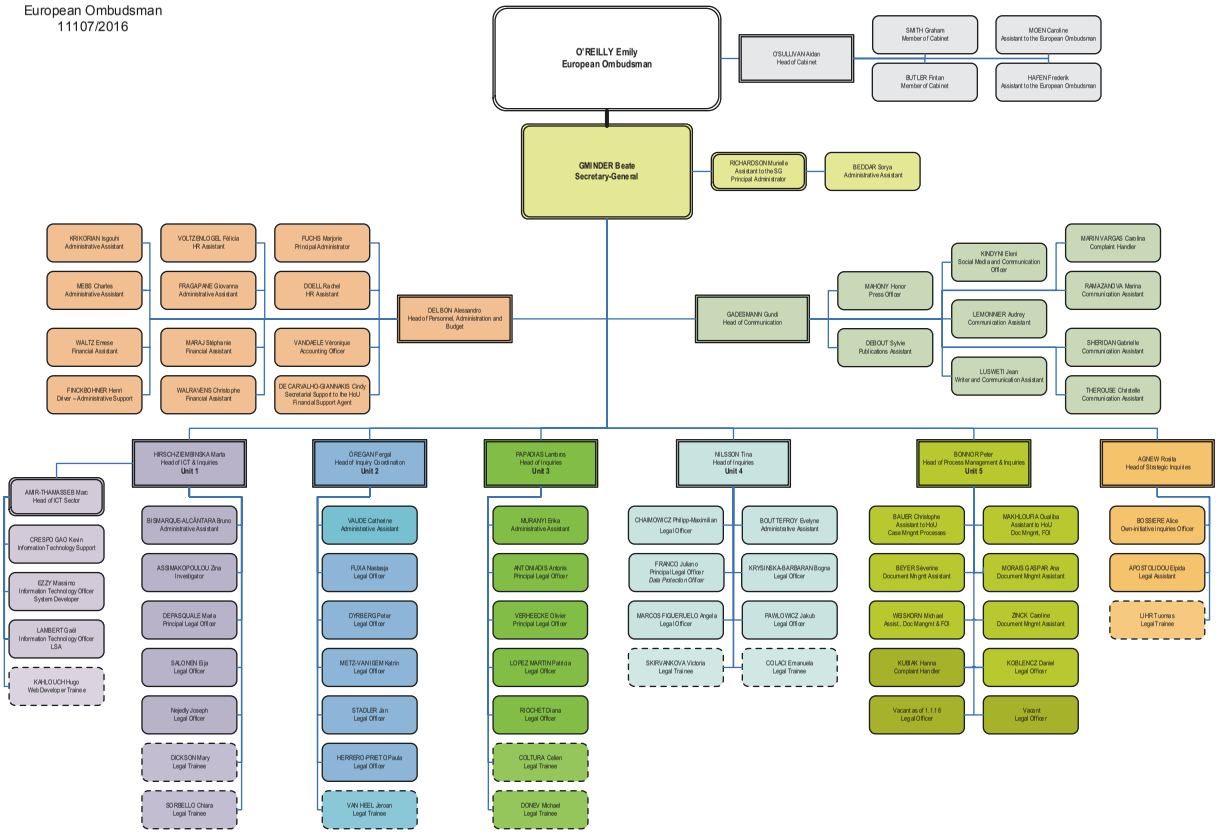

Fig. 2.1 Organigram of July 2016—(© European Union)

The seat of the European Ombudsman is in Strasbourg. It is worth noting, however, that over the last years the Ombudsman's office in Brussels has seen a significant increase in members of staff, which is likely to continue. The Ombudsman and Secretary-General now split their time between Brussels and Strasbourg. This 'move to Brussels' is obviously informed by the fact that most EU institutions and bodies are there, and this facilitates, for example, the inspection of documents. Accordingly, the Communication Unit needs to secure a strong presence in Brussels for dissemination purposes and the organisation of events.

The European Code of Good Administrative Behaviour

One of the significant achievements of the European Ombudsman was the production of the ECGAB. Ombudsman institutions do need to act proactively and publish principles or codes of good practice, also because their decisions are not legally binding. The Code is valuable for the Ombudsman in that it enables her to regularly refer to articles within the ECGAB which the institutions need to respect. When the Ombudsman directs the institution to the respective ECGAB provision, even if in disagreement with the Ombudsman's assessment, that institution still needs to provide an explanation or justification for its action/inaction.

The ECGAB was drafted by the first Ombudsman, who was inspired by past work on complaints, the submissions of domestic similar institutions[96] and the work of the CJEU in the field of good administration and beyond. The Code was updated in 2013 to include the public service principles applicable to EU civil servants. Another driving force behind the Code was the fact that the Ombudsman has consistently supported the adoption of a 'European administrative law', which would codify the rather fragmented area of EU administrative procedures. The previous version of the Code (published in 2005) emphasised the Ombudsman's views that the ECGAB should become legally binding through the adoption of a Regulation. This would facilitate aims such as transparency and consistency.[97] Reference was

[96] On this point see Alexandros Tsadiras, 'Rules of institutional "flat-sharing": The European Ombudsman and his national peers' (2008) 33 *European Law Review* 101, at 114. The ECGAB is available at: www.ombudsman.europa.eu/en/resources/code.faces#/page/1

[97] ECGAB (2005) p. 9.

made to a possible legal basis in the Constitutional Treaty for such an initiative, which is now Article 298 TFEU.[98] The Ombudsman has participated in the workings of the 'Research Network on EU Administrative Law', which has produced a valuable body of work concerning EU administrative procedure.[99] It is understood that Article 298 TFEU will eventually serve as the legal basis for this piece of legislation, if adopted. In June 2016, a Resolution was adopted by the European Parliament for an open, efficient and independent European Union administration.[100] A proposal for a draft Regulation was annexed thereto, while the Commission was invited to 'come forward with a legislative proposal to be included in its work programme for the year 2017'.[101] Interesting developments lie ahead.

The text of the ECGAB is considerably more extensive than the right to good administration as enshrined in Article 41 of the Charter (see below). The Code was endorsed by all EU agencies in 2008, which committed themselves to ensuring its publication and availability.[102] The Code applies only to the EU institutions, bodies, offices and agencies (and thus not to member states' authorities), but has proved a source of inspiration for similar guidelines or principles within national legal orders, frequently

[98] That Article provides as follows:

1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.
2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

For a discussion also on the possible legal bases see Paul Craig, 'A General Law on Administrative Procedure, Legislative Competence and Judicial Competence' (2013) 19 *European Public Law* 503.

[99] See the outputs of the project at: www.reneual.eu. See further Päivi Leino-Sandberg, 'Enforcing citizens' right to good administration: Time for action' (2012) Research report written at the request of the European Parliament's Legal Affairs Committee.

[100] See: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0279+0+DOC+XML+V0//EN

[101] Ibid.

[102] Annual Report 2008, 76.

by ombudsman institutions as well.[103] As already noted, many of the provisions of the ECGAB codify existing case-law of the Court on or beyond good administration[104]; others, however, go significantly further.

The Code contains the 'general principles of good administrative behaviour'. If an institution fails to comply with the provisions of the Code, this can be the subject of a complaint to the Ombudsman.[105] The EU institutions should 'take effective measures' to inform citizens of their rights under the Code.[106] Certain articles refer to lawfulness, absence of discrimination unless objectively justified, abuse of power, proportionality and equality. The quite elaborate formulation of parts of several articles arguably touches quite substantially upon *discretionary* decision-making.[107] The Code stresses that institutions should take decisions or respond within a maximum time limit of two months.[108] If this is not possible, applicants should be duly informed.

One of the most significant contributions of the Code is the inclusion of articles which embed in the EU administration concepts or principles of contemporary governance, and notably a *culture of service* to citizens. Numerous articles oblige the institutions to keep records of their correspondence, to transfer letters or complaints to competent institutions, and to be responsive and helpful when receiving requests for information. (There is a separate article in the ECGAB on access to documents.[109]) This is perhaps fully encapsulated in Article 12 ECGAB, titled 'Courtesy':

[103] ECGAB, p. 11.

[104] Beyond good administration, too, as the Code refers, for example, to proportionality. For interesting analyses comparing the Code with the case-law of the Court see, for example, Joana Mendes, 'Good administration in EU Law and the European Code of Good Administrative Behaviour' (2009) EUI Working Paper Law 2009/09 (accepting that the Code goes beyond Article 41 of the Charter, thereby reflecting 'different layers of good administration'); Leino-Sandberg (n 99); Juli Ponce, 'Good administration and administrative procedures' (2005) 12 *Indiana Journal of Global Legal Studies* 551, in particular 565–576.

[105] Art 26 ECGAB.

[106] Art 25 ECGAB.

[107] See, for example, how the following articles are worded: proportionality (Art 6 ECGAB); absence of abuse of power (Art 7 ECGAB); objectivity (Art 9 ECGAB); fairness (Art 11 ECGAB); duty to state grounds (Art 18 ECGAB)—among others.

[108] Art 17 ECGAB.

[109] Art 23 ECGAB. Regarding data protection, reference is made to Regulation 45/2001 (Art 21 ECGAB).

1. The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked.
2. If the official is not responsible for the matter concerned, he shall direct the citizen to the appropriate official.
3. If an error occurs which negatively affects the rights or interests of a member of the public, the official shall apologise for it and endeavour to correct the negative effects resulting from his or her error in the most expedient way and inform the member of the public of any rights of appeal in accordance with Article 19 of the Code.

The content of this article admittedly amounts to an ideal of administration, one that aims at serving the interests and/or enquiries of citizens in the most efficient way. *Any* administration would need to work hard to fully meet the above standards.

Inspired by the Ombudsman's push for transparency and service-mindedness, the Commission[110] and the Secretary-General of the Council[111] have adopted their own Codes, which cannot be discussed here in detail. Nonetheless, an unnecessary plethora of Codes may be observed. This is not entirely satisfactory for obvious reasons: by drafting customised texts, the EU institutions set their own standards or preferences, undermining coherence. Perhaps such Codes might need to be revisited if the project to enact a Regulation on EU administrative procedure is materialised.

The ECGAB also contains the public service principles that should guide EU civil servants. These stemmed from a broad consultation carried out by the Ombudsman and are, in essence, 'ethical standards to

[110] European Commission, 'Code of Good Administrative Behaviour: Relations with the public' available at: ec.europa.eu/transparency/code/_docs/code_en.pdf. Section 6 of the Commission's Code concerning the complaints against the Commission mentions the possibility to contact the Ombudsman.

[111] Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public, OJ C 189/1.

which the EU public administration adheres'.[112] The five public service principles are: commitment to the EU and its citizens; integrity (the principle underlines the duty to go beyond the legal obligations, and to avoid conflicts of interest); objectivity; respect for others; and transparency.[113] The Ombudsman may refer to these principles, too, in the context of specific inquiries. The public service principles, as well as the ECGAB more generally, enable the institutions to act *proactively* and remedy shortcomings in the first place, thereby improving the quality of service they provide without waiting to answer specific complaints. The Code may therefore be seen as a standard-setting document, too.[114]

The Right to Good Administration

The European Ombudsman recommended the inclusion of a right to good administration in the Charter during the Convention era.[115] In his view, a modern approach regarding 'human rights standards' encompasses the right to an 'open, accountable and service-minded public administration'.[116] The inclusion of this right in the Charter is 'innovative, in so far as it is one of the first European and even international charters of fundamental rights explicitly recognising good administration as containing subjective procedural rights'.[117] The Charter also includes a right of access to

[112] ECGAB, p. 8.

[113] Ibid., 8–10.

[114] This has been acknowledged by the Ombudsman in the ECGAB (on p. 11): 'The principles thus help to raise the quality of public administration, strengthen the rule of law, and make it less likely that discretionary power will be used arbitrarily'; or on p. 2, where the impact of the Code and the proactive 'willingness [of the EU institutions] … to identify shortcomings and to find ways of resolving potential problems before they occur' is discussed.

[115] Nikiforos Diamandouros, 'The European Ombudsman and good administration post-Lisbon' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds) *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 219.

[116] Speech of the European Ombudsman—Public Hearing on the draft Charter of Fundamental Rights of the European Union, Brussels, (2000) available at: www.ombudsman.europa.eu/speeches/en/charter1.htm.

[117] Herwig Hofmann and Bucura Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration

documents,[118] which is of direct relevance to the Ombudsman's work as the latter has been a consistent promoter of a transparent administration.

Article 41 of the Charter (the right to good administration) provides:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Let us first consider the scope of application of Article 41. While the Charter generally applies to the EU institutions, bodies, offices and agencies *and to the member states when they are implementing Union law*,[119] the right to good administration under the said provision applies only to the EU institutions, bodies, offices and agencies.[120]

as the Test Case' (2013) 9 *European Constitutional Law Review* 73, at 85–86. See below for a brief discussion on whether this right contains subjective rights.

[118] Art 42 of the Charter.

[119] Art 51 of the Charter.

[120] See initially Case C-482/10, *Cicala* v *Regione Siciliana*, EU:C:2011:868, para 28; Joined Cases C-141/12 and C-372/12, *YS* v *Minister voor Immigratie, Integratie en Asiel*, EU:C:2014:2081, para 67. Importantly, though, in *YS* the CJEU left open the question of the exact scope of the right to good administration as *general principle of EU law*, because such question was not asked by the referring court (ibid., para 68). In *WebMindLicenses Kft* the CJEU cited the *YS* case and held that Article 41 of the Charter was not relevant as that provision is addressed only to the EU institutions, bodies, offices and agencies (Case C-419/14, *WebMindLicenses Kft*, EU:C:2015:832 para 83). In the earlier *H.N.* case, how-

The rights contained in Article 41 of the Charter have been recognised by established case-law[121] or other Treaty provisions.[122] It is briefly noted that a widely accepted view is that the 'the concept of good administration [is] an umbrella principle, which in itself is an objective principle only, and grants specific subjective rights through its component principles'.[123] Another issue worth examining is how broad the first paragraph of Article 41 of the Charter may be. It certainly includes the rights mentioned in the second paragraph of the same Article—but would it be plausible to argue that the content of the ECGAB is mirrored by Article 41(1) of the Charter? In that regard, Craig noted that an 'expansive interpretation' of Article 41(1) would incorporate a significant part of the ECGAB, while a 'narrower reading' of the provision could not go significantly beyond the rights enumerated in the second paragraph.[124] It is submitted that it is rather difficult to argue that the totality of the ECGAB can be included under the scope of Article 41. The Code was prepared as an instrument that would enable the Ombudsman to direct the institutions and bodies to the relevant principles of good administration, and these principles—as well as the Ombudsman's role as such—go(es) *beyond legality*. Besides, efforts to draft a European administrative law would probably become redundant in such case. To return to a familiar example, Article 41 of the Charter does not go as far as encompassing 'courtesy' under Article 12 ECGAB. In this respect, the Ombudsman has noted that '[e]lements of the [non-binding] Code overlap … with the [binding] fundamental right

ever, the CJEU had found that good administration as a general principle applied to member states—see Case C-604/12, *H.N.*, EU:C:2014:302, paras 49–51.

[121] See the Charter's explanations at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF, and, among others, Case C-269/90, *TU München* EU:C:1991:438, paras 14–15; Case 222/86, *Heylens*, EU:C:1987:442, paras 14–16; Case T-167/94, *Nölle* v *Council and Commission*, EU:T:1995:169, para 73; Joined Cases T-458/09 and T-171/10, *Slovak Telekom* v *Commission*, EU:T:2012:145, paras 67–68.

[122] The reason-giving requirement stems from Article 296 TFEU; Article 41(3) of the Charter corresponds to Article 340 TFEU; Article 41(4) of the Charter corresponds to Articles 20(2)(d) and 24(4) TFEU.

[123] Hofmann and Mihaescu (n 117) 90. The classification between rights and principles need not be discussed in detail here; the term rights under Article 51(1) of the Charter refers to subjective, judicially cognizable rights, while the term principles in Article 51(1) and, in particular, Article 52(5) of the Charter entails that implementation is required via legislative and executive acts, and that these rights 'are judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.

[124] Paul Craig, 'Article 41—Right to Good Administration', in Steve Peers et al. (n 1) 1069, at 1072–1073.

to good administration'.[125] While not encompassing the totality of the ECGAB, how broad the first paragraph of Article 41 of the Charter can be is being determined by the EU courts.[126] In a case also discussed in the next section, and building on established case-law, the General Court held that good administration as a binding rule encompasses the principle/duty of diligence, that is, 'the obligation to examine carefully and impartially all the relevant elements of the individual case', but not several provisions of the ECGAB. In particular, the 'acknowledgment of receipt' principle under Article 14 of the ECGAB or the two-month time limit for the adoption of decisions under Article 17 ECGAB (the Court pointed out that the 'reasonable time' requirement under Article 41(1) of the Charter depends on the circumstances of the case) are not within its scope.[127] An appeal submitted by the European Ombudsman is presently pending.

The contribution of the Ombudsman to the addition of rights in the Charter evidences the influence of the office in the embedding of the EU rule of law. In addition, the principles of good administration, and notably those related to a 'culture of service' certainly align with the Ombudsman's efforts to promote good governance in the EU.[128] The same applies to the ethical standards for the EU civil service.

The Ombudsman's Treatment by the Union Judiciary

On various occasions the EU courts have clarified the scope of the Ombudsman's powers, and also the conditions under which the Ombudsman's conduct might be reviewable by the judiciary. The first issue that led complainants to access the Court was whether the Ombudsman's unsatisfactory resolution of a complaint could lead to an action for a failure to act.[129] The—then—Court of First Instance (CFI, now the 'General

[125] ECGAB, p. 6.

[126] On the Court's case-law touching upon *fairness* and *impartiality* under Article 41 of the Charter see, for example, Leino-Sandberg (n 99) 12–14, and cases cited therein; see further Craig (n 124).

[127] T-217/11, *Staelen* v *European Ombudsman*, EU:T:2015:238, paras 81–83 and 263–267. The case concerned the liability of the Union (via the liability of the Ombudsman).

[128] Some of the content of the ECGAB echoes the Commission's famous White Paper on European Governance; see Commission of the European Communities, 'European Governance: A White Paper' COM (2001) 428 final.

[129] T-103/99, *Associazione delle Cantine Sociali Venete* v *European Ombudsman and European Parliament* EU:T:2000:135. The complainant (a legal person) was dissatisfied with the eclipse of the two-month deadline after submitting its observations to the

Court') confirmed that 'the Ombudsman is not a Community institution … so that the application, to the extent that it refers to a failure to act on the Ombudsman's part, must be declared inadmissible'.[130] The Court left open the question as to whether the Ombudsman was an *organ of Parliament*, and went on to examine whether a possible failure to act could be attributable to Parliament. The Ombudsman's recommendations are not, however, 'challengeable acts of direct and individual concern', in that they do not produce legal effects vis-à-vis third parties; Parliament 'is free to decide … what steps are to be taken' concerning the findings of maladministration; the same 'applies *a fortiori* to the annual report which the Ombudsman must also submit to the Parliament at the end of each annual session'.[131] Was this conclusion a 'denial of justice', as the applicant had argued? The Court answered this question in the negative: to expect that the Ombudsman may be subject to actions for failure to act under such circumstances was a position 'founded on false premises regarding both the status of the Ombudsman and the extent and nature of his powers'.[132]

The Court returned to the relationship between the Ombudsman and Parliament in the *Lamberts* judgments. In the CFI judgment, the Court clarified that the Ombudsman is a 'body established by the Treaty', and that the 'right of citizens to have recourse to the Ombudsman is an integral part of citizenship of the Union'.[133] The complainant was dissatisfied with the outcome of the Ombudsman's inquiry and his decision not to find serious maladministration, on the part of the Commission, in the organisation of a competition, but to produce a critical remark 'regarding the Commission's general administrative practice'; thus, an action for damages was submitted. The Ombudsman advanced the argument that the ambit of his discretion is comparable to the Commission's discretion in infringement proceedings.[134] The Court did not accept such a

Ombudsman, and considered that the Ombudsman had unlawfully refrained from finding an instance of maladministration (failure to act).

[130] Ibid., para 46.

[131] Ibid., paras 47–50.

[132] Ibid., para 54.

[133] T-209/00, *Frank Lamberts* v *European Ombudsman*, EU:T:2002:94, para 50.

[134] More specifically, the Ombudsman argued that 'he has wide discretion with regard to the facts and the measures to be taken following his inquiries and that he is not bound to instigate an inquiry, draw up recommendations, pursue friendly settlements or send reports to the European Parliament. He conclude[d] that his choice of the measure to be taken

comparison, noting that the Ombudsman's role partly differs from that of the Commission. Taking into account that extra-contractual liability is not limited to the EU institutions under—now—Article 13 TEU,[135] the CFI, while confirming the wide discretionary powers of the Ombudsman in the handling of complaints, held nonetheless that 'in very exceptional circumstances' the Ombudsman might be subject to an action for damages. That is so if the complainant proves 'a manifest error in the performance of [the Ombudsman's] duties'; thus, 'review by the Community judicature [over the Ombudsman] must … be limited'.[136] After all, and rehearsing established case-law, the Court noted that an action for damages is an *autonomous* form of action which could arise even in non-binding measures, and therefore had to be dissociated from actions for annulment/failure to act.

The CFI found that the Ombudsman is under no obligation to achieve a specific result in the context of an inquiry. Likewise, the Ombudsman is not obliged to provide advice on alternative avenues for redress, and notably remedies before the Court: she may do so, but doing otherwise cannot give rise to non-contractual liability.[137] While the Ombudsman was invited to complete his inquiries within a 'reasonable time' according to the 'requirements of proper administration', this will ultimately depend on the circumstances of the case, and certainly the Ombudsman's intentions as expressed in Annual Reports to complete inquiries within a year did not amount to a mandatory time-limit.[138] The CFI ultimately safeguarded in that case the broad discretionary powers of the Ombudsman, which are also confirmed by the Statute.[139] Otherwise, all complainants unsatisfied with the outcome of the investigation could take the Ombudsman to the Court, invoking the Ombudsman's liability on the basis of various allegations. Accordingly, the Court clearly avoided interfering with the Ombudsman's choice of the appropriate non-binding instrument of redress.

The European Ombudsman lodged an appeal before the ECJ, apparently concerned with the CFI's decision on the admissibility of the action

following his inquiry cannot give rise to non-contractual liability on the part of the Community'; ibid., para 45.

[135] In this sense, the wording of Article 340(2) TFEU on extra-contractual liability is in disharmony with established case-law.

[136] T-209/00, para 57.

[137] Ibid., paras 68–69.

[138] Ibid., paras 73–77.

[139] See, for example, Arts 2(5) and 3(5) of the Statute, and the relevant discussion above.

for damages.[140] The European Parliament fully supported the Ombudsman in his arguments. The Ombudsman was not, in principle, opposed to an action for damages against the office, under the precondition that such action would not cover the investigatory part of his work.[141] By contrast, 'an action for damages … [seeking] a review of the legality of the inquiry conducted by [the Ombudsman] and of his decision to close the procedure' was, in his view, in breach of Union law.[142] The Ombudsman was effectively objecting to any sort of control concerning the way the inquiries were being conducted, and attempted to limit as far as possible the scope of his non-contractual liability.

Was judicial review justifiable, in light of the review conducted by Parliament over the Ombudsman's activities? The ECJ clearly answered the question in the affirmative, pointing out that the Reports submitted to Parliament do not constitute 'review by the Parliament of the proper performance by the Ombudsman of his duties in dealing with citizens' complaints', while the dismissal procedure by the Court[143] follows an overall evaluation of her or his work and is not the consequence of dissatisfaction with a specific complaint. Thus, judicial review must be dissociated from the inter-institutional relations or collaboration between the Ombudsman and Parliament.[144] Furthermore, the Ombudsman's independence is generally not at risk in instances of actions for damages, because these damages do not concern her or him personally, but are attributable to the Community (now the Union) as a whole. Nonetheless, when the Courts examine the alleged breach and, more specifically, whether or not it is sufficiently serious,[145] they should bear in mind 'the specific nature of the [Ombudsman's] function' and 'that the Ombudsman is merely

[140] Case C-234/02, *European Ombudsman* v *Frank Lamberts*, EU:C:2004:174.

[141] Ibid., para 35. In the Ombudsman's view, a permissible action could concern, for example, the non-respect by the Ombudsman of confidentiality requirements.

[142] Ibid., para 36.

[143] Art 8 of the Statute.

[144] C-234/02, paras 43–47.

[145] The conditions for liability are well known: a *sufficiently serious breach* of the rule of law intended to *confer rights on individuals*; the identification of the *damage* suffered; and the *direct causal link* between the breach of the obligation resting on the author of the act and the damage sustained by the applicant. See Case C-352/98 P, *Bergaderm and Goupil* EU:C:2000:361, paras 41–44. On the sufficiently serious breach, the test is whether the EU institution (or body) *manifestly and gravely disregarded the limits on its discretion*.

under an obligation to use his best endeavours and that he enjoys wide discretion'.[146]

The Advocate General had opined that the Ombudsman's activity, while protecting citizens' rights, differs from the judicial procedure, in that the former is not a typical *inter partes* process as the Ombudsman enjoys significant freedom in dealing with complaints and in cooperating with the parties concerned.[147] The most important difference is, of course, the lack of binding decisions. Given that there are no means of appeal against the actions and decisions of the Ombudsman, it was important—for the purposes of the individual's complete legal protection—not to exclude the possibility of compensation vis-à-vis the Ombudsman's conduct. He accurately pointed out that it would be somewhat ironic for a body that investigates maladministration to be excluded from precisely such a control.[148] As already noted, the Advocate General's views were largely endorsed by the ECJ.

Against this background, it is submitted that the *Lamberts* cases stroke a plausible balance, in that the Court ensured that the Ombudsman is not immune from judicial review but, simultaneously, that her independence and discretion—especially throughout the investigatory work—are not undermined, particularly by an irrational number of judicial review applications against the Ombudsman.

In 2008, the Ombudsman lost a case before the CFI further to an action for damages, and paid a compensation of 10,000 euros to the applicant.[149] The Ombudsman was found to have violated the proportionality principle, the right to respect of private life of the applicant, and the *audi alteram partem* principle.[150] The case concerned the non-respect of confidentiality requirements, on the part of the Ombudsman, since the latter had revealed the identity of the complainant via a specific critical remark. According to the CFI, this could endanger the complainant's professional integrity.[151] Furthermore, the Court stated that the reference to the complainant's name could not be justified either by a need to protect the rights of third parties (notably a possible risk of confusion) or by the gravity of the facts. Regarding

[146] C-234/02, paras 49–50.
[147] Opinion of Advocate General Geelhoed in Case C-234/02, paras 56–59.
[148] Ibid., paras 107–110.
[149] Case T-412/05, *M.* v *European Ombudsman*, EU:T:2008:397.
[150] Ibid., paras 133–140.
[151] Ibid., paras 118–119.

the *audi alteram partem* principle, it concluded that the Ombudsman's invitation to the Commission to hear the complainant could not substitute the complainant's right to be heard by the Ombudsman himself.[152] The Court distinguished the confidentiality rule from the broad discretionary powers and independence of the Ombudsman throughout the inquiry.[153]

A more challenging question is whether the Ombudsman's acts could be subject to an action for annulment. Indeed, Article 263 TFEU extends post-Lisbon to 'the legality of acts of bodies, offices or agencies of the Union intended to produce *legal effects vis-à-vis third parties*'. Recommendations and opinions are excluded, in that they do not produce such effects.[154] From a policy perspective, Peters noted that '[i]mmunity of the Ombudsman's *substantive* findings from review by the courts' is defendable: '[j]ust as the Ombudsman cannot review the substance of judicial proceedings, the courts should not review his findings *in substance*. Otherwise, the idea of alternative means of dispute settlement is betrayed'.[155] However, the Ombudsman's work is not exhausted to the substantive conclusions upon the completion of the investigation.

Thus, Tsadiras argued that the Ombudsman's decision on *admissibility* does produce legal effects vis-à-vis third parties, and could therefore be subject to an action for annulment.[156] This accurate view has recently been confirmed (by analogy) by the Court, in a case regarding the handling of petitions by the respective Committee of the European Parliament. The CJEU found that:

> a decision by which the Parliament considers that a petition addressed to it does not meet the conditions [of] Article 227 TFEU must be amenable to judicial review, since it is liable to *affect the right of petition* of the person concerned. The same applies to a decision by which the Parliament, *disregarding the very essence* of the right of petition, *refuses to consider, or refrains*

[152] Ibid., paras 129–140.

[153] Ibid., para 143.

[154] The General Court confirmed this in a case concerning the Ombudsman's scrutiny over the Commission's handling of an infringement complaint; see Case T-430/14, *Mirelta Ingatlanhasznosító Kft.* v *European Ombudsman*, EU:T:2014:996.

[155] Peters (n 1) 726.

[156] Tsadiras (n 1) 760.

> *from considering*, a petition addressed to it and, consequently, fails to verify whether it meets the conditions [of] Article 227 TFEU.[157]

Thus, if the Ombudsman completely disregards a complaint (a very unlikely hypothesis), or takes an erroneous decision on admissibility, which includes or perhaps presupposes the inside/outside the mandate question, this could perhaps be subject to an action for failure to act (in the first case) or annulment (in the second). In *O'Loughlin*, the CFI stressed that because the Ombudsman was not listed among the institutions, he could not be the addressee of a failure to act (in that case to take action against the Commission), and therefore the application in this respect was inadmissible.[158] However, post-Lisbon, as is the case with the action for annulment, Article 265 TFEU empowers the Court to review applications alleging that an EU body, office or agency has failed to act.

As to the outcome of the Ombudsman's inquiry, it may be wondered whether such a control over legality should be excluded under any circumstances. The existing case-law suggests that the Ombudsman's non-binding decisions do not produce legal effects and, in any event, judicial redress may be sought in exceptional cases via the action for damages. Clearly, the Ombudsman is under no obligation of result. Consider, however, the—admittedly improbable—scenario whereby the Ombudsman would admit the complaint but then disregard an obvious and serious instance of maladministration (e.g. violation of a fundamental right) and opt for the closure of the case without any inquiries, contrary to established practices. The question arising in this very unlikely scenario is whether additional grey zones (beyond the admissibility decision) might exist (or should exist) within the Ombudsman process that could be viewed as potentially judicially reviewable. To return to the abovementioned *Schönberger* case concerning the Petitions' Committee, the Court's approach suggests that the answer is in the negative, because of the broad discretion—of a political nature—granted to that Committee as to how to deal with petitions from the point of admissibility onwards.[159] In any event, it could equally be claimed that this matter need not be considered since the Ombudsman's extra-contractual liability may be engaged in exceptional circumstances; and

[157] Case C-261/13 P, *Schönberger* v *European Parliament*, EU:C:2014:2423, para 22 (emphasis added).

[158] T-144/06, *O'Loughlin* v *European Ombudsman and Ireland*, EU:T:2006:237, para 15.

[159] *Schönberger* (n 157) para 24.

that it is preferable in any event to completely dissociate the Ombudsman process from annulment, for reasons discussed above.

Elsewhere, the Court decided that expenses related to contact/communication of a citizen/legal person with the European Ombudsman are not recoverable through an action for damages.[160] In their reasoning, especially the CFI and indirectly the ECJ, too, pointed out that the purpose of the creation of the Ombudsman was to establish an alternative remedy for European citizens; thus, the assistance of lawyers generally should not be sought.[161] In the appeal, the ECJ verified that costs related to the submission of complaints to the Ombudsman cannot 'be regarded as damage caused by the institution in question' and that there was 'no causal link in law between the damage allegedly suffered by [the applicant] and the actions of the Commission'.[162] The Advocate General had observed that '[i]n cases of smaller-scale irregularities, this wide discretion may even cause [the Ombudsman] to refrain entirely from taking action against the body in question', contrary to the Courts, and for this reason 'the optimisation of the Community administration and not individual legal protection is the focus for the Ombudsman's efforts'.[163] There is no evidence, of course, suggesting that the Ombudsman disregards smaller cases because they are of limited general interest.[164] Indeed, the Ombudsman seeks to find a delicate balance between the promotion of the public interest and the rights of individuals arising from specific complaints. Beyond this, ombudsman institutions (like courts) through the pursuit of an individual (and at first glance less important) complaint, can often have a considerable impact on the quality of the administration.[165]

Should the Court take into account the Ombudsman's findings? In *Komninou*, the ECJ held that the Ombudsman's findings are not binding

[160] Case C-331/05 P, *Internationaler Hilfsfonds eV* v *Commission*, EU:C:2007:390.

[161] Ibid., para 12. See also the Opinion of Advocate General Trstenjak in C-331/05 P, in particular paras 56–71.

[162] Ibid., paras 25–31.

[163] Opinion of AG Trstenjak in Case C-331/05 P, EU:C:2007:191, paras 61–63.

[164] More generally, it has been observed that a 'shift towards a proactive ombudsman model' may result in a restriction 'on citizens' ability to participate' through the submission of complaints to the ombudsman; see Chris Gill, 'The evolving role of the ombudsman: A conceptual and constitutional analysis of the "Scottish solution" to administrative justice' [2014] Public Law 662, at 670–671.

[165] Robert Lee, 'The ombudsman in a political context: The Commonwealth and Victoria ombudsmen in Australia' (1991) 57 *International Review of Administrative Sciences* 441, at 459.

to the EU Courts.[166] The Courts perform their own assessment of the facts and the legal framework; the finding of maladministration by the Ombudsman is not sufficient in itself to constitute a sufficiently serious breach of a rule of law, according to the case-law of the Court.[167] The ECJ's view is consistent with the Ombudsman's position that maladministration is broader than illegality. Further, even if the Ombudsman considers that the activity of the EU institution is unlawful, the EU Courts are not bound by this assessment: this is logical as the Ombudsman's review does not constitute duplication of judicial review, nor does it impose limits on the jurisdictional ambit of the EU Courts.

The Ombudsman's investigatory practice was recently subjected to thorough scrutiny by the General Court in the abovementioned *Staelen* case[168] (which is pending before the CJEU as the Ombudsman has lodged an appeal). The General Court accepted that the Ombudsman enjoys broad discretion throughout an investigation, but this discretion is confined in particular by Article 41 of the Charter. That is so when the Ombudsman disrespects the *duty to exercise diligence*, the obligation to examine with care and impartiality all the pertinent elements of a specific case; the non-respect of that principle results in a sufficiently serious breach, leading to the extra-contractual liability of the Ombudsman.[169] In the case at hand, the General Court held that the Ombudsman during the investigation committed a number of irregularities incompatible with the duty of diligence,[170] and thus the non-contractual liability of

[166] Case C-167/06 P, *Komninou* v *Commission*, EU:C:2007:633.

[167] Ibid., paras 43–46.

[168] *Staelen* (n 127).

[169] Ibid., paras 80–86.

[170] These were: the incorrect assessment of the content of a document produced by the European Parliament; the Ombudsman's omission to examine when and how the applicant's name was registered in the catalogue of successful applicants and then transferred to the EU institutions—this was crucial for the finding or not of maladministration, on the part of the European Parliament; the Ombudsman did not have sufficient evidence to conclude that the name of applicant had been transferred to all the Secretaries-General of the European Parliament, but concluded otherwise in his decision, relying on mere assertions of the European Parliament. A summary of these points may be found at paras 142–145. Another issue was that the Ombudsman, without providing convincing explanations, responded to the complainant's requests with a delay of five and eight months, time-frames which could not be characterised as reasonable (ibid., para 256). However, there was no 'sufficiently direct link between the delay in sending those replies and the loss of opportunity of recruitment for the applicant as an official' (ibid., para 287).

the Ombudsman had been established.[171] The case might have considerable implications for the office of the European Ombudsman, or indeed other institutions or bodies dealing with complaints, and it is certainly worth anticipating the CJEU ruling. If anything, Advocate General Wahl has expressed in rather strong terms his disagreement with the findings of the General Court, demonstrating awareness of the implications that the outcome of the case might have for the proper functioning of the Ombudsman's office.[172]

Until the CJEU's judgment, the following observations can be submitted. The legally binding Charter, which includes the right to good administration (and also the right to complain to the Ombudsman, it is remembered), certainly brings to the fore the European Ombudsman's obligations in the context of inquiries. Such obligations encompass in principle a duty of diligence—after all, in *Staelen* the Court reiterated that the scope of Article 41(1) of the Charter is not limited to the examples provided in Article 41(2) as the term 'includes' features therein. All this despite the broad discretion that the CJEU has granted the Ombudsman under previous case-law. More generally, however, the General Court demonstrated an unusual willingness to inquire into the working methods of the Ombudsman via a judgment of no less than 339 paragraphs. It went through all the steps, arguments and counter-arguments presented during the Ombudsman's inquiry, as well as his findings. Whether such level of scrutiny ultimately failed 'to take into account the specific nature of the function of the Ombudsman and in particular the fact that the latter has a very wide discretion with regard to the conduct of investigations' (as the Ombudsman claims in the appeal)[173] is something that will be resolved by the CJEU. Moreover, the result of the case might have implications for the collaboration between the Ombudsman and the European Parliament, particularly because the former relied on information provided by the latter without demonstrating the required degree

[171] The 'non-pecuniary loss' was calculated at 7000 euros: owing to the Ombudsman's unlawful acts during the investigation, the applicant lost her trust in the institution of the Ombudsman, while spending time and energy waiting on the Ombudsman's findings (ibid., paras 288–294). The Ombudsman's apologies could not redress this, according to the General Court.

[172] Opinion of Advocate General Wahl in Case C-337/15 P, *European Ombudsman* v *Staelen*, EU:C:2016:823, in particular paras 4, 41, 112–113.

[173] Case C-337/15 P, *European Ombudsman* v *Staelen* (pending).

of diligence.[174] Accordingly, it remains to be seen whether the case will mean that henceforth, the Ombudsman may not be able to rely on information provided by other institutions—which immediately brings to the fore the question of resources. The findings of the General Court may also be interpreted as a warning sign for the Ombudsman to complete his or her investigations within a reasonable time.[175] In addition, if the findings are upheld by the CJEU, it may be wondered whether the case will result in a significant increase in the number of applications before the General Court from complainants unsatisfied with the Ombudsman's investigatory practices or decisions, especially in light of Article 41 of the Charter.

Lastly, in another case concerning Internationaler Hilfsfonds and the Commission's disclosure of documents under Regulation 1049, an issue arose as to whether the finding of maladministration by the Ombudsman may be considered as a new element to be taken into consideration for the purposes of an action for annulment.[176] The CFI answered this query in the negative, expressing concerns that if such argument were to be accepted, by turning to the Ombudsman, and assuming that the latter would identify maladministration, the applicant could circumvent the time limit for an action for annulment, which is two months.[177] The case reached the ECJ, and Advocate General Mengozzi took a different view. He opined that the finding of maladministration by the Ombudsman (as opposed to the Ombudsman's decision that the EU administration did not, in fact, commit maladministration) may constitute a 'substantial new fact', and this was not contrary to Article 2(6) of the Ombudsman's Statute, which states that '[c]omplaints submitted to the Ombudsman shall not affect time-limits for appeals in administrative or judicial proceedings'.[178] More specifically, he noted that the 'time-limits for bringing court proceedings would not … be reopened simply because

[174] The General Court did not accept, however, that sufficient evidence had been provided to conclude that the Ombudsman was impartial vis-à-vis Parliament.

[175] This also stems from para 261 of the judgment, where it was explained that a period of less than a year between the opening and the closure of an own-initiative inquiry (opened by the Ombudsman to redress errors made in the context of his previous inquiry) was certainly reasonable.

[176] It is noted that merely confirmatory acts, which do not contain any new element, cannot form the basis of an action for annulment.

[177] T-141/05, *Internationaler Hilfsfonds eV* v *Commission*, EU:T:2008:179, para 86.

[178] Opinion of Advocate General Mengozzi in Case C-362/08 P, *Internationaler Hilfsfonds eV* v *Commission* EU:C:2009:553, paras 166–169.

the matter had been referred to the Ombudsman, but because his decision finding an instance of substantial maladministration in the processing of an application for access to documents constituted a substantial new fact within the meaning of the case-law of the Court'.[179] He added:

> On the one hand … an institution will be all the more likely to comply diligently with the requirement of proper administration in the context of access to documents if it is aware of the possibility open to an applicant of requesting the reconsideration of a decision refusing access following a finding by the Ombudsman of an instance of maladministration. On the other hand, it is clear that, despite the obligation to reconsider the merits of the previous decision refusing access, the institution will retain the power not to disclose the requested document on the basis of the exceptions laid down by Article 4 of Regulation No 1049/2001.[180]

The ECJ set aside the judgment of the CFI insofar as its finding on inadmissibility was concerned, and the case was returned to that Court to examine the substance of the action for annulment. Although the ECJ's analysis did not directly address the aforementioned points by the Advocate General, and mainly focused on the effectiveness of the regime introduced by Regulation 1049,[181] it accepted, nonetheless, that in any case it would have been eventually unsuccessful to require that the applicant submit a *fresh confirmatory application* for access to documents given the Commission's clearly stated position *during the Ombudsman proceedings*. On that basis, it is arguable that the ECJ did not *preclude* that a finding of maladministration by the Ombudsman in the context of a complaint related to the application of Regulation 1049 could constitute a new element for the purposes of an action for annulment.

Overall, this section demonstrated that the Union judiciary has confirmed that the Ombudsman's recommendations do not produce legal effects vis-à-vis third parties, and that the Ombudsman's findings are not binding to the Court and do not necessary entail unlawful conduct. Expenses related to the communication between complainants and the Ombudsman are not recoverable. The Ombudsman is an EU body and an integral part of EU citizenship, but not necessarily an organ of the European Parliament. Reports submitted to Parliament do not amount to

[179] Ibid., para 171.
[180] Ibid.
[181] C-362/08 P, paras 59–61.

a proper review by the latter of the former's performance and in any event Parliament's powers with regard to the Ombudsman are not comparable to judicial review. The Ombudsman enjoys broad discretion in the handling of complaints (and is under no obligation to achieve a specific result), but not when in exceptional circumstances a manifest error is committed; in such cases, the action for damages is open to applicants. It remains to be seen whether, drawing on recent case-law concerning the Petition's Committee, the Court may find that an erroneous decision on admissibility, on the part of the Ombudsman, can be challenged via an action for annulment. Likewise, it remains to be seen whether the CJEU will uphold the findings of the General Court in *Staelen*, which can have considerable implications for the Ombudsman's *modus operandi* and her inter-institutional relations.

The European Ombudsman as a Distinct Actor in EU Governance

The European Ombudsman's role is evidently different in nature from that of the EU courts. The Ombudsman can be a 'complementary institution', in that a complainant might not have otherwise gone to the Court.[182] More generally, because the principles of good administration are broader than illegality, the Ombudsman's function pertains to areas that certainly exceed the scope of the right to good administration under the Charter and/or the Court's earlier case-law 'which enshrined … good administration as a general principle of law'.[183] The drafting of ethical standards for the EU civil service is a step in that direction, too. Whether too broad a notion of maladministration was adopted is a matter that is returned to in subsequent chapters.

The Ombudsman acknowledges that the final word on the authoritative interpretation of EU law remains with the CJEU.[184] This is not a stance to be criticised; after all, the Treaty and the Statute exclude the judicial function of the Court from the Ombudsman's remit and prevent her or him from examining cases pending before the Court. That being said,

[182] Katja Heede, 'Who litigates at Union level, and where?' (2001) 26 *European Law Review* 509, in particular 514–518. She argues (on p. 517) that the Ombudsman is involved in new areas of litigation, which include failure to answer letters and other administrative wrongdoings, the Commission's role in infringement proceedings, and complaints about contracts, funds and grants. See further the discussion in Chap. 4.

[183] Charter's explanations (n 121).

[184] See, for example, Annual Report 2008, 57.

the Ombudsman is not prevented from interpreting EU law when the EU courts have not done so. Ultimately, the Ombudsman is well aware that she needs to rely on the Court's case-law to convince the institutions to comply.[185] It is much more difficult for the EU institutions to question authorities emerging from established case-law.

To what extent the European Ombudsman is or should be dissociated from Parliament is debatable, and a matter returned to in the next chapter, where the question of the Ombudsman's independence is examined. That chapter also explores whether it is straightforward to classify the *European* Ombudsman among typical parliamentary ombudsman offices.

More generally, the ombudsman institution does not appear to fit within the classic separation of powers.[186] Indeed, some commentators believe that the ombudsman forms part of a fourth, separate branch of government, the 'integrity branch', which also includes 'commissioners, regulators, inspectors and auditors'; thus, the ombudsman and 'other non-political, non-legal and non-executive branches of the state' make a distinct contribution to the constitution because they 'improve and uphold the accountability and integrity of Government'.[187]

Turning to the national level, although the workings of the ENO are considered in Chap. 6, it is nonetheless noted that it goes beyond the aims of this book to compare the Ombudsman's mandate with domestic institutions. Still, the divergence in terms of mandate or *modus operandi* of ombudsman institutions across Europe (and beyond) is considerable.[188] Taking this further, to *evaluate* the European Ombudsman's performance via a comparison with specific national or regional ombudsmen entails an additional risk: a misunderstanding of the particularities of EU administrative governance, which is certainly multi-level, complex, at times informal, often shaped by networks of cooperation: in brief, it does not mirror specific political or legal systems or administrative traditions. As Leino rightly observed, it would be 'practically impossible to create such a form of ombudsmanship that would correspond to the expectations of all

[185] Compare also the discussion in Chap. 4 on the Ombudsman's 'approach based on law'.

[186] Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate 2011) 15–19.

[187] Gill (n 164) 675; Richard Kirkham, Brian Thompson and Trevor Buck, 'Putting the Ombudsman Into Constitutional Context' (2009) 62 *Parliamentary Affairs* 600; James Spigelman, 'The Integrity Branch of Government', (2004) 78 *Australian Law Journal* 724.

[188] For a helpful overview see Kucsko– Stadlmayer (n 7).

EU citizens'.[189] Proposals advocating the transformation of the European Ombudsman into a mechanism fit for a particular domestic legal order should therefore be resisted.

That being said, drawing inspiration from national ombudsman offices and examining whether successful domestic practices can be applied at the EU level when appropriate is a constructive exercise. After all, the discussion on the establishment of the European Ombudsman was informed by prior domestic experiences. The numerous activities within the ENO, including its regular meetings—where exchanges of best practice is a routine theme of the discussions—serve precisely this purpose. In this context, national experiences or practices may help us understand, in particular, the outer *limits of the mandate of the institution*. To provide a typical, unsurprising example, it would be contrary to the very nature of an extra-judicial mechanism if the Ombudsman were to be granted enforceable powers. Conversely, the role of the ombudsman clearly goes beyond that of a mediator and beyond other forms of alternative dispute resolution, too.[190]

Concluding Remarks

This chapter began by exploring the legal framework concerning the Ombudsman's operation. The office does not produce binding decisions, but has a number of available instruments to convince the institutions to comply, ranging from friendly solutions to the submission of a special report to the European Parliament. Activities of national authorities implementing Union law cannot be investigated by the Ombudsman, who deals *with the EU administration only*. She can initiate an inquiry without the prior submission of a complaint, while complainants do not need to have a personal interest in the case in order to contact the Ombudsman. The Ombudsman's own administrative set-up creatively accommodates efficiency considerations within a European Union which has seen its membership increase over the last 20 years. Some aspects of the Ombudsman's contribution to EU administrative law and governance were also discussed, in particular the development of the ECGAB (to which the Ombudsman

[189] See Leino (n 1) at 339.

[190] See Ann Abraham, 'The ombudsman and "paths to justice": a just alternative or just an alternative?' [2008] Public Law at 1, 4. For Abraham, what distinguishes the ombudsman from mediators is the 'adjudicatory function', albeit one exercised very differently when compared with courts.

regularly refers in the context of her investigations), and the inclusion in the Charter of a right to good administration. In addition, the case-law of the CJEU vis-à-vis the Ombudsman was examined. Perhaps the main point stemming from that jurisprudence is that the Ombudsman generally enjoys broad discretion in the handling of complaints, but cannot be completely immune from judicial scrutiny, especially via an action for damages. Another point is that the Court is not bound by the Ombudsman's findings, which effectively confirms not only that maladministration is broader than illegality, but also that the role of the Ombudsman is, of course, different from that of the Court. It could best be viewed as a complementary means of redress with different characteristics and different possible outcomes. With regard to the European Ombudsman's peers, they may prove a source of inspiration, particularly when it comes to exchanges of best practice.

The Ombudsman has the challenging task to contribute to the improvement of the EU administration and to shorten the distance between citizens and institutions. Consequently, she needs to ensure that the office serves the general interest, while duly addressing alleged small-scale irregularities stemming from individual complaints. Chapters 4 and 5, discussing the Ombudsman's work in further detail, will illustrate how the Ombudsman has rendered the EU administration more user-friendly and, at times, more responsive. Still, there is scope for improvement if the Ombudsman aims to bring citizens even closer to the EU, and thus further enhance the EU's democratic credentials. How the present mandate could be revisited is a question that is explored in Chap. 6.

CHAPTER 3

The Link Between the Role of the European Ombudsman and Democracy

Introduction

The previous chapter looked at the mandate of the European Ombudsman under EU law, and also considered how that mandate was refined or clarified by the Court's case-law. It also presented the latest internal structure of the office, as well as some of its significant achievements. It was claimed that the European Ombudsman makes a significant contribution to rendering the EU less bureaucratic. Taking this further, this chapter seeks to explore the link between the European Ombudsman and the question of the EU's democratisation. It will be shown that the Ombudsman is part of the debates and amendments aiming to render the EU more accessible, legitimate and accountable and that the European Ombudsman herself actually contributes to this democratisation. However, that contribution is confined by a number of reasons discussed below.

The chapter begins with a consideration of the relationship between ombudsman offices and democracy in broader terms. The next section explains that the Ombudsman was part of the EU's democratisation; a brief summary of the debate on why and how the EU can become more democratic also features therein. Following this, the discussion centres on how the European Ombudsman actually strengthens democracy, and then elaborates on the limits of the Ombudsman's possible contribution. The penultimate section explores to what extent the Ombudsman has legitimacy, while the last one focuses on the Ombudsman's independence (a necessary

N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, European Administrative Governance,
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precondition in order for the Ombudsman to perform her functions) and *own* accountability (which may be viewed as the other side of independence). The chapter does not examine the Ombudsman's thorough work on transparency and access to documents as this is discussed separately in Chap. 5.

Ombudsman Institutions and Democracy

This section will show that ombudsman institutions in general have the potential to contribute to the democratisation of polities, including by making polities more accessible, by embedding openness and transparency, by being an intermediary between individuals and the administration, and an instrument of democratic participation.

Indeed, the institution of ombudsman is historically linked with the establishment, consolidation and promotion of democracy and the rule of law.[1] With exceptions (as ombudsman schemes vary enormously), one of the functions of many offices is to defend citizens' rights. In the European Ombudsman's view, ombudsman institutions around the world are 'an icon of democracy and of the rule of law', in that they operate 'both as an independent check on the power of government and public administration and as a vehicle through which citizens can have their complaints heard and their rights vindicated'.[2] The success of the ombudsman phenomenon partly stems from the flexibility of such offices within a complex modern public administration; the significantly lower (when compared to courts) costs, if any; and the fact that there is 'a global spread of aspirations to democracy and human rights'.[3] As regards flexibility, the ombudsman method is informed by the fact that her work generally is not 'bound by precedents or hampered by restrictive statutory definitions or even judicial efforts to refine the ombudsman's powers'; moreover, the notion of good administration is 'context-dependent' and (as already noted in the previous chapter) exceeds the boundaries of legality.[4]

[1] For example, in Spain and in Portugal, ombudsman institutions were created shortly after these states restored democratic rule; see Katja Heede, *European Ombudsman: Redress and control at Union level* (Kluwer 2000) 83. See also Söderman's solemn oath: 'In general, countries establish the office of the Ombudsman to strengthen and promote democracy and the rule of law'; Annual Report 1995, 22.

[2] European Ombudsman, 'Strategy of the European Ombudsman: Towards 2019' (2014) at 2.

[3] Ian Harden, 'When Europeans complain: The work of the European Ombudsman' (2000) 3 *Cambridge Yearbook of European Legal Studies* 199, at 201.

[4] Trevor Buck, Richard Kirkham and Brian Thompson *The Ombudsman Enterprise and Administrative Justice* (Ashgate 2011) 37.

Ombudsman institutions are committed to the promotion of accountability and transparency. The Wellington Declaration of the International Ombudsman Institute pointed out that 'ombudsman institutions form an integral part of constitutional reality and make an important contribution to the Rule of Law, Transparency, Good Governance, Democracy and Human Rights.'[5] Accordingly, their work 'constitutes an essential and necessary element in the development and maintenance of a transparent and accountable democracy'.[6] What is more, the ombudsman 'in a substantial way contributes to … the consolidation of a democracy not only based on equal universal suffrage but also on the rule of law and respect for human rights'.[7] Tasks related to the ombudsman's role in promoting accountability include reporting at national parliamentary assemblies, pursuing systemic irregularities through own-initiative inquiries or otherwise (and thus making an impact to the lives of a great number of persons), and increasing citizens' trust towards the administration.[8] Alongside this, ombudsman institutions frequently organise seminars and training sessions with a view to *educating* the administration.

In addition, a complaint to the Ombudsman may be seen as an instrument of democratic participation.[9] This is, of course, a very specific form of participation: '[i]nstead of trying to shape the development and content of public policy through democratic representatives, a person who resorts to the ombudsman is reacting to administrative decisions made during the policy implementation stage'.[10] Thus, a complaint to the ombudsman may be a demanding form of participation, especially in terms of 'self-confidence and determination', in that the individual has to 'step forward alone to initiate contact with the Ombudsman'.[11] A study on American ombudsman institutions found that they can contribute to political participation viewed both as 'instrumental action' and 'interaction'; may reduce 'popular alienation';

[5] International Ombudsman Institute, 'Wellington Declaration' (2012) available at: www.theioi.org/the-i-o-i.

[6] Ibid.

[7] 'Table ronde: Le Médiateur européen: 10 ans d'activité' in Symeon Karagiannis and Yves Petit (eds) *Le Médiateur européen: Bilan et perspectives* (Bruylant 2007) 137, at 148 (comments by Mats Melin).

[8] Buck et al. (n 4) 46–49.

[9] Michael Nentwich, 'Opportunity structures for citizens' participation: The case of the European Union' in Albert Weale and Michael Nentwich (eds) *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge 1998) 125.

[10] Stewart Hyson, 'Ombudsman research project: The provincial and territorial ombudsoffices in Canada' in Stewart Hyson (ed) *Provincial and territorial ombudsman offices in Canada* (Toronto University Press 2009) 3, at 15.

[11] Ibid. For the same reason, such participation can prove more 'immediate' and 'personal'.

and may receive complaints from underrepresented members of the society.[12] They may also contribute to deliberative democracy, in particular 'deliberative accountability', since throughout the investigation they engage in a 'process of reasoning and counter-reasoning', during which 'different views will be exchanged as to how the principle in question could have been realised optimally'.[13] Further, by relying on human rights language, the ombudsman contributes to the cause of 'humanising the bureaucracy' but also 'add[s] weight to the findings'.[14] Indeed, the Parliamentary Assembly of the Council of Europe confirmed that 'the role of intermediary between individuals and the administration lies at the heart of the ombudsman's functions.'[15]

One should not, of course, overestimate the ombudsman's contribution to democracy. It is well-known that ombudsman institutions frequently suffer from limited resources and/or staff, occasionally limited visibility/citizens' awareness of their existence, while sometimes their efforts to convince the administration to comply prove unsuccessful. These points are returned to below, where the limits of the Ombudsman's role in improving democracy are reflected upon.

Having discussed the link between the institution of ombudsman and democracy in more abstract terms, our attention will now shift to the EU and the European Ombudsman.

The European Ombudsman as Part of the EU's Democratisation

The above points do apply, of course, to the European Ombudsman; thus, the purpose of this and subsequent sections is to further illustrate or build on these arguments. Before this, it is essential to provide some

[12] Larry Hill, 'The citizen participation-representation roles of American ombudsmen' (1982) 13 *Administration and Society* 405. Participation as 'instrumental action' entails processes which influence elites and maximise interests, and there the 'ombudsman does cause some values to be reallocated'; participation as 'interaction' entails processes whereby 'values such as sharing, reciprocity, communication, justice and self-realisation are prominent', and there the ombudsman 'promotes a sense of political community by resolving some grievances, by explaining seemingly inexplicable decisions, and by existing as a symbol of government's concern for citizens' (ibid., at 429).

[13] Nick O'Brien and Brian Thompson, 'Human rights and accountability in the UK: Deliberative democracy and the role of the ombudsman' [2010] *European Human Rights Law Review* 504, at 508.

[14] Ibid., 506.

[15] Parliamentary Assembly, Recommendation 1615 (2003), 'The institution of Ombudsman', point 3.

brief remarks on the EU's democratisation, not least since this discussion is revisited in the concluding chapter of the book. That being said, an extensive rehearsal of the literature on the perennial debate concerning the EU's democratic deficit is beyond the aims of this project.

Preliminary Remarks on the EU's Democratisation

The EU glossary points out that the term 'democratic deficit' is 'used by people who argue that the EU institutions and their decision-making procedures suffer from a lack of democracy and seem inaccessible to the ordinary citizen due to their complexity'.[16] This summary may be helpful, but warrants a number of disclaimers. In the absence of a generally accepted threshold, further to which the EU may be classified as sufficiently democratic (a point returned to below), it is perhaps better to address the EU's *further democratisation*, rather than its *lack of democracy*. In the second case, reasonable objections may be raised that effectively the underlying goal would be to render the EU equally democratic to its component member states—hence, to render the EU itself a federal state. This is certainly unlikely and probably undesirable, too—at least so this book contends. Moreover, many of the accounts dealing with EU democracy are, quite inevitably, somewhat critical of the EU. This should not be read (and certainly not here) as implying any sort of Euroscepticism; rather, criticising the EU on the basis of its limited democratic credentials stems from a viewpoint that because the EU project (with its flaws) has, on balance, achieved significant results, it is now essential to reflect upon the EU's further democratisation.[17]

Although the democratic deficit thesis does not find universal support,[18] accounts describing the nature of the problem focus, among others, on

[16] See: 'Democratic Deficit', at: eur-lex.europa.eu/summary/glossary/democratic_deficit.html

[17] The reader must be aware that the present crises that the EU is facing have brought to prominence yet again the question of EU democracy; see, among the vast literature, Simona Piattoni (ed) *The European Union: Democratic principles and institutional architectures in times of crisis* (Oxford University Press 2015); Jürgen Habermas, *The crisis of the European Union: A response* (Polity Press 2013); Michael Blauberger, Sonja Puntscher Riekmann, Doris Wydra (eds) Symposium: Conventional wisdoms under challenge—Reviewing the EU's democratic deficit in times of crisis (2014) 52 *Journal of Common Market Studies* 1171.

[18] For different perspectives see, for example, the well-known accounts of Giandomenico Majone, 'Europe's "Democratic Deficit": The question of standards' (1998) 4 *European Law Journal* 5; Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *Journal of Common Market Studies* 603.

the increase in EU executive power and the decrease in national parliamentary control; the 'second order' European elections; the opacity in EU decision-making and citizens' alienation; and the lack of support for EU policies by member states' nationals.[19] Alongside this, the absence of a European demos[20] has led scholars to envisage the progressive creation of a civic transnational identity,[21] while arguing that a plurality of identities (*demoi*-cracy) is a convincing way to conceptualise the EU.[22] The establishment of European citizenship by the Maastricht Treaty, and then the consolidation of the concept through the Court's case-law[23] (although it has to be noted that recently the Court appears to take a different approach[24]), begs the question of how 'concepts of democracy and democratic legitimation, as key citizenship practices, translate in the context of the plural and multi-level character of euro-polity'.[25]

The categorical end of the 'permissive consensus' period, coupled with the EU's manifest inability to be legitimised via its outputs, necessitate answers that will improve the EU's input legitimacy, increase citizens' trust towards the EU and eventually bring Europeans closer to the EU's decision-making world.[26] To that end, citizens' participation is instrumental, also in the language of their choice,[27] and the EU's record

[19] Andreas Follesdal and Simon Hix, 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533.

[20] Joseph Weiler 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 *European Law Journal* 219.

[21] Jürgen Habermas, 'Toward a Cosmopolitan Europe' (2003) 14 *Journal of Democracy* 86.

[22] Kalypso Nicolaidis, 'European Demoicracy and its crisis' (2013) 51 *Journal of Common Market Studies* 351.

[23] Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 *Modern Law Review* 233.

[24] Daniel Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 *Common Market Law Review* 17.

[25] Jo Shaw, 'Citizenship: Contrasting dynamics at the interface of integration and constitutionalism' in Paul Craig and Grainne de Burca (eds) *The evolution of EU law* (Oxford University Press 2011) 575, at 598; for an overview of the academic debates on EU citizenship see also Dimitry Kochenov, 'The essence of EU citizenship emerging from the last ten years of academic debate: Beyond the cherry blossoms and the moon?' (2013) 62 *International and Comparative Law Quarterly* 97.

[26] For an overview see Beate Kohler-Koch and Berthold Rittberger (eds) *Debating the Democratic Legitimacy of the European Union* (Rowman and Littlefield 2007).

[27] Nikos Vogiatzis, 'The linguistic policy of the EU institutions and political participation post-Lisbon' (2016) 41 *European Law Review* 176.

concerning both the facilitation of citizens' participation,[28] and being sufficiently representative and transparent with regard to civil society access to consultations,[29] is generally unsatisfactory.

A related line of criticism focuses on the fact that the EU institutions are insufficiently accountable.[30] This line of criticism is particularly relevant here as ombudsman offices generally contribute to holding the administration to account. Undeniably, the EU crisis has empowered the intergovernmental institutions and, in particular, the European Council, which is traditionally characterised by opacity and lack of accountability.[31] Associated with these considerations, then, are claims for further transparency in the EU: how can otherwise European citizens participate, and hold the EU administration to account, if they are not made aware of the debates and the positions expressed within the EU institutions?

Debating complex problems often means that easy solutions cannot be offered. The discussion about democracy in the EU should take into account that the EU is a (particular) polity based on the rule of law,[32] and perhaps also that democracy and constitutionalism in the EU are interconnected.[33] That being said, little room for contestation leaves the position that the EU via its 'integration-through-law' approach has developed a type of constitutionalism based on a top-down approach. Possibly partly explainable in the absence of a constitutional moment, or a European demos, the truth remains that such constitutionalism is not matched with

[28] Nentwich (n 9).

[29] Beate Kohler-Koch, 'Civil society and EU democracy: "Astroturf" Representation?' (2010) 17 *Journal of European Public Policy* 100. For the problematic use of 'European civil society' by certain EU institutions compare Stijn Smismans, 'European civil society: Shaped by discourses and institutional interests' (2003) 9 *European Law Journal* 473.

[30] Sverker Gustavsson, Christer Karlsson and Thomas Persson (eds), *The Illusion of Accountability in the European Union* (Routledge 2009); Carol Harlow, *Accountability in the European Union* (Oxford University Press 2002).

[31] Deirdre Curtin, 'Challenging executive dominance in European democracy' (2014) 77 *Modern Law Review* 1.

[32] See Art 2 TEU; famously confirmed in Case 294/83, *Les Verts* v *European Parliament*, EU:C:1986:166, para 23. On the particularities of EU constitutionalism see further Giuseppe Martinico, *The tangled complexity of the EU constitutional process: The frustrating knot of Europe* (Routledge 2013).

[33] Compare Miguel Maduro, 'Europe and the Constitution: What if this is as good as it gets?' (2000) Webpapers on Constitutionalism and Governance beyond the State No 5/2000, at 6.

a sufficient degree of democratisation (or perhaps politicisation/contestation) to legitimise this complex legal, administrative and political framework.[34] And the impact of EU law and policies upon citizens (in most cases through implementation via the national level) is undeniable; to that end, Lord observed that 'some threshold in the accumulation of power over ordinary lives' has been exceeded.[35]

Taking into consideration that the EU is not a state, and simultaneously that as an entity it is probably more advanced than international organisations,[36] a plausible avenue to sketch what a more democratic EU could mean would probably 'aim at representation, participation, and deliberation to feed citizens' values, interests and convictions into international decisions, but not at grand schemes such as self-government'.[37] Because of the nature of the EU, and the fact that it relies on a *dual* basis of legitimacy,[38] it is arguable that proposals for reform concerning a more democratic EU would need to concern both the national *and* the European (EU-wide) level. Some of these proposals are briefly considered towards the end of this book.

The Lisbon Treaty contains a Title on democratic principles, which features the notions of representativeness, participation and openness[39]; the role of national parliaments[40]; the role of European political parties[41]; and the European citizens' initiative.[42] The latter instrument is also an addition to the political rights granted by Union citizenship. Other amendments introduced post-Lisbon and aiming at granting a more 'democratic face' to the Union include the increase in the powers of the European

[34] See Nicole Scicluna, *European Union constitutionalism in crisis* (Routledge 2015), noting (on p. 147) that 'EU policymakers [placed] undue faith in law as a means of furthering political objectives'.

[35] Christopher Lord, *A democratic audit of the European Union* (Palgrave Macmillan 2004) 19.

[36] Opinions differ as to whether the EU is a sui generis entity; see, for example, a critical perspective in Bruno de Witte, 'The European Union as an international legal experiment', in Gráinne de Búrca and Joseph Weiler (eds) *The worlds of European constitutionalism* (Cambridge University Press 2012) 19.

[37] Armin Von Bogdandy 'The European lesson for international democracy: The significance of Articles 9–12 EU Treaty for international organizations' (2012) 23 *European Journal of International Law* 323–324.

[38] See Art 10(2) TEU.

[39] See Arts 10 and 11 TEU.

[40] Art 12 TEU. For the role of national parliaments in the monitoring of the subsidiarity principle see also Protocol No 2 to the Lisbon Treaty.

[41] Art 10(4) TEU.

[42] Art 11(4) TEU, in conjunction with Art 24 TFEU.

Parliament through the expansion of what is now the 'ordinary legislative procedure',[43] the Spitzenkandidaten process for the election of the Commission President,[44] the provision that the Council should meet in public when deliberating and voting on draft legislative acts[45]—among others.

The European Ombudsman as Part of This Debate

Where does the Ombudsman fit into this debate? A useful starting point is the establishment of the office itself. While being the product of lengthy negotiations which lasted 20 years, it is plausible that, ultimately, the main reason behind the creation of the Ombudsman was to bring the EU closer to its citizens and thus to improve the latter's legitimacy.[46] This suggests that the European Ombudsman was not launched to provide some 'relief' to the ECJ's workload.[47] Why the European Parliament was not particularly enthusiastic about the creation of an Ombudsman is an issue that has already been discussed.[48] Naturally, bringing citizens closer to the EU is easier said than done. The EU may be keen to host or promote events that seek to raise awareness of the rights of European citizens, but this does not necessarily translate into gains in legitimacy and participation.[49] In this context, the Ombudsman is one of the ways to shorten this distance (a point developed further in the next section), and is frequently advancing the argument that 'the way an institution reacts to complaints is a key indicator of how citizen-centred it is'.[50]

[43] See Art 294 TFEU.

[44] Art 17(7) TEU.

[45] Art 16(8) TEU.

[46] See, for example, European Ombudsman (n 2).

[47] The Court of First Instance (CFI, now General Court) and, later on, the Civil Service Tribunal as a specialised court were established mainly for that purpose. For the CFI compare also Case C-185/95 P, *Baustahlgewebe* v *Commission*, EU:C:1998:608, para 41. It goes beyond the purposes of this contribution to evaluate the latest reform within the Luxembourg Court, including the dissolution of the Civil Service Tribunal. For a critical perspective see Alberto Alemanno and Laurent Pech, 'Reform of the EU's court system: Why a more accountable—not a larger—Court is the way forward' (2015) available at: verfassungsblog.de/reform-of-the-eus-court-system-why-a-more-accountable-not-a-larger-court-is-the-way-forward.

[48] See the discussion in Chap. 2, but also the relevant sections in Chap. 6.

[49] For a critical discussion of the 'European Year of Citizens 2013' see Nikos Vogiatzis, 'A "European Year of Citizens"? Looking Beyond Decision 1093/2012: Eyeing the European Elections of 2014' (2014) 15 *Perspectives on European Politics and Society* 571.

[50] Annual Report 2008, 10.

Evidence of the reasons behind the establishment of the Ombudsman can be found in the latter's first Annual Report. Indeed, before assuming office, Jacob Söderman reflected upon the rationale to the establishment of the institution, in light of the fact that the activities of the Union had always been—in his view—lawful and that there had been established a Petitions' Committee at the European Parliament to deal with complaints.[51] He underlined: 'The idea behind the office of European Ombudsman was to promote the concept of European citizenship, so as to enhance relations between citizens and the European institutions. In other words, the work of the Ombudsman should … give the European administration a more human face.'[52]

Whereas the promotion of the concept of European citizenship is also discussed below, it is additionally noted that the fact that the *political* right to complain to the European Ombudsman features, since the Maastricht Treaty, among the rights of European citizenship is not insignificant, and verifies that the Ombudsman was indeed viewed as part of the EU's need for further democratisation. As a political right, it therefore has the potential to contribute to the strengthening of a complementary (to national, regional or other) civic identity (*demos*). It is also one of the EU citizenship rights open to EU residents.[53] Insufficient attention is often being paid to the fact that there was a dual rationale behind the introduction of Union citizenship: it was meant to facilitate the internal market (the 'market citizenship' logic), and to address the democratic problems of the EU, with a view to involving citizens more meaningfully in the EU decision-making world.[54] The idea of Union citizenship belongs to the Spanish Government, which circulated (before the adoption of the Maastricht Treaty) a document entitled 'The Road to European Citizenship', emphasising the need for European integration to shift towards including the nationals of the Member States, given the political nature of the Union that was being envisaged.[55] In February 1991, Spain prepared 'a text on

[51] Annual Report 1995, 22.

[52] Ibid.

[53] Alongside the right to petition the Parliament and the right to contact the EU institutions in one of the EU official languages; see further Vogiatzis (n 49).

[54] Alex Warleigh, 'Purposeful Opportunists? EU Institutions and the Struggle over European Citizenship' in Richard Bellamy and Alex Warleigh (eds.) *Citizenship and Governance in the European Union* (Continuum 2001) 19.

[55] Damian Chalmers et al. *European Union Law: Cases and Materials* (Cambridge University Press 2010) 444.

European citizenship', which included an ambitious plan concerning the powers of the European Ombudsman[56]; this proposal is retuned to in Chap. 6.

The European Ombudsman Strengthening EU Democracy

Undeniably, as a forum of administrative accountability,[57] the Ombudsman's work strengthens EU democracy. This crucial point is illustrated throughout the remaining chapters of the book and there is no need for repetition here. Likewise, the complaints and own-initiative inquiries on transparency and access to documents, discussed in Chap. 5, evidence the Ombudsman's contribution to democracy. Thus, this section will be confined to a number of additional points/arguments, which are, of course, related to the above.

Rendering the EU More Accessible

The European Ombudsman is admittedly one of the most accessible EU institutions and bodies: one may simply visit the website of the Ombudsman and lodge a complaint. Alternatively, one can always write to the Ombudsman's office. The complaint may be submitted in any of the official languages of the Union, and the office employs multilingual members of staff for that purpose (and also for responding to the needs of the investigatory process, when necessary). With the exception of the anachronistic presence of an 'MP filter' in some remote cases,[58] the faculty to address directly the ombudsman without *locus standi* requirements is one of the main generally recognised features of the institution. That being said, Article 228 TFEU mentions that it is possible—but not, of course,

[56] See Carlos Moreiro Gonzáles, 'The Spanish proposal to the intergovernmental conference on political Union' in *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 27, at 32–36.

[57] Mark Bovens, 'Analysing and assessing accountability: A conceptual framework' (2007) 13 *European Law Journal* 447, at 456; Anchrit Wille, 'The evolving EU accountability landscape: moving to an ever denser Union' (2015) *International Review of Administrative Sciences*, DOI: 10.1177/0020852315589697, at 9–10.

[58] That is the case with the Parliamentary Ombudsman in the UK. A broad discussion in the UK as to whether or not the filter should be maintained has not produced yet any results pointing to its abolition.

compulsory—for a natural or legal person to submit a complaint via a member of the European Parliament (MEP). That is rarely the case, and in any event a future revision of Article 228 could harmonise the Treaty text with established practices.

This link with citizens adds to the Ombudsman's own legitimacy (a point returned to below), but also renders the EU administration—through the Ombudsman—more accessible. Complaining to the Ombudsman may alleviate instances of mistrust between citizens and the EU administration. In addition, the European Ombudsman has established a productive collaboration with numerous NGOs, many of which work for the promotion of democracy, transparency and human rights. Those actors often consider that it is much more burdensome to access the Court—hence this fruitful collaboration. Civil society organisations sometimes complain to promote general interests, and frequently are better equipped (than individuals) to identify systemic problems within the EU administration.[59] As Peters observed, 'the Ombudsman entertains a dialogue with the citizens and thereby contributes to the openness of the Union and to closeness to the citizens.'[60] A prerequisite for this dialogue is the Ombudsman's accessibility. Related to accessibility is, of course, a point already made in the previous chapter: the right to contact the European Ombudsman is open to EU residents as well.

Issues pertaining to the fact that individuals are considered as non-privileged applicants to bring court proceedings under Article 263 TFEU were (very briefly) addressed in the previous chapter.[61] Suffice to note here that Jacob Söderman expressed the view that the Ombudsman's presence may 'prevent unnecessary litigation' and, what is more, 'because of the limitations which Community law imposes on access to the courts', the complaints to the Ombudsman might sometimes constitute the only available remedy.[62]

[59] Peter Bonnor, 'When EU civil society complains: civil society organisations and ombudsmanship at the European level' in Stijn Smismans (ed) *Civil Society and Legitimate European Governance* (Edward Elgar 2006) 141.

[60] Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697, at 732.

[61] Indirectly, through the preliminary reference of Article 267 TFEU, the case may reach the Court. In that regard, it has been observed that the European Network of Ombudsmen may contribute to filling in 'accountability gaps' created *inter alia* by the limited accessibility to Union courts; see Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542.

[62] Annual Report 1999, 12. In the same Report it was also mentioned that the Court, alongside the Ombudsman and the Court of Auditors are 'the EU's three primary supervisory bodies'; ibid., 271.

However accessible the Ombudsman may be, one should also be mindful of the challenges in the Ombudsman's work. It is arguable that loose admissibility conditions and non-enforceability are possibly the two sides of the same coin. In this sense, managing the complainants' expectations can occasionally be a difficult exercise. Further, many complaints concern alleged maladministration that is confined to the particularities of the case, leaving the Ombudsman to implement the broader objectives of her agenda via *strategic inquiries*.

A precondition to the admissibility of complaints is the prior exhaustion of internal review procedures.[63] Accessibility differs from admissibility, in that the Ombudsman may advise the complainant on any possible internal remedies that need to be exhausted. In the past, some UK ombudsman institutions were somewhat suspicious of such internal first-stop remedies, fearing that their workload would diminish or that internal mechanisms are frequently not sufficiently independent from the administration, and could eventually confuse citizens, who would believe that these bodies act as ombudsmen.[64] As long as the term 'ombudsman' is not used inappropriately, there is, in principle, no reason why the administration should not be offered an opportunity to provide internal means of redress. The European Ombudsman takes the view that internal complaints mechanisms complement, if not facilitate, and certainly do not undermine, her work. This was shown, for example, in the special report submitted to the European Parliament concerning Frontex's resistance to establish a complaints mechanism for alleged maladministration in the context of its activities.[65] Further, the Ombudsman has signed a Memorandum of Understanding with the European Investment Bank (EIB), providing that 'a complainant will have recourse to an effective internal EIB complaints procedure before turning to the Ombudsman.'[66] Thus, the availability of internal complaints can improve the quality of the administration and, importantly, provide citizens with faster redress, provided that it is ensured that the European Ombudsman remains citizens' last resort of extra-judicial redress.

[63] See Art 2(4) of the Statute: A complaint 'must be preceded by the appropriate administrative approaches to the institutions and bodies concerned'.

[64] Patrick Birkinshaw, *European Public Law: The achievement and the challenge* (Kluwer 2014) 576.

[65] See Case OI/5/2012/BEH-MHZ.

[66] Annual Report 2008, 75.

Looking beyond the Ombudsman for a moment, it is perhaps worth noting that the significance of extra-judicial redress[67] is increasingly being recognised in the EU. The creation of SOLVIT, 'an on-line alternative dispute resolution (ODR) mechanism and a cooperation network between national administrations'[68] seeking to redress cross-border problems in the application of EU law by national authorities,[69] may be seen as a step in that direction.[70]

Strengthening and Promoting European Citizenship

As already noted, the right to complain to the European Ombudsman forms part of the provisions on European citizenship[71] and the Charter.[72] That reference to the Ombudsman in the provisions on Union citizenship and the Charter 'signals that the Ombudsman is supposed to foster both the Union's commitments to the rule of law (including human rights, access to justice and good administration), and its democratic aspirations (linked to European citizenship and transparency)'.[73] Importantly, and related to the above remarks, the Ombudsman takes a broad view as to what is included under the concept of Union citizenship. In various speeches, the

[67] Jacob Söderman had proposed the insertion of an autonomous right to extra-judicial redress in the EU Treaties; see Annual Report 2002, 222–223.

[68] Micaela Lottini, 'Correct Application of EU Law by National Public Administrations and Effective Individual Protection: The SOLVIT Network' (2010) 3 *Review of European Administrative Law* 5, at 13–14.

[69] See: http://ec.europa.eu/solvit/what-is-solvit/index_en.htm

[70] More generally, for cross-border disputes related to civil and commercial matters see Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136/3, stating *inter alia* (in Recital 6) that: 'Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.' See also Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (Directive on consumer ADR), OJ L 165/63, extensively discussed in Special edition on access to justice and consumer ADR (2016) 24 *European Review of Private Law* 1–186.

[71] See now Article 20(2)(d) TFEU and Art 24 TFEU (which refers to Art 228 TFEU).

[72] Art 43 of the Charter (part of Title V: Citizens' rights). Relevant for the Ombudsman's mandate are also Articles 41 (right to good administration) and 42 (right of access to documents) of the Charter.

[73] Peters (n 60) 723.

Ombudsman claims that Union citizenship encompasses 'transparency, accountability and participation', in that 'the development of citizenship is about raising the quality of democracy and strengthening the legitimacy of democratic political institutions.'[74] In this context, the role of the European Ombudsman includes the *promotion* of 'active citizenship' by raising public awareness of 'rights and duties'; the Ombudsman should also embolden the participation of citizens and civil society organisations 'in the democratic life of the Union, [promote] their ability to hold the EU institutions to account, and [strengthen] their involvement in making the law work in practice'.[75] To that end, Chap. 6 will demonstrate how the Ombudsman has relied on the right to participate in the democratic right of the Union to strengthen the principles contained in Title II TEU, and notably the provisions on consultation and the European citizens' initiative.

Elsewhere, Jacob Söderman pointed out that the Ombudsman can 'promote an open, accountable and service-minded administration'.[76] The promotion of European citizenship may be translated into a mission for the Ombudsman to protect 'substantive' and 'procedural' rights.[77] The CJEU and Advocates-General have referred to the Ombudsman as one of the rights of Union citizenship. For example, Advocate General Geelhoed noted that the 'institution of Ombudsman is one of the instruments by which the Treaty *gives substance* to citizenship of the Union. … The Ombudsman thus plays a part in *protecting citizens' rights*.'[78] Importantly, empowering Europeans concerns the domestic level as well: 'Any focus on citizenship as a means of empowering Europeans must therefore take account of the fact that such empowerment must take place not only

[74] Nikiforos Diamandouros, 'The European Union after Lisbon: Where next for European citizens?' (2010) Speech at the University of Manchester, available at: www.ombudsman.europa.eu/en/activities/speech.faces/en/5470/html.bookmark

[75] Ibid.

[76] Jacob Söderman, 'Transparency in the Community institutions: Speech at the 10th anniversary of the Court of First Instance' (1999) available at: www.ombudsman.europa.eu/speeches/en/cfi10.htm

[77] Roy Gregory and Philip Giddings, 'Citizenship, Rights and the EU Ombudsman' in Bellamy and Warleigh (n 70) 73 and 87–88. According to the authors, the term 'substantive rights' refers to the so-called first, second and third generation of rights, while 'procedural rights' refer to good administration, including the right to be heard and the right to 'corrective action'. See ibid., in particular 73 and 87–88.

[78] Opinion of Advocate General Geelhoed in Case C-234/02, *European Ombudsman* v *Lamberts*, EU:C:2003:394, para 55 (emphasis added).

visà-vis the EU institutions, but also vis-à-vis national authorities in relation to EU matters.'[79]

Thus, the Ombudsman was expected to give *further* meaning to the citizenship of the Union, broadly conceived. The Ombudsman alone could not, of course, have succeeded in such an endeavour. As O'Reilly rightly acknowledged, the famous proclamation of the ECJ in *Grzelczyk* that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'[80] has not materialised to date.[81]

The European Ombudsman Strengthening EU Democracy: The Limits

The discussion so far has explained how the Ombudsman was part of the debates on the EU's democratisation, and how she or he has sought to strengthen democracy. However, an idealistic picture of the Ombudsman's contribution to democracy should be avoided. That is so for a number of reasons.

To begin with, the Ombudsman may be elected by the European Parliament (a point returned to below) but cannot and should not be deemed as having a political mandate; related to this, the Ombudsman cannot augment the EU's representative credentials in the way the European Parliament and the Council do under Article 10(2) TEU. The office cannot therefore be seen as an expression of political representation—rather, access to the Ombudsman may be seen as an instrument of participation or even deliberation,[82] along the lines of the earlier discussion. This is not to suggest that the Ombudsman's contribution to democracy should be neglected, but to point out that it is a different contribution which should be dissociated from popular representation.

Further, the earlier point about resources cannot but affect the European Ombudsman as well. An office that employs approximately 85 members of staff cannot, for instance, undertake limitless proactive initiatives. In this sense, the impact of the Ombudsman cannot be exclusively assessed with reference to the compliance rates vis-à-vis individual

[79] Nikiforos Diamandouros, 'Union citizenship after the Lisbon Treaty', CEUS Research Working Paper 1/2010, p. 10; available at: http://www2.hull.ac.uk/fass/pdf/European%20Ombudsman%20CEUS%20paper%201.2010.pdf

[80] Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 31.

[81] Emily O'Reilly, 'European Year of Citizens —Closing conference' (2013) available at: www.ombudsman.europa.eu/en/activities/speech.faces/en/52763/html.bookmark

[82] O'Brien and Thompson (n 13).

complaints, a matter returned to in subsequent chapters. Moreover, the Ombudsman's visibility may have recently increased, especially further to certain high-profile cases undertaken by the current office-holder, Emily O'Reilly, but as long as the Ombudsman's remit does not extend to the domestic level, the possibility for the Ombudsman to be relevant to the majority of EU citizens is *de facto* limited. That is not to suggest that the Ombudsman should be examining complaints at the domestic level (see further the discussion in Chap. 6), but to highlight some inescapable difficulties that the Ombudsman has to consider when attempting to augment the profile of the office.

In addition, the Ombudsman's work in the area of transparency may be shaped by judgments of the Court—which the Ombudsman has to follow. To give an example further discussed in Chap. 5, the Ombudsman might have wished to strike a different balance between the right of access to documents (associated with transparency and, therefore, democracy) and data protection, but the judgment of the Court in *Bavarian Lager* made it clear that the regime set up by the respective Regulations on access to documents and data protection may be viewed as an 'equilibrium' established by 'the Union legislature'.[83]

Lastly, the Ombudsman is keen to strengthen European citizenship via a promotion of a citizenship that encompasses participation and transparency, but this view is not necessarily universally shared. The Union judiciary has lately adopted a restrictive approach to the rights of economically inactive citizens,[84] but simultaneously appears open to strengthening the political rights of citizenship, most notably in *Delvigne*.[85] But beyond the activity of the EU Courts, augmenting the rights or (more generally) the concept of Union citizenship might not be endorsed by those focusing on domestic control of EU action as a means to improve democracy in the EU.

Overall, the Ombudsman's potential for the EU's democratisation should be seen and evaluated in context, taking also into account the above-mentioned limits or preferences as to the direction of that contribution.

[83] Case C-28/08 P, *Commission* v *Bavarian Lager* EU:C:2010:378, para 65; see generally paras 41 *et seq*.

[84] See, for example, Niamh Nic Shuibhne, '"What I tell you three times is true": Lawful residence and equal treatment after *Dano*' (2016) 23 *Maastricht Journal of European and Comparative Law* 908; Thym (n 24).

[85] Koen Lenaerts, 'Linking EU citizenship to democracy' (2015) 11 *Croatian Yearbook of European Law and Policy* VII–XVIII; Case C-650/13, *Delvigne* EU:C:2015:648.

The Ombudsman's Legitimacy

The Ombudsman's legitimacy is closely associated with direct accessibility, a point that has already been discussed. Complaining to the Ombudsman is an instrument of citizens' participation and one of the political rights of European citizenship. It can also be argued that the Ombudsman's legitimacy in citizens' eyes is often deduced from her independence and own accountability (see the sections below). Beyond the above, the Ombudsman is, of course, elected by the European Parliament for a mandate of five years, which coincides with the latter's five-year term. Each nomination must be supported by at least 40 MEPs, deriving from at least two member states, and the elected candidate will be the one winning the majority of secretly submitted votes.[86] At least half of MEPs should be present during the vote. The election of the Ombudsman by the EU institution representing EU citizens increases the Ombudsman's legitimacy. Importantly, all three office-holders to date had previously served as national ombudsmen, and therefore the existing practice suggests that parliamentarians (in the EU, at least) have not elected inexperienced office-holders.

What do citizens think about or expect of the Ombudsman? How the Ombudsman's role is perceived in the eyes of citizens is also linked to his or her legitimacy. The most comprehensive survey[87] to date was conducted in 2011: the aim was to identify how informed EU citizens were about their rights (especially after the legally binding Charter) and what their perception or knowledge of the Ombudsman institution was.[88] The first conclusion was that citizens were not aware of the Charter.[89] This result was certainly disappointing. Another question was whether citizens were interested in the work of the Ombudsman: 49% responded positively, while 48% admitted that they were not interested.[90] Well-informed citizens about the Charter appeared more likely to express positive views on

[86] Rule 219 of European Parliament's Rule of Procedure: 'Election of the Ombudsman'.

[87] Compare also the views of the various Units of the office *and of stakeholders* prior to the first Strategy in Chap. 6.

[88] Special Eurobarometer 'European Ombudsman', Conducted by TNS Opinion and Social, Brussels (2011) available at: www.ombudsman.europa.eu/en/press/statistics/eb751_eb_report.faces

[89] Seventy-two per cent were not informed, only 14% were informed, while 13% admitted that they had 'never heard of it'; ibid., 6.

[90] Ibid., 10–11. Southern European countries and the Benelux demonstrated a strong interest in the Ombudsman (the positive responses ranged from 74% to 54%). The lowest percentage was found in Slovakia, with 21%.

the Ombudsman.[91] Turning to the performance of the EU administration, three criteria were used: effectiveness, service-mindedness and transparency. In all three categories, the overall performance of the EU administration was generally found unsatisfactory.[92]

The next question centred on what citizens want or expect of the European Ombudsman. Fifty-two per cent claimed that the Ombudsman's most important job is to '[ensure] that citizens know about their rights and how they make use of them'. The next popular answer was the collaboration with national ombudsmen 'to ensure that citizens' complaints about the EU are resolved effectively' (34%). Subsequent answers were as follows: the promotion of the right to good administration (30%); redress for complainants in cases of maladministration (27%); promotion of the right of access to documents (22%); and the promotion of service-mindedness (19%).[93] In addition, citizens were asked to rank specific rights in terms of importance. Naturally, the right to move and reside freely was found to be the most important (48%). However, the next two responses are of relevance here. Citizens responded that the right to good administration (33%) and the right to complain to the European Ombudsman (32%) were the next most important rights. The right to vote for the European Parliament and the right of access to documents followed with 21%, followed by the right to petition the Parliament (20%) and the (little known, at the time) right to submit a citizens' initiative (19%).[94]

The survey underlined the Ombudsman's *proactive* role, which is linked with the mission of the institution to promote the general interest as well:

> [M]ost importantly, the Ombudsman is able to play a proactive role, working with EU institutions to improve their performance rather than simply responding retrospectively to individual complaints. If the systemic issues are tackled effectively, the EU's overall performance will increase commensurately.[95]

[91] Ibid., 12.

[92] Ibid., 13. On transparency, in particular, the overall response was generally disapproving. Also, many EU citizens did not know how efficient, transparent or service-minded the EU was.

[93] Ibid., 19.

[94] Ibid., 23.

[95] Ibid., 27.

The Ombudsman provided an opinion on the survey, finding it 'very encouraging' that the second and third most important rights (the right to good administration and the right to complain to the Ombudsman) relate closely to his mission.[96] Furthermore, he observed that the poor result concerning the EU transparency regime reflected the considerable amount of complaints received by the office on transparency and access to documents. The Ombudsman called for the support of the European Network of Ombudsmen with regard to public awareness of citizens' rights, familiarity with the EU institutions at the national level, and 'targeting information to potential complainants'.[97]

Although some caution is required when interpreting Eurobarometer surveys, the Ombudsman's mandate (and rights related to the Ombudsman's work) generally appeared to matter for citizens, especially because their perception of the standard of the EU administration is rather low; this despite the fact that many did not seem to be familiar with her or his work. Moreover, the Ombudsman's collaboration with her or his interlocutors on matters concerning EU law featured prominently in the responses. The survey did not clarify, however, whether citizens were sufficiently aware of the division of labour between the European and the national (or regional) ombudsmen.[98]

The European Ombudsman's Independence and *Own* Accountability

Beyond benefitting from legitimacy among citizens, if the European Ombudsman wants to be able to perform her role in democratising the EU along the lines of the above discussion or, to refer to the latest mission statement, 'to serve democracy',[99] she needs to be independent, but also accountable herself. Both independence and own accountability[100]

[96] The Ombudsman's Synthesis: The European Ombudsman and Citizens' Rights (2011), available at: www.ombudsman.europa.eu/en/press/statistics/eb751_eo_synthesis.faces, at 11.

[97] Ibid., 12.

[98] This point is returned to in Chap. 6, where the 'geographical scope' of the mandate is discussed.

[99] See the Strategy 2019 at: http://www.ombudsman.europa.eu/en/resources/strategy/strategy.faces

[100] Due to space limitations, these notions (and the relevant literature) will not be considered here in their broader sense; rather, the focus will be on the European Ombudsman.

ultimately contribute to legitimacy, as already noted. These matters are discussed in turn, although they are certainly inter-connected. The discussion in this chapter on the Ombudsman's legitimacy, independence and accountability may be viewed as complementing the discussion on the institutional position of the Ombudsman in Chap. 2.

Independence

The European Ombudsman has to be independent both from the EU institutions and the member states. Indeed, according to well-established standards, independence is one of the prerequisites for the attribution of the 'ombudsman' title.[101] In the European Ombudsman's words, 'independence is vital to my *credibility* as an Ombudsman'.[102] Such independence enhances citizens' trust towards the institution, while enabling the latter to perform his or her function as an accountability forum without pressures. Beyond the possible influence from the subjects of investigations, independence extends to the receipt of complaints, admissibility decisions and own-initiative inquiries, the investigatory process and evidence, the choice of recommendations and reports, and publicity.[103]

The European Ombudsman's independence is guaranteed by the Treaty and the Statute. The Treaty states that the Ombudsman 'shall be completely independent', he or she 'shall neither seek nor take instructions from any Government, institution, body, office or entity' and should refrain from exercising any other professional activity, gainful or not.[104] The Statute adds that the Ombudsman shall perform her duties 'in the general interest of the Communities and of the citizens of the Union' and 'shall refrain from any act incompatible with the nature of her duties'. Furthermore, again according to the Statute, the Ombudsman shall act with 'impartiality'

[101] See Wellington Declaration (n 5); Parliamentary Assembly (n 15); the criteria for membership of the British and Irish Ombudsman Association (now the 'Ombudsman Association'), available at: www.ombudsmanassociation.org/association-membership.php

[102] Nikiforos Diamandouros, 'The work of the European Ombudsman and the European Network of Ombudsmen' (2011) Speech delivered at the Erasmus for Public Administration Programme, available at: www.ombudsman.europa.eu/en/activities/speech.faces/en/10956/html.bookmark (emphasis added).

[103] Parliamentary Assembly (n 15) point 7.2.

[104] Art 228(3) TFEU. The Ombudsman may, of course, lecture on her mandate and related matters publicly. Thus, the Ombudsman's academic activity may be compared to that of the CJEU judges, who are also independent.

and avoid conflicts of interest: 'during and after his term of office he will respect the obligations arising therefrom, in particular his duty to behave with integrity and discretion as regards the acceptance, after he has ceased to hold office, of certain appointments or benefits.'[105] The Ombudsman is considered equal in rank to a judge of the Court of Justice.[106]

The independence of the European Ombudsman was extensively discussed in the *Lamberts* case.[107] The Court found that since the Ombudsman's discretionary powers are wide, in 'very exceptional circumstances' judicial review and the possible liability of the Ombudsman (to be more precise: the liability of the EU owing to the conduct of the Ombudsman) cannot threaten his or her independence.[108] The alternative would amount to immunity.

In addition, and contrary to practices observed with other high-profile EU office-holders who should also work independently,[109] it cannot remain unnoticed that all office-holders to date had previously served as national ombudsmen,[110] and their appointment as European Ombudsman signified their first involvement in an EU office. The wide investigatory powers vis-à-vis the member states (e.g. documents or information in their possession)[111] also safeguards the Ombudsman's independence from the latter.

Since the establishment of the institution, the European Ombudsman has adopted a 'personal dimension to the office, with a publicly recognised office-holder'[112]; thus, the office of the Ombudsman is, by and

[105] Arts 9 and 10 of the Statute.

[106] Art 10 of the Statute.

[107] Case C-234/02, *European Ombudsman* v *Lamberts*, EU:C:2004:174; see the relevant section in Chap. 2.

[108] Ibid., para 48.

[109] Although obviously a very different in nature post, interesting observations can be made with regard to the office of the Commission President; all Presidents since Jacques Santer (also Romano Prodi, Manuel Barroso and Jean-Claude Junker) before their appointment had previously served as Prime Ministers in their respective countries, and therefore as members of the European Council, too. In that sense, they switched from members of an intergovernmental institution to Presidents of a supranational institution.

[110] Emily O'Reilly was formerly the national ombudsman of Ireland; Nikiforos Diamandouros the national ombudsman of Greece; and Jacob Söderman the national ombudsman of Finland.

[111] See the discussion in Chap. 2.

[112] Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press 2009) 529.

large, the Ombudsman herself. The first person is frequently used in the Ombudsman's activities, decisions or recommendations. The Ombudsman is, of course, aided by a multilingual staff. The internal structure of the European Ombudsman's office has already been presented.

The critical question concerning the European Ombudsman's independence is her or his relationship with the European Parliament. On few occasions complainants have advanced the claim that the Ombudsman is not sufficiently independent from Parliament.[113] Manifestation of the delicate relationship between the two institutions is the Ombudsman's decision to consider as a matter of principle complaints against the Petitions' Committee as inadmissible, and those touching upon matters that are already under examination by the latter as not providing 'grounds' for inquiries.[114]

Perhaps a good place to start would be to explore whether the European Ombudsman should be viewed as a 'parliamentary ombudsman'. It is clear that she is elected by Parliament and the duration of the mandate and seat coincide with that of Parliament.[115] The submission of annual and special reports to Parliament should also be mentioned (this point is returned to below). Is the above sufficient to classify the European Ombudsman as a 'parliamentary ombudsman'? For Heede, for example, the 'distinguishing feature of the Parliamentary ombudsman model is that its very purpose is to assist parliament, it has a restricted functional autonomy and forms part of parliamentary control.'[116] This is certainly a high threshold to be met in the EU case.

Indeed, despite acknowledging the institutional proximity with Parliament under the above terms, the fact remains that the European Ombudsman—contrary to most of her European domestic interlocutors—*does have the power* to supervise Parliament. Thus, the appointment/election by and reporting to Parliament are important factors, but perhaps not decisive—after all, insofar as reporting is concerned, in some way or another Parliament is the forum for the political accountability of other institutions, too (including through the examination of annual reports). This was acknowledged by Advocate General Geelhoed in *Lamberts*:

[113] See, for example, Case 900/2010/(MF)RT.

[114] See Annual Report 1995, 5, 16. This issue is returned to in Chap. 6.

[115] Arts 6(1) and 13 of the Statute. If an office-holder retires, interim elections are organised. This took place when Söderman and Diamandouros decided to retire.

[116] Heede (n 1) 110.

> The fact that the Ombudsman is required to report to the European Parliament should also not be seen as part of a review procedure. The reporting requirements are of an entirely different nature. Their purpose is to enable Parliament to form a political assessment of the operation of – and sometimes maladministration in – the institutions. There is one further reason why it is difficult to conceive of review by the European Parliament: the Ombudsman also has the power to investigate maladministration in the European Parliament itself.[117]

The above suggests that Parliament's broader control over the Ombudsman's work also ensures that Parliament monitors the activities of *other institutions as well*, for the purposes of political accountability. Parliament itself pointed out before the Court that 'the Ombudsman [was] not its organ', neither was the Ombudsman institutionally connected to any of the EU institutions, since this was precisely the purpose of the Treaties.[118] This despite the fact that, as Tsadiras convincingly shows with reference to the period between 1992 and 1995, the 'European Parliament sought to strengthen the Ombudsman's powers and increase his dependence', while the 'Council's and Commission's main concerns were just the opposite, namely the disempowerment of the Ombudsman and the fostering of his independence.'[119]

To assess the Ombudsman's independence from Parliament one may actually examine the *modus operandi* of the institution, focusing, in particular, on the 'organisational relations to parliament' or their 'functional connection'.[120] On this point, Heede argues that the 'functional independence' of the Ombudsman in practice has been safeguarded, both with regard to the initiation, as well as the completion of inquiries.[121] Tsadiras' account explains that progressively the Ombudsman has become a 'protagonist in the field of extra-judicial protection'.[122] The establishment of a separate budget for the Ombudsman since 2000 (as an 'independent section of the general budget of the European Union' instead of

[117] Opinion of Advocate General Geelhoed (n 78), para 72.

[118] Case T-103/99 *Associazione delle Cantine Sociali Venete*, EU:T:2000:135, paras 21–23.

[119] Alexandros Tsadiras, 'Of celestial motions and gravitational attractions: The institutional symbiosis between the European Ombudsman and the European Parliament' (2009) 28 *Yearbook of European Law* 435, at 441.

[120] Gabriele Kucsko–Stadlmayer, *European Ombudsman-Institutions: A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea* (Springer 2008) 10–11.

[121] Heede (n 1) 161.

[122] Tsadiras (n 119) 457.

being annexed to the European Parliament's budget) contributed to the Ombudsman's detachment from Parliament.[123]

There have been years when the European Parliament was the EU institution with the second largest number of opened inquiries, after the Commission.[124] More recently, this percentage appears to be declining. According to the latest Annual Report, 21 cases or 8% of conducted inquiries concerned the European Parliament, and this figure was even lower in 2014 (12 or 3.5% of inquiries).[125] Beyond relying on statistical evidence, however, it is essential to consider specific complaints against the European Parliament to assess whether the abovementioned 'functional independence' should be placed in the context of the institutional proximity between the two entities. Such complaints will be discussed in subsequent chapters, while the delicate relationship between the Ombudsman and the Petitions' Committee will be considered in Chap. 6.

Still, the above observations suggest that the European Ombudsman cannot automatically be viewed as falling within the scope of a traditional parliamentary ombudsman. For the purposes of discussing the Ombudsman's independence from Parliament, though (which is the crucial question here), the author subscribes to the above views (and the subsequent chapters will also show) that, *in principle*, the European Ombudsman is *sufficiently independent* from Parliament. On the question as to whether the Ombudsman might be more cautious when deciding to submit (for example) a special report against Parliament itself, a higher level of sensitivity cannot be excluded. That being said, there have been many cases where the Ombudsman has been openly critical of Parliament, as subsequent chapters will show.

Taking these thoughts further, the European Parliament is a directly elected institution representing EU citizens. If the Ombudsman has very infrequently opted for the avoidance of severe tensions with Parliament, this might be compensable if Parliament is generally not opposed to a possible increase in the Ombudsman's influence within the EU administration. The problem is that, first, while Parliament has supported such increase in the Ombudsman's powers, simultaneously it favours (or at least

[123] Ibid., 449. Harden observed, in this respect, that 'the move to a separate budget merely formalised the existing situation', in that it did not augment the *de facto* level of the Ombudsman's budgetary independence; see Harden (n 3) 213.

[124] Annual Report 2009, 41: 11% or 38 opened inquiries.

[125] Annual Report 2015, 34 and Annual Report 2014, 19.

has favoured) firmer control over the Ombudsman[126]; and second, it is not a foregone conclusion that Parliament and its Committee on Petitions follow the same strategy with regard to a possible empowerment of the Ombudsman. If so, the Ombudsman's decision to effectively abstain from interfering with the Committee's work, opting instead for the development of structures of mutually acceptable collaboration, could be reconsidered.

The Ombudsman's Own Accountability

As already mentioned, the Ombudsman is a forum of administrative accountability—but to whom is she accountable? As is well known, a high degree of independence, coupled with significant discretion in the handling of complaints, necessitate sufficient avenues for accountability.[127] The European Ombudsman is politically accountable to Parliament. The duty to submit reports to the latter is generally considered as a mechanism securing the ombudsman's accountability.[128] In the EU, the European Ombudsman submits Annual Reports to the European Parliament and special reports in cases of serious instances of maladministration. The Parliament has therefore the opportunity to supervise her work but also to collaborate with the Ombudsman whenever such need arises—for example, when adopting Resolutions after the submission of the special report. The Petitions' Committee publishes a Report on the Ombudsman's activities.

Related to accountability is the point that the Ombudsman abides by transparency standards in her operation, excluding when the investigation necessitates confidentiality. Acting proactively, the various speeches, reports (including the Annual Reports) and press releases of the office are available on the website. The office is also presently upgrading an already operational public register of documents. The Ombudsman's decisions are thoroughly explained and justified,[129] while the practice of the office is to respect the right to be heard in the investigation.

What is more, the CJEU may dismiss the Ombudsman further to Parliament's request if he or she 'no longer fulfills the conditions

[126] See Tsadiras (n 119).

[127] See generally Giandomenico Majone, 'The regulatory state and its legitimacy problems' (1999) 22 *West European Politics* 1; on the European agencies Madalina Busuioc, 'Accountability, control and independence: The case of European agencies' (2009) 15 *European Law Journal* 599.

[128] Buck et al. (n 4) 155–156.

[129] The Ombudsman's method is further explained in Chap. 4.

required for the performance of [his or her] duties or is guilty of serious misconduct'.[130] The analysis of case-law in Chap. 2 demonstrated that the Ombudsman does not enjoy immunity from judicial review, in particular via actions for damages.

Buck and colleagues raise another interesting argument concerning accountability: because the ombudsman does not produce legally enforceable decisions, the ombudsman's accountability is ensured.[131] This acts as a 'safeguard' against 'activist' ombudsman offices intervening in 'political decision-making'.[132] This assuming, of course, that the ombudsman's findings are generally accepted or, when rejected, that is precisely on the above grounds. In the EU case, the issue of compliance is returned to in subsequent chapters. A question will be posed as to whether, beyond enforceability (an undesirable feature for public sector ombudsman institutions), there may exist additional (to the special report) ways to increase the prospects of compliance, especially in cases of serious maladministration.

Concluding Remarks

Scholarly accounts and public debates on EU democracy tend to focus on the most prominent institutions, and frequently on the European Parliament. This chapter has sought to explain how *the European Ombudsman* is linked with democracy as being part of the debates centring on the EU's further democratisation and proximity with citizens, and as a contributor to strengthening democracy. In this context, the presence of the right to complain to the European Ombudsman among the rights of Union citizenship and the promotion of the concept and rights of EU citizenship by the Ombudsman were mentioned. Accordingly, by being easily accessible (also by civil society organisations) and open to EU residents as well, the Ombudsman renders the EU administration more accessible. Nonetheless, the chapter also underlined the confines or particularities of the Ombudsman's contribution to democracy, which relate to limited resources, the inability to supervise complaints at the domestic level, occasionally certain judgments of the Court that shape the Ombudsman's mandate or activity, the debated notion or direction of

[130] See Art 228(2) TFEU, Art 8 of the Statute and Rule 221 of Parliament's Rule of Procedure.

[131] Buck et al. (n 4) 39.

[132] Ibid., 40.

Union citizenship, or the fact that the Ombudsman cannot be associated with representativeness.

The legitimacy of the Ombudsman was also considered, particularly with reference to her election by Parliament, and citizens' views or (high) expectations of the office. On the Ombudsman's independence, a precondition for the latter to perform her function in rendering the EU more democratic, the delicate relationship with Parliament was reflected upon. The general presumption that the European Ombudsman is a 'parliamentary ombudsman' was questioned.

The next chapter will examine the 'everyday' work of the European Ombudsman—that is, several cases of the office or its 'ombudsprudence'. The purpose is to shed light on the Ombudsman's method, and also to demonstrate the large number of areas where the Ombudsman can hold the EU administration to account. On some occasions the limitations of the present mandate will be unravelled.

CHAPTER 4

Exploring the European Ombudsman's Method: Analysis of Cases

Introduction

This chapter examines in further detail the everyday work and outputs of the European Ombudsman, through an exploration of cases stemming primarily from the Annual Reports 2008 to 2015 and also from the Ombudsman's website.[1] This is a suitable moment to assess the development and *modus operandi* of the office: the Ombudsman is not anymore the cautious 'beginner' of the early nineties. Indeed, the Ombudsman has stabilised her position within the EU's architecture, drafting rather ambitious strategies, consulting with civil society actors, organising events and seminars, while frequently criticising rigorously the EU institutions in instances of maladministration. Thus, the cases under examination cover the second five-year period of Diamandouros and the first years of O'Reilly, who assumed office in October 2013. As already noted, the entry into force of the Lisbon Treaty in December 2009 expanded the ambit of the Ombudsman's mandate.

The years 2008–2009 were pivotal for the office in terms of communication with citizens and stakeholders. The Annual Report was re-designed to be a 'timely, accessible, environmentally-friendly and modern-looking

[1] It is remembered that cases concerning access to documents and transparency are dealt with separately in the next chapter.

N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, European Administrative Governance,
DOI 10.1057/978-1-137-57395-7_4

publication',[2] while in 2009 the new website of the Ombudsman was launched.[3] Importantly, an online interactive guide was created, aiming at directing complainants to the appropriate redress avenue when the case falls outside the Ombudsman's mandate.[4] This guide has been responsible for the significant decrease of complaints falling outside the mandate. Also, the guide enables citizens to receive first-stop advice on matters not necessarily related to the Ombudsman's remit: in 2015, 17,033 citizens were helped by the office, out of whom 13,966 by the interactive guide.[5] In 2010, the Ombudsman adopted a new logo or 'visual identity'.[6] The arrival of Emily O'Reilly marked a new design for the (now significantly shorter) Annual Report, including the addition of links to webpages and videos, where members of staff explain how a particular investigation was carried out. Accordingly, the reliance on social media ensures that the Ombudsman's proactive and reactive work is broadly and efficiently disseminated.

The Significance of the Annual Reports

The Annual Report provides the European Ombudsman with an opportunity to exercise pressure, since it is the most read publication of the office. The Ombudsman can explain therein her future strategy or specific goals so as to gather and assess reactions or receive feedback. The Reports are also a vehicle through which the mandate and the results of the investigations can be communicated to citizens so that they can familiarise themselves with the institution. It has to be observed, though, that in the age of social media many stakeholders are updated on the Ombudsman's activity on a daily basis. Simultaneously, being the outcome of the previous year, an Annual Report ensures that an ombudsman is accountable.[7] It is

[2] Annual Report 2008, 4–5.

[3] See: ombudsman.europa.eu

[4] Annual Report 2009, 85.

[5] Annual Report 2015, 31.

[6] See: www.ombudsman.europa.eu/en/press/visualidentity.faces. See more generally on the Ombudsman's communication policy between 1995 to 2010, Nikos Vogiatzis, 'Communicating the European Ombudsman's Mandate: An overview of the Annual Reports' (2014) 10 *Journal of Contemporary European Research* 105.

[7] Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate 2010) 155–156.

remembered that the Reports are not, of course, legally binding.[8] Another way to highlight and disseminate important cases is through a press release, which often contains a summary of the case and the Ombudsman's findings or recommendations.

The Annual Report is presented shortly after its publication (which generally takes place during the spring/early summer of the next year) at the Petitions' Committee of the European Parliament, which is also responsible for the relations between the Parliament and the Ombudsman.[9] The Petitions' Committee draws its own report on the Ombudsman's report, and *that* report is discussed in the plenary of the European Parliament, in the Ombudsman's presence. Sometimes other high-ranking EU officials participate in the discussion on the Ombudsman's Annual Report. The Report is now mainly produced and distributed in electronic format; the number of hard copies is rapidly decreasing.

General Remarks Stemming from the Annual Reports 2008–2015

The Ombudsman traditionally receives more complaints falling outside, rather than inside the mandate. Reasons related to this tendency include the limited awareness of the institution,[10] and also some complainants' understandable difficulty in realising that EU-related problems arising at the domestic level cannot be dealt with by the Ombudsman. After the introduction of the interactive guide in 2009, a decrease in the number of such complaints can be identified. Thus, while in 2008, 2604 complaints (out of the total 3406 registered) were found to fall outside the mandate,[11] in 2014 this number dropped to 1427 complaints[12] and in 2015 to 1239.[13]

The Ombudsman in 2014 opened 342 inquiries, including 17 own-initiative inquiries, and closed 400 further inquiries, out of which 13

[8] This obvious point was confirmed by the Court; see Case T-103/99, *Associazione delle Cantine*, EU:T:2000:135, paras 49 and 50, and the relevant discussion in Chap. 2.

[9] On the responsibilities of the Committee on Petitions see Rules of Procedure of the European Parliament, Annexes VI—XX.

[10] See, in this regard, the Ombudsman's thoughts in Annual Report 2009, 36.

[11] Annual Report 2008, 37.

[12] Annual Report 2014, 17.

[13] Annual Report 2015, 32.

were own-initiative.[14] In 2015, 261 inquiries were opened, including 12 own-initiative. Another 277 were closed, out of which 16 were own-initiative.[15] This is no small amount of work for an office of approximately 85 members of staff, including trainees.[16] The recent increase in the use of own-initiative inquiries so as to tackle systemic irregularities within the EU administration and to raise the impact and visibility of the institution marks a certain departure from past years, when the instrument was used cautiously; compare, for example, the three own-initiative inquiries opened in 2008.

This matter was discussed during an interview with the former European Ombudsman, Nikiforos Diamandouros. A question was submitted as to whether he was planning to augment the use of own-initiative inquiries and special reports, instruments which are associated with the Ombudsman's systemic-improvement function.

> '*Both of these instruments are extremely valuable for the Ombudsman … and here comes the paradox: because they are extremely valuable, they have been used with very judicious approaches and sparingly. If I were to flood the European Parliament with special reports, it is not a foregone conclusion that the Parliament in fact would react, would give attentiveness to what I would be putting before it. … The Ombudsman may submit a special report to Parliament, but once he has submitted it, it's out of his hands, it is entirely within Parliament's political realm and the Parliament may in fact choose to do nothing about it. Again, you have to be sensitive to the relations*'. Then the Ombudsman pointed out that out of 17 years of operation only 16 or 17 cases '*made it to that particular point*'. A breach of fundamental rights and systemic problems usually lead to special reports, if there is '*potential for the future*'. '*These are instruments … that you'll have to use* intelligently, judiciously and sparingly *to safeguard their power; the same goes with the own-initiative inquiry*' (emphasis added). The Ombudsman then underlined that he had increased the number of own-initiative inquiries. In addition, '*the Ombudsman is a small institution. In my view, the Ombudsman should seek to remain a small institution, because once you get into the realm of … to the logic of largest institutions, then you inevitably also glide, slide in the direction of bureaucratization. Complex organizations are by definition increasingly rigid and bureaucratic*'. The Ombudsman is '*trying to combat excessive*

[14] Annual Report 2014, 16.

[15] Annual Report 2015, 31.

[16] This is based on information available in June 2016 at: www.ombudsman.europa.eu/en/atyourservice/team.faces

bureaucratization', '*deliberately … the institution and the physical person occupying it have the same name*', so as to be able to transmit to the citizen '*a human face to that bureaucracy*'. '*If you maintain … the capacity to have this kind of more personal approach … then the inevitable issue that comes up is resources.*' So, if you preserve a small in size institution, it is not possible to open limitless own-initiative inquiries. Besides, the Ombudsman has a '*profoundly educative role, as far as the public administration is concerned*', and the own-initiative inquiries, the special reports and even the follow-up studies do relate to this role as well and '*subscrib[e] to the philosophy of promoting a culture of service*'. The Ombudsman concluded by pointing out that he wished to insist '*on quality, not on quantity*'.[17]

As the institution enters its third year of operation, O'Reilly's decision to pay further attention to this proactive, strategic instrument, with a view to increasing the impact and visibility of the Ombudsman, is understandable, if not necessary. It is remembered that in such cases the Ombudsman usually publishes a call for contributions, thereby giving the opportunity to individuals and NGOs to participate in debates concerning the EU administration. O'Reilly's approach also differs in that the launch of the own-initiative or strategic (as it is presently being referred to) inquiry does not necessarily depend on a high number of complaints received on a particular issue. These inquiries concern matters that the Ombudsman believes would be of general interest to European citizens, within, of course, the confines of the Ombudsman's mandate. In addition, the Ombudsman examines the added value that she can bring to this particular area, and also estimates the result to be achieved (which again relates to earlier points about managing expectations). An example of such an (ambitious) inquiry was the transparency of trilogues.[18]

It is also underlined that there is a stark difference between the own-initiative inquiry and the special report: as already noted, the effectiveness of the latter essentially depends on Parliaments' intentions (and especially those of the Committee on Petitions, which is responsible for the relations with the Ombudsman), while the activation of the former depends entirely on the Ombudsman's decisions or priorities. This perhaps explains why O'Reilly has increased the use of own-initiative inquiries, but not that of special reports.

[17] Interview with the European Ombudsman, 17.02.2012 (on file with the author).
[18] See Case OI/8/2015/JAS, discussed in Chaps. 5 and 6.

The Commission has consistently been the most 'targeted' institution by complainants. This is indeed logical, since the Commission is the main EU institution directly interacting with natural or legal persons.[19] In 2008, 66% of opened inquiries concerned the Commission,[20] while in 2015 this figure was 55.6%.[21] The European Personnel Selection Office (EPSO) is understandably subject to a significant number of complaints, too, but noteworthy is also the rise in the number of complaints against the EU agencies. In 2008, the Ombudsman attended a meeting where the EU agencies accepted that the European Code of Good Administrative Behaviour (ECGAB) applied to them.[22] In 2015, the agencies were the subject of 11.5% of complaints,[23] but there have been years when the percentage was significantly higher (e.g. in 2013, 24% of complaints, occupying the second place after the Commission).[24] Remarkably low is the number of complaints against the Council.

Most complaints are generally submitted in English, followed by German, Spanish, Polish and French.[25] That being said, the geographic origin of complaints is quite diverse.[26] The vast majority of complainants now use the online platform to submit a complaint.[27] Between the years 2006 and 2012, Diamandouros decided to 'reward' institutions willing to implement the Ombudsman's findings with the inclusion in the Annual Report of a 'star case exemplifying best practice'. While this idea has not been taken up by O'Reilly in the latest versions of the Annual Reports, she has recently announced, nonetheless, the inauguration of the 'award for good administration'.[28]

The areas of maladministration covered by the office are related to its broad definition, which encompasses legality and fundamental rights,

[19] Annual Report 2015, 22.
[20] Ibid., 43.
[21] Annual Report 2015, 34.
[22] Annual Report 2008, 76.
[23] Annual Report 2015, 34.
[24] Annual Report 2013, 10.
[25] See, for example, Annual Report 2012, 22. English counted for 30% of submitted complaints, German for 13%, Spanish for 12%, Polish for 10%, while French for approximately 9.5%. In the remaining official languages that figure was below 5%.
[26] For 2015 see: www.ombudsman.europa.eu/en/press/infographic.faces/en/34/html.bookmark
[27] The Ombudsman's website requires the complainants to create an account first.
[28] Press release 12/2016, 'Ombudsman launches "Award for Good Administration"', available at: www.ombudsman.europa.eu/press/release.faces/en/72245/html.bookmark

discretionary decisions, and more generally the principles of good administration as contained in the ECGAB. Transparency and access to documents have consistently been (with some remote exceptions in specific years, such as in 2011) the subject matter of most inquiries. In 2015, 62 of closed cases (or 22.4%) concerned 'requests for information and access to documents'.[29] Further areas of investigated maladministration concern: the Commission's role as guardian of the Treaties; competition; institutional and policy matters (this 'covers a range of complaints made against the institutions with regard to their policy-making activities or their general operation'); conflict of interest; human rights; award of tenders and grants; execution of contracts; and selection procedures.[30] The Ombudsman's website breaks these categories down to more specific 'types of maladministration alleged', which include lawfulness, abuse of power, discrimination, reason-giving requirements, fairness and impartiality, proportionality, requests for information or access to documents—among others.[31] This latter classification corresponds to relevant articles of the ECGAB. A further classification stems from the relevant 'field of law', such as agriculture, competition, the CFSP or the 'People's Europe', which covers cases that cannot be easily classified elsewhere, like those on the European citizens' initiative.[32] The above classifications do not affect the *modus operandi* of the office. Besides, often a complaint will fall under more than one category.

The Ombudsman—like many ombudsman institutions—has a long-standing preference for friendly solutions. O'Reilly appears to distinguish between a 'full-scale inquiry' and a more 'simplified procedure'; in the latter case, the Ombudsman could, for example, solve the case via a telephone call or a rapid inspection of files.[33] The obvious goal is efficiency: the average length of inquiries dropped from 13 to 11 months in 2014, and to 10 months in 2015. Still, even in 2015, 17% of cases were closed after 18 months (which could be more than two years), and 12% between 12 and 18 months.[34] Compared to past years, such figures mark an improvement—yet some cases are a source of concern if the Ombudsman wants to be a convincing alternative to the lengthier judicial process.

[29] European Ombudsman, Annual Report 2015, 35.
[30] Annual Report 2014, 20.
[31] See: www.ombudsman.europa.eu/en/cases/home.faces
[32] Case OI/9/2013/TN, discussed in Chap. 6.
[33] Annual Report 2014, 23.
[34] Annual Report 2015, 37.

The explanation provided for is that certain 'complex cases require several rounds of consultations with the complainant and the institution concerned. … [T]he office of the European Ombudsman not only fully establishes the facts, but also tries to reach a solution that is acceptable to both parties'.[35]

The right to be heard is generally respected in the investigatory process (something which no doubt occasionally contributes to the length of procedures). Once maladministration is established by the Ombudsman, the latter cannot but be on the complainant's side. In this sense, the Ombudsman has to strike a delicate balance between acting on behalf of the general interest, and providing redress to specific complaints. Sometimes both options might not be simultaneously possible. For example, if a systemic problem of maladministration is identified, which stems from an individual complaint, the Ombudsman will need to consider if the unproductive, antagonistic stance of the institution will force her to pursue the inquiry further, despite the clearly expressed view of the complainant that she would be satisfied with an outcome that would not solve the systemic problem. This was reflected in the interview with the former Secretary-General of the European Ombudsman.

> On the selection of the appropriate non-binding instrument, after the completion of the investigation, I enquired of the Secretary General whether the institution concerned or the relevant field of law are factors which are taken into consideration. He opined that an 'internal reflection' always takes place, deriving from the flexibility of the Ombudsman on the procedures to be followed. For instance, a friendly solution may not be the best way to proceed, in a case where the complainant is probably right, on a general issue, but there is no remedy justified or practically possible that is going to satisfy the complainant's own individual case. With the draft recommendation, the Ombudsman has also to consider how to manage the expectations of the complainant, since in that case the latter will naturally assume that he or she will somehow benefit from it, which is not always the case, if the institution will not comply with the draft recommendation. However, whenever complainants clearly stress that their real concern is the general issue and not the specific case, this is not problematic.
>
> The Secretary General added that the Ombudsman has to 'strike a difficult balance' between his general responsibility to promote good administration and his responsibility to provide redress for the individual in a given case. In any case, the complainant must have a clear view on what is precisely being pursued by the Ombudsman.

[35] Ibid.

> On the use of the special report, the Secretary General emphasised that under the Rules of Procedure of the European Parliament, the Committee on Petitions, which is responsible for the handling of the Ombudsman's reports, is entitled to a very limited number of 'own initiative reports' per year, including the reports deriving from the Ombudsman. These reports could lead to Resolutions or other appropriate means to pursue a case, but the Committee on Petitions wants to pursue other issues on its agenda, beyond the Ombudsman's submissions. Additionally, given the concerns on resources, it is 'pointless' for the Ombudsman to contact the Committee if the latter is not *ex ante* convinced to take up the case, precisely because the special report, as often highlighted in the Annual Reports, is the Ombudsman's 'ultimate weapon'.[36]

The Approach Based on Law

The above demonstrates that the European Ombudsman method can vary or depend on the circumstances of the case, but it can safely be claimed that this method is characterised by at least one element: the approach based on law. The stance of the first Ombudsman, Jacob Söderman, informed this approach. He noted in 1995:

> [T]he work of the Ombudsman should focus on helping European citizens and others entitled to apply to the Ombudsman, to exercise their rights fully and, in so doing, to give the European administration a more human face. In performing this task, *an approach based on law is to be adopted*. … [M]ost of the European Ombudsman's work will consist in arguing convincingly and appropriately in favour of reasonable solutions. Naturally this task will have to be carried out *in conformity with the law*. The essence of European law concerning good or bad administration is to be found in the numerous cases heard in this very Court of Justice. These will guide the work of the Ombudsman and constitute in fact a veritable treasure trove of resources.[37]

To that end, the European model of ombudsman has been characterised as a quasi-judicial institution as the latter has 'tried to maximize the quasi-judicial aspects of his role by adopting strategies … which are similar to the conduct of the ECJ since the 1960s'.[38] In this context, specific cases are used to deduce broader principles of good administrative behaviour;

[36] Interview with the Secretary-General, 14.02.2012 (on file with the author).

[37] Annual Report 1995, 22–23 (emphasis added).

[38] Paul Magnette, 'Between parliamentary control and the rule of law: The political role of the Ombudsman in the European Union' (2003) 10 *Journal of European Public Policy* 677, at 682.

'through his "decisions", he has gradually established a "jurisprudence" based on a teleological philosophy of "good administrative practices" and even "good governance"'.[39] Thus, the Ombudsman has a dual function to promote the rule of law *and* the EU's 'democratic aspirations'.[40] These functions are not antagonistic to each other but complementary.[41] In so far as the embedding of the rule of law is concerned, the notion of maladministration includes lawfulness and human rights, and thus the Ombudsman may be seen as contributor (alongside the Courts and the Commission) to the safeguarding of the rule of law within the EU administration.[42] Another dimension of the Ombudsman's contribution to the rule of law and to the 'quality of democracy' is that the extra-judicial remedy 'widens access to justice'.[43] Peters concluded in 2005 that the Ombudsman had 'matured to an indispensable factor of European constitutionalism'.[44] Cases discussed in this chapter will demonstrate that the Ombudsman frequently refers to his or her role as a safeguard for the EU rule of law. The Ombudsman's reliance on the legal method can also be seen in the application (not to mention the drafting style itself) of the ECGAB: even though the Code is soft law, the Ombudsman meticulously refers to articles within the Code when reviewing the conduct of the EU administration or responding to counter-arguments.[45] Complainants use the Code as well—and increasingly so.

The style of the Ombudsman's decisions changed considerably in 2008. The main aim was to render the decisions citizen-friendly, focused and shorter, but simultaneously accurate, in terms of the arguments presented

[39] Ibid.

[40] Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697, at 723.

[41] It is remembered that the EU is based both on the rule of law and on democratic principles; see Arts 2 and 9–12 TEU.

[42] Peters (n 40) 723, 728.

[43] Nikiforos Diamandouros, 'The European Ombudsman and the European Constitution' in Deirdre Curtin, Alfred Kellerman and Steven Blockmans (eds) *The EU Constitution: The best way forward?* (Asser Press 2006) 265, at 267. On the Ombudsman's accessibility compare also the discussion in Chap. 3.

[44] Peters (n 40) 743.

[45] It has been observed that a broader understanding of the rule of law (to prevent abuse of power by the executive) could encompass the concept and principles of good administration; see an interesting account in Richard Kirkham, Brian Thompson and Trevor Buck, 'Putting the ombudsman into constitutional context' (2009) 62 *Parliamentary Affairs* 600, in particular 604–608.

by the parties and the Ombudsman's evaluation. Indeed, the evolution of the office quite inevitably led to an increase in the level of complexity of the decided cases.[46] In the latest style of decision 'the letter to the complainant is separate from the decision', and the tone of the decision is more personal. As to the structure, the Ombudsman in the first two sections 'sets out the background to the complaint and then explains the scope of [the] inquiry'; next, the different stages of the inquiry are presented, including the positions of the parties concerned, and 'the Ombudsman's efforts to resolve the problem(s)', while the final section 'reviews the evidence and explains the Ombudsman's findings and [his or her] reasons for closing the inquiry'.[47]

Since maladministration is broader than illegality, the Ombudsman expects of the EU institutions to abide by the principles of good administration even when acting lawfully. Thus, the Ombudsman's role goes beyond legality and therefore makes a substantial contribution to good governance, too.[48]

The first European Ombudsman was criticised for adopting a legalistic approach, especially during the first years of operation and concerning the Commission's role in infringement proceedings.[49] Although different views exist on that matter,[50] the Ombudsman's approach has no doubt evolved over the years: the drafting of the ECGAB, the increase in the

[46] See 'The European Ombudsman adopts a new style of decision', available at: www.ombudsman.europa.eu/shortcuts/document.faces/en/3688/html.bookmark

[47] Ibid.

[48] As is known, the Commission's White Paper on European governance referred to openness, participation, accountability, effectiveness and coherence as the five principles underpinning good governance; Commission of the European Communities, 'European Governance: A White Paper' (2001) COM (2001) 428 final. The ECGAB crystallises some of these (vaguely drafted) principles.

[49] See Richard Rawlings, 'Engaged elites: Citizen action and institutional attitudes in Commission enforcement' (2000) 6 *European Law Journal* 4, at 6, 15–16. The consequence of this approach, according to the author, was that the Ombudsman lacked creativity and was not able to fully explore the possibilities offered by the mandate. See also Magdalena Elisabeth de Leeuw, 'The European Ombudsman's role as a developer of norms of good administration' (2011) 17 *European Public Law* 349, at 357–358.

[50] Compare, for example, Peter Bonnor, 'Institutional attitudes in context: A comment on Rawlings' 'Engaged Elites—Citizen action and institutional attitudes in Commission enforcement' (2001) 7 *European Law Journal* 114; Päivi Leino, 'The wind is in the North: The first European Ombudsman (1995–2003)' 10 *European Public Law* 333, pointing out that—perhaps expectedly—the Nordic tradition of ombudsman institutions influenced Söderman's approach.

use of proactive initiatives (such as the own-initiative inquiries), as well as further activities—notably the establishment of a European Network of Ombudsmen—evidence such evolution. What is more, and leaving the debate on the infringement process aside, within a political and administrative system considerably shaped by the judgments of the ECJ, it is questionable whether the Ombudsman would have been more—if equally—successful had he not relied on law to convince the institutions that his non-binding recommendations should be taken seriously.[51] This was confirmed during the interview with the former Secretary-General.

> The legal culture in the EU led the Ombudsman to work primarily as a 'law-based institution'. The Secretary-General added: 'the most persuasive arguments we've put forward usually are legal arguments'.[52]

Having discussed the significance and some general remarks stemming from the Annual Reports, the Ombudsman's selection of non-binding instruments, as well as the latter's broader approach as one which is mainly based on law, it is now appropriate to analyse specific cases decided by the office, starting from those related to the Commission's role as the guardian of the treaties.

The Role of the Commission as the Guardian of the Treaties

The Commission has the privilege and the responsibility to monitor the implementation of Union law by the member states.[53] This was a difficult area for the Ombudsman to intervene owing to the wide discretion that the Court has granted the Commission as to how the infraction process may be conducted.[54] Nonetheless, the Ombudsman—despite the initial ten-

[51] A point de Leeuw (n 49, at 358) acknowledges. It has also been pointed out that the Commission had made it clear to the Ombudsman that a 'legal obligation' would need to be at stake in order for it to respond to claimants, which can explain the Ombudsman's 'meticulous and legalistic approach'; see Jill Wakefield, *The right to good administration* (Kluwer 2008) 108.

[52] Interview with the Secretary-General, 14.02.2012 (on file with the author).

[53] See now Art 258 TFEU and Art 17(1) TEU: the Commission 'shall oversee the application of Union law under the control of the Court of Justice of the European Union'.

[54] See, for example, Melanie Smith, 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process' (2008) 33 *European Law Review* 777; Rawlings (n 49).

sions with the Commission[55]—eventually managed to produce a notable number of cases in this area. Latest figures indicate that such inquiries still represent a substantial part of the Ombudsman's work.[56] As this section will show, the Ombudsman's approach has now been crystallised, arguably to a point where it should be accepted that the Ombudsman institution has gone as far as it can in this area (this point is returned to in Chap. 6). The Ombudsman relies on a Communication issued by the Commission, which explains how it handles complaints stemming from individuals and concerning infringements of EU law.[57] This is an updated version of a Communication first issued by the Commission in 2002. The complainant does not need to be directly concerned, or to demonstrate 'a formal interest in bringing proceedings' in order to contact the Commission.[58]

The Ombudsman underlines (in Annual Reports, complaints and elsewhere) that generally, the broad discretionary powers of the Commission are respected in the context of such complaints. Further, it is important to clarify to complainants that actions by member state authorities infringing Union law do not fall under the Ombudsman's mandate.[59] Regarding the Commission's *procedural* obligations vis-à-vis complainants, including the registration of complaints, lack of information on the part of the Commission, and delays in responses, the point of reference in the Ombudsman's supervisory work is the abovementioned Communication. Regarding the Commission's *substantive* considerations in the infraction process, the Ombudsman's review verifies 'whether the conclusions reached by the Commission are reasonable and whether they are well argued and thoroughly explained to complainants'.[60] In addition, the Ombudsman may *rarely* 'fundamentally disagree' with the Commission's substantive conclusions; in such cases, the Ombudsman will still point out that the highest authority in the interpretation of EU law is the Court. Still, as already noted, in most cases, 'the Ombudsman consider[s] the Commission's stance on the substance of the case to be correct'.[61] Overall,

[55] See Vogiatzis (n 6) 114.

[56] Annual Report 2015, 35: 20.2% of closed inquiries.

[57] Commission's Communication to the Council and the European Parliament, 'Updating the handling of relations with the complainant in respect of the application of Union law' COM (2012) 154 final.

[58] Ibid., point 2.

[59] Annual Report 2008, 56.

[60] Ibid., 57.

[61] Ibid.

while the Ombudsman does not expect every infringement of EU law to lead to infringement proceedings, there is an expectation, on the part of the Commission, to provide explanations as to how its broad discretionary ambit is exercised.[62]

Thus, the Ombudsman is willing to go significantly beyond the Court in this area, assessing the *reasonableness* of the Commission's conclusions and even providing a personal assessment of the latter's overall stance (despite the fact that disagreements of this sort are rare). When the case strictly concerns the Commission's substantive decision, the Ombudsman can always transfer the case either to the Committee on Petitions or the Commission itself. The main contribution of the Ombudsman is that the Commission is now under pressure to consider complainants as citizens with rights, rather than 'informers' who should not participate in the proceedings; in this sense, the Ombudsman seeks to redress citizens' 'sense of alienation'.[63]

Many such complaints relate to environmental matters. One such case concerned the construction of a Tram network in the greater area of Athens, and the complainant considered that a proper environmental impact assessment was not conducted, while the publicity of the announcement was unsatisfactory.[64] The Commission was of the opinion that it should not pursue an infringement action against Greece. The Ombudsman closed the case with critical remarks, given that the project had been completed some years ago, while the Commission's wide discretionary powers in initiating infringement proceedings were also taken into account.[65] Still, the Ombudsman assessed the Commission's method of arriving at its conclusions.[66] Elsewhere, again on the environmental impact assessment, the Ombudsman accepted that the Commission had the right not to start infringement proceedings against Italy, but it still had to provide 'sufficient

[62] Annual Report 2012, 44.

[63] Patrick Birkinshaw, *European Public Law: The achievement and the challenge* (Kluwer 2014) 551.

[64] Case 789/2005/(TN)(GK)(ID)(STM)CK.

[65] Ibid., point 1.12.

[66] See ibid., point 1.9: 'it would not exceed [the Commission's] above discretion if, instead of focussing on whether a specific relevant requirement of the applicable national legislation had been respected or not, it were to examine whether the Member State concerned acted in such a way as to offer sufficient guarantees of compliance with the provisions of [the relevant article] of the Directive and with the need to ensure their useful effect. This is what the Commission appears to have done in the case at hand.'

and coherent' reasons according to the principles of good administration.[67] Measured by the above standards, the Commission's explanations were found to be inadequate, and therefore the case was closed with a critical remark, approximately three-and-a-half years after the initiation of the inquiry. These indicative examples show how the review of the process may indirectly lead to review of the substance of the Commission's decision, and ultimately its discretion; this matter is returned to in a moment.

On the registration of complaints by the Commission, the Ombudsman has noted that the Commission should distinguish between 'identifying, registering and acknowledging receipt of complaints', which should be done promptly, and 'deciding how to deal with each complaint'.[68] It is underlined that Articles 3 and 4 of the Communication refer to the Commission's obligation to register and acknowledge receipt of the received complaints. The instances where the Commission will not record the complaint are enumerated in the Communication, and that list is exhaustive.[69] Although some aspects of that list (e.g. the Commission's 'clear, public, and consistent position') entail some degree of discretionary assessment, the Ombudsman is willing to push as much as possible for the acknowledgment and registration of complaints.

A friendly solution was achieved (since the Commission agreed to register the complaint) in a case[70] where the complainant alleged that the Commission had erred as regards the handling of a complaint on Sweden's insufficient transposition of the Citizenship Directive.[71] The Ombudsman considered that the existence of an infringement procedure against a member state is not a 'reason for not considering a complaint investigable' or refuse its registration.[72] Furthermore, any delay in the process of the infringement procedure should be communicated to the complainant

[67] Case 1962/2005/IP.

[68] Annual Report 2009, 54, and Cases 1628/2008/TS; 2884/2008/(WP)GG.

[69] See Art 3 of the Communication. These instances are as follows: anonymity of the complainant; lack of reference to the member state concerned; denouncement of acts or omissions of private bodies; failure to set out a grievance; or when it sets out a 'grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant'; or when the grievance clearly falls outside the scope of EU law.

[70] Case 1174/2007/TN.

[71] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77.

[72] Case 1174/2007/TN, points 8–13.

because this is in line with citizens' legitimate expectations, an area that falls under the scope of maladministration and features in the ECGAB.[73] Elsewhere, the Commission did not register a complaint although the complainant had used the applicable form.[74] The Ombudsman, again relying on the abovementioned Communication, found that the Commission is not exempt from such obligation even when previous correspondence has been exchanged between the Commission's services and the complainant.[75] The case was closed with a critical remark.[76]

Frequently, the collaboration between the Ombudsman and the Commission is productive, and it has certainly become more productive compared to the first years of the Ombudsman's operation. Thus, the Commission may exemplify best practice: that was the case when the Commission decided to re-open the infringement procedure against Italy, further to a complaint that the requirements of the Landfill Directive had not been met.[77] The Ombudsman inspected several documents, including the conditioning plan, the Commission's notes on the case and the correspondence between the Commission and the Italian authorities.[78] The Ombudsman did not identify instances of maladministration on the part of the Commission, but suggested (using a further remark) that the Commission should verify within a short timeframe the compliance of the landfill site with the Directive. The Commission responded positively.[79]

In another case, the Ombudsman used a draft recommendation to invite the Commission to improve its explanations related to the non-applicability of secondary legislation; the Commission responded positively, acknowledged the difficult wording of that piece of legislation, adopted a 'pragmatic solution' with a view to clarifying uncertainties and ultimately endorsed the Ombudsman's systemic recommendation to work towards providing further clarity in the application of the relevant Directive.[80] An interesting

[73] Ibid., points 30–31. See also Art 10(2) ECGAB.

[74] Case 1009/2009/(VL)KM.

[75] The Commission expressed the view that in these cases the complaint is 'pointless' and 'repetitive'; ibid., point 21.

[76] The Ombudsman also examined the substance of the case. He found that the Commission is under no obligation to cite relevant CJEU case-law to justify its decisions (a point raised by the complainant). Thus, the Ombudsman considered that the Commission's explanations (through correspondence) were reasonable, and limited the findings of maladministration to the Commission's procedural obligations.

[77] Case 791/2005/(RR)(IP)FOR.

[78] Ibid., point 33. These documents were marked as 'confidential'.

[79] Annual Report 2009, 48.

[80] Case 846/2010/PB, in particular points 63–68.

point was whether the complainant should participate in the Commission's meetings with the Danish authorities. The Ombudsman acknowledged the Commission's discretion and the lack of a relevant legal obligation, but suggested—without finding maladministration—that:

> In the present state of EU law, the relationship between the Commission and the Member States in infringement cases is such that it would be most unusual for the Commission to discuss—in the sense of arguing or negotiating—infringement issues in a round-table setting with a Member State and the complainant. The matter is different, however, if the Commission meets with the Member State simply to obtain factual information. This may for instance happen if Commission officials carry out an on-site visit of certain projects in a Member State. In those cases, it may be both fair and operationally expedient to ensure the complainant's presence.[81]

The Ombudsman may also investigate complaints alleging that the Commission is inactive because of conflict of interest between specific Commissioners and national entities. In a case alleging unlawful state aids granted by Spain to four major football and basketball clubs, the complainant believed that the DG Competition had remained inactive for more than two years owing to the Commissioner's strong support for one of these clubs.[82] The Ombudsman observed that any impressions of this sort had to be dissolved, and given that the Commission had initially overlooked the Ombudsman's attempts for a friendly solution, she adopted a draft recommendation inviting the Commission to examine whether or not the infraction process against Spain should be initiated. Despite the considerable delay of four years since the submission of the first complaint to the Commission, the latter decided to examine the substance of it, to the Ombudsman's satisfaction. Thus, the Ombudsman's draft recommendation was effective.

The Ombudsman carefully assesses whether the received complaint falls primarily under the responsibility of member states[83] or outside the

[81] Ibid., point 79.

[82] Case 2521/2011/JF.

[83] That was the case in a complaint regarding the mutual recognition of diplomas for academic purposes. The Ombudsman accepted the Commission's submissions that 'the recognition of diplomas for academic purposes is the responsibility of Member States. In this field, the Commission must only check that the refusal to recognise a diploma is not based on a direct or an indirect discrimination based on nationality. Such discrimination did not exist in the present complaint.' See Case 3303/2008/(ELB)OV, point 13.

scope of EU law.[84] When complainants allege misapplication of EU law by national authorities, the Ombudsman reminds them of the limitations of the mandate. In addition, the Ombudsman may, of course, side with the Commission's approach. In a case where an instance of unlawful state aid in Portugal was alleged, the Ombudsman welcomed the Commission's apology to respond to the complainant in Portuguese, and expressed his support for the Commission's interpretation of EU law—while pointing out that, as always, the CJEU provides the authentic interpretation.[85]

The Ombudsman is not always in the position to provide meaningful redress to natural and legal persons. The Commission may be criticised quite severely in the Annual Reports for its exercise of discretion,[86] but sometimes the Ombudsman confines his or her action to publication of critical remarks. Such decisions point to the rather limited available modes of action at the Ombudsman's disposal, and therefore to the limits of the mandate more generally.

As already mentioned, the Ombudsman's method is to exercise control via scrutiny of the Commission's reasoning and explanations. More specifically, in one case a Spanish firm went bankrupt in 1995 and the employees claimed that during the insolvency proceedings they lost a significant percentage of their pension rights, because of the delayed implementation of a specific provision of the relevant Directive in Spain.[87] The complainants exhausted the judicial remedies, but none of the national courts sent a preliminary reference to the ECJ. Shortly afterwards, the Court interpreted the pertinent provision for the first time in the context of another case,[88] and this interpretation was significantly broader than the one adopted by the Commission and the Spanish courts.[89] The Ombudsman criticised the Commission for delays in responding to the complainant (15 months in total), and for failing to justify why, especially further to the Court's interpretation, it decided to close the infringement procedure against Spain. In particular, the Ombudsman underlined that, unless stated otherwise, 'the

[84] For example, allegations concerning decisions before Romania's accession to the EU; see Case 1738/2012/RT, in particular point 45.

[85] Case 1708/2011/JF.

[86] See, for example, Annual Report 2010, 45, and Cases 3307/2006/JMA, 1528/2006/VL and 953/2009/MHZ.

[87] Case 953/2009/(JMA)MHZ.

[88] Ibid., point 6, and Case C-278/05, *Robins,* EU:C:2007:56.

[89] Case 953/2009/(JMA)MHZ, points 48–49.

interpretation of [EU] law given by the Court of Justice has an effect *ex tunc*', and therefore the Commission's argument concerning the elapsed time between the *Robins* judgment and the bankruptcy (13 years) was irrelevant, as was the argument that *Robins* was issued shortly after the Spanish courts' final decision.[90] The complaint was closed with two critical remarks.

In a case concerning 27 citizens' initiatives submitted to the Commission in 2006 and alleging irregularities of an *ex post* environmental impact assessment on the expansion of the Vienna airport, the Ombudsman was very critical of the Commission's practices.[91] This matter had been the subject of another inquiry carried out by the Ombudsman, whereby the latter had invited the Commission to take action and address the allegations.[92] After an overall period of four years since the submission of the first complaint, the Ombudsman closed the second case, pointing out that the situation constituted a 'deplorable example … where the Commission (i) failed to take appropriate remedial action in relation to a clear infringement of EU law in an important case and (ii) chose to ignore the Ombudsman's advice'.[93] He therefore submitted a special report to the European Parliament. The latter adopted a Resolution ten months after the Ombudsman's special report, but it is questionable whether the Resolution addressed that particular issue.[94]

The Ombudsman can act proactively, too. In 2014, she closed a three-year own-initiative inquiry into the 'EU pilot' project[95] concerning the handling of infringement procedures.[96] The Ombudsman was interested in identifying whether the Commission was willing to revise the earlier

[90] Ibid., points 50–51.

[91] Case 2591/2010/GG. The irregularities referred to the fact that the authority entrusted to carry out the *ex post* assessment could give rise to conflict of interest, and that members of the public should have access to the review procedure. The impact assessment is normally carried out before the commencement of the project, but the Commission agreed otherwise with the Austrian authorities in that case.

[92] Case 1532/2008/(WP)GG.

[93] Case 2591/2010/GG, point 5.

[94] See European Parliament Resolution of 12 March 2013 on the Special Report of the European Ombudsman concerning his inquiry into complaint 2591/2010/GG against the European Commission (Vienna Airport).

[95] Communication from the Commission, 'A Europe of Results—Applying Community Law' (2007) COM/2007/0502 final. The aim of the project was to increase the efficiency and effectiveness in the handling of infringement procedures.

[96] Case OI/2/2011/OV.

2002 Communication in light of the EU pilot experience. The 'EU pilot' project was generally positively assessed, but the Ombudsman issued a draft recommendation to the Commission regarding how the 2002 Communication could be improved. The recommendation was based on the Ombudsman's opinion that the Commission's initial response focused disproportionately on the relations with member states, rather than individuals. When the Commission responded to the draft recommendation, it had already adopted the new (2012) Communication. However, several aspects of the Ombudsman's recommendation had remained unaddressed in that revised version, most notably 'modifications aimed at better informing complainants'.[97] Still, the Ombudsman's main concern was that the Commission adopted the new Communication just five days after the Ombudsman's draft recommendation: the Ombudsman's input had obviously been disregarded.[98] Further, contrary to the 2002 Communication, the Ombudsman is not an addressee in the new Communication as the latter is directed at the European Parliament and the Council. The Commission also did not explain why the Communication had not been published in the Official Journal of the EU.[99] Lastly, the Commission appeared unwilling to revise the text of the 2012 Communication. While expressing her regret, and underlining that such complaints 'constitute an important mechanism through which citizens can participate in maintaining the rule of law',[100] the Ombudsman did not submit a special report to the European Parliament, although that option was considered by the office. The rationale was that Parliament regularly scrutinises the Commission via the Annual Report on the monitoring of the application of EU law, and that there was (and, in fact, is) an ongoing discussion on the adoption of an EU law on administrative procedure.[101] On the lack of further action, on the Ombudsman's part, one would submit, however, that the special report as the 'ultimate weapon' should be distinguished from Parliament's overall responsibility to politically hold the EU administration to account. Otherwise, the special report could become redundant. Especially for important aspects of the infringement process (such as

[97] Ibid., point 37.
[98] Ibid., point 33.
[99] Ibid., point 36.
[100] Ibid., point 38.
[101] On which see the brief discussion in Chap. 2.

the Communication), the intervention of Parliament would have been desirable. It should be noted, nonetheless, that in May 2016 the Ombudsman decided to open another strategic inquiry into the 'EU Pilot', which is presently pending.[102]

Moreover, in another own-initiative inquiry the Ombudsman examined the Commission's omission to translate the 2002 Communication into all of the official languages of the EU after the enlargements of 2004 and 2007.[103] Despite providing a number of arguments pointing otherwise,[104] the Commission eventually decided to publish the Communication in all of the official languages. The same now applies to the 2012 Communication.

Delays in the handling of infringement complaints is another substantial area of investigation. Normally, the Commission should decide on the complaint within one year from its registration. The latest own-initiative inquiry of May 2016 into the 'EU Pilot' also touches upon this matter. The Ombudsman has noted that 'the Commission could make clear to its services that the need for inter-service consultations does not, in itself, justify exceeding the one-year deadline'.[105]

Elsewhere, the Ombudsman found 'regrettable' and 'unfair' the Commission's view that the above deadline does not constitute a legal obligation, since the Commission itself had authored the Communication.[106] Exceptions may be necessary, of course, but if an extension to the deadline is required, the Commission should provide explanations and—importantly—inform the complainant. To that end, a critical remark was issued in that case. The Ombudsman also explored the substance of the Commission's decision that no infringement of EU law had taken place. Touching upon the Commission's discretionary ambit, he underlined that the complainants 'may … expect the Commission, in its administrative activity in the pre-litigation phase, to apply a *sufficient degree of diligence* when deciding what action is the *most appropriate* to deal with

[102] Case OI/5/2016/AB.

[103] Case OI/2/2012/VL.

[104] Most notably that the Communication was a purely 'internal guideline'. The Ombudsman could not accept that view, underlining that the Communication was, in fact, addressed to the Ombudsman and the Parliament, and that it served as a 'yardstick for the Ombudsman and Parliament to assess how the Commission respect[s] the procedural rights of Union citizens in discharging its duties as the "guardian of the Treaties"'; ibid., point 15.

[105] Case 412/2012/MHZ, further remark.

[106] Case 1786/2011/MHZ, point 49.

their complaint in order to find out whether or not an infringement has taken place and also when *assessing the outcome* of these investigative actions'.[107] The Ombudsman's intervention helped, nonetheless, the Commission to remedy this and provide adequate explanations to the complainant.

The complainants turned to the Ombudsman in another case concerning an allegation of discrimination against men in voluntary additional pension schemes in Finland, given that the Commission was unable to reach a decision as to what to do next and, in particular, whether to bring the matter before the Court within a reasonable time.[108] In such cases the Ombudsman normally inspects the Commission's files to assess whether the delays are justified. In that case, although in the meantime the Commission had reached a conclusion to close the case, the Ombudsman reiterated that the Commission's discretion is confined by the right to good administration under Article 41 of the Charter, and notably the requirement to handle affairs within a reasonable time.[109] While recognising the complexity of the case (an argument raised by the Commission), the Ombudsman was doubtful as to whether the Commission's additional request to the Finnish authorities for information (which prolonged the overall examination of the complaint) was truly necessary.[110] Further, the Ombudsman argued that the Commission's stance vis-à-vis similar infringement cases across member states has to be consistent. To that end, 'the Commission needs to analyse similar cases against another Member State before taking a position' and take into account citizens' interests.[111] The Ombudsman concluded that the Commission committed an instance of maladministration, but in such circumstances—the Commission having eventually adopted a position—it was not useful to proceed with a draft recommendation[112]; thus, a critical remark was issued. Again, the case illustrates the Ombudsman's willingness to inspect the coherence of the Commission's activity through a review of the reasoning and the factors behind the excessive delays in reaching a decision.

[107] Ibid., point 62 (emphasis added).
[108] Case 230/2011/EIS.
[109] Ibid., point 26.
[110] Ibid., point 32.
[111] Ibid., point 34.
[112] Ibid., point 37.

Competition

The European Ombudsman acknowledges the Commission's significant powers in the field of competition law, adding that the office is one of the '*external* mechanisms of administrative control'.[113] The message is that, again, maladministration is broader than illegality, and this also applies to the Commission's activity in competition.

The Ombudsman dealt with a complaint concerning an envisaged merger between Ryanair and Aer Lingus, which the Commission found to be incompatible with the common market. The complainant, representing Ryanair, alleged that the Commission had failed to protect the confidentiality of highly sensitive information provided by Ryanair in the context of the Commission's inquiry into the merger.[114] As a preliminary observation, the Ombudsman rejected Aer Lingus' proposal to participate in the proceedings as a third party, pointing out that this is not allowed by the Statute and the Implementing Provisions.[115] If Aer Lingus had important information to share, it could (i) forward the information to the Commission, if it was of the view that the Commission had not breached the principles of good administration or (ii) submit its own complaint to the Ombudsman, if it considered that the Commission had breached the principles of good administration.[116] The Ombudsman inspected the relevant documents and the applicable legal framework and found that the Commission had acted appropriately when transmitting sensitive information to Aer Lingus and to the Irish Department of Transport, while commending the Commission for carrying out an internal inquiry to identify the source of the leak. The Ombudsman concluded that the Commission officials were not *necessarily* the source of the leak of such sensitive information to the press.[117] As to the leak to a press agency of the

[113] Nikiforos Diamandouros, 'Improving EU competition law procedures by applying principles of good administration: The role of the Ombudsman' (2010) 1 *Journal of European Competition Law and Practice* 379, at 380 (emphasis added). For an interesting discussion on the 'particularities of competition law enforcement' see further Albert Sanchez Graells, 'The EU's accession to the ECHR and due process rights in EU competition law matters: Nothing new under the sun?' in Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds) *The EU accession to the ECHR* (Hart Publishing 2014) 255, in particular 260–263.

[114] Case 1342/2007/FOR, point 3.

[115] Ibid., point 13.

[116] Ibid.

[117] Ibid., points 48–75.

Commission's 'statement of objections',[118] the Ombudsman concluded that the Commission had taken appropriate steps to confirm that its officials were not the origin of the leak. The Commission also contacted all National Competition Authorities (NCAs), which had lawfully received a copy of this confidential document, in order to locate the source of the leak. Not all national authorities responded, but the Ombudsman's mandate does not extend to such national authorities, even when they collaborate with the Commission within the European Competition Network.[119] In order to raise the standards of good administration, the Ombudsman issued a further remark inviting the Commission to explore with NCAs appropriate ways to ensure confidentiality in the transmission of sensitive information.

The Ombudsman can also examine the way in which the Commission exercises its discretion in competition policy. When doing so, the Ombudsman relies on the case-law of the Union courts.[120] On that basis, the Ombudsman's scrutiny is limited to 'checking whether the Commission's decision is based on materially incorrect facts or whether it is vitiated by an error of law, a manifest error of assessment or misuse of powers'.[121] The DG Competition will be cleared when concluding reasonably that the conduct of an undertaking or groups of undertakings is

[118] The Commission thoroughly investigates the effects of the merger on competition and if it considers that the merger will impede competition, it sends the *statement of objections* to the parties, to which the parties have the right to respond, including the right to request an oral hearing.

[119] Case 1342/2007/FOR, point 106.

[120] Case 1142/2008/(BEH)KM, points 34–35, referring to relevant case-law. The Court has clarified that complainants do not have the right to insist that the Commission adopt a final decision on the infringement; the Commission can prioritise complaints also taking into account the EU interest, but (and here is where the discretion is confined) it must examine all the facts and legal arguments submitted to it and provide reasons. Compare also the 'high intensity review', on the part of the—then—Court of First Instance vis-à-vis the Commission's discretion in competition in Paul Craig, *EU administrative law* (Oxford University Press 2012) 420 *et seq*, with particular reference to Cases T-5/02, *Tetra Laval BV* v *Commission*, EU:T:2002:264, and the appeal in C-12/03 P, *Commission* v *Tetra Laval*, EU:C:2005:87. See, accordingly, Miro Prek and Silvère Lefèvre, 'Competition litigation before the General Court: Quality if not quantity?' (2016) 53 *Common Market Law Review* 65, in particular 71–74. For an account querying whether complex technical assessments should be dissociated from public interests within administrative decision-making see Joana Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' (2016) 53 *Common Market Law Review* 419.

[121] Ibid., point 36 and case-law cited therein.

unlikely to have an effect on trade between member states.[122] It is also remembered that the Commission may choose not to pursue a complaint when finding a lack of sufficient EU interest. It is up to complainants to provide the Ombudsman with sufficient evidence demonstrating the Commission's *manifest error of assessment*, especially because any 'assessment of economic matters … necessarily involves a margin of discretion'.[123]

In 2010, on the occasion of the Intel case,[124] the Ombudsman elaborated on the application of the principles of good administration in EU competition law procedures. The Commission investigated Intel's dominant position in the market, and the latter complained to the Ombudsman that during the investigation, the Commission had committed a series of procedural errors. Almost one year after the submission of the complaint to the Ombudsman, the Commission decided to fine Intel enormously, and shortly afterwards the Ombudsman closed his inquiry with findings of maladministration.[125] The first claim was that the Commission had not recorded the meeting with Dell officials (a manufacturer that had purchased chips from Intel); to that end, Intel cited various Articles from the ECGAB and argued that its defence rights were violated, and that the Commission should not be allowed 'to conceal the existence of exculpatory evidence from the defendant'.[126] The Ombudsman concluded that the meeting with Dell was indeed related to the subject matter of the Commission's investigation, and thus a legal obligation was established to record the interview.[127] However, because the relevant provision had not been interpreted by the Court, the Ombudsman went on to find that even in the absence of a legal obligation, maladministration is broader than illegality, while illegality is always maladministration: 'when exercising a discretionary power, the administration must always have good and legitimate reasons for choosing one course of action rather than another'.[128]

The Ombudsman opined that only exceptionally could the Commission's omission to record the meetings be justified under the principles of good administration, for instance when another source provides the Commission

[122] Ibid., points 38–40.
[123] See Case 2015/2008/GG, in particular point 81.
[124] Case 1935/2008/FOR.
[125] Diamandouros (n 113) 381.
[126] Ibid., 383–385.
[127] Ibid., 387.
[128] Case 1935/2008/FOR, point 95.

with the information concerned and the latter is already included in the file.[129] Regarding the rights of defence, a breach of maladministration does not necessarily constitute a breach of a fundamental right, but 'the seriousness of a particular instance of maladministration will indeed be aggravated if the instance of maladministration also includes an infringement of a fundamental right'.[130] As an aside, it therefore follows that the breach of a fundamental right can be an indicator of the action (critical remarks, draft recommendations or special reports, among others) the Ombudsman will take, or the level of priority he or she will attribute, to a specific inquiry. In the case at hand, aware of the possible implications of providing a definitive response to this issue, the Ombudsman eventually refrained from positioning himself as to the violation of the rights of defence, leaving this 'task' to the Court.

The procedural rights of the parties were at stake in another case where the Commission imposed a fine on a German IT company (and a member of a suspected Smart Card Chips cartel). The complainant alleged that the Commission had provided the company with access to key evidence with considerable delay, and therefore that the rights of defence had been breached.[131] The Ombudsman was not convinced by the Commission's explanations as to why the latter had sent its 'Letter of facts' to the German company (which, according to the that company, contained an email of doubtful authenticity by a competitor) at a very late stage during the investigation, thereby forcing the company to provide a response and examine the authenticity of the email within five working days. While the Ombudsman concluded that the Commission had realised in advance the significance of the evidence, and furthermore opined in a press release that the Commission 'risked compromising its investigation' due to this delay,[132] the case was closed with a critical remark. It would have been useful if some additional information had been provided as to why the matter was not pursued further by the Ombudsman. It is remembered that a critical remark may be issued if a draft recommendation 'would serve no useful purpose' or 'in cases where the institution or body concerned fails

[129] Diamandouros (n 113) 388.

[130] Ibid., 391.

[131] Case 1500/2014/FOR.

[132] Press release 23/2014, 'Ombudsman criticises Commission for delay in giving access to key evidence in cartel investigation', available at: www.ombudsman.europa.eu/en/press/release.faces/en/58355/html.bookmark

to accept a draft recommendation but the Ombudsman does not deem it appropriate to submit a special report to Parliament'.[133]

More recently, and using a draft recommendation, the Ombudsman underlined that she expects of the Commission to respect the principle of *impartiality* and, in particular, to avoid making statements during the investigation which could give the impression that a final decision (on whether a financial institution participates in a cartel) has already been reached.[134] The Ombudsman considered that the Commission took adequate steps to 'avoid this happening in the future'.[135]

Institutional and Policy Matters

This is a purposefully broad area of supervision over various activities of EU institutions, bodies, offices and agencies. Thus, it is difficult to provide some preliminary remarks about the Ombudsman's general approach. It is noted, nonetheless, that—as with other areas—the Ombudsman can often improve the quality of the EU administration via a number of techniques.

In a case concerning the Commission's unwillingness to organise an independent *external* audit of the European schools, the Ombudsman concluded that his draft recommendation had not been accepted by the Commission.[136] The Ombudsman underlined that the submission of a special report would not be justified in that case as these should not be used too frequently. When the Ombudsman decides not to submit a special report, a frequently used practice—inherent in the flexibility of the office—is to *inform* the Parliament: in this case the Chairpersons of the Committee on Culture and Education and the Committee on Petitions were informed. While the Ombudsman certainly enjoys discretion when deciding on the possible modes of action, some further elaboration on such choices would be desirable, particularly when a draft recommendation—which by definition is issued when the case has general implications—is not accepted by the institution. Elsewhere, the Ombudsman was more effective, achieving a friendly solution with the Commission in a complaint concerning the Commission's failure to notify the complainant of a decision finding that the latter had breached the Code of Conduct of the

[133] Annual Report 2008, 47.
[134] Case 1021/2014/PD.
[135] Annual Report 2015, 16.
[136] Case 814/2010/JF, in particular points 32, 52.

EU Election Observation Missions.[137] The Ombudsman proposed that in its revision of the Code of Conduct and the Observers' evaluation procedure the Commission take into account the right to be heard featuring in the Charter and Article 16 ECGAB. The Commission pointed out that the complainant was not excluded from future EU Election Observation Missions, and agreed to review the general procedure for finding a breach of the Code of Conduct.[138]

Moving to other EU institutions, the security services of the European Parliament treated a former assistant of an MEP inappropriately, further to their assessment that the contract had been terminated. This disrespected the ECGAB and Article 41 of the Charter and, in particular, the right to be heard.[139] Both the friendly solution—suggesting an apology and an *ex gratia* payment—and the draft recommendation were not endorsed by Parliament. The Ombudsman accurately observed that the fact that the security services removed the employee from Parliament's premises had a direct impact on her; the non-respect of the right to be heard constituted an instance of maladministration and a disrespect of a fundamental right. Moreover, the proportionality principle was not observed either.[140] The Ombudsman was not eventually able to help the complainant, and the latter observed that 'Parliament ignored the Ombudsman's findings, contained in his draft recommendation'.[141]

The Ombudsman addressed a draft recommendation to the European Investment Bank (EIB), further to a complaint on the construction of a railway that would pass through the centre of Barcelona.[142] The project would be financed by the EIB, but it was up to the Spanish authorities to decide on the necessary steps to be taken vis-à-vis the environmental impact assessment (EIA). Instances of maladministration concerning the Spanish authorities could only be addressed to the Spanish Ombudsman. As regards the EIB, its assessment of the EIA—a prerequisite for funding—was not recorded and therefore the Ombudsman was not able to verify if the EIB had indeed acted in accordance with its obligations.[143]

[137] Case 2635/2010/TN.

[138] Ibid., points 38–41. The Ombudsman also referred to Article 20 ECGAB (notification of decisions).

[139] Case 2819/2005/BU.

[140] Ibid., points 1.3–1.14.

[141] Ibid., 'The complainant's observations'.

[142] Case 244/2006/(BM)(JMA)MHZ.

[143] Ibid., points 2.5–2.7.

This was an instance of maladministration. However, the EIB collaborated constructively on the basis of the draft recommendation, with a view to documenting its assessments in the future.[144] More generally, evidence of constructive collaboration between the Ombudsman and the EIB is the signing of a Memorandum of Understanding between the two institutions in 2008. That document contains the principle that citizens should first seek redress via the EIB's internal complaints mechanism before turning to the Ombudsman.[145]

Several complaints submitted to the Ombudsman have concerned the European Anti-Fraud Office (OLAF). In a case which lasted more than three years, a complaint was submitted against OLAF in the context of an acquisition of a building by European Parliament in Brussels.[146] It was alleged that OLAF had insufficiently monitored the applicability of the public procurement Directive and 'the possible impact of the case on the financial interests of the Community'.[147] The Ombudsman observed that the nature of OLAF's tasks do extend to irregularities beyond the possible criminal or disciplinary liability of specific officials.[148] Otherwise, 'a narrow understanding of its mandate could have the effect that OLAF would not be able to fully live up to its task of fighting fraud, corruption and any other illegal activity affecting the financial interests of the European Community'.[149] The Ombudsman issued a rather effective draft recommendation as OLAF decided to appoint an investigator and re-examined the case.[150] Elsewhere, the complainant, a UK-based NGO, alleged several procedural errors in the context of OLAF's investigation.[151] On the relationship between maladministration and illegality, the Ombudsman reiterated that 'any procedural irregularity may constitute an instance of maladministration, even if that procedural irregularity does not, in a particular case, constitute grounds for the annulment of a decision'.[152]

[144] Annual Report 2009, 47.

[145] Ibid., 76. The general purpose of the Memorandum is to offer protection to stakeholders, who include non-EU citizens/residents, and, if necessary, the Ombudsman is committed to taking own-initiative action (ibid., 24).

[146] Case 1450/2007/(WP)BEH.

[147] Ibid., point 71.

[148] Ibid., point 39.

[149] Ibid.

[150] Annual Report 2010, 34.

[151] Case 1560/2010/FOR.

[152] Ibid., point 22.

The Ombudsman identified procedural irregularities in OLAF's conduct (and therefore maladministration) but concluded that the rights of defence had not been infringed. Another issue concerned the allegation that OLAF had failed to give the complainant the right to be heard before transferring its findings to the UK authorities.

> While it was not illegal[153] for OLAF to transfer its findings to the UK authorities without granting the complainant a formal right to be heard, this does not automatically imply that OLAF should not have, in compliance with principles of good administration, informed the complainant of the allegations against it, and the evidence supporting those allegations, before finalising its position on those allegations and evidence.[154]

The Ombudsman concluded that OLAF had not breached the principles of good administration when forwarding its findings to the UK authorities. Nonetheless, his conclusion differed as regards OLAF's decision to forward these findings to *third party donors*, since that act adversely affected the complainant, proven by the fact that one of the donors ceased funding the complainant. Thus, OLAF had acted 'outside its powers' in that case.[155] The problem was essentially of a broader constitutional nature: 'the decision to brief the donors had no legal basis. As a result, the problem with that decision is not that it was taken without respecting the right to be heard, but rather that it was taken at all'.[156] It is questionable whether the Ombudsman in that case could have gone significantly further than issuing a critical remark, the instrument that was eventually selected to close the case. Again, reflections on the limitations of the mandate are pertinent.

The fact that the Ombudsman can supervise institutional and policy matters does not mean that he or she is able to look at the merits of legislation. In a case against the Council concerning the visa requirements for entry to Switzerland, the complainant argued that the period of 15 days

[153] See, in this respect, Case C-521/04, *Tillack* v *Commission*, EU:C:2005:240, where the Court noted that such decisions whereby information is forwarded to national authorities does not constitute an act adversely affecting a person. But compare also later case-law, as well as an assessment of due process rights within OLAF's investigative process in Xavier Groussot and Ziva Popov, 'What's wrong with OLAF? Accountability, due process and criminal justice in European anti-fraud policy' (2010) 47 *Common Market Law Review* 605.

[154] Case 1560/2010/FOR, point 82.

[155] Ibid., points 87–88.

[156] Ibid., point 89.

between the decision of the Council on Switzerland's accession to the Schengen area, and the date of its entry into force, was extremely short.[157] The Council observed that 'when the institutions act in their legislative or political capacity, such activities fall outside of the Ombudsman's mandate'; only administrative activities fall under the scope of the Ombudsman's review.[158] The Ombudsman agreed, reiterating that he cannot question 'the merits of [EU] legislation or political decisions taken by the [EU] institutions or bodies'.[159] Thus, that aspect of the complaint was outside the mandate.[160]

By contrast, inside the mandate was a complaint concerning the limited access of MEPs to the *Justus Lipsius* building each time the European Council convenes.[161] The Council (which owns the building) raised an inadmissibility objection as there were no specific rules on access to that building and, in addition, the matter concerned 'inter-institutional relations'.[162] The Ombudsman considered the complaint admissible since maladministration is broader than illegality and, furthermore, inter-institutional relations are not excluded from the mandate, nor are MEPs excluded from submitting a complaint to the Ombudsman.[163] On the substance, however, the Ombudsman observed that the Council had indeed provided 'sufficient and reasonable grounds' (safety and security considerations) for allowing only a limited delegation of MEPs to access the building, and therefore it had not acted 'arbitrarily' by 'allocating the MEP delegation the same number of badges as it awards to other delegations'.[164] No maladministration had been committed by the Council.

In another case concerning the composition of the Banking Stakeholders Group of the European Banking Authority, the Ombudsman found that the requirements of the relevant Regulation concerning the balanced representation of stakeholders across the Union were not complied with.[165]

[157] Case 107/2009/(JD)OV.

[158] Ibid., point 13.

[159] Ibid., point 15. See further Case 875/2011/JF, point 20 (concerning the actions of the Commission in formulating legislative proposals).

[160] The distinction between matters political and matters administrative, for the purposes of the Ombudsman's mandate, is returned to in Chap. 6.

[161] Case 3272/2008/(WP)BEH.

[162] Ibid., point 11.

[163] Ibid., points 12–13.

[164] Ibid., point 33.

[165] Case 1966/2011/LP.

Several critical remarks were issued, but the Ombudsman rightly pointed out that it would serve no useful purpose to reconsider the composition of the Group shortly before its term was about to expire. Rather, it would be opportune to focus on the future policy of the agency, with a view to improving representation. The agency worked constructively with the Ombudsman and agreed to consider her recommendations. This and other cases[166] show that the Ombudsman may have an impact on the policy and practice of the EU institutions, bodies and agencies, even when her efforts in the context of a specific inquiry are confined by the nature or the context of the complainant's claim.

The Ombudsman has also dealt with complaints regarding the linguistic policy of the EU institutions, bodies, offices and agencies. One of these complaints concerned the language regime of the Office of the Harmonisation of the Internal Market (OHIM).[167] The Ombudsman underlined OHIM's mission to be 'an accessible, user-friendly organisation',[168] emphasising a number of shortcomings in the latter's policy. However, OHIM agreed to fully update its website with a view to including all of the EU official languages, prompting the Ombudsman to 'applaud' it for its stance.[169] In another case, the complainant argued that Parliament 'should ensure adequate and proportionate use of Irish on its website. At a minimum … any sections where the citizen is invited to interact with Parliament … [should be] available in Irish'.[170] The Ombudsman examined Parliament's arguments, centring on objective and technical difficulties, shortage of staff, 'specific challenges associated with Irish' and 'the fact that the website of its Information Office in Dublin contains information in Irish',[171] but remained unconvinced. Taking also into account the proportionality principle, the Ombudsman concluded that such arguments could not explain why at least some of the most pertinent pages of the website could

[166] To return to OLAF, compare, for example, Case 2676/2009/ANA, concerning the behaviour of OLAF agents during an on-the-spot check, which was against the principles of good administration, leading the Ombudsman to issue critical remarks and point out that 'the Ombudsman trusts that OLAF will duly consider the conclusions set out in this decision and draw the necessary lessons therefrom' (ibid., point 117).

[167] Case 2413/2010/MHZ.

[168] Ibid., point 22.

[169] Ibid., point 41. Compare this case with Case 640/2011/AN on the Commission's consultation practices, and Case 3419/2008/(AF)(BEH)KM on the consultation practices of the European Aviation Safety Agency (both discussed in Chap. 6).

[170] Case 861/2012/FOR, point 4.

[171] Ibid., point 29.

not be translated into Irish. Thus, a draft recommendation was sent to Parliament, to which Parliament responded very positively: it committed itself to going further with a view to progressively translating the entirety of the website into Irish. This obviously satisfied the complainant and the Ombudsman.[172]

Very different was the outcome of the Ombudsman's efforts regarding the languages used for the presentations of the Presidency of the Council and, in particular, the request that they be submitted also in German.[173] The complainant pointed out that German ranked as the second language spoken and understood by EU citizens. A question of democratic legitimation was therefore at stake, given the importance of the Presidency's Internet presentations. The Council observed that these presentations were linked to the member state holding the Presidency, despite confirming that 'the Presidency was functionally part of the Council'.[174] The Ombudsman opined that when a member state acts 'in its capacity as President of the Council', it should be subject to the Council's obligations.[175] The Council regrettably did not comply with the Ombudsman's draft recommendation, forcing the Ombudsman to submit a special report to the Parliament. The Ombudsman stressed that if the exposition of information in all EU languages is not feasible, 'the choice […] must be based on objective and reasonable considerations', in line with relevant case-law.[176] The special report was not successful either, as the matter is still regulated by the presidencies on an *ad hoc* basis. This complaint is one example demonstrating that the Council, despite having to respond to very few complaints in comparison to other institutions, is often unwilling to constructively consider the Ombudsman's recommendations.[177]

That being said, the Ombudsman resolved a case concerning the Council's alleged omission to remove a company established in the United Arab Emirates from the financial sanctions lists, following a judgment by the General Court.[178] As per tradition, the Council initially adopted an antagonistic stance, arguing *inter alia* that the Ombudsman was not

[172] Ibid., points 43–57. See also a similar complaint concerning the official languages used on the website of the European Banking Authority; Case 1363/2012/BEH.

[173] Case 1487/2005/GG.

[174] Ibid., 'The complaint'.

[175] Ibid., points 3–5 of the draft recommendation.

[176] See notably Case C-361/01 P, *Kik* v *OHIM*, EU:C:2003:434.

[177] See also the discussion in Chap. 5 on the Council and transparency.

[178] Case 681/2013/TN.

competent to examine 'a question of law and not of proper administration'. However, at a later stage it explained that in subsequent acts it decided to include a recital stating that after the Court's judgment the company was removed from the lists; 'these recitals should make it clear to all operators that the company was not subject to restrictive measures and that its assets should not be frozen'.[179] The Ombudsman concluded that the Council had settled the matter in an appropriate way.

Moving to other areas falling under 'institutional and policy matters', the Ombudsman conducted an own-initiative inquiry in relation to the European External Action Service (EEAS) concerning alleged irregularities affecting the EU Rule of Law Mission in Kosovo.[180] The Ombudsman inspected the files but as the investigation commissioned by the EEAS was ongoing at the time of the closure of the inquiry, she reserved the right to re-examine the matter in due course.[181]

The fact that the right to complain to the Ombudsman is open to EU residents as well was illustrated in a case involving a Canadian national who arrived in the EU (in Munich and in Madrid) as an Erasmus student. He pointed out that he and other students had met financial difficulties owing to, among others, the high tuition fees, attributing this to insufficient information provided by the Commission before their arrival.[182] The Ombudsman clarified that the inquiry was directed against the Commission, and not at the Erasmus centres, which are, of course, member state institutions.[183] The Ombudsman observed that the purpose of these scholarships was not to provide the essentials for survival, but 'to attract highly qualified post-graduate students to study at European universities', with a view to ensuring that they 'enjoy a decent standard of living by European standards'.[184] Since the information provided by the Commission was found unreliable, he proposed via a friendly solution an *ex gratia* payment. Further to the Commission's refusal to settle this, he produced a draft recommendation, proposing the *ex gratia* payment of 1500 euros per student.[185] The Commission rejected the draft recommendation, invoking *inter alia* (unconvincingly, according to the

[179] Ibid., point 14.
[180] Case OI/15/2014/PMC.
[181] Ibid., point 36.
[182] Case 3031/2007/(BEH)VL.
[183] Ibid., point 36.
[184] Ibid., point 48.
[185] Ibid., point 89.

Ombudsman, particularly because no lower amount was proposed) the proportionality principle.[186] The Ombudsman 'deeply regret[ed]' the Commission's stance on this matter, categorised the maladministration as 'serious', but was of the view that he should not proceed with a special report, since these reports cannot be used too frequently.[187] The above entails that a broad remit does not necessarily entail satisfactory solutions for complainants.

The cases against the CJEU are very limited—this is reasonable as the Ombudsman's mandate does not extend to the judicial activity of the Court.[188] That being said, the Court is included in broader own-initiative inquiries, such as the ones on access to documents (closed in 1998[189]) and whistleblowers' protection.[190] More recent cases concerning specifically the administrative activity of the Court include the Ombudsman's assessment that a call for tenders for the translation of legal texts into Greek requiring a law degree is not discriminatory vis-à-vis those who hold a translator's degree,[191] and a successful friendly solution for a complainant who had applied to teach English at the EU institutions in Luxembourg. The complainant's application was rejected by the Court allegedly due to her Australian accent or nationality, but the Court re-invited the applicant for an interview and eventually hired her.[192] Furthermore, a complainant submitted that the Court's 'Digest of case law', as well as the 'alphabetical table of subject-matter', should be available in all of the official languages of the EU.[193] The Court 'expressed doubts' that the Ombudsman is competent to deal with this case as the digest and the table 'were developed to meet internal needs with a view to facilitating the Court's *judicial activities*'.[194] The Ombudsman advanced the view that, especially because the *right to complain to the Ombudsman* features in Article 43 of the Charter, the reference to and interpretation of the Court's judicial role in Article 228 TFEU—as an exception to *this right*—'must not be construed in a manner which would go beyond the purpose pursued by

[186] Ibid., point 116.
[187] Ibid., points 118–119.
[188] See Art 228(1) TFEU.
[189] Case 616/96/(PD)IJH.
[190] Case OI/1/2014/PMC. Both cases are discussed in Chap. 5.
[191] Case 777/2013/CK; see also the similar Cases 826/2013/EIS and 878/2013/EIS.
[192] Case 2177/2009/(TN)DK.
[193] Case 635/2012/BEH. Presently both items are available in French only.
[194] Ibid (emphasis added).

the exclusion'. The Ombudsman decided not to pursue the matter further and accepted the Court's view that the latter was not legally obliged to translate these items into all of the official languages, owing to resource and budgetary constraints. However, the Ombudsman acknowledged that this approach could 'give rise to concern from the point of view of the principle of multilingualism', and raised 'far-reaching questions which [were] not confined to the Court but instead affect a number of EU institutions, bodies, offices and agencies'; to that end, she promised to examine the matter in the future via an own-initiative inquiry.[195]

The first case against the European Council was decided in March 2012, and concerned the European Council's dismissive replies to a citizen who had requested clarifications on the use of service cars by the President.[196] The European Council apologised to the complainant, and the Ombudsman commended the former on its stance.

Conflict of Interest

The Ombudsman classifies complaints concerning revolving doors/conflict of interest allegations as either 'administration/Staff Regulations' matters or 'institutional and policy' matters. In latest Annual Reports they fall under the category of 'ethical issues'. O'Reilly has prioritised several areas related to ethical administration, as will be seen below.

The Commission was invited to improve its rules on conflict of interest of Special Advisers, after the investigation of a complaint submitted by an NGO.[197] It concerned the appointment of a former European Parliament President as Special Adviser to a former Health and Consumer Policy Commissioner. The allegation was that the former President participated in the advisory boards of three corporations strongly influencing consumer policy, while simultaneously running his own lobbying firm.[198] The Ombudsman assessed that the Commission had failed to obtain 'a declaration on the absence of conflict of interest'.[199] The Ombudsman submitted a critical remark on this procedural error and was particularly disapproving in his conclusions:

[195] Ibid.
[196] Case 808/2011/MHZ.
[197] Case 476/2010/ANA.
[198] Ibid., point 2.
[199] Ibid., points 57–58.

> [T]he Ombudsman regrets the manner in which the Commission handled the procedure concerning the appointment of Mr Cox as a Special Adviser to Commissioner Kuneva. The Commission's overall approach does not abide by the increasingly high standards which the citizens expect from the Union institutions, and does not show due respect to the procedural safeguards which the Commission itself has put in place in response to public concerns about transparency in relation to Special Advisers.[200]

Regarding the substantive part of the complaint, the Commission drew a distinction between 'policy-making and policy-communication in consumer matters', the latter being the rationale behind the appointment of Mr. Cox.[201] The Ombudsman did not accept this, and issued another critical remark criticising the appointment.[202] Given the 'public interest considerations' of the inquiry, he warned that he would start an own-initiative inquiry if the Commission did not consider amending the rules on the appointment of Special Advisers. Indeed, a systemic inquiry was opened by the current Ombudsman in May 2016,[203] which is presently pending.

Another complaint submitted by three NGOs concerned the re-appointment of one member in the Commission's Ad Hoc Ethical Committee, which has the task to examine whether the integrity of the Commission may be undermined. The outcome of the case was successful as that member was replaced owing to the Ombudsman's intervention.[204] The Ombudsman issued a further remark inviting the Commission to 'comply with its commitment to create a specific page on its EUROPA website relating to the Ad Hoc Ethical Committee and its work'. The Commission has indeed created such a website,[205] while O'Reilly and Junker have exchanged correspondence on how the Commission can become more proactive on ethical matters. In this context, the Ombudsman has welcomed the Commission's decision to publish the minutes of the decisions taken by the College of Commissioners concerning former Commissioners' post-mandate occupations via a link on the same

[200] Ibid., point 62.
[201] Ibid., point 97.
[202] Ibid., point 112.
[203] Case OI/6/2016/AB.
[204] Case 297/2013/FOR.
[205] See: https://ec.europa.eu/transparency/ethics-for-commissioners/ad-hoc-ethical-committee_en.htm

webpage.[206] More recently, O'Reilly has welcomed Junker's decision (further to her intervention) to refer the question of Barroso's appointment at Goldman Sachs to the Commission's Ad Hoc Ethical Committee.[207]

The Ombudsman has also received complaints on the Commission's expert groups, often by civil society organisations,[208] and has therefore decided to open an own-initiative inquiry looking at the composition of such groups.[209] Such systemic inquiries generate media attention and possibly also pressure upon the institutions under scrutiny. Via the call for contributions published on the Ombudsman's website, the input of stakeholders, citizens and NGOs is received and evaluated. The Ombudsman has addressed a number of recommendations to the Commission but the case is still open. Simultaneously, some positive steps taken by the Junker Commission that improve transparency were underlined,[210] but ultimately found insufficient.[211] In particular, the Ombudsman expects of the Commission to publish 'meaningful' minutes of the positions of the experts, and establish that the deliberations will be confidential only exceptionally. Other recommendations concern the definition of 'balance', in terms of composition; that expert groups should be linked to the Transparency Register; the Commission should improve its conflict of interest policy (this encompasses *potential* conflicts[212]) and, more specifically, it should publish detailed CVs of appointees, while declarations of interest should be updated yearly.[213]

[206] See the Ombudsman's letter at: www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61417/html.bookmark, and the relevant webpage of the Commission at: ec.europa.eu/transparency/ethics-for-commissioners/decisions_en.htm

[207] Press release 11/2016, 'Ombudsman welcomes further scrutiny of Barroso appointment', available at: www.ombudsman.europa.eu/en/press/release.faces/en/71040/html.bookmark

[208] Case 1682/2010/BEH.

[209] Case OI/6/2014/NF.

[210] Press release 10/2015, 'Ombudsman welcomes improvements to Commission expert groups', available at: www.ombudsman.europa.eu/en/press/release.faces/en/60046/html.bookmark. These steps included the revision of the experts registry and the conflict of interest policy, and further transparency in the selection process.

[211] Press release 1/2016, 'Ombudsman: Citizens need to know more about expert groups' advice to Commission', available at: www.ombudsman.europa.eu/en/press/release.faces/en/63520/html.bookmark

[212] On this compare also Case 297/2013/FOR, point 66.

[213] See OI/6/2014/NF, 'The Ombudsman's assessment leading to a recommendation'. See further on this topic Julia Metz, *The European Commission, expert groups, and the policy process: Demystifying technocratic governance* (Palgrave Macmillan 2015).

The website maintained by the Commission on the register of expert groups demonstrates that the Commission has taken steps to implement the Ombudsman's recommendations.

The Ombudsman will not always side with the complainants. One notable case was the decision regarding the European Central Bank (ECB) President's membership of the 'Group of Thirty', submitted by an NGO.[214] The allegation was that such membership undermined the ECB's independence, which is constitutionally guaranteed.[215] The Ombudsman carefully examined the complainant's allegations concerning the composition, funding, and aims of the Group, as well as the ECB's detailed opinion. The Ombudsman opined that the great diversity of the membership of the Group meant that it was not a foregone conclusion that it was a lobby or an interest group compromising the ECB's independence.[216] Likewise, an examination of the Group's funding could not lead to a conclusion that the Group represents 'private financial sector parties' only.[217] The Ombudsman found no maladministration, but issued a further remark inviting the ECB to publish on its website that the President is a member of the Group of Thirty and, more generally, to improve its communication with the public, especially in light of its increased responsibilities after the financial crisis.[218]

Human Rights

When the Ombudsman examines complaints touching upon Articles 41 or 42 of the Charter, such matters may be deemed to fall under the scope of fundamental rights. Beyond such cases, the broad concept of maladministration has enabled the Ombudsman to deal with a significant number of cases raising further human rights issues. In such cases the Ombudsman's role to promote or protect human rights and the rule of law is demonstrated. It should be noted that the Ombudsman was referring to the Charter before Lisbon (both in speeches and in specific cases), and was a strong proponent of the EU's accession to the ECHR.[219]

[214] Case 1339/2012/FOR.
[215] See Arts 130 and 282(3) TFEU.
[216] Case 1339/2012/FOR, point 56.
[217] Ibid., points 62–63.
[218] Ibid., 'Further remarks'.
[219] See Annual Report 2002, 223.

The European Ombudsman has emerged as one of the most important fora for Frontex's accountability. One of the first important decisions that O'Reilly made after assuming office was to submit a special report to the European Parliament concerning Frontex's unwillingness to establish a complaints mechanism for violations of human rights.[220] The own-initiative inquiry (commenced by Diamandouros) covered more generally the steps taken by Frontex to address concerns expressed by civil society actors about human rights violations in the context of its activities. While the Ombudsman assessed as 'satisfactory' some initiatives undertaken by the Agency to comply with the Charter, she was totally unconvinced that the complex issue of the allocation of responsibility for these operations between Frontex and the member state authorities prevented the former from establishing a first-stop complaints mechanism for the handling of human rights complaints. The Ombudsman's special report was eventually discussed at the European Parliament (in the presence of the Petitions' Committee and the Committee on Civil Liberties, Justice and Home Affairs) in November 2015.

In addition, the Ombudsman opened another own-initiative inquiry concerning Frontex's compliance with human rights specifically in the context of forced return operations of irregular migrants in their country of origin.[221] Similarly to the aforementioned broader own-initiative inquiry on Frontex, the Ombudsman took into account the input provided by several NGOs, the Fundamental Rights Agency, but also her colleagues within the Network of Ombudsmen. The Ombudsman highlighted that, while Frontex staff should be present during Joint Return Operations (JROs),[222] notably with a view to ensuring compliance with human rights, the inspection of documents revealed that in several operations that was not the case.[223] Starting from the premise that Frontex 'must engage fully with the Member States' both proactively (i.e. before the JROs) and reactively (during a JRO), she published several proposals touching upon the actions that Frontex representatives may take when identifying actions that cannot be tolerated. Other proposals concerned transparency initiatives to increase scrutiny over JROs, the rights of families with pregnant women and/or children, changes to the Code of Conduct for JROs, among others.[224]

[220] Case OI/5/2012/BEH-MHZ.

[221] Case OI/9/2014/MHZ.

[222] JROs are operations 'coordinated, co-financed or fully financed by Frontex with several Member States taking part'; ibid., point 1.

[223] Ibid., point 27.

[224] Ibid., points 28–56.

The Ombudsman's investigations have also touched upon Article 26 of the Charter (integration of persons with disabilities). Further to the Ombudsman's intervention, the Commission undertook the commitment to render its Beaulieu building fully accessible to persons with disabilities.[225] In another case against the European Parliament, the complainant was not granted an allowance for his disabled child because, according to Parliament, it was of the same nature to an allowance received by the national authorities.[226] However, in an identical case, the ECJ had rejected Parliament's claim, thereby forcing Parliament to pay retrospectively the allowance.[227] Despite this, Parliament argued that the aforementioned case did not apply *erga omnes* and refused to reconsider its position, forcing the complainant to turn to the Ombudsman.[228] The Ombudsman drew a distinction between a *de jure* obligation to apply the judgment and a *de facto* effect in accordance with the principles of good administration, to which Parliament should also subscribe.[229] He also highlighted the 'strong social objective' of these benefits: '[t]hrough its unlawful actions in the present case, Parliament denies this objective and jeopardizes the handicapped person's legitimate expectations of a better life'.[230] The Ombudsman made an explicit reference to Article 26 of the Charter. The maladministration was 'aggravated' by the fact that the complainant had suggested to Parliament to wait until the result of the similar case pending before the Court, and the Parliament had not accepted to do so. The Ombudsman eventually issued a draft recommendation, inviting the Parliament to retrospectively meet its obligations. Parliament rejected the draft recommendation, and the Ombudsman closed the case with a critical remark, while informing the Committee on Petitions accordingly. He noted:

> The Ombudsman deeply regrets that Parliament has taken a legalistic approach to a complaint submitted by the parent of a disabled child … Parliament represents European citizens and should understand and respect the situation of such parents better than any other institution. However, it failed to do so. Moreover, Parliament obviously acted unfairly by not

[225] Case 2631/2007/(JMA)MHZ.
[226] Case 1953/2008/MF.
[227] Ibid., point 7, and Case C-135/06 P, *Weißenfels* v *European Parliament*, EU:C:2007:812.
[228] Ibid., points 11–13.
[229] Ibid., point 29.
[230] Ibid., point 34.

following the complainant's request to suspend its decision before the Judgment was issued. The Ombudsman has no choice but to close the case and make a critical remark below.[231]

One may draw one's conclusions as to the outcome of this case, considering, in particular, the rather limited available instruments at the Ombudsman's disposal and, admittedly, his reluctance to submit a special report *against* the Parliament. The Ombudsman also highlighted throughout his reasoning the *unfairness* of Parliament's decision, but was eventually unsuccessful.

In another case, however, a friendly solution was reached with the Commission concerning a reserved—to an official—parking space, further to a serious accident.[232] It is also noted that the Ombudsman concluded in 2007 a large-scale own-initiative inquiry on the Commission's actions to ensure the integration of persons with disabilities.[233]

As with other areas, the Ombudsman will not always find in favour of complainants. One such case concerned the organisation by the European branch of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA Europe) of an exhibition on same-sex couples at the Berlaymont building in Brussels.[234] The complainant argued that the Commission had exceeded its powers in that case. The Ombudsman highlighted that discrimination on the grounds of sexual orientation within the scope of EU law is prohibited under Article 21 of the Charter.[235] He pointed out that the EU has not only the power, but also the 'the obligation to fight discrimination on the grounds of sexual orientation within the scope of its competence. Thus, as a matter of principle, the Commission is empowered to pursue such a goal by direct as well as indirect means', such as via financing or organising exhibitions.[236] Hosting the exhibition and providing direct or indirect financial support were not, therefore, instances of maladministration. As regards the allegation that the Commission had 'insulted and discriminated' against those who do not share the views promoted by the exhibition, the Ombudsman referred to freedom of expression as guaranteed by Article 11 of the Charter

[231] See points 51 and 56 of the Ombudsman's Decision.
[232] Case 1226/2008/OV.
[233] Case OI/3/2003/JMA.
[234] Case 1640/2011/MMN.
[235] Ibid., points 54–55.
[236] Ibid., point 60.

(and Article 10 ECHR) and the case-law of the Court; that right is 'among the fundamental values of a democratic society'.[237] No maladministration was identified in that case.

Turning to OLAF, in one case it requested information from firms which had previously employed the complainant and were funded by the EU budget, in an attempt to verify whether the complainant had committed irregularities.[238] OLAF initially raised the point that it cannot be 'instructed' by the Ombudsman in its operation, and therefore was unable to provide information.[239] The Ombudsman specified that friendly solutions and draft recommendations are not 'instructions', but rather attempts 'to identify how the potential or actual instances of maladministration may be eliminated or corrected'.[240] The critical question was whether OLAF had respected the presumption of innocence (a fundamental right under Article 6(2) ECHR) because while enjoying discretion, according to the CJEU's case-law OLAF is indeed confined by the respect of this right when requesting information.[241] When sending these letters, OLAF made a presumption that the employee had indeed committed irregularities. The Ombudsman considered that beyond the presumption of innocence, the principles of proportionality and fairness were not respected, too; thus, a critical remark was issued.[242] The reason behind the choice of this instrument was that the serious maladministration related to events that had occurred in the past.

In addition, the Ombudsman has produced a number of cases in the field of data protection, a right guaranteed by Article 8 of the Charter. The Ombudsman and the European Data Protection Supervisor (EDPS) signed a Memorandum of Understanding in 2006.[243] This was deemed necessary in order to avoid possible instances of 'jurisdictional' overlap and ensure constructive cooperation. A number of 'points of agreement' feature therein, including that the EDPS is the 'specialised authority' on

[237] Ibid., points 89–93.

[238] Case 1748/2006/JMA.

[239] Ibid., point 9.

[240] Ibid., point 12. The Ombudsman added that further or critical remarks might be addressed to the entity under investigation, but '[i]t is then for the institution or body to decide how it should deal with such findings'.

[241] Ibid., points 20–24, and case-law cited therein.

[242] See point 28.

[243] Memorandum of Understanding between the European Ombudsman and the European Data Protection Supervisor (2007) OJ C 27/21.

data protection, and that, if possible, 'unnecessary duplication of procedures should be avoided'.[244] Regarding the interpretation of EU law on data protection, the Ombudsman committed to consulting the EDPS if more than one interpretation is plausible and if the views of the EDPS are not known to that date.

Data protection was the subject of an inquiry concerning a request for statistics on the absence of MEPs due to medical reasons.[245] The Ombudsman consulted the EDPS, who pointed out that if individual MEPs could be identified, then alternative ways of disclosure could be found, such as the generalisation of data.[246] The Ombudsman concluded that there was no sufficient justification as to the processing of data (the statistics), particularly because MEPs are 'public figures' and their lives are often exposed to the public, 'including, potentially, their medical status'.[247] No maladministration was found.

Turning to freedom of expression, an official working for the Commission attempted to upload a commentary (a letter) on the Commission's portal related to an article published by Sunday Times, but the Editor of the portal did not accept it.[248] The letter submitted by the complainant apparently touched upon an issue under investigation (at the time) by OLAF. The complainant attempted to publish two further letters with different content without success, and without receiving reasons for the rejection. The Ombudsman referred *inter alia* to freedom of speech as guaranteed by the ECHR and the Charter[249] (but noted the Charter's limitations under Article 52 as well[250]). The Ombudsman pointed out that the general editorial policy was the publication of letters, and the rejection (under established principles) the exception, in that 'the Commission cannot, when applying the editorial policy, interpret the exceptions foreseen in it in an overly broad manner, thereby limiting the ability of a civil

[244] Ibid.

[245] Case 2682/2008/(MAD)(TN)ELB.

[246] Ibid., points 13–19.

[247] Ibid., points 32–36.

[248] Case 2365/2009/(MAM)KM. According to that article, 'a high-ranking Commission official had met journalists posing as representatives of a Chinese business and provided them with information on ongoing anti-dumping proceedings'; ibid., point 1.

[249] Article 10 ECHR and Art 11 of the Charter.

[250] With regard to freedom of expression, similar limitations feature in Article 10(2) ECHR.

servant to express himself freely in the forum set up for this purpose'.[251] The Ombudsman examined the content of these letters, and found that a revised version of the first article submitted by the complainant did not contain any accusations against the Commission, and was therefore in accordance with the editorial policy.[252] He observed that the additional letters could not be viewed as threatening the interests of the institution or as directly accusing individuals; consequently, both articles should have been published,[253] and a draft recommendation was issued to that effect. Explaining one of the Commission's rejections, the complainant referred to a Spiegel article that was cited in his second letter, according to which the 'rating system by which the German government evaluated the performance of high-ranking officials in international organisations, using criteria which had not been made public […] clearly undermined the independence and loyalty of the European civil service'.[254] The Ombudsman was unclear on why the Commission had not examined if the rating system could have 'repercussions' on the functioning of the EU institutions. Thus, the Commission was invited to investigate if 'independence, impartiality and loyalty to the EU' could be undermined, including the possibility of an infringement procedure against Germany, which was one of the complainant's claims. The case was eventually settled in December 2012, more than three years after the submission of the complaint, when the Ombudsman persuaded the Commission to '[take] steps', after its initial refusal to comply with the former's draft recommendation. The Commission agreed to only *partially* publish *two* of the letters but rejected the Ombudsman's recommendation to investigate if national rating systems could undermine the Commission's loyalty. The critical remark was chosen because the Ombudsman was not fully convinced—despite stating the importance of the case—that a special report was justified.[255] It is arguable that the length of the inquiry, as well as its outcome (which was only partially successful), unravels *both* the contribution of the office *and* the limitations of the mandate. Related to such cases is the Ombudsman's initiative to draft public service principles for EU civil servants, discussed in Chap. 2.

[251] Case 2365/2009/(MAM)KM, points 32–35.
[252] Ibid., points 45–51.
[253] Ibid., points 52–67.
[254] Ibid., point 77.
[255] Ibid., points 116–117.

A large-scale own-initiative inquiry was concluded by the Ombudsman in 2015, concerning the Commission's role in ensuring that rights guaranteed by the Charter are complied with when the EU cohesion policy is implemented by member states.[256] The Ombudsman contacted the Fundamental Rights Agency and also the national ombudsman offices[257] and took into account their input. As with many own-initiative inquiries, several civil society actors responded as well. The principle of shared management of funds effectively suggests that the Commission in cohesion policy has a supervisory role: it verifies 'that Member States' management and control systems function effectively and [applies] sanctions where necessary'.[258] Drawing on the Court's case-law, the Ombudsman initially opined that 'most, if not all, Member State actions which arise in the context of programmes funded under the EU's cohesion policy involve the implementation of EU law'[259] (and thus the obligation to abide by the Charter). Next, the Commission should not be financing activities which do not respect the Charter. Cooperation with third countries is frequently conditioned upon a human rights clause, and therefore the standard required from member states should 'necessarily … be significantly higher'.[260] To that end, the Ombudsman published a number of guidelines for the Commission, which concern: the mapping of actions falling under the 'implementation of EU law'; awareness-raising of the Charter's application in such cases; preventive measures; systematic monitoring of the management and control systems of funds; the use of 'sanctioning prerogatives' when conditionalities are not met within the deadlines; the possible activation of infringement proceedings against member states when violating Charter rights in the context of cohesion policy; and the creation of a transparent framework (an online platform) enabling civil society actors to report violations of human rights.[261] The above suggestions also demonstrate that, although the Ombudsman cannot supervise the domestic level (member state actions implementing EU law), by monitoring the Commission's role in cohesion policy there is scope to (indirectly) try to

[256] Case OI/8/2014/AN.

[257] Some national offices pointed out that they mostly deal with the following human rights breaches: equal treatment, the right to social security, social assistance and health care and the right to be heard (ibid., point 25).

[258] Ibid., point 2.

[259] Case OI/8/2014/AN, point 39.

[260] Ibid., point 46.

[261] Ibid., 48.

push for improvements in terms of human rights, transparency and so on. This matter is evidently linked with the flexibility of the Ombudsman's mandate and is returned to in Chap. 6.

Awards of Tenders and Grants

The Ombudsman acknowledges the discretion of the administration (especially that of the evaluation committees and the awarding authorities) in the awards of tenders and grants. Drawing on the Court's case-law on the intensity of review of discretionary decisions,[262] the Ombudsman will examine the procedural rules and the statement of reasons, the correctness of facts, manifest errors of assessment or misuse of powers.[263] A common theme in several complaints is ensuring transparency in the procedure and the fair treatment of applicants. Indeed, 'fairness as a key principle of good administration' under Article 41(1) of the Charter is of relevance in the awards of tenders and grants.[264] The Ombudsman occasionally highlights that the principles of good administration are broader than illegality. As with other types of maladministration, the Ombudsman undertakes several proactive initiatives as well, which include the production of publications containing guidelines for businesses.[265]

The Ombudsman found several issues of maladministration in a case which lasted more than four years and concerned a funding application to the Commission by an NGO supporting refugees and victims of war, including lack of fairness and objectivity, failure to hear the applicant, 'unfounded accusations of fraud against the complainant' and provision of reasons with a delay of three years.[266] The applicant had also complained to the Ombudsman in the past regarding its funding applications to the Commission. The Ombudsman considered that the most serious instances of maladministration contained in his draft recommendation had not been addressed by the Commission, but decided to close the case with critical remarks. While the complainant clearly invited the Ombudsman to

[262] On this point see, for example, the Opinion of Advocate General Léger in Case C-40/03 P, *Rica Foods* v *Commission*, EU:C:2005:93, and notably paras 47–49.

[263] Annual Report 2008, 58.

[264] Annual Report 2010, 46.

[265] See notably European Ombudsman, *Good for business* (Publications Office of the European Union 2014).

[266] Case 2283/2004/GG.

contact the Parliament,[267] the Ombudsman reiterated that special reports should not be used 'too frequently' and added that the scope of the case was 'vast': 'in order to be useful, [a special report] would have to be succinct and limit itself to one central issue'.[268] It is, of course, perfectly possible for the Ombudsman to submit a special report on one or few of the issues under investigation, as the abovementioned Frontex inquiry demonstrated.

The limits of the mandate were also unravelled in a case concerning the European Investment Bank's (EIB) decision to exclude the complainant from a public tender in Bosnia and Herzegovina.[269] The complainant initially turned to the aforementioned internal complaints mechanism within the EIB, and—interestingly—the latter decided in the complainant's favour.[270] The Ombudsman had to consider how to address the EIB's '*legally incorrect* reading of the tender documents'.[271] While underlining that 'wholly unacceptable' cases of this sort undermine 'not only the EIB's own reputation, but also the Union's commitment to strengthening the rule of law in Bosnia and Herzegovina', which further meant that the maladministration was serious and had severe implications,[272] the Ombudsman closed the case with critical remarks, hoping that the EIB will learn lessons for the future. The main reason for this was that the project had already been awarded to another bidder, and that the complainant had not claimed compensation.[273] When the Ombudsman chooses not to pursue the matter further, notably with a submission of a special report, she may inform high-ranking EU officials of her findings and publish a critical press release. In this case the decision was forwarded to the Presidents of the European Parliament, the Commission and the Council, and the Ombudsman severely criticised the EIB for 'weaken[ing] EU efforts to strengthen [the] rule of law'.[274] Importantly, in that case the EIB's internal

[267] Ibid., point 279.

[268] Ibid., points 280–281.

[269] Case 178/2014/AN.

[270] Namely that 'the tender documentation [did] not state clearly and unambiguously which construction methodology' had to be used; ibid., point 14.

[271] Ibid., point 20 (emphasis added).

[272] Ibid., points 24–25.

[273] Ibid.

[274] Press release 21/2014, 'Ombudsman: EIB's public tender failure weakens EU efforts to strengthen rule of law', available at: www.ombudsman.europa.eu/en/press/release.faces/en/58173/html.bookmark

review mechanism and the Ombudsman were of the same view, but the EIB decided to follow a different approach.

It took the Ombudsman almost four years to complete an own-initiative inquiry concerning the Commission's Early Warning System (EWS).[275] That system has now been replaced by the 'Early Detection and Exclusion System'.[276] Persons registered therein were classified into five categories of issued 'warnings', depending on the severity of the threat. The Ombudsman found several problems with the system—notably that persons featuring therein generally were not notified of the decision and could not appeal it, and issued a draft recommendation to the Commission. The following proposals were submitted: the right to be heard can be limited only in exceptional circumstances; an internal review mechanism had to be established; access to the file should be guaranteed; persons subjected to warnings should be informed of the right to access the Ombudsman or the EU courts; a revised Decision should explicitly mention the internal review process and the right to seek judicial and extra-judicial redress.[277] The Ombudsman was keen to ensure that compliance with the principle of sound financial management does not breach the fundamental rights of persons included in the EWS, and notably the right to be heard.[278] Further recommendations (going beyond legality) included appropriate training for staff operating the EWS. The Commission accepted the draft recommendation, expressing its commitment to reforming the EWS. The new system refers to the proportionality principle and the notification of operators before their inclusion in the database. It therefore appears that the Ombudsman's input was considered, alongside the CJEU's decision in *Planet*.[279]

The difference between illegality and maladministration is emphasised in complaints of this sort as well. A company in Romania submitted a tender for a project in Moldova one day after the deadline, and the Ombudsman invited the Commission via a critical remark to be more precise and provide complete information when drafting its calls so as to avoid misunderstandings and ultimately abide by principles of good administration.[280]

[275] Case OI/3/2008/FOR. The EWS was a 'computerised information system operated by the European Commission which seeks to identify "threats" to the EU's financial interests and reputation' (ibid., point 1).

[276] See: ec.europa.eu/budget/explained/management/protecting/protect_en.cfm

[277] Ibid., point 152.

[278] Ibid. The principle of sound financial management is enshrined in Article 317 TFEU.

[279] Case C-314/11 P, *Commission* v *Planet*, EU:C:2012:823.

[280] Case 1561/2008/RT.

Elsewhere, the fact that a grant application was not treated rapidly enough, that is, before the commencement of the year that the grant was supposed to cover, constituted maladministration and led to a critical remark, even though the Ombudsman accepted that the Commission had not disrespected its 'legal obligations'.[281] In another case, the Commission 'failed to assess the complainant's bid correctly and to handle the tender procedure properly'; by rejecting the complainant's lowest priced bid, it departed from the key criterion it had announced for the award of the tender.[282] The Ombudsman proposed a friendly solution (that the Commission and the complainant engage in direct negotiations about the financial loss), while accepting that the conditions for non-contractual liability probably had not been established. The Commission's rejection of the friendly solution led the Ombudsman to issue a critical remark and conclude that an acceptable solution in this case would '[depend] on the Commission's willingness to adopt a citizen-friendly approach'.[283]

The Ombudsman was very critical of the Commission when the latter decided to terminate a grant to an Icelandic NGO in light of political developments related to Iceland's accession to the EU.[284] She pointed out that 'the contract had created not only legal obligations but also moral and social ones which prevented the Commission from acting the way it did. It was unfair, if not abusive, to place the whole burden of the uncertainty of the accession process on the shoulders of an NGO'.[285] The Commission did not accept the Ombudsman's proposals, and the latter found that the Commission had 'acted wrongly and in bad faith', below the standards of good administration and ultimately 'undermining the reputation, not just of the Commission, but also of the overall European Union'.[286] A critical remark was the selected avenue to close that complaint.

In one of the first cases involving the European Research Council,[287] the Ombudsman initially observed that the very high number of applications were an indication of trust, on the part of citizens, towards the selection procedures.[288] The Ombudsman furthermore 'applauded' the

[281] Case 271/2009/VL.
[282] Case 3346/2005/MHZ.
[283] Ibid., point 3.5.
[284] Case OI/5/2014/MDC.
[285] Ibid., point 10.
[286] Ibid., 'Critical remarks'.
[287] Case 485/2008/IP.
[288] Ibid., point 44.

fact that the applicant was able to access the reviewers' assessments, and also the Commission (carrying out some of the Agency's task during the first period of its operation) for handling in a timely fashion a significant number of applications.[289]

The Ombudsman can provide effective solutions (including compensation) to complainants who are not treated fairly, either via friendly solutions[290] or through more laborious processes. An example of this sort was a case concerning a Commission's decision to ask for the recovery of funds from a non-profit organisation, which had carried out a project in Russia.[291] Certain shortcomings identified by an audit had to be balanced with the good faith in which the organisation had acted. In light of the dramatic consequences for the organisation stemming from the Commission's decision, the Ombudsman underlined that fairness and proportionality had not been observed. He pointed out that, while the Commission should certainly be verifying that EU funds are spent correctly, it should also be examining *who is responsible* when that is not the case.[292] The Commission did not initially accept the draft recommendation, and the Ombudsman, while acknowledging that the matter merited a special report to Parliament, decided not to do so before opening a proper own-initiative inquiry on this issue. Despite this, after the closure of the case with a critical remark, the Commission decided to reconsider its position and cancelled the relevant debit notes.[293] While the Ombudsman was eventually successful, it would have been preferable if the Commission had complied *within* the context of the Ombudsman's investigation.

It is worth noting that, while internal review mechanisms have to be exhausted under Article 2(4) of the Ombudsman's Statute, the European Court of Auditors in a special report on public procurement observed that this 'lengthens the process and virtually rules out a swift intervention of the Ombudsman before a contract is signed'.[294]

[289] Ibid., point 46.

[290] See, for example, Case 3000/2009/JF.

[291] Case 3373/2008/(BB)(BU)JF.

[292] Ibid., point 89.

[293] Press release 10/2013, 'Ombudsman helps solve EUR 93,000 payment dispute between NGO and the Commission', available at: www.ombudsman.europa.eu/en/press/release.faces/en/50453/html.bookmark

[294] See European Court of Auditors, Special report 17/2016, 'The EU institutions can do more to facilitate access to their public procurement', available at: www.eca.europa.eu/Lists/ECADocuments/SR16_17/SR_PROCUREMENT_EN.pdf, point 86.

Execution of Contracts

There is some overlap between cases concerning the 'award of tenders and grants' and the 'execution of contracts'; generally, the complaints in the latter category concern the post-award stage. Now, at a fairly early stage the Ombudsman took the view that contractual disputes *in principle* fall under the mandate.[295] However, the Ombudsman does not want to substitute the judgment of 'a court of competent jurisdiction' as to whether a breach of contract has taken place. Thus, his or her control over contracts concluded by EU institutions 'is necessarily limited'.[296] The Ombudsman's review in contractual disputes concerns 'whether the Union institution has provided [the Ombudsman] with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified'.[297] In such cases, no maladministration is identified. The number of complaints concerning contractual disputes is generally limited.[298]

A number of own-initiative inquiries have been launched by the Ombudsman on the Commission's late payments to contractors and to beneficiaries of grants and subsidies.[299] Public consultations with stakeholders have been organised, while several individual cases have been considered by the Ombudsman further to complaints by NGOs, research centres or contractors. The Ombudsman regularly invites the Commission to provide statistics or to notify her or him of further steps with a view to decreasing delays in payments.[300] Claims stemming from public consultations have touched upon several issues: the absence of uniformity among DGs as regards deadlines, the unavailability of financial services during the summer break, or the comment that '[i]nterested parties do not contact the European Ombudsman because they fear to lose the Commission as a customer'.[301] On this latter point, the Commission's overall response was that the matter was taken seriously, and that it 'applie[d] to all its ben-

[295] Annual Report 1997, 24; this contrary to the mandates of some national ombudsmen, the European Ombudsman added.

[296] Annual Report 2012, 46.

[297] Ibid.

[298] In 2015 only 18 (or 6.5% of) closed inquiries had as subject matter the execution of contracts; see Annual Report 2015, 35.

[299] Case OI/1/2009/GG; Case OI/2/2013/EIS; Case OI/5/99/(IJH)GG and Case OI/5/2007/GG.

[300] Case OI/1/2009/GG, points 8–9; Case OI/2/2013/EIS, point 12.

[301] Case OI/1/2009/GG, point 34 (16).

eficiaries without distinction the same principles of equal treatment and fair competition, based on criteria known in advance through transparent procedures'.[302] The Ombudsman underlined that he would 'vigorously investigate any complaint in which a person alleges that she or he was disadvantaged on the grounds that she or he turned to the Ombudsman'.[303] More generally, the Ombudsman has found that the Commission's performance is steadily improving, but also that 'the total amount of interest paid on account of delays in payment has increased', and therefore it was 'necessary to keep this issue of late payments under consideration'.[304]

When institutions are willing to improve their practice, the Ombudsman will acknowledge this. In 2009, for example, the Ombudsman noted that 'unlike in previous years' no cases were decided concerning delays in payment.[305] The reasons for this could be twofold: 'either the Commission is improving its system of payment or is making an effort to settle relevant problems before its contractors complain to the Ombudsman'.[306] This relates to the above general findings of the more recent own-initiative inquiry suggesting improvement. In a case involving an Austrian institute claiming that the Commission had not paid a sum for research purposes deriving from a contract, the Commission responded that 'it had not received the final cost statements on time'. Still, the Ombudsman opined that the Commission's position was 'manifestly disproportionate', and the latter agreed to pay over half of the sum claimed for.[307] The institute expressed its gratitude to the Ombudsman. The Ombudsman observed that the discretionary ambit of the Commission is confined not only by the law, but should also be assessed under the principles of good administration; further, the proportionality principle, a general principle of EU law, should be observed when the Commission imposes administrative and financial penalties.[308]

Other areas investigated and settled by the Ombudsman include the need to respect the rights of defence when an expert is withdrawn from a

[302] Ibid., point 37.
[303] Ibid., point 60.
[304] Case OI/2/2013/EIS, points 28–29.
[305] Annual Report 2009, 58.
[306] Ibid.
[307] Case 3784/2006/FOR.
[308] Ibid., points 30–32. Beyond references to relevant case-law, Article 6(1) ECGAB was also mentioned by the Ombudsman.

Commission project.[309] Elsewhere, since good administration is broader than illegality, while legally not obliged to accept late requests for final payment, an EU agency has, nonetheless, to take into account principles of fairness (featuring in Article 11 ECGAB). This suggests, for example, that the broader implications of the EU's economic crisis on a particular project will have to be considered, too.[310] That being said, the Ombudsman will not always find in favour of the complainant, including when an allegation is advanced that the principle of fairness had not been respected.[311]

Selection Procedures

Since the commencement of EPSO's operation in January 2003, the selection office has been the subject of a significant number of complaints. That being said, the Ombudsman's collaboration with EPSO is often productive.[312] In 2008, EPSO accepted the Ombudsman's draft recommendation and disclosed the evaluation and marking criteria used in selection procedures, and the Ombudsman applauded the latter for its stance, pointing out that its 'response constitute[d] tangible evidence of an important change in administrative culture'.[313] In the context of the inquiry, the Ombudsman did not accept the view that such disclosure would increase the number of complaints against EPSO; by contrast, he added, full transparency will eventually lead to considerably fewer complaints and, in any event, withholding such information to discourage complaints contravened the rule of law.[314] Elsewhere, the Ombudsman found no maladministration when EPSO booked exam centres in each Member State according to the principles of cost-effectiveness and proportionality.[315] More recently, the Ombudsman addressed further remarks to EPSO regarding the booking

[309] Case 2441/2010/OV.

[310] Case 443/2011/ER, concerning the Executive Agency for Competitiveness and Innovation.

[311] See, for example, Case 901/2011/OV concerning the ineligibility of costs not accompanied with proofs of payments.

[312] See, for example, the Ombudsman's comments in Annual Report 2009, 62.

[313] Case OI/5/2005/PB, in particular point 26.

[314] Ibid., points 16–17. For a similar complaint see also Case 2346/2007/JMA. Compare also the own-initiative inquiry into access to computer-based tests (CBT); Case OI/4/2007/(ID)MHZ. The Ombudsman did not agree that the disclosure of the tests would bring about administrative and financial implications and highlighted the added value of transparency.

[315] Case 1943/2008/BB.

of exam centres and the conditions during the assessment.[316] Concerning EPSO's failure to comply with the principle of equal treatment when deciding that rescheduling the test of a pregnant woman was not possible, the Ombudsman criticised the latter's stance but chose not to pursue the case further taking into account EPSO's 'constructive attitude in the course of his inquiry'.[317] Moreover, the Ombudsman has invited EPSO to 'do its best' to accommodate the needs of visually impaired candidates, both with regard to its website and also more generally with regard to its overall policy vis-à-vis candidates with disabilities.[318]

EPSO is not the only EU entity attracting complaints on competition and selection procedures. A number of cases concern the practices of EU agencies or bodies, which have some leeway when selecting staff. Often, the Ombudsman can provide redress. For example, further to the Ombudsman's friendly solution, the European Economic and Social Committee agreed to pay a complainant approximately 4000 euros for suffered losses resulting from the Committee's withdrawal of a job offer two weeks before the commencement of the post.[319] Lastly, publishing potentially misleading information in a brochure—a matter captured by the notion of maladministration—is insufficient, in itself, to justify cancellations or re-advertisement of recruitment procedures where appointments have already been made.[320] This was no doubt a plausible use of a critical remark to close the case in the absence of a convincing alternative. The Ombudsman added that 'it [was] necessary to balance on the one hand the interests of the complainant and on the other hand the interests of the persons who have been appointed, as well as the interest of the service. In this context, particular regard should be had to the principle of proportionality and the principle of legitimate expectations'.[321]

[316] Case OI/9/2010/RT.

[317] Case 1933/2010/BEH. See also Case 1719/2013/CK, where the Ombudsman achieved a friendly solution. The case concerned alleged irregularities in EPSO's 'Talent Screener' competition procedure.

[318] Case 2455/2011/JF.

[319] Case 2924/2007/TS. See further Case 2003/2008/TS, concerning the European Research Council Executive Agency; Case 1562/2008/BB concerning the Executive Agency for Competitiveness and Innovation; Case OI/3/2012/CK, concerning the European Network and Information Security Agency; Case 1425/2012/VIK, concerning Eurofound—among others.

[320] Case 1017/2010/MMN, concerning the European Parliament.

[321] Ibid., point 102.

Concluding Remarks

This chapter demonstrated that the Ombudsman has contributed significantly to the improvement of the administrative culture of the EU institutions, either reactively or proactively (notably through the use of own-initiative inquiries). Complainants also make good use of the online interactive guide to receive further advice. The legally binding Charter has no doubt helped the Ombudsman to push further with a view to rendering the EU administration more accountable (e.g. through references to Article 41 of the Charter) and also to launch large-scale strategic inquiries (those on Frontex and the EU cohesion policy are two examples).

The Ombudsman's work extends to various areas of EU administrative activity: the Commission's role as the guardian of the Treaties; competition; institutional and policy matters; human rights; conflict of interest; the award of tenders and grants; the execution of contracts; selection procedures organised by EPSO or other EU institutions and bodies; and, of course, access to documents and transparency, discussed in the next chapter. In most of these cases, the Ombudsman's supervision has been effective. Challenging cases occasionally result in delays, and this should be noted. Still, the Ombudsman's impact becomes all the more important if one considers that in various instances the Ombudsman touches upon the institutions' broad discretion (the Commission's role in infringement proceedings is a classic example here; see also complaints on institutional and policy matters). The discretion is confined further than the Court's case-law via the principles of good administration, in the sense that the EU institutions are required to do more than their legal obligations (see also the cases on the awards of tenders and grants). Compensations may be granted or payment disputes can be settled (often involving NGOs) further to the Ombudsman's intervention, who can invoke fairness as a principle of good administration. The conflict of interest complaints or related own-initiative inquiries build on the principles that should apply to an ethical EU administration, thereby making an important contribution to good governance. Inter-institutional collaboration is being pursued, because it enables the Ombudsman to delineate potentially overlapping mandates (the memorandum with the EDPS) or reduce her workload via underlining the first-instance internal complaints mechanisms (the memorandum with the EIB). Importantly, the Ombudsman's remit concerns EU residents as well—and even if a complainant is not an EU resident, the Ombudsman has demonstrated willingness to open an own-initiative inquiry to overcome admissibility obstacles.

Building on the above remarks, the chapter therefore also sought to shed light on the EU Ombudsman's method. The analysis was at places quite extensive to unravel the efforts of the Ombudsman and the occasional resistance of the institutions to comply. The explanations provided by the EU institutions may at times be poor. Compliance is not a straightforward matter: sometimes certain arguments are accepted by the institutions when others are not; on (infrequent) occasions the administration may choose to implement the Ombudsman's findings *outside* the context of the investigation. Thus, quantitative studies on compliance, however indispensable, cannot provide a complete picture.

The Ombudsman will frequently use her broad investigatory powers to examine the validity of allegations: inspection of documents/files or other sources is indispensable. The most important dimension of the Ombudsman's method is arguably the *reliance on the law*, which obviously includes the citation of CJEU judgments and occasionally even the effort to interpret the law when the EU courts have not done so. References to the Charter are also frequent, and that was still the case even before the Lisbon Treaty.[322] The Ombudsman therefore makes a contribution to the EU rule of law, and sometimes he or she will *clearly mention* the need to safeguard the rule of law in the decision. Often, and related to earlier remarks, supervising the procedure, including the quality of reasons, indirectly leads to the supervision of the substance. Despite the above, it is being stressed by the Ombudsman that maladministration is broader than illegality; the frequent reliance on the ECGAB proves this point.[323] In this sense, the Ombudsman contributes to the 'establishment of "new" standards of administrative conduct directed at promoting a culture of service'.[324]

[322] The Ombudsman does not produce binding decisions and therefore the Ombudsman's references to the Charter before Lisbon are unsurprising. Equally explainable, perhaps, was the Court's choice to be more reluctant with Charter citations pre-Lisbon (see, e.g. David Anderson and Cian Murphy, 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law after Lisbon* (Oxford University Press 2012) 155, at 157). The picture changed drastically, of course, after 2009 (see Grainne de Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168).

[323] For Smith, the development of principles of good administrative behaviour as 'administrative legitimacy' have some potential to contribute to the EU's overall legitimacy; see Melanie Smith, 'Developing administrative principles in the EU: A foundational model of legitimacy?' (2012) 18 *European Law Journal* 269, at 277.

[324] Joana Mendes, 'Good administration in EU Law and the European Code of Good Administrative Behaviour' (2009) EUI Working Paper Law 2009/09, p. 11.

Alternative modes of persuasion (such as the *communication* of the findings to the Presidents of the EU institutions) may be used when a case is closed and a special report or a draft recommendation is not selected; further remarks are used as *educational advice* for improvement. The Ombudsman always evaluates the institutions' submissions—in many cases, these are convincing. This means that the Ombudsman will not always side with the complainant. In addition, the Ombudsman will not hesitate to commend the EU institutions when adopting a constructive approach to recommendations, for example through the recognition of a 'star case exemplifying best practice' or otherwise.

The Ombudsman does not examine aspects of a complaint (or the whole complaint if necessary) when concerning national authorities implementing EU law as such matters fall outside the mandate. This stems directly from the Treaty and the Statute, as discussed in Chap. 2. Whether this is, in fact, an inappropriate limitation of the existing mandate is a matter further addressed in Chap. 6; suffice to note here that it will be argued later on that the present division of labour between the European Ombudsman and her national peers should be kept.

Building on that remark, the purpose of this book is also to assess the Ombudsman's mandate from a critical perspective. In certain cases, the delays in the response of the EU institutions entail that the inquiry may last three or four years, without necessarily resulting in a successful outcome. What is more, there are cases where the institutions simply do not comply with the Ombudsman's well-reasoned findings; this can be a source of concern particularly when these complaints raise broader issues of general interest.

While the above may not be entirely satisfactory from the perspective of accountability, it may be objected that, pragmatically, an ombudsman institution inevitably will not be as effective as the courts; otherwise, an impermissible risk of duplication of judicial review is imminent. The book fully aligns with this view: the European Ombudsman cannot and should not duplicate the work of the EU courts as her role is different. Simultaneously, one cannot be satisfied when the EU institutions simply refuse to comply or extend their responses indefinitely, and certainly above the limits prescribed by the Ombudsman's Statute. That is even more so when such conduct is not based on the lack of persuasiveness (or legal soundness) of the Ombudsman's findings, but on the basis of their own interpretation of their obligations or even of the Ombudsman's supervisory ambit. The arguments presented by institutions unwilling to comply

can then sound totally unconvincing, especially to citizens who trust the institution of ombudsman and present a fair and convincing case.

All this implies that the Ombudsman's discretion often entails some test of effectiveness vis-à-vis the available modes of action, including an estimate as to the outcome/success of her or his recommendations. This is also linked to the broad definition of maladministration endorsed by the office: arguably the broad notion of maladministration in the EU legal order was an institutional victory for the Ombudsman, but it does not come without costs. These points are returned to in subsequent chapters.

CHAPTER 5

A Case-Study: Inquiries on Transparency and Access to Documents

Introduction

Transparency could well be the area where the European Ombudsman's contribution is best known, and that was probably the case even before the arrival of Emily O'Reilly, who has given further impetus to the Ombudsman's push for transparency. Transparency (including access to documents) is also a matter closely associated with democracy as it is a precondition for participation and accountability, and ultimately legitimacy. In this context, this chapter, a case-study on transparency and access to documents inquiries, illustrates how the Ombudsman's work has contributed to strengthening democracy in the EU. Nonetheless, on certain occasions of significant public interest (and this accords with one of the findings of Chap. 4) the Ombudsman was not as effective as he or she might have wanted to be. Certain institutions have been, at times, particularly reluctant to implement the Ombudsman's recommendations. When this happens, inevitably the Ombudsman's efforts to strengthen and promote democracy are undermined.

It should be noted that the majority of admissible complaints examined by the Ombudsman have consistently concerned access to documents and transparency (including requests for information).[1] Given that a refusal

[1] Considering the latest figures, in 2008 and 2009, 36% of alleged maladministration concerned 'lack of transparency, including refusal of information'; in 2010 the figure was 37.1%;

N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, European Administrative Governance,
DOI 10.1057/978-1-137-57395-7_5

to grant access to a requested document is judicially reviewable, citizens (or legal persons) affected by such decisions should choose between two alternatives: the Court and the Ombudsman. It is noted that the case-law has confirmed that 'a person may make a new demand for access relating to documents to which he has previously been denied access. Such an application requires the institution concerned to examine whether the earlier refusal of access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime'.[2] Submitting a complaint to the Ombudsman after a rejection should, in principle, be faster and more flexible than the judicial avenue, and is certainly free of charge. Still, the Ombudsman cannot issue legally binding decisions, and this is perhaps the price to be paid for flexibility.

The next section will provide some very brief remarks on the transparency principle in the EU, before discussing and evaluating both the *proactive* and *reactive* work of the Ombudsman therein.

On Transparency, Access to Documents and Democracy in the EU

This section provides some context in which the Ombudsman's work on transparency and access to documents can be situated. A good place to start is to underline that transparency goes, of course, beyond access to documents; openness is also included,[3] the proactive provision of

in 2011, 23.3%; in 2012, 19.2%; in 2013, 25.6%; in 2014, 21.5%; and in 2015, 22.4%. All the data has been retrieved from the Ombudsman's Annual Reports 2008–2015.

[2] Case C-362/08 P, *Internationaler Hilfsfonds* v *Commission* EU:C:2010:40, para 57, referenced by Ian Harden, 'European Ombudsman' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1121, at 1141. Thus, according to Harden, if an applicant chooses the extra-judicial avenue under Regulation 1049 she or he 'does not, in substance, lose the opportunity subsequently to bring the matter before the Court, because it is possible to make a further application for access'.

[3] For an interesting discussion on the relationship between openness and transparency see Alberto Alemanno, 'Unpacking the principle of openness in EU law: Transparency, participation and democracy' (2014) 39 *European Law Review* 72. For Birkinshaw, openness 'means concentrating on processes that allow us to see the operations and activities of government at work', including 'opening up the processes and meetings of public bodies'; see Patrick Birkinshaw, 'Freedom of information and openness: Fundamental human rights?' (2006) 58 *Administrative Law Review* 177, at 190.

information,[4] possibly conflict of interest, too.[5] As Curtin observed, 'transparency and accountability will … mutually reinforce one another' if the former is understood as going beyond mere obligations of reporting 'at precise moments in time', but rather as implying 'constant visibility of information'.[6] Article 1 TEU states that 'decisions are taken as openly as possible and as closely as possible to the citizen'. Thus, transparency and openness directly relate to the EU's aim to bring citizens closer—it is, of course, doubtful whether this aim has been fulfilled.

Before proceeding further, it is acknowledged that proponents of transparency naturally do not believe that there should be no limitations to the principle. Indeed, challenges related to full transparency include the possibility of decisions being made behind closed doors, privacy rights,[7] delays in decision-making, among others.[8] Thus, the Court and the Ombudsman will often engage in a balancing exercise to identify how much transparency is required, and whether perhaps other competing public or private interests should prevail.

It is generally accepted that the accession of Sweden and Finland in 1995 accelerated the developments in transparency in the EU.[9] In its famous White Paper, openness was viewed by the Commission as one of the five principles underpinning good governance, and also as an expression of democracy and the rule of law at 'all levels of government', including

[4] Paul Craig, *EU administrative law* (Oxford University Press 2012) 357.

[5] Pierpaolo Settembri, 'Transparency and the EU legislator: "Let he who is without sin cast the first stone"' (2005) 43 *Journal of Common Market Studies* 637, at 642.

[6] Deirdre Curtin, *Executive power of the European Union: Law, practices, and the living constitution* (Oxford University Press 2009) 258. Simultaneously, whereas transparency is a precondition, it should not be treated as 'a panacea for the legitimacy problems of the European Union and can only be a starting point in building public understanding, participation and involvement'; see Deirdre Curtin and Albert Jacob Meijer, 'Does transparency strengthen legitimacy? A critical analysis of European Union policy documents' (2006) 11 *Information Polity* 109, at 120.

[7] Interestingly, Article 15 TFEU is followed by the right to the protection of personal data (Article 16 TFEU).

[8] See, among others, Suzanne Piotrowski and Erin Borry, 'An analytic framework for open meetings and transparency' (2010) 15 *Public Administration and Management* 138.

[9] Ian Harden, 'The Revision of Regulation 1049/2001 on Public Access to Documents' (2009) 15 *European Public Law* 239. Such pressures materialised in the inclusion of the right of access in the Amsterdam Treaty, a provision on the basis of which Regulation 1049 was adopted (ibid.).

the European and the national level.[10] The Laeken declaration underlined that the EU derives its legitimacy also from transparency, and that it should become 'more democratic, more transparent and more efficient'.[11] Further to the unsuccessful adventure to ratify the Constitutional Treaty, the Lisbon Treaty under Article 15(3) TFEU refers to the right of access to documents,[12] subject to the conditions established by Regulation 1049.[13] Article 42 of the Charter is thus based on Article 15(3) TFEU.[14] The Provisions on democratic principles (Title II TEU) refer explicitly or implicitly to openness and transparency: Article 10(3) TEU links openness with the right to participate in the democratic life of the Union, while Article 11 TEU refers to consultations and openness[15] (the above provisions will be discussed in further detail in Chap. 6). Articles 16(8) TEU and 15(2) TFEU provide that when the Council deliberates and votes on a draft legislative act it should meet in public; under the latter provision, the European Parliament will generally meet in public. To return to Article 15(3) TFEU, it can also be viewed as encouraging the institutions to act proactively and 'ensure that their proceedings are transparent'; further, the European Parliament and the Council should make sure that documents concerning the legislative process are duly published.

A number of initiatives have been adopted by the Commission, often with the participation of other institutions, such as the 'transparency

[10] European Commission, 'European Governance: A White Paper' COM (2001) 428 final, 10. The other principles were participation, accountability, effectiveness and coherence.

[11] Laeken Declaration on the future of the European Union (2001) available at: www.cvce.eu/en/obj/laeken_declaration_on_the_future_of_the_european_union_15_december_2001-en-a76801d5-4bf0-4483-9000-e6df94b07a55.html

[12] The CJEU, the European Central Bank and the European Investment Bank are covered by Article 15(3) TFEU only when exercising their *administrative tasks*.

[13] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 (hereinafter 'Regulation 1049').

[14] Deirdre Curtin and Joana Mendes, 'Article 42' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1100–1101. Importantly, although Article 42 does not refer to member states, the authors point out that Regulation 1049 imposes several obligations upon member states concerning documents which fall 'within the scope of Union action'.

[15] For Alemanno (n 3, at 79–80), the Lisbon provisions on consultation (and, therefore, participation) form one of the 'component[s]' of openness. See also Art 15(1) TFEU.

register'[16] or the 'comitology register'.[17] Another register provides information about the Commission's expert groups and other similar entities.[18] None of the above implies that shortcomings (or scope for improvement) have not been identified by commentators.[19]

The right of access to documents is 'the most developed' feature of transparency 'in legal terms' in the EU.[20] Undeniably, the adoption of Regulation 1049 was a landmark moment. Article 1 of the Regulation defines the purposes of the instrument, and these include ensuring 'the widest possible access to documents' and 'the easiest possible exercise of this right'. The Regulation adopts a broad definition of document, 'whatever its medium', while the right extends to 'documents drawn up or received by [an institution] and in its possession, in all areas of activity of the European Union'.[21] While the Regulation provides for a general right of access, a number of exemptions have been established. Much of the Court's case-law, as well as a significant portion of the Ombudsman's reactive contribution concern the exemptions to access to documents: the EU institutions often tend to interpret the exemptions broadly, leaving the judicial and extra-judicial review mechanisms with the task—where, of course, appropriate—to stress the value of transparency. In addition, Article 11 of the Regulation obliges the EU institutions to set up registers of documents.

[16] That register provides information on lobbying at EU level; see Stijn Smismans, 'Regulating interest group participation in the European Union: changing paradigms between transparency and representation' (2014) 39 *European Law Review* 470, at 485–486.

[17] This provides—among others—summaries and agendas of various committee meetings; see further Gijs Jan Brandsma, Deirdre Curtin and Albert Meijer, 'How transparent are EU "comitology" committees in practice?' (2008) 14 *European Law Journal* 819.

[18] See: ec.europa.eu/transparency/regexpert

[19] See Brandsma et al. (n 17) on the comitology register; and Smismans (n 16), in particular his observations on whether an improvement in representativeness can take place.

[20] Craig (n 4) 357.

[21] See Arts 2(3) and 3(a) of Regulation 1049. However, according to Article 2(5) of the Regulation 'sensitive documents' are subject to special treatment in accordance with Article 9. These documents are classified as 'top secret' or 'confidential' and may originate from the EU institutions, the member states, third countries or international organisations. Such documents 'protect essential interests' of the EU or the member states and concern—most notably—public security, defence and military matters. The EU institutions need to provide reasons when rejecting access, and also publish their rules concerning sensitive documents. See also Deirdre Curtin, 'Official secrets and the negotiation of international agreements: Is the EU executive unbound?' (2013) 50 *Common Market Law Review* 423.

Insofar as the exceptions are concerned, Article 4(1) of Regulation 1049 enumerates instances where the EU institutions *shall refuse* access. Disclosure in these cases would undermine: public security; defence and military matters; international relations; the financial, monetary or economic policy of the EU or a member state; privacy and the integrity of the individual in light of the EU legislation concerning data protection. The second paragraph of the same Article enumerates instances where the EU institutions shall refuse access *unless there is an overriding public interest in disclosure*. These instances are: the 'commercial interests of a natural or legal person, including intellectual property'; legal advice and/or court proceedings; inspections, investigations and audits. Likewise, the third paragraph of Article 4 refers to a possible disclosure which would *seriously undermine* the institution's decision-making process. The article refers to documents related to both stages, namely before and after the decision has been reached. As with Article 4(2), a balancing exercise should take place: if there is an overriding public interest, disclosure should prevail. As Harden notes, the Regulation does not *automatically* cover the so-called space to think,[22] and this is perhaps where, procedurally at least, the tension with democracy may be stronger. When a document originates from a member state and is in the possession of the EU institutions, the Regulation provides (in an unclear way) that the member state concerned may request the EU institution not to grant access without its agreement.[23] When the document is in the possession of a member state, but originates from an EU institution, the member state in cases of uncertainty will consult with the institution and reach a decision 'that does not jeopardise the attainment of the objectives of [the] Regulation' *or* 'refer the request to the institution'.[24]

The applicant does not need to provide reasons for the request. That being said, the application should be submitted in a 'sufficiently precise

[22] Harden (n 9) 241.

[23] Art 4(5) of Regulation 1049. This does not entail that member states have a final say on whether that document will be disclosed; this decision will still be made by the relevant EU institution via a genuine dialogue with the member state. Beyond the well-known *Sweden* v *Commission* case (discussed below) see also Case T-59/09, *Germany* v *Commission*, EU:T:2012:75.

[24] Art 5 of Regulation 1049. For an initial assessment of Regulation 1049, including an exposition of the background to several of its provisions, see Steve Peers, 'The new Regulation on access to documents: A critical analysis' (2002) 21 *Yearbook of European Law* 385.

manner to enable the institution to identify the document'.[25] When an EU institution refuses access, the Regulation invites the applicant within 15 working days to submit a *confirmatory application*, essentially an administrative procedure 'asking the institution to reconsider its position'.[26] If the EU institution eventually decides to reject the application, it should inform applicants of their available options, which are essentially two: to initiate courts proceedings or to apply to the European Ombudsman.[27] It is to be noted that the rejection of the *confirmatory application* under Regulation 1049 is the reviewable act under Article 263 TFEU[28] and the Ombudsman.

The debate on the reform of Regulation 1049—which is already rather dated—appears to be inconclusive.[29] For some, the duration of the debate is evidence of 'transparency fatigue' in the majority of member states within the Council.[30] The reform of the Regulation has attracted considerable attention from NGOs and other civil society actors—many of these actors have regular contacts with the Ombudsman and push for a more transparent EU regime.

A brief presentation of the EU transparency framework cannot but include the contribution of the ECJ, which often (but certainly not always) has ruled in favour of transparency. To cover extensively the Court's case-law therein goes beyond the scope of this contribution,[31] which focuses on the Ombudsman. That being said, the approach based on law identified in Chap. 4 is confirmed here: the Ombudsman does rely extensively on the case-law of the Court, especially on the judgments delivered after

[25] Art 6(1) of Regulation 1049. For further discussion on this point see H.R. Kranenborg, 'Is it time to revise the European Regulation on public access to documents?' (2006) 12 *European Public Law* 251, at 269–271.

[26] Art 7(2) of Regulation 1049.

[27] Art 8(1) of Regulation 1049. Article 8(3) states that if an institution fails to reply, this will be considered as a *negative* reply.

[28] Koen Lenaerts et al., *EU procedural law* (Oxford University Press 2015) 300–301, and case-law cited therein.

[29] See Harden (n 9).

[30] Maarten Hillebrandt, Deirdre Curtin and Albert Meijer, 'Transparency in the EU Council of Ministers: An institutional analysis' (2014) 20 *European Law Journal* 1, at 15.

[31] For a thorough and critical survey of the earlier case-law see Joni Heliskoski and Paivi Leino, 'Darkness at the break of noon: The case-law on Regulation No. 1049/2001 on access to documents' (2006) 43 *Common Market Law Review* 735; for later accounts compare Dariusz Adamski, 'Approximating a workable compromise on access to official documents: The 2011 developments in the European Courts' (2012) 49 *Common Market Law Review* 521; Curtin and Mendes (n 14).

the entry into force of Regulation 1049, and it is arguable that the traditionally pro-transparent Ombudsman was aided significantly by the ECJ's landmark ruling in *Turco*, where the judgment of the—then—Court of First Instance was set aside. The case concerned the qualification of 'legal advice' as a justifiable exception to disclosure, and it was brought against the Council.[32] The Court held that when the EU institutions want to derogate from access invoking the exemptions of the Regulation, they have to demonstrate a risk which is 'reasonably foreseeable and not purely hypothetical'.[33] It fell on the Council, the Court explained, to justify its reliance on the exception and to ascertain whether there was an overriding public interest in disclosure.[34] The Court famously stated that openness 'enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system'; also, '[t]he possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights'.[35]

The right of access has to be balanced, nonetheless, with data protection[36]; this is indeed acknowledged by Regulation 1049.[37] In the well-known *Bavarian Lager* case, the CJEU (inversely, this time) set aside the decision of the General Court. The CJEU decided that the Commission rightfully sought the consent of the participants (in a meeting attended by the Commission—the DG Internal Market—and other companies) in order to reveal their names to Bavarian Lager, a UK company importing German beer.[38] The Court attributed equal weight to the Regulations on access to documents and data protection.[39]

[32] Joined Cases C-39/05 and C-52/05, *Sweden and Turco* v *Council*, EU:C:2008:374.

[33] Ibid., para 43.

[34] Ibid., para 45.

[35] Ibid., paras 45–46.

[36] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 008. See also Article 8 of the Charter.

[37] Art 4(1)(b) of Regulation 1049.

[38] Case C-28/08, *European Commission* v *Bavarian Lager*, EU:C:2010:378.

[39] Ibid., in particular para 65. More generally, fresh attention to data protection under EU law has been generated further to the CJEU's decisions in Case C-131/12, *Google Spain* EU:C:2014:317 and Case C-362/14, *Schrems* v *Data Protection Commissioner*, EU:C:2015:650.

With regard to Article 4(5) of Regulation 1049, and more specifically the scope of member states' 'prior agreement' for disclosure of a document in the possession of an EU institution, the Court in another landmark judgment held that the said provision does not confer on member states 'a general and unconditional right of veto'.[40] By contrast, member states should provide reasons for non-disclosure. The Court referred *inter alia* to the preamble of the Regulation and its overall purpose. Thus, in light of the broader aims pursued by the Regulation, Article 4(5) should be interpreted as confining the powers of member states: such powers should be translated into 'a *form of assent* confirming that none of the grounds of exception under Article 4(1) to (3) [of Regulation 1049] is present'.[41]

In *Access Info Europe*, a case concerning the revision of Regulation 1049 and the positions of member states during the negotiation, the CJEU rejected the Council's claims invoking the effectiveness of the decision-making process: aligning with the views of the General Court, the CJEU accepted that the Council had not provided sufficient justifications.[42] Concerning the same provision, namely Article 4(3) of Regulation 1049, in *MyTravel*, the CJEU clarified that once the decision is adopted (and therefore the second sub-paragraph of Article 4(3) applies), 'the requirements for protecting the decision-making process are less acute'.[43]

For certain categories of documents, including in investigations on state aids and merger control proceedings (a matter falling under Article 4(2) of Regulation, thus requiring a balancing exercise on the part of the institutions), the Court found elsewhere that the Commission was entitled to rely on a *general presumption* that the disclosure of such documents, containing sensitive information, would undermine the purpose of secondary EU law relating to mergers and competition.[44] In *API* the Court accepted that a general presumption pointing to non-disclosure applies

[40] Case C-64/05 P, *Sweden* v *Commission and Others*, EU:C:2007:802, para 58.

[41] Ibid., para 76 (emphasis added).

[42] Case C-280/11 P, *Council* v *Access Info Europe*, EU:C:2013:671.

[43] Case C-506/08 P, *Sweden* v *MyTravel and Commission*, EU:C:2011:496.

[44] Whose purpose is not primarily to facilitate access, but to guarantee the rights of defence of the parties and the duty of professional secrecy; Case C-365/12 P, *Commission* v *EnBW Energie Baden-Württemberg*, EU:C:2014:112, paras 60–68 and 83. The Court reiterated that similar considerations apply to 'the pleading lodged by one of the institutions in court proceedings' and 'documents concerning an infringement procedure during its pre-litigation stage' (ibid., para 66).

to the submissions of the parties in *pending court proceedings*, within the meaning of Article 4(2) of the Regulation.[45]

Lastly, in *in 't Veld*, the Court confirmed that, with regard to the mandatory exceptions in Article 4(1) of the Regulation, the institutions should still specifically explain how the interest protected under that provision is undermined. Further, insofar as 'international relations' are concerned, no 'general rule [exists] under which disclosure of the existence of a divergence of views among the institutions as to the legal basis on which one of them is empowered to open negotiations to conclude an international agreement … would in itself undermine the public interest as regards the European Union's international relations'.[46]

The European Ombudsman's Proactive Efforts to Increase Transparency

The Ombudsman's proactive role in strengthening transparency should be stressed. Indeed, while the Courts may occasionally draft broader principles on the basis of individual cases that they adjudicate (the antithetical *Turco* and *Bavarian Lager* cases are perhaps suitable examples), the fact remains that in terms of areas of intervention, they are limited by the factual dispute at hand. And yet the European Ombudsman has used various methods to promote transparency throughout the years of operation, and the areas concerned clearly go beyond the scope of application of Regulation 1049. If O'Reilly has signified her willingness to increase the use of own-initiative inquiries, it is clearly in the area of transparency, broadly conceived, that the impact of the proactive initiatives of the office has been more visible. Many of such own-initiative inquiries are analysed below.

It is to be noted that in the 2008 Annual Report, the Ombudsman presented himself as the 'guardian of transparency', evidently drawing inspiration from the Commission's role as the 'guardian of the treaties'.[47] This formulation is still used by the office. Furthermore, the mission statements adopted by both Diamandouros and O'Reilly refer to transparency.

[45] Case C-514/07 P, *Sweden and Others* v *API and the Commission*, EU:C:2010:541.

[46] Case C-350/12 P, *Council* v *in 't Veld*, EU:C:2014:2039, paras 46–60.

[47] See Nikos Vogiatzis, 'Communicating the European Ombudsman's mandate: An overview of the Annual Reports' (2014) 10 *Journal of Contemporary European Research* 105, at 113.

It is remembered that the Ombudsman promotes a version of European citizenship that includes transparency and participation, and thus goes beyond Articles 20–25 TFEU.[48] Putting motives aside (it cannot be ruled out that such a stance may be partly informed by an institutional self-interest), advancing a stronger vision of supranational citizenship goes hand-in-hand with the Ombudsman's efforts to improve or increase democracy in the EU, within, of course, the confines and limits highlighted in Chap. 3. The Ombudsman has established the 'International right to know day', an outreach seminar seeking to promote transparency and accountability.[49] Delivering presentations on transparency-related matters features frequently on the Ombudsman's agenda. For example, at a Conference on transparency research the Ombudsman underlined:

> I have long argued that full transparency of the legislative process in the Council would strengthen both national and Union citizenship. It would let Europeans see what the governments they have elected as national citizens are doing at the European level. It would also allow them, as Union citizens, to monitor more effectively the work of a vital EU institution, thereby promoting accountability.[50]

Press releases are also used for similar purposes; after all, the visibility of an ombudsman crucially depends on effective communication—and now on online presence, too. Via twitter, these (frequently critical of the institutions) press releases can be easily disseminated to various stakeholders, including civil society actors. In 2011, and in light of the 'International right to know day' organised at the time, the former Ombudsman expressed concerns about the consistently high number of complaints on transparency and access to documents.[51] As he commented, '[m]any EU institutions are still too reactive in their approach to public access and some

[48] See further the discussion in Chap. 3; see also Emily O'Reilly, 'European Year of Citizens—Closing conference—Address by European Ombudsman' (2013) available at: www.ombudsman.europa.eu/en/activities/speech.faces/en/52763/html.bookmark

[49] The first of these seminars was jointly organised by the Ombudsman and Transparency International.

[50] European Ombudsman, 'Building Trust in Times of Crisis', Utrecht (2012) available at: www.ombudsman.europa.eu/en/activities/speech.faces/en/11664/html.bookmark. See also Case 2497/2010/FOR, discussed below.

[51] Press release 17/2011, 'International Right to Know Day: Ombudsman calls for more pro-active transparency in the EU' available at: www.ombudsman.europa.eu/en/press/release.faces/en/10876/html.bookmark

even seem to be defensive in their thinking'.[52] The institutions referred to were not specified. More recently, O'Reilly invited the Council to support and participate in the Transparency Register, run by the Parliament and the Commission.[53] At times and where justified, the press releases congratulate the EU institutions on their proactive approach to transparency.

Before launching an own-initiative inquiry, the Ombudsman may write publicly to the EU institutions and bodies to clarify matters or encourage pro-transparency policies. In 2015, the Ombudsman welcomed the ECB's decision to clarify the transparency standards of speaking engagements of the Executive Board, with a view to avoiding instances where market-sensitive information would be disclosed to a limited audience[54]; its commitment to extend the so-called quiet period for these members was also endorsed.[55] In light of the ECB's independence, such policies prevent the selective release of information and engagement with 'external interests'. The letter was sent to the ECB because the Ombudsman 'must uphold the highest standards of governance'. In 2016, the Ombudsman also approached the President of Eurogroup to inquire about transparency.[56]

As already noted, the Ombudsman within the confines of the existing resources has invested considerably in communication. The Head of the Communication Unit and her team work closely with the Ombudsman; the Unit is currently employing no less than ten members of staff, with various responsibilities. This 'upgrade' of the Unit was initiated by Diamandouros towards the end of his tenure. Through the abovementioned avenues (social media, press releases, Annual Reports, organisation of events and

[52] Ibid.

[53] Press release 11/2014, 'Ombudsman calls on member states to back EU Transparency Register', available at: www.ombudsman.europa.eu/en/press/release.faces/en/54096/html.bookmark. It is noted that the Commission has recently organised a consultation on a mandatory transparency register, and the report summarising the responses may be accessed here: https://ec.europa.eu/transparency/civil_society/docs/summary_report.pdf

[54] Press release 13/2015, 'Ombudsman welcomes ECB's move towards greater speaking engagement transparency', available at: www.ombudsman.europa.eu/en/press/release.faces/en/61045/html.bookmark. See the ECB's guidelines for external communication at: www.ecb.europa.eu/ecb/orga/transparency/html/eb-communications-guidelines.en.html

[55] Press release 14/2015, 'Ombudsman welcomes further transparency steps by ECB', available at: www.ombudsman.europa.eu/en/press/release.faces/en/61516/html.bookmark. The ECB essentially announced that 'Executive Board members will not meet or talk to the media, market participants or other outside interests on monetary policy matters in the week leading up to monetary policy meetings'.

[56] See the discussion in Chap. 6.

dissemination of results) the Unit regularly informs stakeholders about new consultations announced by the Ombudsman, recommendations, achievements of the office, speeches, to name a few.

The European Code of Good Administrative Behaviour (ECGAB) refers to 'requests for information' (a term going beyond access to specific documents) and 'requests for access to documents'. With regard to the former, Article 22 ECGAB specifies that officials should provide information upon request in a clear and comprehensible way. If such information cannot be disclosed, the official should state the reasons and, where appropriate, direct the person seeking information to the responsible authority. With regard to access to documents, the ECGAB under Article 23 points to Regulation 1049 and the institutions' own rules of procedure, while underlining that when oral requests cannot be dealt with, the official should advise the applicant to formulate the request in writing. Moreover, the ECGAB contains the ethical standards that should guide the EU civil servants, within which features transparency.[57]

Proactive Initiatives Continued: Own-Initiative Inquiries Related to Transparency

The Ombudsman has also the power to initiate inquiries on his or her own, and several inquiries of this sort have concerned transparency. In 1996, before the adoption of Regulation 1049, the Ombudsman clearly positioned himself in the pro-transparency camp by initiating an inquiry which sought to verify the regime of 15 EU institutions and bodies in relation to public access to documents, excluding the Commission and the Council, which had adopted their own rules.[58] Surprisingly, only the Office for Harmonization in the Internal Market (OHIM) had adopted specific rules on access; most of the institutions/bodies, however, agreed or signified their intention to adopt rules within a reasonable time. The Ombudsman pointed out that in many of the complaints received by the office it was evident that certain institutions, bodies and offices did not know how to deal with requests on access. If an institution would even-

[57] The relevant principle reads as follows: 'Civil servants should be willing to explain their activities and to give reasons for their actions. They should keep proper records and welcome public scrutiny of their conduct, including their compliance with these public service principles.' See ECGAB, p. 10.

[58] Case 616/96/(PD)IJH.

tually refrain from adopting specific rules, this would clearly constitute an instance of maladministration, the Ombudsman underlined.[59] At the time, the Ombudsman left the standard of protection, in other words the evaluation of the quality of the forthcoming rules, to the European Parliament.[60] Overall, the Ombudsman in his special report expressed satisfaction with the institutions' follow-up to his recommendations, in that all of the institutions and bodies (except for the Court of Justice[61]) eventually adopted relevant rules.

As already noted, O'Reilly has been particularly active regarding the use of own-initiative inquiries. The first inquiry concerned the time limits for dealing with initial and confirmatory applications under Regulation 1049, and was addressed to the Commission, the Council and the European Parliament.[62] On the basis of the responses received by the EU institutions, and taking also into account past experience in the examination of several complaints, the Ombudsman identified a number of shortcomings in the handling of requests for access. Still, the Ombudsman concluded that the solution would effectively be an amendment or expansion of Regulation 1049 (an ongoing issue, as already noted, and certainly a matter that goes beyond the Ombudsman's powers).[63] Importantly, the Ombudsman proposed to be involved in the 'interinstitutional committee' provided by Article 15(2) of Regulation 1049[64] and/or provide guidance to members of staff dealing with requests on access. By doing so, the 'provision of central guidance and support to decision makers' could be materialised.[65]

[59] Annual Report 1996, 84–87.

[60] Case 616/96/(PD)IJH, point 3.

[61] The Court indicated that it needed more time to determine which documents fell under its judicial role. While pointing out that it was 'regrettable' that the Court had not provided a concrete timetable for the adoption of access rules, the Ombudsman still concluded that '[s]ince the judicial role of the Court is outside the Ombudsman's mandate, no formal recommendation can be made'; ibid., point C 2.

[62] Case OI/6/2013/KM.

[63] She noted that 'the effective tackling of these problems is best approached on a broader level than is possible within the confines of the present inquiry'; see ibid.

[64] Ibid. That Article provides that '[t]he institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents'.

[65] Ibid.

The Ombudsman opened another topical strategic inquiry, addressed to various EU institutions and bodies, on the protection of whistleblowers.[66] The Ombudsman expressed her disappointment that only the Commission and the European Court of Auditors had adopted such rules, but also noted that the remaining institutions and bodies since the commencement of the Ombudsman's inquiry 'intensified their discussions on this issue'.[67] Guidelines were therefore issued to the EU institutions and bodies, and following the Commission's model, the Ombudsman adopted her own rules on whistleblowing in order to 'lead by example'. The EU institutions should, in particular: implement rules that will 'enable whistleblowers to fulfil their duty to speak up if they become aware of serious misconduct or wrongdoing, thus serving the public interest, by fostering integrity, transparency, accountability, and ultimately legitimacy in and of the EU administration'; ensure that 'whistleblowers will be protected against negative action … and that their reporting will lead to a proper investigation and they will be informed of the outcome'; and within the confines of their 'legal and operational' powers, 'safeguard … the rights and interests of external whistleblowers', that is, persons who do not work within the EU institutions but are in contact with them.[68]

Another area where O'Reilly has made an important contribution is in the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations. As is well known, the negotiations have generated significant attention from the media, citizens, and civil society actors. The first inquiry concerned the Commission's efforts to render the negotiation process more transparent; this was acknowledged by the Ombudsman.[69] The Ombudsman received 315 responses to her public consultation, which is probably a record number of submissions, while the Commission received numerous requests for access to documents. The Ombudsman initially congratulated the Commission on its stance to publish, for the first time (generally negotiations of this nature and magnitude are characterised by confidentiality and secrecy), negotiating documents

[66] Case OI/1/2014/PMC. The institutions concerned were the European Parliament, the Commission, the Council, the Court, the European Court of Auditors, the European External Action Service, the European Economic and Social Committee, the Committee of the Regions, and the European Data Protection Supervisor. Under the revised Staff Regulations the aforementioned institutions and bodies were obliged to adopt such rules.

[67] Ibid., point 10.

[68] Ibid., points 2, 3, 10 and 13.

[69] Case OI/10/2014/RA.

concerning TTIP.[70] The Commission made an important point that doing so will also—inevitably, perhaps—have an impact on the Council's stance. Regarding the Commission's general intention not to publish US documents—no doubt a delicate matter—the Ombudsman pointed out that reliance on the 'international relations' exemption has to be substantiated and cannot just be assumed without evidence.[71] Further, for third party documents the Commission may, of course, consult with the USA, but it is also 'vital that the Commission inform the US of the importance of making, in particular, common negotiating texts available to the EU public before the TTIP agreement is finalised'; citizens have a right to know and participate in the EU decision-making world and this right 'deepens the democratic nature of the EU and its institutions'.[72] The Ombudsman provided the Commission with further recommendations, referring *inter alia* to: its *proactive* publication of documents (including records of meetings with business organisations, lobby groups or NGOs) and an up-to-date website concerning such documents; the equal treatment of applicants, in that the Commission should grant everyone access to those documents which have already been released to third parties; and build on its innovative approach on this occasion to enhance public participation, with a view to rendering such participation more balanced and transparent.[73]

Accordingly, the Ombudsman was successful in convincing the Council to release the EU negotiating mandate issued to the Commission concerning TTIP.[74] Although the text had been made available online, the Ombudsman eventually forced the Council to formally release the mandate; that was an achievement because the negotiating directives had been kept secret for over a year. Through the initiatives taken by the Italian presidency of the Council, which consulted the member states, the Council agreed by common accord to publish the negotiating mandate.[75] The exceptionally brief length of the inquiry (approximately three months), as well as the Council's eagerness to comply when in numerous instances it has been particularly reluctant to follow the Ombudsman's recommendations,

[70] Ibid., points 11–12.

[71] Ibid., points 15–20. The Ombudsman emphasised that it will have to be demonstrated that 'disclosure would *undermine* the public interest as regards international relations'.

[72] Ibid., point 22.

[73] Ibid., 'Conclusion'.

[74] Case OI/11/2014/RA.

[75] Ibid., 6–9.

may be explained by the Commission's stance on the matter, and the unprecedented interest in and scrutiny of TTIP.[76] That being said, the Ombudsman should be credited for identifying an area of broad and ongoing concern, and for urging the Council, via her proactive strategy (which involved a letter to the Italian presidency), to release this information.[77]

In May 2015, the Ombudsman opened an own-initiative inquiry on the transparency of 'trilogues' and sent letters to the Commission, the Council and the European Parliament.[78] The Ombudsman pointed out that 'trilogues' are 'an established feature of the ordinary legislative procedure', in that the text of legislation is negotiated and frequently agreed via these meetings. Thus, 'the increased use of trilogues has meant that around 80% of EU laws are now agreed at first reading', while an 'estimated 1500 trilogue meetings took place over the past five years'.[79] The Ombudsman inspected several files originating from Parliament, the Commission and the Council, and received input from civil society actors, too. She addressed several recommendations to the EU institutions: to publicise a 'trilogue calendar', as well as the co-legislators' positions on the Commission's proposal; to make available summary agendas before or shortly after the meetings; to provide lists of representatives who are 'politically responsible' for these trilogue meetings—among others. The institutions were granted time to respond to these recommendations. The Ombudsman has clearly touched upon a fairly opaque part of the legislative process. Simultaneously, the 'trilogues' investigation may be deemed by some (and certainly by the Council) to raise concerns about whether the Ombudsman is going beyond the confines of her mandate; this question is dealt with in Chap. 6.

Own-initiative inquiries focusing on transparency have also concerned areas where the link with democracy is arguably more tenuous. For example, a special report was submitted in 1999 when the Ombudsman investigated the insufficient degree of transparency as regards the Commission's

[76] See, for example, the 'Stop TTIP' citizens' initiative, which was refused registration by the Commission, but still generates support across Europe: https://stop-ttip.org

[77] The 'declassified' document can be found at: http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf

[78] Case OI/8/2015/JAS.

[79] Press release 9/2015, 'Ombudsman opens investigation to promote transparency of "trilogues"', available at: www.ombudsman.europa.eu/en/press/release.faces/en/59975/html.bookmark

recruitment procedures.[80] Particularly because many citizens might contact the EU institutions for the first time for employment purposes, it is critical for the latter to be responsive and transparent and generate a positive impression.[81] The Ombudsman insisted on the disclosure of the names of the members of the Selection Board to candidates. The Commission was willing to collaborate on this point, but was hesitant to accept access to the examination scripts, which led the Ombudsman to submit a special report. Parliament strongly supported the Ombudsman and, beyond endorsing the draft recommendation, it authorised an MEP to produce a report (adopted as a Resolution), in which all EU institutions were asked 'to respect the Ombudsman's recommendations'.[82] What is more, the EU institutions should 'inform candidates of the possibility of complaining to the Ombudsman', and should upload any vacancies on their websites. The Ombudsman viewed these developments 'as a 100% success'.[83] In this case the special report was particularly effective as even before the completion of the Bösch report, the Commission had agreed to amend its policy. The Ombudsman considered that this special report was the most successful to that date and optimistically added that it 'show[ed] the benefit of using such a possibility when other attempts to resolve a complaint are unsuccessful'.[84]

Complaint Handling: The Ombudsman's Reactive Contribution

Given the high number of complaints concerning access to documents and transparency registered by the office each year, it is only natural that the European Ombudsman has produced a considerable volume of work therein. Due to space limitations, it is not possible to cover all the complaints decided by the office in the area of openness and transparency. Inevitably, when 'significant' cases are selected, the reactive work of a

[80] Case 1004/97/(PD)GG. The case was closed before the launch of EPSO, which became operational on 1 January 2003.

[81] Ibid.

[82] Press release 20/2000, 'Bösch report a victory for recruitment candidates and for Ombudsman', available at: www.ombudsman.europa.eu/en/press/release.faces/en/224/html.bookmark

[83] Ibid.

[84] Ibid.

smaller scale runs the risk of being obscured.[85] The selection was based on criteria such as the importance of the case (evidenced by indicators like the use of a special report, draft recommendation, press release, media attention or the accentuation of the case in an Annual Report), its relevancy and timeliness (with preference to more recent than earlier cases), and representativeness (an effort was made to focus on many EU institutions, bodies, offices and agencies, and also on various matters that have emerged, particularly from the application of Regulation 1049, including its exemptions).[86]

A Sceptical Institution: The Council and Transparency

The Council has occasionally been fairly reluctant to comply with the Ombudsman's findings and very keen to raise concerns about the scope of the Ombudsman's mandate. Simply put, the EU 'ombudsprudence' concerning the Council verifies its reputation on transparency and access to documents, as will be explained below.

One of the well-known cases of the office was closed in 2005 and concerned access to the meetings of the Council when it legislates.[87] The case was decided before the entry into force of the Lisbon Treaty, which indeed provides that the Council should meet in public when it deliberates and votes on a draft legislative act. According to the complainants, 'the exclusion of the public only protected the governments in Member States from close scrutiny by the European public, and this had only negative effects for European integration and for citizens'.[88] The Council rejected these arguments, endorsing the view that the principle of openness had a general formulation; it was 'more an aim rather than an absolute rule'. More importantly, perhaps, the Council questioned the Ombudsman's competence to consider this matter. This issue is returned to in the next chapter because it raises broader issues on the scope of the Ombudsman's mandate; it is remembered that similar objections were raised by the Council

[85] In particular, this section does not include many inquiries where the Ombudsman, working with a responsive institution or body, achieved a smooth and efficient solution.

[86] For a *quantitative* (and generally positive) assessment of the Ombudsman's contribution in the area of transparency see Petia Kostadinova, 'Improving the transparency and accountability of EU institutions: The impact of the office of the European Ombudsman' (2015) 53 *Journal of Common Market Studies* 1077.

[87] Case: 2395/2003/GG.

[88] Ibid.

in the context of the aforementioned own-initiative inquiry on trilogues. The Ombudsman pointed out that the question did not concern the internal organisation of the Council but touched upon citizens' right to be informed.[89] The Council did not accept the draft recommendation and the Ombudsman submitted a special report to Parliament, and then closed the case. The Council did not convincingly explain—in the context of the Ombudsman's inquiry—why one of the two co-legislators in most areas of EU action should deliberate in secrecy.

Access to preparatory Council documents concerning justice and home affairs was the subject of another case submitted by an NGO.[90] The Council argued that preparatory documents can be divided into documents which represent 'a certain degree of "finality"'—usually official—and documents which represent 'preliminary reflections' on the deliberations inside the Council, personal or collective, usually not official.[91] The complainant responded: '[t]o argue that documents should not be recorded, archived, registered or be accessible to citizens when they were produced by a "single person" or a "very small group of persons" was an extremely dangerous idea in democracy'. The Ombudsman effectively subscribed to these views, and issued a draft recommendation.[92] Another instance of maladministration occurred further to the Council's negligence to file and register the documents: the Ombudsman shared the view that the additional administrative burden upon the Council services could not prevail over the principles of good administration.[93] Before the closure of the case the Regulation 1049 entered into force, and the Ombudsman later in the course of the inquiry referred to the Council's obligation to produce a registry under Article 11 of that Regulation. The Ombudsman eventually submitted a special report to Parliament, inviting the latter to adopt a Resolution. The Parliament was supportive of the Ombudsman's recommendations, and its Resolution also included information as to the steps taken by the Council to produce a registry.[94]

[89] Ibid., point 1.3.
[90] Case 917/2000/GG.
[91] Ibid.
[92] Ibid., points 1.1–1.7.
[93] Ibid., points 2.1–2.7.
[94] See European Parliament resolution on the Special Report from the European Ombudsman to the European Parliament in complaint 917/2000/GG (C5–0277/2002—2002/2135 (COS)). See also Case 916/2000/GG against the Council concerning access to the 'agendas of the "Senior Level Group" and the "EU-US Task Force"'.

Another special report against the Council was submitted in a case concerning *inter alia* access to documents held by the Council regarding the Commission's consultation on the reform of Regulation 1049, and documents stemming from the Council's legal department.[95] The documents were requested by a student for the purposes of his dissertation on public access to Council documents. The 'legal advice' exemption was the rationale behind the refusal. In its opinion, the Council (having briefly questioned the Ombudsman's competence to deal with a matter falling under the scope of legality, leading the Ombudsman to remind it that maladministration in the EU encompasses legality) argued that it was for the benefit of public interest that the legal department of the Council remain independent. Accordingly, allowing access entailed the danger that every document deriving from the legal department could be tested against the need for transparency, and this would deprive Article 4(2) of Regulation 1049 of its *effet utile*.[96] The Ombudsman accentuated the need to increase transparency in the context of the Council's legislative process, including when the latter considers and evaluates legal advice. That reasoning was not followed by the Council, and therefore the Ombudsman's efforts were unsuccessful on that occasion. The case was concluded before the first *Turco* judgment.

Occasionally, the Ombudsman's collaboration with the Council can be fruitful. That was the case in a complaint concerning the Council's refusal to grant access to an opinion of its Legal Service discussing the legal basis for a Regulation on genetically modified food and feed.[97] Importantly, the Ombudsman and the complainant were 'aided' by the CJEU's final decision in *Turco*.[98] The Council decided to accept the Ombudsman's friendly solution, not necessarily because it shared the Ombudsman's legal analysis, but because it considered that the time that had elapsed since its refusal rendered the exemption inapplicable.[99] This should be deemed as a successful outcome for the Ombudsman and the complainant; after all, various arguments are often advanced by the EU institutions when they feel—for their own reasons—that subscribing to the Ombudsman's views would somehow undermine their authority. Regarding the procedural requirements under Regulation 1049, the Ombudsman expressed satisfaction with the

[95] Case 1542/2000/(PB)(SM)IJH.
[96] Ibid., point 8 of the Council's opinion.
[97] Case 1170/2009/KM.
[98] Ibid., point 33–46.
[99] Ibid., point 49.

Council's statement that 'in the interest of good administration, it [was] ready to indicate the actual date on which the time limits for its replies expire, in relation to both initial and confirmatory applications'.[100] Another interesting procedural question emerged: if the institution requires an extension to respond to an application, is it good administrative practice to go beyond the letter of Regulation 1049 and inform complainants before its final decision *on the available judicial and extra-judicial remedies*, which would apply in a possible expiration of the time limit for the institution's reply? The Ombudsman clearly thought so, even though the wording of this provision refers to 'total or partial refusal' and thus—as the Council argued—presupposes a final decision on disclosure.[101] Nonetheless, the Ombudsman decided not to pursue this matter further.

Few cases to date have concerned the other (or perhaps the classic) intergovernmental institution, the European Council, which deliberates in secrecy.[102] A complaint was submitted by a civil society actor concerning meetings and correspondence with the Institute of International Finance held by the European Council.[103] The Ombudsman accepted the European Council's explanations that two pertinent documents fell under the scope of the exemption on the protection of the financial, monetary or economic policy of the EU or a member state (Greece, in that case). Besides, the Court has held that when Article 4(1)(a) of Regulation 1049 applies (which does not involve the balancing test), the institutions enjoy wide discretion.[104] No maladministration was found in this case.

To return to the Council, then, it may be wondered whether its stance to often dispute the Ombudsman's authority or recommendations is explainable. To begin with, different views exist on the desirability of transparency vis-à-vis the various functions that the Council performs.[105] While these

[100] Ibid., point 65. The Council's initial position was that 'citizens are in a position to calculate these dates themselves'.

[101] Ibid., point 63. See also Art 8 of Regulation 1049.

[102] See Article 4(3) of European Council Decision of 1 December 2009 adopting its Rules of Procedure, OJ L 315/51. According to Article 10(2) of the Rules, the provisions on access to documents applicable to the Council apply *mutatis mutandis* to European Council documents.

[103] Case 531/2012/MMN.

[104] The Ombudsman took into account the case-law of the Court, for example Case T-362/08, *IFAW Internationaler Tierschutz-Fonds* v *Commission*, EU:T:2011:6, para 104.

[105] See, for example, the views on transparency within the Council as a 'legislative body, or as an executive Cabinet, or as a vehicle for multinational negotiations' in the report House of Commons European Scrutiny Committee, 'Transparency of decision-making in the

views should be duly noted, it is observed that it is not unusual for an intergovernmental institution to be sceptical to transparency. Reliance on the so-called space to think finds fruitful ground in (largely) consensual, intergovernmental settings, in the name of 'decisional productivity'.[106] Latest manifestations of the Council's scepticism may also be attributable to the 'transparency fatigue' that Hillebrandt and colleagues are describing; after all, the pro-transparency camp within the Council has always been the minority.[107]

It is submitted that an additional perspective should be offered to the above valid claims: the Council is not the subject of many European Ombudsman complaints. In other words, the lack of inter-institutional cooperation does play a role. One may contrast this to the relations between the Ombudsman and the Commission; initially, the Commission was less accommodating to the Ombudsman but then progressively became more receptive to recommendations and interested in developing inter-institutional relations with the Ombudsman. Whether the development of firmer cooperation between the Ombudsman and the Council (while maintaining a healthy distance, of course) would persuade the latter to view the Ombudsman's recommendations in a more constructive way is a question that cannot be answered. The fact remains, however, that the Council is not used to external scrutiny.

The UK's 'Opt-Out' from the Charter

Moving to the Commission, a case of fundamental importance concerned access to documents regarding the UK's 'opt-out' from the Charter of Fundamental Rights,[108] submitted by an NGO. The Commission put forward a number of arguments in favour of non-disclosure: the protection

Council of the European Union' (2016), HC 128. But compare also the work of Hagemann and Franchino, arguing that the publication of legislative records does not impact on the Council's efficiency; see Sara Hagemann and Fabio Franchino, 'Transparency vs efficiency? A study of negotiations in the Council of the European Union' (2016) 17 *European Union Politics* 408.

[106] Maarten Hillebrandt and Stéphanie Novak, '"Integration without transparency"? Reliance on the space to think in the European Council and Council' (2016) 38 *Journal of European Integration* 527.

[107] Hillebrandt et al. (n 30).

[108] Case 2293/2008/(BB)(FOR)TN. This is not the place to discuss whether the UK has had an 'opt-out', and the term refers to the way the complaint was formulated, but see Protocol 30 of the Lisbon Treaty and Case C-411/10, *N.S.* v *Secretary of State for the Home*

of legal advice, the protection of the decision-making process, and the point that the disclosure would not eventually 'shed any light on the reasons and arguments' behind the UK's opt-out.[109] The complainant pointed to the broader implications of the case—'European citizens have the right to know the reasons why they will not have the same fundamental rights in the UK as they have in the other Member States'—and emphasized that the necessary 'balancing test' was missing, on the part of the Commission.[110] The Ombudsman shared these views and issued a draft recommendation, inviting the Commission to grant access. The Ombudsman referred to *Turco*, reiterating how access strengthens democracy.[111]

> [T]he above considerations [are] of the greatest importance in respect of documents forming the basis of the EU Treaties, which are sometimes referred to as 'primary legislation' or, indeed, as being a constitutional charter. … The Ombudsman considers that access to documents showing how the Lisbon Treaty came about is important for the citizens' understanding of the Treaty and enhances the legitimacy, vis-à-vis the citizens, not only of the Charter itself, but also of EU law and of the EU in general.[112]

Despite acknowledging that in some cases it could be 'harmful to the interests of the EU' to reveal documents related to negotiations, the Ombudsman opined that the negotiations in question related to the adoption of primary or constitutional EU law: '[a]s such, [they] should, correctly classified, be considered as forming part of the legislative process'.[113]

This case was not only delayed considerably (the investigation lasting more than four years), but the Ombudsman's hands were also effectively 'tied' in relation to the available modes of action while awaiting the Commission's response or when the latter rejected the requests for disclosure. The Ombudsman strongly criticised the Commission in various ways. Beyond expressing 'greatest regret', he added that the Commission 'disregard[ed], or deliberately refus[ed] to engage with the Ombudsman's arguments concerning the case-law of the EU Courts'.

Department, EU:C:2011:865, paras 116–122, where effectively the CJEU held that the UK is bound by the Charter.

[109] Case 2293/2008/(BB)(FOR)TN, points 4–11.

[110] Ibid., point 21.

[111] Ibid., point 31.

[112] Ibid., point 32.

[113] Ibid., point 51.

Thus, 'the Commission's position constitute[d] a substantive violation of the fundamental right of access to documents foreseen in Article 42 of the Charter'.[114] No special report was submitted in that case.[115] Shortly after the closure of the case by the Ombudsman, the Commission decided to publish these documents. Depending on one's perspective, the Commission's overall stance can be viewed either as a response to the Ombudsman's criticism, or a clear disregard for the Ombudsman's authority.

Further Cases Against the Commission

A complaint was submitted by an NGO against the Commission when the latter refused to grant access to three (out of eighteen) requested documents relating to environmental protection.[116] The Commission relied on the 'commercial interests' exemption of Regulation 1049. The Ombudsman inspected these letters to identify whether an overriding public interest of disclosure should prevail over the commercial protection of the specific company. He found that the refusal of the Commission constituted an instance of maladministration; thus, a draft recommendation was produced. The Commission submitted to the Ombudsman no less than six requests for an extension to respond, and afterwards attempted to reach an agreement with the third party (i.e. the company concerned). Finally, the Commission decided to partially allow the disclosure of these documents, creating edited versions. The Commission's willingness to notify and collaborate with the company as third party was not a justifiable reason to postpone the reply to the draft recommendation, according to the Ombudsman. The latter referred to Article 4(4) of Regulation 1049: the consultations with third parties, however lengthy, should not undermine in any event the deadline to respond to the Ombudsman's draft recommendations as enshrined in Article 228 TFEU, which is three months.[117] What is more, the Ombudsman referred to the Commission's obligation

[114] Ibid., point 77.

[115] The Ombudsman offered some explanations: 'the present case is of such importance that it would normally merit making a Special Report to the European Parliament. However, in order to comply with the express wish of the complainant to obtain a definitive decision from the Ombudsman regarding the matter, the Ombudsman closes the case with a critical remark which reflects the seriousness of this issue' (ibid., 78).

[116] Case 676/2008/RT.

[117] Ibid., point 35.

to cooperate in good faith with the Ombudsman.[118] The Ombudsman was very critical of the Commission's stance, essentially underlining that the latter was against the EU rule of law. He observed that, by adopting an 'uncooperative attitude', the Commission risked 'eroding citizens' trust in the Commission' and 'undermined the capacity of the European Ombudsman and the European Parliament adequately and effectively to supervise' it.[119] A special report was therefore submitted to the European Parliament. Beyond the limitations of the mandate (and notably the excessive delays in responses that the Ombudsman might encounter), the case also demonstrates how the Ombudsman's inquiries can raise issues which prompt the Ombudsman to invoke the need to protect the rule of law.

Another case highlighting the delays, on the part of the Commission, to respond to the Ombudsman's recommendations, was a complaint submitted by a German researcher further to the Commission's refusal to grant access to documents relating to the Commission's proposal for a new regulation on the Common Fisheries Policy. The Commission invoked the exception concerning the decision-making process under Article 4(3) of the Regulation.[120] The Ombudsman took the opportunity to underline the importance of transparency in a democracy and quoted at length and at various places the Opinion of Advocate General Cruz Villalón in *Access Info Europe*.[121] The complainant was eventually granted access to these documents, but after a laborious process of two-and-a-half years.[122] The Ombudsman also found that the Commission had not respected the time limits set out in Regulation 1049 and, importantly, he emphasised that good administration goes beyond the observance of the law. Thus, dealing with applications with *due diligence* means that the institutions should check carefully that all requested documents actually exist, and if they find that a specific document does not exist, they should inform applicants accordingly.[123]

[118] Ibid., point 38.

[119] Ibid., points 38–39.

[120] Case 2232/2011/FOR.

[121] According to that Opinion, while 'in administrative procedures, transparency serves the very specific purpose of ensuring that the authorities are subject to the rule of law, in the legislative procedure it serves the purpose of legitimising the law itself and with it the legal order as a whole'; see ibid., point 9 and Opinion of Advocate General Cruz Villalón in *Access Info Europe* (n 42), para 64.

[122] The complainant stressed that access should have been granted earlier; see ibid., point 45.

[123] Ibid., points 37–41.

The closure of duty-free shops in Bulgaria at the borders with Turkey and Serbia, further to a Commission's Interim Report—where suspicions of organised crime and corruption were expressed—was the subject of another inquiry.[124] The complainant claimed that the accusations in the Report were not sufficiently substantiated and required access to minutes, whereas the Commission responded that it had based its Report on general (yet often confidential) information, and that in any case the decision to close the shops had been made by the Bulgarian authorities and not by the Commission itself.[125] The Ombudsman referred to a combination of ECGAB Articles and past 'ombudsprudence' requiring 'the Commission […] to carry out its tasks […] in a manner which is proportionate, impartial, objective and diligent'.[126] After inspecting confidential documents, he opined that, whereas the Commission could be entitled to have 'concerns', these concerns could not justify the public statements made by the Commission.[127] Regarding access to the minutes of the pertinent meeting, the Ombudsman did not accept the Commission's arguments on the protection of the internal decision-making process.[128] The Ombudsman cited the 'fundamental right of access' under Article 42 of the Charter and relevant principles from the Court's case-law on the strict interpretation of the exemptions featuring in Regulation 1049. The Ombudsman observed that the Commission had not demonstrated the existence of a 'concrete risk' and added that, in fact, the risk *was* rather hypothetical.[129] A draft recommendation (proposing access) was addressed to the Commission, which was accepted, as the Commission eventually decided to grant access to these minutes, to the complainant's satisfaction. The Commission appeared convinced that the time that had elapsed was sufficient to redress its reservations, but underlined that future requests on the same matter would be dealt with on a case by case basis.[130] Via a further remark, the Commission was invited to observe the principles of good administration in the context of public reports under the 'Cooperation and Verification Mechanism', and advise its members of staff to publish accurate and defendable information.

[124] Case 715/2009(VIK)ANA.
[125] Ibid., points 30–38.
[126] Ibid., point 49.
[127] Ibid., points 45–60.
[128] Ibid., point 98.
[129] Ibid., point 99.
[130] Ibid., point 107.

What if the complainant is satisfied with the solution proposed by the institution, as opposed to the Ombudsman's views? In such cases the balance between the promotion of the general interest and providing individual redress is brought to the fore. A good way for the Ombudsman to handle such dilemmas is by issuing further remarks and by relying on the 'follow-up' process, that is, an annual review conducted by the office to monitor compliance with further and critical remarks (this issue is returned to in the next chapter). A complainant requested access to documents held by the European Regulators Group (composed of national and Commission authorities, aiming at the coordination of the internal market for electronic communications networks and services).[131] The Commission denied access and a number of exemptions were raised, most notably those referring to 'international relations' and 'commercial interests'; Article 4(5) of Regulation 1049 was also invoked. The Ombudsman relied on established case-law to explain that the institutions (even when the mandatory exemptions apply, and therefore, in principle, their discretion is broader) should substantiate their decision. Comprehensive evidence should be provided to enable review by the Ombudsman. The Ombudsman proposed a friendly solution and the Commission accepted to disclose all but one document after consultations with member states; the complainant accepted the friendly solution, not least because the requested documents had already been made available online.[132] However, the Ombudsman was not entirely satisfied with the Commission's response in relation to the delicate matter of documents originating from member states.[133] Using a further remark and relying on the follow-up process, the Ombudsman invited the Commission to clarify its position on the scope of application of Article 4(5) of the Regulation.

Elsewhere, in a complaint submitted by an environmental organisation concerning documents originating from Spain, the Ombudsman reminded the Commission that in *Sweden* v *Commission*,[134] the Court did not grant the member state concerned the right to veto disclosure.[135] Regarding internal Commission documents, the Ombudsman observed that the latter had failed to perform 'properly' the balancing test, which

[131] Case 488/2007/PB.
[132] Ibid., points 78–80.
[133] Ibid., points 83–86.
[134] See above n 40.
[135] Case 355/2007/(TN)FOR, in particular points 21–27.

pointed 'heavily' towards transparency.[136] The Ombudsman was unsuccessful with his friendly solution, and then an extensive exchange of legal arguments followed. After the Ombudsman's draft recommendation, the Commission agreed to disclose the internal documents, but did not agree to disclose the documents originating from Spain, which was the pressing issue on that occasion. Thus, the Ombudsman closed the case with the subsequent statement (on the documents originating from Spain):

> The Ombudsman expects that the Commission will take this critical remark into account in the context of its ongoing dialogue with the Spanish authorities. In these circumstances, the Ombudsman considers that *it would not be useful to make a special report to the European Parliament*.
>
> The Ombudsman will also consider launching an own-initiative inquiry with the Commission, the Council and the Parliament as regards how, in similar cases, these institutions have carried out the dialogue with Member States in relation to the application of Regulation 1049/2001 to documents originating from Member States and in the possession of the institution.[137]

The explicit intention to open an own-initiative inquiry on this matter certainly constitutes an additional avenue to exercise pressure. That being said, the decision not to pursue the case further by approaching Parliament without any justification, while certainly falling under the broad discretionary powers of the Ombudsman, reveals, nonetheless, that the Ombudsman's available instruments might not always be effective.

The documents concerning the minutes of a meeting between the Trade Commissioner and the organisation BusinessEurope was the subject of another complaint, submitted by an NGO.[138] The complainant raised the point that access was justified as EU citizens could not be discriminated vis-à-vis industry lobbyists.[139] The Commission had deleted certain parts of the document, raising the 'international relations' exemption of Regulation 1049. The Ombudsman inspected the document and found that generally, the Commission's view was justified, since the

[136] Ibid., point 29.

[137] Ibid., points 90–91 (emphasis added). On documents originating from member states see also, among others, Case 1472/2011/MMN, where the *Sweden* v *Commission* case-law was relied on by the Ombudsman.

[138] Case 1633/2008/DK.

[139] Ibid., point 9.

negotiations were ongoing. Still, one of the deletions contained, according to the Commission, 'information', thus falling outside the scope of the Regulation, which only covered (again, according to the Commission) 'documents'.[140] The Ombudsman did not, of course, share this view, effectively suggesting that the institutions 'cannot decide that a certain part of an existing document constitutes a "sub-document" or another document because it contains a different kind or type of information'.[141] Further, the institutions must not give the impression that they regulate access in an arbitrary and discriminatory way as this is, in addition, contrary to principles of good administration.[142] The Ombudsman proposed a friendly solution suggesting disclosure which was largely (albeit belatedly, as the complainant observed) accepted.

Another request for access concerned documents related to the entry of Greece into the Eurozone.[143] The Commission (owing to the volume of the requested documents) agreed with the complainant to extend the deadline. After the Commission's disregard of the agreed deadline and its failure to respond to him, the complainant turned to the Ombudsman. One of the difficulties that the Commission underlined was that these documents were kept across several files at different DGs. Despite this, in January 2014 the complainant was granted full access to these documents, and the Ombudsman commended the Commission on its stance. The Ombudsman accepted the Commission's justifications, pertaining to the age of documents (and that they were not kept in electronic format), and the amount of research and coordination involved in the task.[144] Thus, the Ombudsman's intervention speeded up the process and reduced the already significant delay in the disclosure of documents. The case also demonstrates the occasional pressure that openness may put on the Commission services, and, indeed, the Ombudsman acknowledged this in her investigation.

After a lengthy and eventually unsuccessful exchange of arguments with the Commission on the latter's obligation to launch a *comprehensive* registry on access to documents, as required by Article 11 of Regulation

[140] Ibid., points 22–24.

[141] Ibid., point 24 and 'further remark'. Compare, more generally, the Court's case-law on partial disclosure, and notably Case C-353/99 P, *Council* v *Hautala*, EU:C:2001:661.

[142] Case 1633/2008/DK, points 29–30.

[143] Case 705/2012/BEH.

[144] Ibid., point 34.

1049, the Ombudsman in an earlier case issued a draft recommendation which the Commission did not accept.[145] The Commission argued that, beyond falling outside its legal obligations, it would also be impractical for it to register all documents. A special report had already been submitted to Parliament on the same issue, and therefore the case was closed with a critical remark.[146]

A Delicate Balance: Supervising the European Parliament

Nothing prevents the Ombudsman from submitting a special report to the European Parliament against the latter. Instances of this sort are, however, infrequent. Such a report was submitted in a case concerning a candidate who had failed to pass a competition organised by Parliament and then requested the names of the successful candidates.[147] According to Parliament's competition rules, only successful candidates benefitted from a right to access the reserve list. The Ombudsman stressed that he was unaware of any rule preventing Parliament from disclosing the names, and insisted that in future competitions, this practice should be revised.[148] Effectively, the Ombudsman argued that the principle of openness as enshrined in the Treaties should apply to these competitions[149] (yet as already noted, in such cases the link with democracy is probably more tenuous). Two months after the submission of the special report, the President of the European Parliament decided to accept the Ombudsman's recommendations, and the complainant was informed accordingly.

The clash between access to documents and data protection was illustrated in a complaint concerning the right of the public to be informed about the allowances of MEPs; the case led to a draft recommendation proposed to Parliament in 2008.[150] The Ombudsman decided to consult the EDPS, acknowledging that 'a balance [had to] be struck between openness and the right to privacy'. The EDPS initially highlighted that both rights are of a 'fundamental nature', but considered that the disclosure of these allowances was justified, because the public should be

[145] Case 3208/2006/GG.
[146] Ibid., points 50–51.
[147] Case 341/2001/(BB)IJH.
[148] Ibid., points 3–7.
[149] Ibid., point 4 of the Ombudsman's draft recommendation.
[150] Case 3643/2005/(GK)WP.

informed about how public funds are allocated. The assessment was different as regards the MEPs' assistants: their names had to be removed. Parliament decided to only partially accept the draft recommendation. The Ombudsman clarified that:

> [T]he issues raised by the complainant … could, in theory, be interpreted from three main perspectives, that is to say, in relation to the principles of transparency, financial accountability and political responsibility. … As regards [financial accountability], the manner in which MEPs use public funds raises the issue whether the relevant expenditure has been properly accounted for. The Ombudsman considers that this examination constitutes the primary responsibility of Parliament's internal budgetary control authorities and of the Court of Auditors. As regards the principle of political responsibility, the Ombudsman takes the view that this matter falls within the exclusive competence of Parliament and its MEPs. It is therefore important to stress at the outset that the present inquiry exclusively concerns the issue whether, in the present case, Parliament has respected the principle of transparency with regard to public access to the data in question.[151]

The Ombudsman cited the first *Bavarian Lager* case[152] in his conclusion (as already mentioned, the CJEU eventually set aside the decision of the General Court). Still, the complaint raised important issues pertaining to the balance between data protection and access to documents, the close working relations with the EDPS and, importantly, the question to identify when political responsibility should outweigh the concept of maladministration. This critical question is returned to in the next chapter, where a case raising similar problems (on the MEPs' pension scheme[153]) is discussed. Both cases demonstrate that the otherwise supportive European Parliament may be a challenging institution to work with when it comes to complaints against it. After all, such complaints are examined by the EU body that Parliament elects. That being said, it is clear that the situation (data) of MEPs is not necessarily comparable to the data requested in *Bavarian Lager*.[154]

[151] Ibid., points 1.9–1.10.

[152] Case T-194/04, *Bavarian Lager* v *Commission*, EU:T:2007:334.

[153] Case 655/2006/(SAB)ID.

[154] More recently, journalists have taken the European Parliament to Court on this matter, see: www.euractiv.com/section/public-affairs/news/29-journalists-take-european-parliament-to-court/. Also, the CJEU has acknowledged that 'the role played by the data subject in

The financing of a European Parliament building was the subject matter of a draft recommendation against Parliament on the grounds of refusal to grant access to documents.[155] The case raised further issues on the interpretation and application of procurement legislation and the Financial Regulation, but of relevance here was Parliament's claim on the protection of the 'commercial interests of the banks'. The Ombudsman underlined that Parliament's claim was presented in too general terms, was against the overall spirit of Regulation 1049 and, of course, the Court's case-law.[156] The Ombudsman's draft recommendations were satisfactorily met by Parliament in this case, and the Ombudsman was eventually successful after an inquiry which lasted three-and-a half years.

Pushing for Further Transparency Vis-à-Vis a Completely Independent Institution: The European Central Bank

The Ombudsman can investigate complaints against the European Central Bank (ECB) in the area of transparency as well. A leading case concerned the ECB's refusal to grant access to a letter that it had sent to the Irish Finance Minister in 2010.[157] The Ombudsman inspected the document and found reasonable the explanations presented to the complainant at the time: the disclosure could undermine 'the integrity of Ireland's monetary policy and the stability of the Irish financial system'.[158] However, upon the completion of the investigation the Ombudsman considered that sufficient time had elapsed, and that the 'prevailing monetary and economic conditions' at the time of the conclusion of the investigation suggested that the ECB could disclose the document: she therefore made a relevant proposal for a friendly solution.[159] The initial response of the ECB's Governing Council was to refuse disclosure, arguing that 'even though the prospects of the Irish economy [had] … improved considerably, financial stability risks were still present, and the situation continued

public life' should be duly considered for the balancing exercise in the so-called right to be forgotten; see *Google Spain* (n 39) para 97.

[155] Case 793/2007/(WP)BEH.

[156] Ibid., points 83–88.

[157] Case 1703/2012/CK.

[158] Ibid., point 3.

[159] Ibid., point 4.

to require close monitoring'.[160] This prompted a very critical press release by the Ombudsman:

> I regret that the Governing Council of the ECB has wasted an opportunity to apply the principle that, in a democracy, transparency should be the rule and secrecy the exception. At a time when so many people have been, and are, suffering as a result of austerity arising from the economic crisis, the very least a citizen can expect is openness and transparency from those who make decisions that directly impact on their lives and on the lives of their families.[161]

However, a few months later the ECB decided to disclose this letter, and the Ombudsman expressed her satisfaction, while also pointing out that the letter 'should clearly have been released much earlier', and that failing to do so 'provoked intense speculation about its contents'.[162]

Medical Data: Complaints Concerning the European Medicines Agency

The European Medicines Agency (EMA) has been subject to significant scrutiny by the Ombudsman, who has often been able to open up its practices. One complaint was submitted by researchers who were refused access to clinical reports related to two anti-obesity drugs on the grounds that this could undermine the protection of commercial interests.[163] In this case the EMA had applied the overriding public interest test, relying 'on its task of informing healthcare professionals and patients'; however, the Ombudsman stressed that such a test presupposes a convincing exposition of how the commercial interests were affected in the first place, which was missing.[164] Moreover, while accepting that in very exceptional cases and further to the Court's jurisprudence 'an excessive administrative burden' could be a reason to derogate from disclosure, the Ombudsman found that in this case the EMA did not convincingly explain why editing the

[160] Ibid., point 5.

[161] Press release 7/2014, 'Ombudsman: Governing Council of the ECB has wasted an opportunity for openness and transparency', available at: www.ombudsman.europa.eu/en/press/release.faces/en/53710/html.bookmark

[162] Press release 22/2014, 'Ombudsman welcomes ECB decision to release "Irish ECB letter"', available at: www.ombudsman.europa.eu/en/press/release.faces/en/58279/html.bookmark

[163] Case 2560/2007/BEH, point 3.

[164] Ibid., points 35–36.

documents would constitute such a burden.[165] Thus, given that researchers were 'motivated by purely scientific concerns', the Ombudsman invited EMA to grant access. EMA indeed accepted the draft recommendation and committed itself to disclosing the documents; the Ombudsman 'applaud[ed]' this stance.[166]

In another important case the subject of inquiry was a refusal, on the part of EMA, to grant access to documents related to suspected serious adverse reactions of an anti-acne drug.[167] Was data contained in the database administered by the Agency (entitled EudraVigilance) 'documents', within the meaning of Regulation 1049? The Ombudsman highlighted the broad definition of document enshrined in Article 3 of the Regulation, and unequivocally concluded that the requested data fell within its scope.[168] The Ombudsman addressed a draft recommendation to the Agency, which the latter accepted through a laborious process that lasted three-and-a-half years. The Ombudsman accepted (taking also into account the Opinion of the EDPS) that certain data had to be deleted to disable a possible identification of individuals.[169] The Agency committed itself to improving its proactive policy on public access, and the Ombudsman endorsed that decision.[170] It has been observed that 'by opening up access to clinical study reports, the Ombudsman's intervention has created an important precedent, which essentially allows for the contestation of science, by making it possible for third parties to independently verify the science at the basis of an agency's decisions and opinions'.[171] More recently, however, the Ombudsman issued a press release expressing significant concerns about the EMA's intended forthcoming policy on clinical trial data transparency, which marked a shift from the abovementioned accommodating stance.[172]

[165] Ibid., point 37.

[166] Ibid., points 89–94.

[167] Case 2493/2008/(BB)(TS)FOR.

[168] Ibid., points 77–84.

[169] Ibid., points 173–179. This was in accordance with the data protection Regulation, as interpreted by the Court.

[170] See also Press release 22/2010, 'Ombudsman applauds European Medicines Agency's adoption of new transparency policy', available at: www.ombudsman.europa.eu/en/press/release.faces/en/5498/html.bookmark

[171] Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) 235.

[172] Press release 13/2014, 'Ombudsman concerned about change of policy at Medicines Agency as regards clinical trial data transparency', available at: www.ombudsman.europa.eu/en/press/release.faces/en/54348/html.bookmark

Further, in the context of another inquiry, the Ombudsman invited the EMA to create a 'comprehensive publicly accessible register of documents'.[173] Elsewhere, the Ombudsman found that, when the EMA agreed with a pharmaceutical company an out of court settlement which led to the release of *redacted versions* of the reports, some of the redactions were not justified.[174] The Ombudsman closed the case with a number of 'suggestions for improvement' addressed to the Agency.

Other Bodies, Offices and Agencies

As mentioned in earlier chapters, even when deciding to open an investigation, the Ombudsman will not always take the complainant's side. In the context of a complaint against OLAF concerning the disclosure of OLAF's mission reports in Bangladesh, the Ombudsman found that the 'general presumptions' case-law could apply to OLAF investigations as well. The Court had not provided an answer on this very question, but of course nothing prevents the Ombudsman from interpreting Union law on the basis of existing case-law. Thus, OLAF's decision not to release these documents on the basis of the 'investigations, inspections and audit' exception of Regulation 1049 was reasonable, and there was no overriding public interest favouring disclosure.[175]

The Ombudsman has successfully used the instrument of draft recommendation to convince the European Aviation Safety Agency (EASA) to release documents[176] or minutes of meetings.[177] The Ombudsman was equally successful in a case concerning access to the list of participants of a hearing organised by the Committee of European Banking Supervisors (CEBS) in October 2010, which has become since 2011 the European Banking Authority (EBA).[178] The EBA—which responded to this complaint—demonstrated a commitment to transparency and openness and, among other initiatives, it disclosed the participants' names of

[173] Case 1877/2010/FOR, in particular points 50–51 and 'further remark'.

[174] Case OI/3/2014/FOR. The case was technically an own-initiative inquiry but is exceptionally discussed here in order to provide a fuller picture of the Ombudsman contribution to transparency in medical data.

[175] Case 2048/2011/OV.

[176] Case 1174/2011/MMN

[177] Case 726/2012/FOR.

[178] Case 2497/2010/FOR.

that CEBS meeting, to the complainant's satisfaction.[179] The Ombudsman took this opportunity to emphasise that transparency is crucial 'in terms of generating legitimacy and trust in banking institutions'.[180]

When the Court is not acting in its judicial role, it can be subject to an investigation by the Ombudsman. An interesting complaint concerned a request for information on the composition of the chambers, and the available remedies in case the applicant thinks that one of the judges is biased.[181] The CJEU underlined that 'each court has its own rules on the composition of chambers and, as regards the Court itself, … parties are informed of the composition of the chamber hearing their case after that case has been dealt with'.[182] The Ombudsman opined that Article 22 ECGAB (requests for information) cannot be interpreted as imposing a duty, upon the EU institutions, to provide individual legal advice (in this case on the composition of chambers). Still, the Ombudsman addressed a friendly solution to the Court inviting it to provide further information on the procedural rules applicable to suspected bias, and the available remedies. The Court responded that there is no provision under EU law concerning an allegation of bias within the Court, and therefore the general rules on remedies applied.[183] The complainant thanked the Court for its explanations. In its response to the Ombudsman, the CJEU interpreted the Ombudsman's Statute, pointing out that the matter under investigation concerned the *judicial* and not the *administrative* activity of the Court, and thus the Ombudsman should not assess the quality of the Court's replies to the complainant.[184] The Ombudsman cautiously closed the inquiry by finding that the Court had accepted his friendly solution: '[t]he Ombudsman welcomes and applauds the fact that, as well as expressing doubts concerning the Ombudsman's mandate, the Court adopted a constructive and helpful approach in addressing the substance of his friendly solution proposal'.[185]

[179] Ibid., points 22–25.
[180] Ibid., point 31.
[181] Case 2252/2011/BEH.
[182] Ibid., point 43.
[183] Ibid., points 56–57.
[184] Ibid., points 61–62.
[185] Ibid., point 64. See more generally on transparency and openness within the Court. Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a taboo' (2014) 51 *Common Market Law Review* 97.

Concluding Remarks

This chapter demonstrated that the Ombudsman is one of the most prominent actors at the EU level promoting the principles of openness and transparency. The Ombudsman meticulously engages with almost all of the contentious aspects of Regulation 1049, including its exemptions and the application of the overriding public interest test. The procedural requirements of the Regulation is another important area. A broad definition of document has been adopted, matched by a narrow one as to the exemptions. Moreover, especially the current Ombudsman is increasingly using her proactive role to advance transparency (see, e.g. the TTIP and trilogues cases), including but also going beyond access to documents, notably through own-initiative inquiries and also via a significant investment in communication and awareness-raising. This includes the presentation of the office-holder as the 'guardian of transparency' and the reference to transparency in the mission statement. The Ombudsman pushes the EU institutions to proactively release documents or adopt relevant policies (see, e.g. the whistleblowers investigation). What is more, the Ombudsman has been very active in the debates concerning the revision of Regulation 1049.

It would be an omission to overlook the role of NGOs and the initiatives they have triggered in the area of transparency. As noted earlier, these NGOs beyond seeking redress in a specific case also 'complain to promote general interests'.[186] Several complaints on transparency have been lodged by NGOs, and the Ombudsman's regular interaction with civil society is frequently the source of inspiration behind an own-initiative inquiry. Further, those actors frequently contribute to calls launched by the Ombudsman in the context of strategic inquiries. The role of NGOs vis-à-vis transparency is often acknowledged by the European Ombudsman.[187]

Despite the above, in certain significant cases the institutions hesitate to implement the Ombudsman's recommendations or extend (with their belated responses) the length of the inquiry. When it takes years for the

[186] Peter Bonnor, 'When EU civil society complains: civil society organisations and ombudsmanship at the European level' in Stijn Smismans (ed.) *Civil Society and Legitimate European Governance* (Edward Elgar 2006) 141.

[187] See Press release 1/2008, 'Ombudsman: NGOs can help EU institutions do their job better', available at: www.ombudsman.europa.eu/en/press/release.faces/en/236/html.bookmark

Ombudsman's investigation to be concluded, one of the advantages of the extra-judicial avenue (speed and, perhaps related to this, flexibility) is lost. These remarks are relevant particularly with regard to the Ombudsman's *reactive* work, namely responding to complaints. Moreover, the Council is particularly sceptical when it comes to transparency inquiries. Concerning the Commission, its current President appears to endorse a more constructive approach than his predecessor, but of course the Ombudsman's inter-institutional relationship with the Junker Commission will have to be assessed in due course. In any event, whereas non-enforceability necessitates good working relations with the institutions, a 'healthy distance' is arguably a prerequisite for the Ombudsman to maintain his or her independence from the administration. O'Reilly appears to be successful in striking that balance with the Commission.

Here again, the Ombudsman's method generally mirrors the approach taken by the CJEU. The Ombudsman relies especially on the landmark cases of the Court to push for compliance. In this regard, the principles from, as well as the outcome in the *Turco* judgment in particular, have enabled the Ombudsman to frame her or his inquiries in the context of the EU's broader aims to increase its legitimacy, accountability and participation through transparency. Likewise, the *Sweden* v *Commission* case-law is used when it comes to documents originating from member states. In addition, it should be emphasised that the Ombudsman invokes the principles of good administration to advise institutions to be more citizen-friendly and responsive (e.g. to advise applicants on the time limits that they should expect to hear from them or to promptly notify them when a requested document does not exist) than what is required by the Regulation. Thus, the Ombudsman's work complements that of the Court, and often—but not always—complainants (including civil society organisations) are indeed aware of the limitations, but also the advantages of the Ombudsman when deciding to submit a complaint.

Overall, within the confines of the existing mandate, there is no doubt that the Ombudsman has contributed to rendering the EU administration more transparent. With the extensive use of own-initiative inquiries and other proactive efforts, the Ombudsman has certainly been able to scrutinise areas where the Court would not be able to go. Thus, when the Ombudsman's efforts are successful, citizens are able to be better informed about decision-making in the EU and, consequently, to hold

the EU administration to account. As explained in earlier chapters,[188] the more EU governance becomes opaque, the more difficult it becomes for citizens to participate. Simultaneously, given that transparency and openness form part of the requirements of good governance, a successful investigation carried out by the Ombudsman can a make a contribution to improving the standards of the EU administration. By contrast, when the Ombudsman is unsuccessful—and this chapter has shown that the Ombudsman's contribution to transparency cannot merely be assumed but rather assessed on a case-by-case basis—this can obviously have repercussions for citizens' ability to scrutinise the EU institutions. Finally, two of the cases discussed in this chapter (on the meetings of the Council when acting in its legislative capacity, and the transparency of trilogues) raise the interesting question as to whether the Ombudsman should be dealing with the *process* leading to the adoption of legislation.[189]

Having discussed the Ombudsman's method and her or his work in a particular field, transparency, it is now appropriate to critically revisit the existing mandate of the European Ombudsman, including its limitations as discussed throughout the earlier chapters.

[188] Compare the relevant discussion in Chaps. 2–4.
[189] See the relevant discussion in Chap. 6.

CHAPTER 6

Revisiting the Mandate and Practice of the European Ombudsman

Introductory Remarks

One of the purposes of this book is to critically revisit the existing limitations of the European Ombudsman's mandate and, where appropriate, to explore proposals for improvement. Given that previous chapters examined the Ombudsman's work and 'ombudsprudence' in detail, this is the right moment to provide such a normative perspective.

It is acknowledged, however, that this path of enquiry is rather challenging, for many reasons. First, ombudsman institutions differ enormously, including across the EU member states. Certain institutions focus primarily on human rights, others on a non-'legalistic' concept of maladministration. Some offices have only recently been established. Germany does not have a public sector ombudsman, while Italy has only regional offices. Further, administrative law obviously differs across member states. For example, what discretion means under UK public law can be different from the German understanding of discretion.[1] Likewise, the traditions of public administration in Europe, including the features of public

[1] See, for example, Roberto Caranta, 'On discretion', in Sacha Prechal and Bert van Roermund (eds) *The coherence of EU Law: The search for unity in divergent concepts* (Oxford University Press 2008) 187 *et seq.*

N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, European Administrative Governance,
DOI 10.1057/978-1-137-57395-7_6

service, vary as well.[2] Thus, the EU Ombudsman cannot be the equivalent of any specific national ombudsman, in terms of institutional design. The Ombudsman's mandate is presently defined by Article 228 TFEU and the Statute. Similar considerations underpin the design of other EU institutions, some of which have quite particular powers (the Commission being a typical example). Accordingly, it was claimed in previous chapters that the EU version of ombudsman may not be classified—at least without serious consideration of counter-arguments—among the parliamentary ombudsman offices. This position has no doubt implications for the Ombudsman's inter-institutional relations with Parliament, as will be shown below.

Second, the office of ombudsman cannot fit within the traditional separation of powers, if, of course, such rigid tripartite model presently exists: partly quasi-judicial, partly quasi-political (in the sense that it relies on parliamentary support), perhaps occasionally performing certain audit functions as well, it is extremely difficult to find universal agreement on which specific function of the ombudsman should be strengthened or weakened. Third, with regard to the EU multi-level system of governance, questions of how power *is* shared (e.g. formally or informally; domestically or centrally) or *should be* shared are apt to generate rather inconclusive debates. Thus, this book does not argue that the claims and proposals discussed in this chapter represent the ultimate solution for the European Ombudsman; rather, its purpose is to address the various dimensions, parameters or challenges of the mandate and invite further discussion and reflection on the way forward.

Further, to avoid the potential destabilisation of the efficiency agenda that is currently in place, it is accepted that some of these proposals may require *additional resources* for the office in Strasbourg or in Brussels. It is, of course, underlined that the post-crisis EU may not select to invest extensively in the Ombudsman's office. Naturally, resource constraints are being discussed within the office—if anything, the new administrative set-up (see Chap. 2) reflects this. However, the case can be made that some investment in resources could increase the Ombudsman's potential as a means to improve democracy in the EU.[3]

[2] See a comparative analysis in Sabine Kulhmann and Hellmut Wollmann, *Introduction to comparative public administration: Administrative systems and reforms in Europe* (Edward Elgar 2014) Chap. 3.

[3] Simultaneously, it is accepted that decisions of this sort often follow a cost/benefit analysis which cannot take place here.

Revisiting the status quo quite inevitably brings about diverse reactions: actors often tend to resist amendments, including (or especially) those concerning accountability mechanisms supervising their activities. While this is understandable, the proposals discussed here are informed by a number of considerations: (i) experiences from domestic ombudsman institutions can be a source of inspiration, in that they define the broadest limits of an ombudsman's mandate[4]; (ii) the aim is to propose pragmatic reforms, taking into due consideration the EU's institutional framework; (iii) fundamental principles of EU constitutional law are considered—on this latter point, of particular relevance are the principles of conferral[5] and subsidiarity.[6] In addition, it is pertinent to examine the post-Lisbon 'provisions on the democratic principles',[7] and consider how the Ombudsman has relied on these provisions, as well as whether new areas can be investigated by the Ombudsman on the basis of the principles contained therein.

These concerns or preconditions should not prevent an account from examining cautious proposals aiming at enabling the Ombudsman to further contribute to the EU's democratisation, along the lines or within the confines of the discussion in earlier chapters, and especially in Chap. 3. It is noted, in this respect, that the office is presently exploring ways to further increase its impact and visibility, including proposals to reform the European Network of Ombudsmen (ENO). Simultaneously, it is emphasised that this chapter does not make a generalised claim that any of the proposals presented here should apply to other ombudsman institutions, be they regional, national or international.

The chapter revisits several dimensions of the Ombudsman's mandate: the available instruments when maladministration is identified; the geographical scope of the mandate; the distinction between political and administrative matters; the Ombudsman's contribution to political participation and communication with citizens; the possibility for the Ombudsman to be included among the EU institutions under Article 13 TEU. To provide some background to the discussion that follows, the next section discusses the processes leading to the adoption of the 'Strategies for the mandate', as well as the latest 'Annual Management Plan', i.e. the one for 2016.

[4] On this point see the discussion in Chap. 2.
[5] See Art 5(2) TEU.
[6] See Art 5(3) TEU.
[7] See Arts 9–12 TEU.

Background: The 'Strategies for the Mandate' and the Annual Management Plan 2016

In 2010, before the publication of the first Strategy, covering the period between 2010 and 2014, Diamandouros conducted consultations which involved submissions from the various Units of the office and views/surveys with stakeholders.[8] In light of the aims of this chapter, the discussion here will mainly focus on the *suggestions for improvement* appearing therein.

As regards the internal consultation, one of the issues raised was that submitting a case to the Ombudsman may negatively impact the complainant's relations with the institution complained against; the use of own-initiative inquiries and the possibility of 'collective complaints' were suggested as possible responses.[9] On the effectiveness of the office, it was pointed out that compliance was 'not quite as high as would be desirable, and—perhaps more importantly—the Administration [had] not developed a clear and coherent policy regarding its response' to the Ombudsman's recommendations. It was therefore proposed that the Ombudsman should encourage institutions to develop a more coherent policy regarding draft recommendations or even friendly solutions. The aim should be to develop such an institutional understanding of the role of the Ombudsman so that the EU institutions be forced to 'implement' the draft recommendation, 'even if [they] disagree', because 'the ombudsman is the ombudsman'. Another Unit commented *inter alia* on the Ombudsman's attitude towards the institutions: the European Ombudsman should become 'more ambitious and more systemic' and 'give the impression of an institution more independent and critical than perceived by citizens'. What is more, the idea of peer review with national or regional ombudsmen was considered. Another account focused on the length of inquiries: the Ombudsman could draw fruitful lessons from national ombudsmen or members of the ENO. Another proposal was the possibility for the European Ombudsman to intervene before the Court when appropriate, notably in cases related to the right to good administration and access to documents. The possibility to launch a 'suggestion box for improvements in the EU administration'

[8] The author was granted access to these documents during a research visit in February 2012. All the submissions have been anonymised. Translation of French contributions, when quoted, is by the author.

[9] This problem also stems from the results of a public consultation conducted by the Ombudsman; see Case OI/1/2009/GG, point 34 (16).

on the website was also mentioned. Elsewhere, the development of courses on good administration targeted at EU administrators was recommended. By highlighting the importance of education, the aim would be to promote a culture of contacting the ombudsman similar to Nordic countries.

Turning to the views of stakeholders before the first Strategy (expressed during various meetings or events with members of staff of the Ombudsman's office), the expectations of the Ombudsman's office were, naturally, quite high. Proposals included the following: the importance of ensuring the Ombudsman's independence from Parliament; addressing potential negative impact via the use of own-initiative inquiries or collective complaints; work with a view to supporting the establishment of an 'inter-institutional agreement for civil dialogue at EU level'. Proposals submitted by stakeholders referring to the *other* EU institutions included the following: the consultations launched by the Commission were not sufficiently transparent, the deadlines were short and the input of some organisations was not always taken into account; expert groups appointed by the Commission did not necessarily reflect a 'diversity of viewpoints'; the lack of transparency in decision-making did not enable the public to see that sometimes decision-making in Brussels was 'influenced by powerful special interest groups'; transparency in the Council should be improved. Suggestions of stakeholders falling outside the mandate were not included in that report (e.g. the Ombudsman's supervision of matters related to legislation).

Complainants had also the opportunity to participate in a survey—again, they were not asked about the boundaries of the mandate. In general, the complainants assessed very positively the performance of the Ombudsman on correspondence, accessibility and information. By contrast, on speed, the complainants' views were mixed at best, with 60% responding from 'poor' to 'average'. However, regarding the 'overall experience of the European Ombudsman's office', most complainants (2 out of 3) responded very positively. A final question was formulated as follows: 'how could we improve the service the Ombudsman offers?' Many complainants were satisfied and had no suggestions for improvement. When submitting remarks, most of these concerned 'the speed of the inquiries and the outcome'. Some invited the Ombudsman to show 'less tolerance' vis-à-vis the EU institutions in cases of delays. Critical observations about the outcome were submitted, too, from the admissibility stage to the final decision. Certain complainants 'express[ed] frustration' about the limits of the mandate, suggesting that the 'ruling of the Ombudsman should

have clear consequences' or be accompanied with 'sanctions'. Lastly, some observations invited the Ombudsman to use the special report more often and to ultimately defend the rights of citizens (to 'be a real "defender of the people"'), while others encouraged the Ombudsman to publicise his role in order to increase awareness of the mandate.

It is to be noted that these views were collected *circa* 2010. Previous chapters have shown that the Ombudsman has taken steps to address many of these points (the composition of expert groups and the transparency of trilogues are, perhaps, indicative cases).

The second—and present—Strategy ('Towards 2019') was prepared and published by Emily O'Reilly. As noted in Chap. 2, O'Reilly's aim is to increase the effectiveness of the office. In the final version of the Strategy, she explained: '[m]y role and ambition now is to bring the European Ombudsman on to the next level of influence, relevance, and effectiveness.'[10] One of the aims is to 'achieve results faster', by 'setting shorter deadlines' or by adopting simplified procedures. Likewise, O'Reilly is keen to explore 'ways to make the Ombudsman's proposals for friendly solutions, draft recommendations and remarks more persuasive'. In this context, the Strategy announced the intention to increase the use of 'systemic' (own-initiative) inquiries;[11] this has already taken place.

The procedure of preparing the Strategy 2019 was different from the one that was followed when the first Strategy was drafted under the previous Ombudsman. The 'Towards 2019' strategy was developed with the help of a thematic internal Steering Group. Since the Steering Group included high level staff, formal submissions from the various Units were not received. The work for the new Strategy resulted in a new mission statement, featuring on the website: 'Our mission is to serve democracy by working with the institutions of the European Union to create a more effective, accountable, transparent and ethical administration.'[12]

The above discussion shows that, quite naturally, an internal reflection does take place within the office as to the aims and priorities of each term. While the scope of the mandate as such is not being discussed, ways to improve the effectiveness and efficiency of the office using the *existing*

[10] See Strategy of the European Ombudsman—'Towards 2019', available at: www.ombudsman.europa.eu/en/resources/strategy/strategy.faces

[11] Ibid.

[12] See: www.ombudsman.europa.eu/en/resources/strategy/strategy.faces

mandate feature prominently in such submissions. Simultaneously (and this point mainly stems from documents related to the first Strategy), more could be done with regard to delays in complaint-handling and, more generally, the impact and visibility of the office. Occasionally it is understood that complainants might not be entirely satisfied with the outcome of the Ombudsman's efforts, and such concerns were reflected in certain submissions before the first Strategy or (more indirectly) in the new Strategy extending to 2019. The Ombudsman's inter-institutional relations were also mentioned in the above submissions.

The Ombudsman's objectives are also illustrated in the latest annual management plan. Using a circular flow, the Ombudsman explained that: 'Impact (EU administrative change, culture change and transparency) requires relevance (legal excellence, strategic focus, [being] proactive), which generates visibility, which increases impact', and so on.[13] On *achieving greater impact*, in particular, priorities and actions included the following: investing further in the organisation of the own-initiative inquiry; improvements in how compliance is measured 'to assess fully the Ombudsman's impact'; the use 'in an appropriate and prudent manner' of 'the full scope of the powers of the Ombudsman's Statute, using all available tools and options at our disposal depending on the case'; the strengthening of 'co-operation and dialogue' with other EU institutions or stakeholders so that the Ombudsman's recommendations be supported.[14]

Referring a Case to the Court

Having introduced some necessary disclaimers (first section) and provided some background to the feedback received from within and outside the office (second section), this chapter will now discuss a number of proposals regarding the mandate of the Ombudsman and her practice. The first proposal concerns the available 'toolkit' of the Ombudsman once the inquiry is completed and may be summarised as follows: the Ombudsman, in addition to the right to submit a special report to the European Parliament, should have the possibility to refer a limited number of cases to the Court, if the draft recommendation is not accepted by the institution concerned. When the case does not stem from an own-initiative inquiry, the consent of the natural/legal person should be obtained first. This section will discuss the above proposal in further detail.

[13] See Annual Management Plan 2016, 4.
[14] Ibid., 8.

Background

During the European Convention that took place before the adoption of the Constitutional Treaty, Söderman proposed that 'the European Ombudsman […] refer a case involving fundamental rights to the Court of Justice, if it could not be solved through a normal ombudsman inquiry'.[15] One formulation of this proposal read as follows:

> If the European Ombudsman considers, after carrying out an inquiry in accordance with [now Article 228 TFEU], that a Member State or a Community institution or body is failing to respect a fundamental or human right binding in Community law, he may bring the matter before the Court of Justice.[16]

The Ombudsman's proposal arguably derived from his sensitivity vis-à-vis fundamental rights, demonstrated *inter alia* in various speeches and proposals suggesting that the Union should accede to the European Convention on Human Rights or other international human rights instruments.[17] The proposal was advanced at a time when the Charter of Fundamental Rights was not binding, and there was no clause in the Treaties enabling the EU's accession.[18] The further constitutionalisation of human rights therefore figured among the priorities for the Union,[19] and the Ombudsman's proposal may primarily be viewed in that context, rather than as an initiative to expand the mandate. The Ombudsman's aforementioned proposal was not eventually followed, despite the fact that

[15] Annual Report 2002, 223.

[16] Contribution by Mr. Jacob Söderman, European Ombudsman: 'Proposals for Treaty changes' CONV 221/02 CONTRIB 76. See also Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697, at 708.

[17] See, for example, Speech by the European Ombudsman, Jacob Söderman to the European Convention (2003), available at: www.ombudsman.europa.eu/speeches/en/2003-02-28.htm

[18] See now Art. 6(2) TEU. But see also the controversial CJEU's Opinion 2/2013 (EU:C:2014:2454) on the non-compatibility of the 'Draft Agreement' with the autonomy of EU law.

[19] See, for example, Gráinne de Búrca, 'The evolution of EU human rights law' in Paul Craig and Gráinne de Búrca (eds) *The evolution of EU law* (Oxford University Press 2011) 467.

it was also repeated by Söderman's successor, Diamandouros.[20] Leaving aside the limb of the proposal concerning the member states (an issue examined in the next section), one of the challenges with this proposal would be to justify the focus on human rights: while the Ombudsman has certainly produced considerable work in the area of human rights, he or she is not really a 'human rights' ombudsman.[21] The Ombudsman, of course, did include fundamental rights under the notion of maladministration. Still, for the above reasons, if that proposal were to be followed, it could be extended beyond areas of alleged violations of human rights.

The right to bring matters to the court features in the mandates of some (but of course not all) national ombudsman institutions. For example, Spain's *Defensor del Pueblo* can 'take to the Constitutional Court unconstitutionality appeals'.[22] In Poland, the 'Commissioner for Citizens' Rights' may apply to the 'Constitutional Tribunal' on matters falling under its jurisdiction.[23] Albeit a possibility different in nature, some offices have the power to prosecute officials committing a criminal offence or serious illegality and initiate legal proceedings; the Swedish and Finnish Parliamentary Ombudsmen are two examples.[24]

[20] He opined: 'As European Ombudsman, I would like to explore with the European Parliament how to make sure that citizens' complaints about violations of the rights contained in the Charter can be looked into as rapidly and effectively as possible and eventually brought before the European Court of Justice, if an important issue of principle cannot be resolved in any other way'. See Nikiforos Diamandouros, 'Reflections on the future role of the Ombudsman in a changing Europe' in *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 217, at 227–228.

[21] The human rights model, according to Reif, combines features of a 'classical' model plus 'human rights commission roles' and emerged in countries such as Spain and Portugal, further to the 'history of human rights abuses committed by public authorities'. See Linda Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers 2004) 8–9. See further Katja Heede, *European Ombudsman: Redress and Control at Union Level* (Kluwer 2000) 83.

[22] Reif (n 21) 147 and Article 161(1)(a) of the Spanish Constitution.

[23] Ibid., 161 and Articles 188 and 191(1)(a) of the Polish Constitution.

[24] Gabriele Kucsko-Stadlmayer (ed) *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea* (Springer Verlag 2008) 184, 414. The reader is referred to the same account for a comparative assessment of the powers of national ombudsman institutions, an assessment which, as already noted, falls outside the scope of the present contribution.

On Compliance and Delays

The analysis in previous chapters has unravelled two issues that require consideration here: *unsatisfactory solutions* were identified in a number of cases of considerable gravity, whereas in the same or other cases the *delays* observed (usually when the institution was unwilling to collaborate or comply) defeat one of the reasons why complainants turn to the Ombudsman, namely efficiency. The Ombudsman is a mechanism contributing to democratic accountability. It is therefore understood that whenever institutions bypass the Ombudsman's well-reasoned findings, supported by sound legal argumentation,[25] this has undesirable consequences for the quality of the EU administration. In her first Annual Report, and in accordance with established practices within the office, O'Reilly pointed out that she will be 'guided by the case-law' of the Court, 'which creates the framework within which the Ombudsman promotes the rule of law in the European Union. [She] will also be guided by principles of good administration and public service'.[26] The 'ultimate goal' of this approach is to 'help strengthen the structures and institutions of accountability and transparency at the European level, to improve the quality of democracy in the European Union'.[27] Following such considerations, the Ombudsman's Annual Management Plan reflects upon several possible actions that will increase the Ombudsman's impact.[28]

An obvious question emerges: given that the Ombudsman is an extra-judicial avenue which does not produce binding decisions, what can be deemed as a satisfactory (or even successful) compliance rate for the office? Answering this question certainly depends on one's view about the function of a public sector ombudsman institution. The consultation documents discussed in the previous section, including the views of some stakeholders, illustrate that compliance is something that was and is being discussed within the office—and possibly within any ombudsman office keen to increase its impact and visibility. The author submits that, while the Ombudsman's findings are increasingly being taken into account by

[25] It has been noted that 'the practice of "beefing up" his decisions with legal arguments and case law is part of the Ombudsman's tactics to convince the institutions to comply with his decisions'; see Magdalena Elizabeth de Leeuw, 'The European Ombudsman's role as a developer of norms of good administration' (2011) 17 *European Public Law* 349, at 358.

[26] Annual Report 2013, 5.

[27] Ibid.

[28] See above n 14.

the EU institutions, there is still scope for improvement, especially in sensitive cases. In other words, a culture to fully respect the Ombudsman's well-reasoned findings has not been embedded (yet) at the EU level.

> I enquired of the former European Ombudsman whether he had ever felt any disappointment from citizens or civil society groups given that his decisions are not legally binding. The Ombudsman replied:
>
> The Ombudsman does not possess a quantitative study in 27 member states to see what citizens think on this matter. But '*I do have, however, fairly frequent, if not very frequent questions being put to me on this issue and I have a very clear view of that one*'. […] '*Compliance is a very complex issue that ultimately is a function of the legal, political and institutional setting within which each ombudsman operates. … The optimal conditions for an ombudsman are two. A well established and deeply entrenched rule of law and also a consolidated deeply established democratic political order*'. In countries where these two conditions are met, the ombudsman can indeed fulfil his or her mission as a '*significant complement to the courts*'. '*In these countries … compliance is extremely high*', because the '*moral authority*' of the ombudsman is strengthened by the two conditions, the rule of law and the democratic order. One example is the Scandinavian countries, but it is not the only one. '*While the institutions have the legal right to ignore, this hardly ever happens*'. If and when it happens, '*it produces significant political and institutional earthquakes*'. In a nutshell, '*this alternative [to courts] would be lost, if the ombudsmen had powers equivalent … to a tribunal. That would be a loss for the quality of democracy, it would be a loss for citizens as well*'.[29]

Thus, democracy and the rule of law form the two necessary preconditions to securing compliance with the Ombudsman's findings. Due to the EU's particularities or nature, however, assessing the EU's democratic credentials is a subject that has generated an extensive debate.[30] The other side of the coin is that the extra-judicial avenue cannot duplicate the judicial one, and essentially this means that the occasional unwillingness to comply goes hand-in-hand with the nature of the ombudsman's powers as such.

Shortly after the arrival of Diamandouros, the office began to monitor compliance more closely. To that end, a study is published on the website, focusing in particular on the institutions' follow-up to further and critical

[29] Interview with the European Ombudsman, 17.02.2012 (on file with the author).
[30] See the relevant discussion in Chap. 3.

remarks. The two should be distinguished: when a further remark is being issued, the institution concerned has not committed maladministration. Thus, while these accounts reasonably focus on both further and critical remarks,[31] more pertinent, for present purposes, is the institutions' satisfactory response to *critical remarks* (which may be issued after a poor response to draft recommendations). In 2012 and 2013, the rate of satisfactory responses to critical remarks was 78%.[32] This improved to 88% in 2014 (the latest study published to date).[33] This is certainly a significant achievement, especially viewed 'against the backdrop of increasingly limited resources and increasing and legitimate expectations from the public'.[34]

Simultaneously, there are some (perhaps inevitable given that this is mainly a quantitative assessment of performance) difficulties with this otherwise interesting study. Some difficulties are acknowledged in the above reports. First, the report on compliance percentages to further/critical remarks is somewhat unclear on whether instances where proposals and recommendations were not accepted, but did not lead to a critical remark, are included. For example, it is noted that in 2014 '[t]hree solution proposals were rejected (by the Commission), as were five recommendations (two by the Commission, two by EPSO and one by OLAF)'.[35] Second, compliance rates vary across the institutions and bodies each year, and it is therefore challenging to discern a consistent pattern vis-à-vis compliance.[36] Third, and more significantly, percentages by definition do not provide a qualitative dimension to the instances where EU institutions refuse to comply. However, when it comes to cases concerning the general

[31] Reasonably so because the Ombudsman has an educational function as well, and the further remark enables the Ombudsman to provide suggestions for improvement even in the absence of a finding of maladministration.

[32] See 'Putting it Right? How the EU institutions responded to the Ombudsman in 2013' available at: www.ombudsman.europa.eu/en/cases/followup.faces/en/58401/html.bookmark

[33] As of 31 August 2016. See 'Putting it Right? How the EU institutions responded to the Ombudsman in 2014' available at: www.ombudsman.europa.eu/en/cases/followup.faces/en/61644/html.bookmark

[34] Ibid.

[35] Ibid.

[36] According to this study, the Commission complied 84% in 2012, 73% in 2013 and 86% in 2014; the European Parliament complied 56% in 2012, 86% in 2013 and 100% in 2014; OLAF complied 75% in 2012, 91% in 2013 and 83% in 2014. These percentages include critical *and* further remarks.

interest, and especially areas which touch upon perceived prerogatives, the EU institutions are less keen to respond positively.

The report indicates that the 'institutions concerned were invited to respond to the remarks within a period of six months. Responses were received to all the remarks made in 2014 although with a delay in some cases'.[37] Further clarity would be desirable—if possible—with regard to what precisely a satisfactory response to a critical remark is: for example, is the assurance by the institution that it will explore all possibilities to implement a critical remark a satisfactory response? Naturally, it is outside the scope of such *follow-up* studies to address the persistent problem of delays in the handling of *certain* investigations—certain, because the overall length of inquiries dropped to ten months according to the 2015 Annual Report, certainly a better result when compared to past years, but probably unsatisfactory for some specific cases.[38]

The above should not be read as implying that compliance has not improved, or that it is unreasonable for an extra-judicial institution to face the inevitable consequence of the occasional reluctance to comply. Rather, it should be read as inviting reflections on *further improvement*, in areas where such improvement may be required. Thus, the question is not whether the Ombudsman should be constitutionally empowered to enforce decisions (an undesirable development for a number of reasons returned to below), but whether the Ombudsman's toolkit should be strengthened, with a view to empowering the latter to pursue further important cases, when disappointing reactions from the EU institutions do occur.

Non-compliance and Delays

Examples where the Ombudsman's efforts resulted in unsatisfactory solutions were discussed in previous chapters. Suffice to briefly mention here a few indicative cases. The first one concerned the European Parliament: the sensitive issue therein was the relations between the Ombudsman and Parliament, rather than the nature of the dispute as such.[39] It concerned a complaint submitted by an official of Parliament who was denied access

[37] Ibid.

[38] Annual Report 2015, 37. According to the report, 17% of cases were closed in 2015 after more than 18 months.

[39] Case 900/2010/(MF)RT.

to an 'Audit Report' and to a 'Legal Opinion' concerning his payment scheme. The Ombudsman did not accept Parliament's reliance on the protection of the decision-making process under Regulation 1049, given that Parliament had not concretely demonstrated how this could have been 'seriously' affected.[40] The Ombudsman proceeded with an (unsuccessful) friendly proposal, inviting Parliament to disclose the two documents. The complainant expressed the following concerns:

> In the complainant's view, the Ombudsman's above-mentioned attitude [to suggest, rather than 'recommend' disclosure and to delay the process] is due to the '*controversial*' framework cooperation agreement between the Ombudsman and Parliament, which impedes the Ombudsman from exercising his mandate independently. He further took the view that it was '*naïve*' for the Ombudsman to propose a friendly solution to Parliament, given its repeated refusals to satisfy his request for access before he lodged the present complaint.[41]

The Ombudsman referred to his institutional role under Article 228 TFEU, which safeguards his independence (also) vis-à-vis Parliament. Simultaneously, he pointed out that his extra-judicial mission by definition does not amount to enforceability.[42] The Ombudsman expressed his disappointment with Parliament's stance, and highlighted that he chose not to close the case with a critical remark in the first place, because he attempted to offer Parliament the possibility to remedy its initial maladministration via a friendly solution. He observed that Parliament maintained a 'very formalistic approach',[43] and finally closed the case with a critical remark.

> In his further observations on Parliament's reply to his friendly solution proposal, the complainant asked the Ombudsman to take a final decision on his complaint. In light of the above, the Ombudsman does not consider that he should pursue the matter further and to issue a draft recommendation to Parliament. Therefore, he decides to close the case with the critical remark found below.[44]

[40] Ibid., points 37–38. See also Art 4(3) of Regulation 1049.
[41] Ibid., point 49 (emphasis original).
[42] Ibid., points 52–56.
[43] Ibid., points 60–62.
[44] Ibid., points 65–66.

No explanations were offered as to why the case was closed without a draft recommendation. One would assume that either the matter was considered of limited significance or that indeed, the Ombudsman considered that a draft recommendation could not be any more effective to convince Parliament.[45]

The second example concerns the Council; in a case where the sponsorship of the Irish Presidency by private companies was at stake, the Council did not assume its responsibility.[46] The complainant 'asked the Ombudsman to use all possible legal means to convince the Council to adopt a more conciliatory attitude'.[47] The Ombudsman carefully considered the available options and decided not to act further, because in the context of another case concerning the Presidencies of the Council[48] a special report had been submitted to Parliament. He informed the President of the European Parliament, while observing that 'no progress can be made on this aspect of the case within the framework of the present inquiry'.[49]

Regarding excessive delays, an illustrative example is the case concerning access to documents on the UK's 'opt-out' from the Charter.[50] The complaint was submitted to the Ombudsman in August 2008.[51] The latter adopted his draft recommendation in July 2011, inviting the Commission to grant access. It was stated therein that the Commission should grant

[45] It should be reminded that in the context of another inquiry against Parliament (Case 2819/2005/BU, discussed in Chap. 4) the Ombudsman was equally unsuccessful when attempting to convince Parliament to accept his draft recommendation. The case concerned a former assistant of an MEP, who was treated inappropriately by Parliament's security services. The Ombudsman found maladministration, and in particular a violation of the right to be heard and the proportionality principle, but did not pursue the case further and closed it with a critical remark, because the instrument of special report should be exercised with caution (see point 1.17). The Ombudsman added that he 'regret[ted] that Parliament's administration [had] been unwilling to put right the maladministration in this case by making the *ex gratia* payment proposed by the Ombudsman. However, since the Ombudsman [had] no reason to suspect that the deplorable treatment of the complainant was the result of a general policy rather than an isolated error of judgment, he [did] not consider it justified to make a special report' (point 1.18).

[46] Case 2172/2005/MHZ.

[47] Ibid., point 1.5.

[48] Case 1487/2005/GG, concerning the languages of the Council Presidencies, discussed in Chap. 4.

[49] Case 2172/2005/MHZ, point 1.9.

[50] Case 2293/2008/(BB)(FOR)TN, further discussed in Chap. 5. The formulation 'opt-out' is used because the complaint was submitted in such terms.

[51] Ibid., point 13.

an opinion by the end of November 2011, but the opinion was extensively belated. The Ombudsman decided in December 2012 to close the case with a severe critical remark. The NGO was eventually successful in obtaining access in January 2013, albeit outside the framework of the Ombudsman inquiry, and the Ombudsman welcomed this.[52] One can assess this development either as 'a victory not only for transparency, but also for the moral authority of the European Ombudsman',[53] or inversely, precisely as a stance undermining the Ombudsman's moral authority, on the part of the Commission. To refer to another case, the Ombudsman submitted a special report to Parliament in 2010 to address the delays in responses to draft recommendations, relying *inter alia* on the duty of the institutions to cooperate in good faith under the case-law and the Treaty.[54] Despite the above steps undertaken by the office, the issue persists.

> The following question was posed to the former Director of Directorate A of the Ombudsman's office: Why not use the special reports more often, since the Ombudsman does not produce legally binding decisions?
>
> The workload of the Parliament is obviously one concern. So if you really want to catch Parliament's attention, you have to be selective. But this brings about a more general discussion: '*we don't want to abuse the mechanism of the special report, but we are trying to invent other things to do, apart from closing the case with a critical remark, which is no solution, it's just a critical remark, we are just criticising, not really changing anything; of course we want them to say to us what they've done, not to repeat it again, it's the follow-up to critical remarks… but, I mean, sometimes we are left out with a certain bitter taste in our mouth… not sufficiently important to justify a special report, but should we just close it with a critical remark? Can't we do anything to try to change the situation?*'. So the office becomes '*experimental*', using '*alternative soft information techniques*', always respecting the limits of the mandate. These techniques are '*not foreseen*' in the Statute: informing a particular Committee of Parliament, or the Court of Auditors, etc.[55]

[52] Press Release 5/2013, 'Ombudsman welcomes the Commission's disclosure of documents on UK opt-out from Charter of Fundamental Rights', available at: www.ombudsman.europa.eu/en/press/release.faces/en/49424/html.bookmark

[53] See the ECAS-EU Rights Clinic Press Release, available at: www.ecas-citizens.eu/content/view/484/406

[54] See Case 0676/2008/RT, discussed in Chap. 5. See further Case 204/86, *Greece* v *Council*, EU:C:1988:450, para 16; Art 13(2) TEU.

[55] Interview with the Director of Directorate A, 14.02.2012 (on file with the author).

Alongside the above, it is remembered that the Ombudsman has to strike a delicate balance between acting *on behalf of the general interest*, and providing *redress to specific complaints*; and occasionally this balance is reflected in the choice of the appropriate step/instrument when institutions are unwilling to comply.[56] Also, the Committee on Petitions of the European Parliament can only produce a limited number of reports, and not all of these (if any) can be devoted to issues/areas identified by the Ombudsman.[57]

To return to the question of delays, in remote cases the institutions may eventually comply but outside the framework of the Ombudsman's inquiry; this could imply the involvement of other persons (e.g. a new office-holder within the administration who decides to adopt a more accommodating approach to the Ombudsman).

Justifying the Proposal to Refer the Case to the Court, and Its Limitations

If one considers the Ombudsman's non-binding set of instruments, the last step to be taken if the institution does not comply with a draft recommendation is the submission of a special report to Parliament. Special reports cannot be used too frequently, for reasons already explained (frequently in Annual Reports, too).[58] Simultaneously, granting the Ombudsman enforceable powers entails the undesirable consequence of duplication of judicial review, which would, in turn, undermine the added value of the extra-judicial avenue.[59] Further reasons point to non-enforceability: non-binding decisions ensure that the ombudsman office itself is accountable and not excessively activist.[60] The Annual Reports echo the tenet that the

[56] See the interview with the Secretary-General in Chap. 4.

[57] See the interview with the Secretary-General below at n 241.

[58] Compare also the excerpt from the interview with the former European Ombudsman in Chap. 4; the Ombudsman pointed out that special reports should be used '*intelligently, judiciously and sparingly to safeguard their power*'.

[59] That being said, private ombudsman schemes occasionally produce biding decisions, reviewable by the judiciary; see in the UK, for example, the 'Financial Ombudsman Service' (and the discussion in Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press 2009) 481) and the 'hybrid public/private' Pensions Ombudsman Service (Rhoda James, *Private Ombudsmen and Public Law* (Dartmouth Publishing 1997) 154–182).

[60] Trevor Buck, Richard Kirkham and Brian Thompson *The Ombudsman Enterprise and Administrative Justice* (Ashgate 2011) 39–40, and the relevant discussion in Chap. 3.

raison d'être of the European Ombudsman is to be an extra-judicial body and not impose sanctions. An additional explanation of this position could be that certain ombudsman offices consider that the levels of trust they have built with institutions and their ability to intervene, on the basis of an understanding of the needs of the complainant and the public authority, is based exactly on the absence of 'legal powers of enforcement'.[61] The European Ombudsman views the office as an opportunity for European citizens *and for institutions* to avoid the judicial avenue. This is a valid argument. Difficulties begin to surface in cases where the ombudsman's thoroughly articulated recommendations are not followed (or, in extreme cases, are systematically ignored) by the institution(s) concerned. In other words, if it is accepted that the ombudsman offers an alternative to the judicial avenue, it should be a well-respected alternative. It is remembered that, confined as it was to human rights, the proposal to refer such matters to the Court was advanced by former office-holders. In the EU, cases of constitutional sensitivity have been observed where the institutions are sometimes unconvinced to see the Ombudsman's intervention as an opportunity to remedy their distance with citizens. Besides, the possibility of an unsatisfactory outcome or unreasonable delays could prevent a natural or legal person from even submitting a complaint to the Ombudsman in the first place. This is not to suggest that, overall, compliance rates are not satisfactory.

Further reasons point against enforceability. In general, the (more) informal ombudsman process would have to be reconciled, in that case, with the respect of the right to be heard.[62] While this may be challenging for certain ombudsman institutions, the practice of the EU Ombudsman points otherwise: the right to be heard is duly respected throughout the process. Another argument is the lack of 'independent appeal' against the ombudsman's findings.[63] Again, this is a valid point, which almost automatically entails that enforceability would lead to an excessive judicialisation of the European Ombudsman's office.[64]

[61] Ibid., 42.

[62] Richard Kirkham, Brian Thompson and Trevor Buck, 'When putting things right goes wrong: enforcing the recommendations of the ombudsman' [2008] Public Law 510, at 523–524.

[63] Ibid.

[64] On this point see the analysis by Kirkham et al. (n 62) of the UK case of *R (Bradley and others)* v *Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin). But compare also the Court of Appeal decision *R (Bradley and others)* v *Secretary of State for Work and Pensions* [2008] EWCA Civ 36.

The faculty to refer a limited number of cases to the Court at the Ombudsman's discretion, however, cannot and should not be equated to enforceability. That right will inevitably enhance the Ombudsman's status, in that the Ombudsman would be able to put into effect another strategic instrument, where appropriate. If such proposal were to be advanced, it is far from certain that it would substantially increase the Court's workload, especially if the scope of such right was limited (as will be explained in a moment). Furthermore, one should distinguish between the *existence* of this power in the Ombudsman's arsenal and its *exercise*. The *possibility* to activate the referral procedure by itself may be a satisfying condition for the institution concerned to comply in the first place. Thus, this proposal does not constitute duplication of judicial review or enforceability, but an additional instrument to further improve accountability.

Looking at the broader, institutional picture, then, this proposal can be viewed as an 'invitation' to the Ombudsman to seek alliances beyond the European Parliament. In this sense, it may sound problematic to those believing that the ombudsman process is an instrument of purely political accountability. However, and again looking at the broader institutional picture in the EU, one should take into consideration how pivotal and influential the Court has been throughout the process of European integration, and also that the European Parliament is not, *alone*, the legislature in the EU. Crucially, the Ombudsman *does have* the power to review activities of the European Parliament. Again, comparisons with domestic parliamentary ombudsman institutions cannot offer fully satisfying solutions. One could argue that non-binding decisions mean that the Ombudsman 'depends' on the willingness of the EU institutions to comply, and therefore that the Ombudsman's focus should be on further improving the relations with the institutions or even abstain from the examination of certain sensitive complaints. That would be highly undesirable from the point of view of the Ombudsman's independence. It would be equally undesirable from the perspective of the approach based on law endorsed by the office, which includes an effort to set, as much as possible, clear admissibility guidelines and cite 'ombudsprudence' when dealing with fresh complaints. In brief, such level of dependency or discretion would depart from established practices. It could also be argued that the proposal would insert an element of 'confrontation' to the Ombudsman's operation. On this point it is firstly observed that similar or analogous powers feature in the mandate of certain public sector ombudsman institutions and, secondly, that the European Ombudsman—albeit a proponent of

friendly solutions—is not really a mediator between parties. Relying on the right to be heard, and giving both sides an opportunity to respond, eventually she or he adopts a position which is frequently—but not always, as shown in previous chapters—to side with the complainant. Thus, the proposal does not appear to run counter to the existing method followed by the office.

What about an increase in the Ombudsman's judicialisation? That risk is not significant, in accordance with the *Lamberts* case-law. The pending *Staelen* case does not seem to question the discretion of the Ombudsman as to the available instruments after the closure of the investigation, but rather focuses on the investigatory process itself. With regard to flexibility as to how a case will be handled, the faculty to submit special reports to Parliament did not have an impact on the imaginative ways employed by the Ombudsman to find solutions (also because the Ombudsman decided not to use the special report too frequently). In the short-term, one can speculate (but only speculate) that some institutions finding themselves as defendants before the Court might be less reluctant to comply with the Ombudsman in immediately forthcoming cases. However, it can be anticipated that the long-term effect would be that the Court's findings would establish a clearer culture of compliance, even if it would take some time for certain institutions to accept the possibility of a case being transferred to the judiciary. Conversely, if the Court were to find against the Ombudsman's recommendations, this would motivate the Ombudsman to further pursue the goal of 'legal excellence', as expressed in the latest Annual Management Plan. The Ombudsman's team does include several legal officers who follow the Court's case-law, so the selection of cases that would reach the Court would be cautious. Still, it would, of course, be possible for the Court to find otherwise. Linked with the above points is the observation that the Court's involvement would extend the length of the overall process of the specific inquiry; again, this valid point should be assessed in light of the long-term benefits on compliance that could arise. After all, no referral would be submitted without the complainant's consent.

An interesting (and related) question is why the EU Courts abstain from referring to the 'ombudsprudence' of the office (except when one or more complaint(s) to the Ombudsman was part of the evidence/argumentation submitted to the Court).

On the inter-institutional relations with the Court, and more specifically on the absence of references to cases decided by the European Ombudsman, the former Secretary General characterised the decision of the Courts as 'very wise', linking the references to a possible increase in the actions for annulment against the European Ombudsman. He referred to the UK case, where the courts review the activity of ombudsmen, but in his view this has not 'over-judicialised' the ombudsmen's work, partly because they do not need to operate 'with a great deal of legal reasoning'. The legal culture in the EU led the Ombudsman to work primarily as a 'law-based institution'. He added: 'the most persuasive arguments we've put forward usually are legal arguments'.

Due to the non-binding legal effects of the Ombudsman's decisions, the Court has taken the position that the findings of the former are not subject to actions for annulment. If the Court decided to depart from this position, certain institutions would not resist referring Ombudsman cases to the courts, and the Ombudsman would sacrifice considerable resources in order to defend his position. In brief, the Secretary General added that the clear separation of the Ombudsman's findings from the Court's reasoning does not represent 'judicial neglect', on the part of the Court, but instead a 'very wise decision', given the risk of increased 'judicialisation' discussed above. He acknowledged, nonetheless, that some of his colleagues might have different views on that issue.[65]

Discussing the relations with the Courts and how the Court 'treats' the Ombudsman in general, one former Director opined:

'*I would say they treat us fairly respectably.*' '*The Court does not give the impression that the Ombudsman's decisions can be ignored. There was one unfortunate judgment which gave the impression that what the Ombudsman said was completely irrelevant, but that's probably the exception*'. '*We have informal exchanges with the Courts … we invite members of the three courts to lectures …the reactions we got in all three occasions was an encouraging one, they said, please go ahead, you fulfil an important role, you are taking care of cases that we, courts, cannot address*'.[66]

Would the Ombudsman welcome a change in the Courts' stance, meaning that the Court would at some point start referencing cases dealt with by the Ombudsman, as it has happened in the UK? The Civil Service Tribunal was

[65] Interview with the Secretary-General, 14.02.2012 (on file with the author).
[66] Interview with the Director of Directorate B, 14.02.2012 (on file with the author).

mentioned as the obvious example which could refer to cases dealt with by the Ombudsman. Even though the courts do not *rely* on the Ombudsman, sometimes '*it adds to the reasoning*' to refer to him or her.

'*Absolutely. That of course would be our wish. Two things. First of all we follow the Court's case law quite clearly and of course we look very carefully to check whether they make any reference; you are right, they haven't done so yet. Nothing prevents them.*' But the '*style of judgments in the European Union is quite different*'. '*It would be a very positive thing for us if at some stage*' the Court mentioned that '*this approach corresponds to what the Ombudsman said*'. Then the Director underlined that the Ombudsman's work did have an influence on the Court in some specific cases.[67]

One should admit that, indeed, a certain price is to be 'paid' for each institutional choice. The more the Ombudsman is linked with the judiciary (including when the courts start referring to the findings of the ombudsman), the more tempting it becomes for the institutions to question him or her legally. The proposal advanced in this contribution may not, however, result in an over-judicialisation of the Ombudsman. First, the Court's view that the Ombudsman has broad—but not unlimited—discretion is settled case-law; second, the proposal comes with limitations on the extent of the use of such instrument (this issue is returned to in a moment). Of course, a certain increase in litigation involving the Ombudsman cannot be excluded. Still, this is a price that the Ombudsman might afford to pay, in light of the significant implications for the rule of law and accountability that would stem from this proposal. Undoubtedly the right to report to Courts should be exercised with the complainant's *consent*, while the Ombudsman should certainly comply with procedural guarantees[68] and be transparent in the handling of the complaint. Also, that option should be used with significant caution, precisely because the aim is not enforceability. One option could be to explicitly provide a limit of referrals per mandate; other options to achieve similar results will exist. Because amendments to the existing legal framework would be required, the limits of this power is a matter that can be examined by the

[67] Ibid. The interview was conducted before the latest reform of the Court and the abolition of the Civil Service Tribunal.

[68] This appears to be consistent with the practice that the office has adopted in the handling of complaints. Informality is generally avoided, and every step of the inquiry is registered on the respective file.

legislature.[69] Article 228(4) TFEU empowers the European Parliament to adopt secondary legislation in accordance with the special legislative procedure on the performance of the Ombudsman's duties, and therefore it appears that Treaty reform might not be necessary. It is to be noted that the Commission should be *consulted* and the Council has to provide its *consent*.

Useful lessons can also be drawn from the Ombudsman's efforts to *intervene* in cases pending at the Court. The Ombudsman was granted leave to intervene in a case concerning requests for public access to documents in the possession of the European Medicines Agency, containing information on the safety and efficacy of medicines.[70] While the case was discontinued, it was the granting of leave to intervene that is relevant here. The intervention before the Court had been discussed for considerable time within the office. In 2005, Diamandouros observed that 'it could be useful for the Ombudsman to be able to intervene' before the Court, pointing out that the powers of the European Data Protection Supervisor (EDPS) included such faculty.[71] The comment was made in connection with the aforementioned proposal regarding the possibility for the Ombudsman to refer a human rights matter (notably falling under the scope of the Charter's field of application) to the Court. The EDPS *can*, in fact, refer a matter to the Court.[72] Conceptually, at least, the two powers are not completely dissociated (in the EDPS case this is clear by looking at the structure of Article 47 of Regulation 45/2001, enumerating the EDPS' 'powers'). Now, the Statute of the Court stipulates that 'bodies, offices and agencies of the Union … which can *establish an interest* in the result of a case submitted to the Court' may request permission to intervene.[73] Unlike the EDPS, who has a rather specialised mandate, the

[69] Under the present legal framework, the most logical amendment would concern Article 3 of the Statute.

[70] Case T-44/13 R, *AbbVie Inc.* v *European Medicines Agency*, EU:T:2013:221, (Order granting interim measures). The Ombudsman's intervention (supporting the release of the reports) may be accessed at: www.ombudsman.europa.eu/en/cases/correspondence.faces/en/68005/html.bookmark. The pharmaceutical company and EMA eventually reached an out-of-court agreement on the scope of disclosure, but the Ombudsman pursued the case further acting on behalf of the public interest with the own-initiative inquiry OI/3/2014/FOR. The case is also mentioned in Chap. 5.

[71] Diamandouros (n 20) 228.

[72] See Article 47(1)(h) of Regulation 45/2001.

[73] See Article 40 of Protocol No 3 to the Lisbon Treaty on the Statute of the Court of Justice of the European Union (emphasis added). Interventions should be limited to 'supporting the form of order sought by one of the parties'.

Ombudsman's mandate is rather broad, and therefore it may be asked in which cases the Ombudsman can reasonably expect to be granted leave to intervene. Cases concerning access to documents are indeed a relevant area for intervention.

The Material Scope of the Proposal

The proposal partially departs from past ideas advanced by the Ombudsman in that it is not confined to human rights. That being said, since it is clear that maladministration is broader than illegality, which means that '[f]indings of maladministration by the Ombudsman do not therefore automatically imply that there is illegal behaviour that could be sanctioned by a court',[74] when maladministration found by the Ombudsman does not fall under the judicial control of the Court (illegality), the abovementioned referral would not serve any meaningful purpose. Such matters could be further pursued via a special report to Parliament.[75] It is to be

[74] Annual Report 2008, 29 and reference therein to case T-193/04 R, *Hans-Martin Tillack* v *Commission*, EU:T:2006:292, para 128: '[T]he classification as an "act of maladministration" by the Ombudsman does not mean, in itself, that OLAF's conduct constitutes a sufficiently serious breach of a rule of law within the meaning of the case-law. … That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings'.

[75] Nineteen special reports were submitted as of 31 August 2016. The areas concerned were as follows: Case OI/5/2012/BEH-MHZ (on Frontex's complaints mechanism); Case 2591/2010/GG (infringement proceedings); Case 676/2008/RT (lack of the Commission's cooperation with the Ombudsman; the complaint concerned access to documents); Case 185/2005/ELB (non-discrimination on the basis of age); Case 3453/2005/GG (delays in dealing with infringement complaints submitted by citizens); Case 1487/2005/GG (the linguistic regime of the websites of the Presidencies of the Council); Case 289/2005/(WP)GG ("indefinite" delays in dealing with an infringement complaint when the Commission identifies lack of political consensus as to how to proceed); Case 2395/2003/GG (openness in the Council when meeting in its legislative capacity); Case 1391/2002/JMA (discrimination against children with special educational needs); Case 2485/2004/(PB)GG (incorrect and misleading submissions to the Ombudsman by OLAF in the context of an inquiry); Case OI/2/2003/GG ('the classification of posts of press officers in [the Commission's] delegations in third countries'); Case 1542/2000/(PB)(SM)IJH (access to Council documents); Case 341/2001/IJH (openness in European Parliament competitions); Case 917/2000/GG (access to Council documents); Case 242/2000/GG (discrimination on grounds of sex); Case 713/98/(IJH)GG (access to documents and data protection); Case 1004/97/(PD)GG (access to examination scripts in recruitment competitions); Case OI/1/98/OV (adoption of a Code of Good Administrative Behaviour in all EU institutions and bodies); Case 616/96/(PD)IJH (rules on transparency and access to documents in the EU administration).

noted that the last special report to date was submitted in November 2013, shortly after O'Reilly assumed office. It would not be advisable for the Ombudsman to refer matters to the Court in situations where the latter has granted very broad discretion to the EU institutions: the Commission's role as the guardian of the Treaties would be such an area.

Taking these thoughts further, in a case discussed in Chap. 2 concerning Regulation 1049 on access to documents, a question was raised as to whether the Ombudsman's findings may constitute a *new element* to be taken into account for actions for annulment against the EU institutions. The General Court answered the question in the negative, adopting the view that a different answer would 'relax' the deadline for an introduction of an action for annulment.[76] As already mentioned, the application to the Ombudsman does not affect the deadline for an action for annulment. When the case reached the CJEU, the latter did not explicitly deal with this point, but the Advocate General did. He pointed out that a finding of maladministration by the Ombudsman can be classified as a 'substantial new fact'.[77] More specifically:

> [R]ecognition of such a classification does not call into question the fact that the lodging of a complaint with the Ombudsman does not have suspensory effect on the time-limits for bringing court proceedings against the initial decision … Those time-limits continue to run against the initial decision, which may even become definitive in relation to the applicant, either where the Ombudsman does not identify any instance of maladministration or where, although an instance of maladministration has been identified, the latter, being merely procedural, does not in particular raise any doubt as to the merits of the solution adopted in the previous act not challenged within the time-limits for bringing court proceedings.
>
> The time-limits for bringing court proceedings would not therefore be reopened simply because the matter had been referred to the Ombudsman, but because his decision finding an instance of substantial maladministration in the processing of an application for access to documents constituted a substantial new fact within the meaning of the case-law of the Court. …
>
> In my view, the approach of treating [such] a decision by the Ombudsman as a substantial new fact justifying reconsideration by the administration of a

Some of these cases were discussed in earlier chapters. Many (but of course not all) of these reports would fall under the scope of illegality.

[76] Case T-141/05, *Internationaler Hilfsfonds eV* v *Commission* EU:T:2008:179, para 86.

[77] Opinion of Advocate General Mengozzi in Case C-362/08 P, *Internationaler Hilfsfonds eV* v *Commission*, EU:C:2009:553, para 169.

> previous decision which has become definitive *ensures the effectiveness of a finding of an instance of maladministration by the Ombudsman* and at the same time preserves the discretion of the requested institution. On the one hand, contrary to what the Commission maintains in its response to the appeal, an institution will be *all the more likely to comply* diligently with the requirement of proper administration in the context of access to documents if it is aware of the possibility open to an applicant of requesting the reconsideration of a decision refusing access following a finding by the Ombudsman of an instance of maladministration. On the other hand, it is clear that, despite the obligation to reconsider the merits of the previous decision refusing access, the institution will retain the power not to disclose the requested document on the basis of the exceptions laid down by Article 4 of Regulation No 1049/2001.[78]

This Opinion provides some support to the claims made in this contribution that the faculty to refer an unresolved complaint to the Court is linked with the question of compliance.

In addition, it has been demonstrated how the Ombudsman's method is inextricably linked with law and the citation of CJEU judgments; if so, it is probably only inevitable that some further collaboration between the two institutions should be developed in due course, possibly along the aforementioned lines and limitations.

Procedure and Outcome

The main purpose of this broader section is to consider the justifications behind a possible power granted to the Ombudsman to refer a matter to the Court, and also some counter-arguments or objections to this proposal. To that end, the discussion on the procedure and the outcome of the Court's intervention will be limited.

The most logical procedure would be for the Ombudsman, upon the receipt of the complainant's necessary consent, to bring the case as one of the parties (the other being the institution/body concerned), acting on behalf of the general interest. The role of the Ombudsman acting as a promoter of the EU's general interest has also been underlined by the Court.[79] In the same case, Advocate General Trstenjak pointed out that

[78] Ibid., paras 170, 171 and 174 (emphasis added).

[79] See, for example, Case C-331/05 P, *Internationaler Hilfsfonds eV* v *Commission*, EU:C:2007:390, para 26.

in 'cases of smaller-scale irregularities, [the Ombudsman's] wide discretion may even cause him to refrain entirely from taking action against the body in question, which is not an option open to the Community Courts'.[80] Further, the 'focus of the Ombudsman's efforts' is 'the optimisation of the Community administration and not individual legal protection', and the aim of the legislature was to offer 'citizens a low-cost, flexible solution with a view to making the public aware of misconduct on the part of the administration'.[81] Although the analysis of cases and the conducted interviews demonstrate that the Ombudsman actually tries to achieve a *balance* between the two aims (individual redress and optimisation of the EU administration), the Court's recognition of the latter function is important also for the purposes of the proposal advanced in this section.

As regards the outcome in instances where the case reaches the Court, the Court should be empowered to examine the merits of the case and decide appropriately. For example, if an institution still refused to disclose a document further to the Ombudsman's draft recommendation, and if the Court agreed with the Ombudsman's finding that the initial refusal was unlawful, it should be empowered to annul that decision, which would effectively lead to the disclosure of the document in question.

To summarise, the possibility for a Court referral would contribute significantly to the strengthening of the EU rule of law and—more generally—accountability in cases where the Ombudsman is not successful in convincing the institution concerned to comply with a draft recommendation. This section also considered the limitations of this proposal and several counter-arguments. Ultimately, one's perspective depends on one's understanding of the role of the European Ombudsman within the existing constitutional and institutional framework: the more one departs from the traditional parliamentary model, the more one is likely to be open to a closer, yet cautious and limited, collaboration with the judiciary. If this proposal were to be advanced, it would fall upon the Ombudsman to strategically decide upon the—limited—cases per mandate where the Court should intervene. This is no doubt remindful of the existing strategy concerning the use of special reports.

[80] Opinion of Advocate General Trstenjak in ibid., para 61.
[81] Ibid., para 63.

The 'Geographical' Scope of the Mandate

As underlined in previous chapters and cases, the Ombudsman supervises alleged maladministration against the EU institutions, bodies, offices and agencies, and cannot supervise complaints against national authorities, even if they implement EU law. The 'geographical scope' of the mandate is a question that has at least three dimensions, which will be discussed in this section: first, whether the Ombudsman should be granted powers to supervise national authorities when implementing EU law; second, whether the existing arrangements within the European Network of Ombudsmen (ENO) are sufficiently efficient or transparent and, in the negative, how they could be improved; third, which entities are *EU* institutions, bodies, offices and agencies under Article 228 TFEU and which entities fail this threshold, thereby falling outside the scope of the mandate.

It will be argued that the Ombudsman should intensify the collaboration with the national interlocutors in the implementation of EU law at the domestic level, in particular via drafting a non-binding Code of good practice, without, however, any modifications as to the existing 'jurisdictional' division. Related to this point, the ENO should further develop with a view to becoming more transparent.

Background

Before the adoption of the Maastricht Treaty, the Spanish government advanced an ambitious ombudsman scheme, in the context of European citizenship.[82] The scheme was not eventually adopted (the Danish plan prevailed, while the European Ombudsman's mandate was designed under considerable influence by the Danish Ombudsman).[83] The Spanish proposal contained provisions on 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'.[84] One of the alternatives of the same plan was a European Ombudsman who would 'reinforce the action of the national "mediators"':

[82] Carlos Moreiro Gonzáles, 'The Spanish proposal to the intergovernmental conference on political Union' in The European Ombudsman (n 19) 27–37.

[83] Heede (n 21) 25 *et seq.*

[84] Moreiro Gonzáles (n 82) 33.

> Article 9 also [gave] 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 entitle[d] 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'…).[85]

Moreover, the first European Ombudsman proposed at the Convention the addition of a fifth paragraph to what is now Article 228 TFEU, which would read as follows:

> An ombudsman or body dealing with petitions in a Member State may transfer a case involving fundamental rights under Community law to be dealt with by the European Ombudsman. Such complaints may be addressed directly to the European Ombudsman if no ombudsman or body dealing with petitions in a Member State is competent to deal with the matter.[86]

The geographical scope of the mandate was therefore discussed before and after Maastricht. A number of reasons have been suggested as to why the Spanish scheme did not convince the EU institutions and member states: Parliament's opposition (including concerns that the Committee on Petitions would become significantly weakened); the unclear wording and imprecise definition of the Ombudsman's mandate in many respects; the absence of ombudsman institutions in all member states at the time; that the proposal would correspond to 'a more advanced stage' of European integration, hence the preference to the Danish scheme, which limited the Ombudsman's reach to the—then—Community administration; finally, the absence of a list of rights could not render the creation of a 'constitutional body' a sufficiently substantiated choice.[87]

In this context, the creation of the ENO was advanced by Söderman as he understood that the European Ombudsman's mandate was limited and it could not possibly extend to national entities implementing EU law.[88] Accordingly, Peters argued that 'reliance on and improvement of the

[85] Ibid., 33–34.

[86] Söderman (n 16) 6.

[87] Moreiro Gonzáles (n 82) 30–37.

[88] Nikos Vogiatzis, 'Communicating the European Ombudsman's Mandate: An overview of the Annual Reports' (2014) 10 *Journal of Contemporary European Research* 105, at 119–120.

network of national ombudsmen is important for the European ombudsman, because of his limited mandate'[89]; while Harlow and Rawlings observed that this 'jurisdictional limitation has special resonance, since the [European Ombudsman] has been pressed from the outset to promote an accountability network' (the ENO).[90]

The Implementation of EU Law and the Subsidiarity Principle

What the implementation of EU law means has generated a substantial academic debate. At least post-*Akerberg Fransson* we know that the terms 'scope of EU law' and 'implementation of EU law' under Article 51(1) of the Charter overlap.[91] Beyond the 'implementation proper' (when a member state is required 'to take action')[92] and the 'derogation'[93] situations, there exist cases/situations that have been found to fall *within* the scope of EU law '*otherwise* than through the traditional categories of implementation and derogation'.[94] This is not the place to examine this matter, precisely because, even in the narrowest understanding of the term

[89] Peters (n 16) 724 (commenting on the proposal by the first European Ombudsman to include a specific right to non-judicial remedies in each member state).

[90] Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542, at 556–557.

[91] Case C-617/10, *Akerberg Fransson*, EU:C:2013:105, in particular paras 18–20.

[92] See, for example, Case 5/88, *Wachauf*, EU:C:1989:321, para 19, and Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, at 378. As Dougan rightly notes:

> The rationale for subjecting such measures to judicial review on the basis of Union law is clearly established and widely accepted: when exercising power on behalf of the Union, the member states should be held to the public law standards expected under the Treaties; not only so as to ensure a common level of protection for citizens affected by the exercise of Union power, but also so as to subject the discretionary powers of the Union's domestic agents to a single framework of public control.

See Michael Dougan, 'Judicial review of member state action under the general principles and the Charter: Defining the "scope of Union law"' (2015) 52 *Common Market Law Review* 1201, at 1211.

[93] See, for example, C-260/89, *ERT*, EU:C:1991:254.

[94] See the discussion by Dougan (n 92) 1220 *et seq*. As he observes, any incoherent approach, on the part of the Court (including the occasional possible expansion of the scope of EU law) risks raising difficult questions concerning the clear delineation of the Union and member state competence.

(i.e. member states *taking action* imposed by EU law) national authorities do not fall under the Ombudsman's mandate.

This brings us to the subsidiarity question. Indeed, it was pointed out—also by the European Ombudsman—that the principle of subsidiarity entails that it is up to the national ombudsman offices to deal with a case involving EU law, within the confines of their own 'jurisdiction'; a more precise formulation was that the principle of 'subsidiarity in remedies' was at stake.[95] More generally, subsidiarity entered the EU world due to concerns about possible disproportionate federal steps, 'the desire to avoid excessive centralization', and the need to augment 'pluralism and the diversity of national values'.[96] The fully developed version of the principle features in Article 5(3) TEU:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

It follows from the above provision that subsidiarity under EU law presupposes shared competence, and arguably also a test of effectiveness/efficiency,[97] notably if the 'scale' or 'effects of the proposed action' justify EU intervention. Simultaneously, it is no secret that subsidiarity is a widely debated and contested notion.[98]

In the area of maladministration, 'subsidiarity in remedies' could be taken to mean that if a national (or regional) ombudsman is not best suited or even does not have a mandate to deal with a case involving the implementation of EU law, notably a case of considerable scale and effects, she or he would need to forward the case to the European Ombudsman. This is not possible, however, owing to the very precise wording of Article

[95] See, for example, Annual Report 2006, 16.

[96] Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72–73.

[97] Craig (n 96) 84.

[98] For a broader discussion on subsidiarity as a principle of *international law* see, for example, Andreas Follesdal, 'The principle of subsidiarity as a constitutional principle in international law' (2013) 2 *Global Constitutionalism* 37, at 38.

228 TFEU, which specifies that the Ombudsman's ambit does not extend to the national level. Thus, the better view would be that the conferral principle,[99] rather than subsidiarity, substantiates and justifies the limitation of the mandate to EU institutions and, consequently, the Ombudsman's lack of powers to supervise national authorities implementing EU law. As will be seen, this division of labour between the European and the national interlocutors stems from a clear (and legitimate) decision to avoid potential conflicts between the former and the latter, and essentially prompted developments with regard to the creation of a network of ombudsmen.

Harlow and Rawlings explained that the ideas of the European Ombudsman to extend the geographical scope of the mandate were met with reactions by Member States due to 'national constitutional traditions' and the principle of subsidiarity.[100] For Member States to invoke the principle of subsidiarity whenever a competence question is being discussed is certainly not surprising. Accordingly, in his analysis of the inter-institutional relations between the European Ombudsman and his peers, Tsadiras underlined that subsidiarity was employed as 'a face-saving solution' to the 'dovetailing' issue of the division of competences, but underneath the surface two 'central issues' had to be considered: 'shared area[s] would be bound to generate operational confusion and institutional tension', whereas national ombudsman offices feared 'the creation of a two-tier arrangement that would place national ombudsmen under [the European Ombudsman's] hierarchical influence'.[101]

The following excerpts from interviews conducted in Strasbourg will provide further insights.

> There are '*legal*' and '*political*' '*considerations*' for what the legal basis for an extension of the mandate could be. '*In terms of the legal considerations, there is no room … there is no legal provision in the treaties that would allow such an extension of the mandate and on the contrary there is sufficient legal provision that in fact prevents it. The reason for that –now we come to politics- was that … the Spanish plan did envisage that the Ombudsman would in fact have*

[99] See Art 5(2) TEU.

[100] Harlow and Rawlings (n 90) 559.

[101] Alexandros Tsadiras, 'Roles of institutional "flat-sharing": the European Ombudsman and his national peers' (2008) 33 *European Law Review* 101, at 109–110.

authority to intervene in the member states. Ultimately … the so-called Danish model prevailed'. '*I think that the political problem there was that obviously if the Ombudsman were to have [that authority] you would have the very clear possibility of … territorial conflicts or even jurisdictional questions … because obviously this would also be the territory, the* chasse gardée *of the national ombudsmen and you have two competences … with no particularly clear lines of demarcation. That I think would have been very detrimental to the European Ombudsman, who of course came in the scene late and arrived after a very large number of national ombudsmen'*. '*It would have been impolitic for the Ombudsman to have that kind of possibility because of the conflicts that would have arisen*'. The former European Ombudsman moreover explained that one condition for accessing the Ombudsman is that the complaint must concern an EU institution. '*That condition is not obvious even to quite sophisticated citizens, and therefore the result is that when they see a breach of EU law, they automatically assume that this falls under the mandate of the European Ombudsman, and then they come to us*'. He referred to the high number of complaints falling outside the mandate for that reason, approximately 60 or 70% of the complaints received (at least at the time when the interview was conducted). These cases '*would be contested between the two authorities*' and '*that would not create particularly good outcomes for citizens*'. The '*current arrangement*' of '*mutual respect of jurisdictions*' via the Network has worked '*extremely well'* and was preferable, according to Diamandouros.[102]

One of the observations submitted to the former Secretary General was the absence of any references to the limits of the Ombudsman's mandate, especially in the first 'Strategy' document, contrary to some of Söderman's Annual Reports. He confirmed that there had been no discussions in-house as to a possible request to extend the mandate. On the possibility for a geographical expansion, he distinguished between a political and a practical reason. On the political side, he observed that, seeking to extend the European Ombudsman's mandate to cover the member state authorities would entail conflicts with national ombudsmen, given that in all member states (with the exception of Italy and Germany) national ombudsmen do exist, and their independence is 'part of their institutional identity in their own constitutional frameworks'. This was confirmed during the discussions for the creation of a European Health Ombudsman, dealing with complaints on cross border medical treatment. The idea stemmed from one of Parliament's Committees, and national ombudsmen clearly rejected the idea as a 'threat

[102] Interview with the European Ombudsman, 17.02.2012 (on file with the author).

to their competence'. The European Ombudsman was also against it. On the practical side, the Secretary General referred to resources, an issue the Commission has also to deal with when examining infringement procedures against member states.[103]

The European Network of Ombudsmen: Potential and Challenges

The European Network of Ombudsmen was established in 1996 as a form of cooperation that includes, beyond national or regional ombudsman offices from the EU member states, similar offices from candidate countries, and the Committee on Petitions of the European Parliament. According to its website, the aims and activities include the following: 'enable[s] [the European Ombudsman] to deal promptly and effectively with complaints that fall outside her mandate'; to share '[e]xperiences and best practice … via seminars and meetings, a regular newsletter, an electronic discussion forum and a daily electronic news service'; while '[v]isits of the European Ombudsman organised by the ombudsmen in the Member States and accession countries have also proved highly effective in developing the Network'.[104]

The creation of the Network was an important achievement of the office. Established by the first European Ombudsman, it was developed by initiatives undertaken by Diamandouros, who decided to raise its visibility.[105] O'Reilly is presently keen to reflect upon the reform of the network, a point returned to below. An important step in its development took place in 2007, when its members adopted a 'Statement', with a twofold purpose: 'to make the EU dimension of the work of ombudsmen better known and to clarify the service that members of the Network provide to people who complain about matters within the scope of EU law'.[106] A non-binding document, it clarified a number of points regarding the network and its EU law-related activities: membership of the network is voluntary; national and regional offices deal with complaints against domestic authorities that fall within the scope of EU law; all offices operate under the principles of impartiality, effectiveness and fairness, while respecting the

[103] Interview with the Secretary-General, 14.02.2012 (on file with the author).

[104] See the Network's website at www.ombudsman.europa.eu/en/atyourservice/enointroduction.faces

[105] See, on this point, Vogiatzis (n 88) 116.

[106] Annual Report 2007, 12. The statement was slightly updated in 2009 to include the European Ombudsman's online interactive guide; see Annual Report 2009, 78.

values of the EU under what is now Article 2 TEU; national and regional ombudsmen 'may ask the European Ombudsman for written answers to queries about EU law and its interpretation, including queries that arise in their handling of specific cases'.[107] This point should be stressed: indeed, an informal mechanism exists within the Network whereby a national ombudsman can transfer the case to the European Ombudsman and vice versa. Simultaneously, a national ombudsman may submit a query on EU law to the European Ombudsman, and the latter provides an interpretation.[108] O'Reilly has announced a plan to expedite the query procedure. The overall aim is to answer the submitted query within 20 working days, unless the Commission—where the query is usually transferred—requires more time to provide a response.[109] However, the publication of the query and of the Commission's reply will, in principle, still remain accessible only to Network members (the ENO 'extranet'). That being said, the Ombudsman's website contains a limited number of queries submitted by national/regional ombudsman offices and successfully transferred to the Commission.[110] Thus, while the initiative is to be welcomed insofar as it improves the efficiency of the cooperation on queries, it does not automatically constitute an impressive improvement in transparency terms.

In 2010, the European Ombudsman announced a project 'to map the competences of national ombudsmen within the Network'.[111] This project has not produced—to date, at least—tangible results. More generally, the existing regime (the informality of the network) cannot be considered optimal, mainly because it raises some concerns about its overall transparency. Before exploring the transparency question, a fundamental pillar for a more democratic EU but also a matter that does not depend solely on the European Ombudsman's intentions, some remarks on the transfer of cases within the network are apposite.

> When discussing the transfer of cases via the Network with one of the former Directors of the office, one of the questions concerned the criteria behind the choice:

[107] Ibid., 110.

[108] See further Tsadiras (n 101) 106–109.

[109] See 'Queries from Members of the Network', available at: www.ombudsman.europa.eu/en/cases/queries.faces

[110] See 'Summaries of queries', available at: www.ombudsman.europa.eu/en/cases/queries-summaries.faces

[111] Annual Report 2010, 64.

'*Not easy… There are multiple ways of redress … formal, less formal*' (…) *The Ombudsman has instructed us to help people. Helping people means giving advice –hopefully good advice'*. '*So, it's extremely difficult to be 100% sure that the advice you are giving is one that can help people*', because if the entity to which the complainant might be directed is not competent or able to help, this might have implications for the EU Ombudsman's reputation as well. Sometimes the European Ombudsman contacts the national ombudsman in advance (before transferring the complaint) to identify if they can deal with a case. Overall, this matter is dealt with on a '*case-by-case*' basis. '*As far as I know, we are the only institution which does that*' – i.e. providing advice to complainants.[112]

According to the latest Annual Report, in 2015 the European Ombudsman transferred or advised complainants as follows: 512 complaints were transferred to a member of the network, out of which 470 to a national or regional ombudsman or a similar body, and 42 to the Committee on Petitions; 137 to the Commission; and 439 to other institutions and bodies.[113] Sometimes the advice is a recommendation to contact more than one entity. Also, the complainant's consent is required before the transfer of a complaint. That being said, if one considers situations where the complainant does not actually submit a complaint to the Ombudsman, because she finds useful advice via the Ombudsman's online interactive guide, it can be seen that the impact of the office—in terms of providing advice—is significantly wider. Thus, the interactive guide has reduced the number of complaints transferred to national or regional similar bodies.

Talking to the former Media and External Relations Officer, it was observed that a general message from the Annual Reports was that a better information campaign would lead to less complaints falling outside the mandate.

'*It's extremely difficult to inform 500 million citizens about what the Ombudsman does and the exact nature of his mandate'*. Many complaints are about problems with national authorities, when there is '*a European angle to it*', but the Ombudsman is not competent to deal with these cases: '*It is very difficult for people to understand, that we are only dealing with complaints about the EU administration*'.[114]

[112] Interview with the Director of Directorate A, 14.02.2012 (on file with the author).
[113] Annual Report 2015, 25.
[114] Interview with the Media and External Relations Officer, 13.02.2012 (on file with the author).

The EU office is not of course, the only ombudsman institution devoting time and resources in 'directing traffic', that is, advising complainants on where to turn in cases falling outside their 'jurisdiction'.[115] Let us now return to the question of transparency.

During the interview with the former European Ombudsman, it was pointed out by the author that, despite its success, the network had not been entirely transparent, especially when it came to publishing the outcomes of cases transferred by the European Ombudsman to a national ombudsman. If a citizen had his or her case transferred to a national ombudsman, it would be beneficial to know what happened to that case for future reference. In brief, the following question was submitted: '*How do you see the informality of the Network vis-à-vis the principle of transparency?*'

The Ombudsman replied by pointing out that he did not find any problem there. '*No case may be transferred without the explicit written permission of the complainant. … From that point on, it becomes an issue between the national ombudsman at the national level and that citizen. I think that is entirely transparent. The outcome of the case obviously, in terms of transparency, then becomes transparency at the national level … transparency of 27 different legal orders. The Ombudsman will put on his website the decision to transfer a case to an ombudsman. I am occasionally informed by my national colleagues how they resolved the issue; whether they in fact put on their websites the decisions or not, some of them do, some of them don't; but that is not a weakness of the Network … I cannot of course impose my views on my colleagues on how they handle these things. It depends on the legal transparency regimes of the 27 member states*'.[116]

On the informality of the ENO and citizens' limited access, in light of the principle of transparency, the former Head of the Communication Unit observed:

'*The development was purposely informal. We were very keen to create the kind of Network where somebody who had a question could ask it without any formality and without any fear that their question might appear silly or too*

[115] Compare the practice of Canadian offices in Stewart Hyson, 'Ombudsman research project: The provincial and territorial ombuds-offices in Canada' in Stewart Hyson (ed) *Provincial and territorial ombudsman offices in Canada* (University of Toronto Press 2009) 3, at 15.

[116] Interview with the European Ombudsman, 17.02.2012 (on file with the author).

> *straightforward*'. (…) Furthermore, '*as much as possible, we wanted to avoid a hierarchical Network where people started competing for importance within the Network*'.[117]

An informal network is no doubt a legitimate choice, but looking at this matter from a critical perspective, one wonders whether this is, indeed, the *optimal* choice. O'Reilly has arguably demonstrated awareness of this issue: in the proposals to modernise the network, she pointed out that in 'the medium term, the Extranet [a website reserved only to ENO members] will turn into a genuine Network website with public sections and those that will continue to be reserved for Network members'. Accordingly, the aim is 'to open up the "News" section of the Extranet and to allow the general public to subscribe to Daily News', with a view to increasing the 'visibility of Network activities'; in addition, the quarterly ENO newsletter will be replaced by an annual newsletter, publicly available online.[118] These initiatives are to be welcomed, and time will tell if and when they will be implemented, and notably how these proposals will be received by the remaining members of the network.

The Possibility of Joint Inquiries

Article 5(1) of the Statute states: 'In so far as it may help to make his enquiries more efficient and better safeguard the rights and interests of persons who make complaints to him, the Ombudsman may cooperate with authorities of the same type in certain Member States provided he complies with the national law applicable'. That provision has prompted reflections on whether the EU Ombudsman could launch joint inquiries with the national interlocutor on a matter falling within the scope of EU law.[119] The current Ombudsman is keen to develop a stronger cooperation

[117] Interview with the Head of the Communication Unit, 13.02.2012 (on file with the author). Compare also an analysis of how informality and interdependence go hand-in-hand with the *internal perceived* (i.e. *by their members) efficiency* of networks in Josine Polak and Esther Versluis, 'The virtues of interdependence and informality: An analysis of the role of transnational networks in the implementation of EU Directives' in Sara Drake and Melanie Smith (eds) *New directions in the effective enforcement of EU law and policy* (Edward Elgar 2016) 105.

[118] See 'Reforming the European Network of Ombudsmen', available at: www.ombudsman.europa.eu/en/activities/reforming-the-network.faces

[119] See, for example, Annual Report 2004, 19.

with national ombudsman offices, but such cooperation has not taken the form of 'joint inquiries'. Some steps have been taken though, always in the context of an own-initiative inquiry launched by the European Ombudsman, but these initiatives have taken the form of *parallel investigations*, while the participation of the national interlocutors was voluntary. The Ombudsman collates the responses—including those from civil society actors, institutions or individuals—and publishes her report. Such intensified cooperation is to be welcomed as it has the potential to produce tangible results for citizens on matters affecting them and falling within the scope of EU law.

The office has recently concluded an own-initiative inquiry on the respect of Charter rights when member states are implementing the EU cohesion policy.[120] Some national ombudsman institutions participated in the consultation, and a summary of their views was provided in the Ombudsman's decision.[121] This was a rather loose form of cooperation, perhaps a feedback exercise. However, more advanced was the cooperation concerning the inquiry into the forced return of irregular migrants; the Ombudsman focused on Frontex, while 19 national ombudsmen on the member state authorities.[122] Those responses feature on the Ombudsman's website; quite expectedly, the level of detail or the quality of the responses vary. The 19 national ombudsman offices involved in these parallel investigations held a follow-up meeting in Madrid,[123] which led to a 'Declaration'. That declaration contains a number of important recommendations, including that national ombudsmen will encourage domestic authorities to introduce complaints mechanisms that returnees can access; they can be involved in the monitoring of forced returns, provided that sufficient resources are set aside for this; and can recommend improvements to domestic codes of conduct/guidelines for the return of migrants.[124] Forthcoming areas of cooperation include the respect of human rights of migrants at the domestic level in activities stemming from

[120] Case OI/8/2014/AN; see also the relevant discussion in Chap. 4.

[121] Ibid., points 24–25. The fundamental rights mentioned by the domestic offices included the following: 'the principle of equal treatment, the right to social security, social assistance and health care, and the right to be heard'.

[122] Case OI/9/2014/MHZ; see also the relevant discussion in Chap. 4.

[123] Annual Report 2015, 26.

[124] European Network of Ombudsmen: Investigators' meeting on forced returns, 2015 ('Madrid Declaration', on file with the author).

the EU's Asylum, Migration and Integration Fund; and guidelines on lobbying transparency at the national level.[125]

Still, as already noted, the parallel investigations conducted so far cannot be characterised as 'joint inquiries'. And indeed, one could envisage jurisdictional and investigatory conflicts if the proposal for joint inquiries and possibly the production of joint reports were to be implemented. As Tsadiras observed, when the office was designed, ideas granting the Ombudsman a stronger role at the national level were not met with enthusiasm; national ombudsmen feared the creation of a 'European "mentor"', a 'pyramid-like construct' via a 'disguised preliminary reference', possibly contrary to Article 5(1) of the Statute.[126]

A Proposal to Further 'Institutionalise' the Network and Increase Its Transparency

As already mentioned, O'Reilly is presently reflecting upon how to render the impact or outputs of the Network more visible. The above discussion has unravelled that the jurisdictional question is obviously a delicate matter; that the network is not particularly keen to be open to the 'outside world', possibly contrary to the European Ombudsman's explicit or implicit references for further transparency; and that practices across the domestic offices vary—which is quite natural, given that some of these offices have only recently been established.

For an account seeking to critically reflect upon the various dimensions of the existing mandate, a question that should not be avoided, especially in light of discussions or proposals submitted during the early days of the institution (or even before its establishment), is whether the EU Ombudsman should be granted new powers concerning the implementation of EU law at the domestic level, which would, of course, require, Treaty amendment. It is submitted that the Ombudsman should *not* be granted such powers, namely to decide on complaints on maladministration

[125] Annual Report 2015, 26. See also the 'Report on the consultation of the European Network of Ombudsmen on public officials' interaction with interest representatives', summarising the main points in the responses of 13 ombuds-offices in the EU, plus the Icelandic and Norwegian offices: www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/67521/html.bookmark

[126] Tsadiras (n 101) 109, 111 and 113. He also notes (on p. 108) that the Danish Ombudsman had proposed in 1992 the formal establishment of a "preliminary reference system".

by national authorities implementing EU law. As already explained, this would create significant tensions and possibly some type of hierarchical structure undermining the independence of national ombudsman offices.

To limit the discussion to competence and jurisdiction, however, would probably be insufficient. One influential civil society actor with established relations with the Ombudsman's office opined that he did 'not believe that the case has been made out for extending the European Ombudsman's brief to include complaints against national governments, but [thought] the performance levels of national ombudsmen are very variable, and wonder[ed] whether the European Ombudsman should be given a stronger co-ordinating role between them'.[127]

Furthermore, the ENO is not, of course, the only network raising transparency concerns. It has been shown that multi-level governance networks tend to suffer from 'weak visibility', 'remoteness from parliaments and voters' and informality.[128] Also, and related to this, they are favouring 'peer', rather than external or public, accountability.[129] Some insights from the European Competition Network (ECN) are useful here—while noting that, first, competition rules and maladministration are not quite similar areas, including in terms of enforceability and second that, unlike the ENO, the ECN is by design hierarchical, with the Commission situated on the top of the scheme. Now, Cengiz's account underlines the accountability and transparency problems of the ECN, which are indeed found to derive from asymmetries inherent in multi-level governance: opacity to 'the outside world' or 'outside actors', contrary to transparency and solidarity inside the Network.[130] She underlined: '[t]his opacity jeopardizes, if not entirely prevents, active, critical and timely contribution of the epistemic community to the discussion process'.[131] All this relates to the aforementioned remarks on the informality/lack of transparency of the ENO, and the preference, among its members, to limit external scrutiny. However, given that O'Reilly is keen to reform the network, it is timely to discuss proposals for its further development.

[127] Dick Leonard, 'Good work, but could be better… (the role of the European Ombudsman)' available at: fpc.org.uk/articles/427

[128] Yannis Papadopoulos, 'Problems of democratic accountability in network and multi-level governance' (2007) 13 *European Law Journal* 469.

[129] Ibid., 480.

[130] Firat Cengiz, 'Multi-level governance in competition policy: the European Competition Network' (2010) 35 *European Law Review* 660, at 674.

[131] Ibid.

To do that, it is again necessary to reflect upon the EU's need to bring citizens closer and increase its democratic performance. Here, of particular significance is citizens' need to interact with the national administration when implementing EU law: asymmetries across the domestic ombudsman institutions is one issue; the ENO's lack of transparency another. Yet both issues relate to citizens' participation and their ability to hold the administration to account. The remarks of the former European Ombudsman are of relevance: 'Any focus on citizenship as a means of empowering Europeans must therefore take account of the fact that such empowerment must take place not only vis-à-vis the EU institutions, but also vis-à-vis national authorities in relation to EU matters'.[132]

The implementation of EU law primarily takes place at the national level, by national authorities. This point was mentioned during the discussions on the establishment of a 'Community Ombudsman' in the seventies; some actors considered that such an establishment was, indeed, unnecessary.[133] There are, of course, exceptions to this rule (competition law would feature among the exceptions), while scholars have pointed out that Europe's administration is effectively 'integrated', and to depict an overly simplified picture would not do justice to the existing administrative reality.[134] Building on these thoughts perhaps, it is difficult for complainants to understand why a case clearly falling within the scope of EU law has to be dealt with by the national or regional ombudsman. To point out this difficulty does not automatically entail that the European Ombudsman should decide on such cases. Still, in order to provide meaningful solutions, it is firstly essential to identify the nature and the scope of the problem. In addition, some national offices cannot have the European Ombudsman's expertise or even privileged access to the EU institutions and/or EU-related information. Alongside this, national ombudsmen apply or interpret EU law in a variety of ways and to a variable extent:

[132] Nikiforos Diamandouros, 'Union citizenship after the Lisbon Treaty', CEUS Research Working Paper 1/2010, p 10; available at: http://www2.hull.ac.uk/fass/pdf/European%20Ombudsman%20CEUS%20paper%201.2010.pdf

[133] See further 'Report drawn up on behalf of the Legal affairs Committee on the appointment of a Community Ombudsman by the European Parliament, Rapporteur Sir Derek Walker-Smith', 6 April 1979, PE 57.508/fin, available at: www.ombudsman.europa.eu/resources/historicaldocuments.faces

[134] Herwig Hofmann and Alexander Turk, 'Conclusions: Europe's integrated administration' in Herwig Hofmann and Alexander Turk (eds) *EU administrative governance* (Edward Elgar 2006) 573.

several questions arise with regard to—for example—their views on supremacy or their reliance on human rights as general principles of law (and now also guaranteed by a legally binding Charter) as opposed to human rights stemming from the constitution or the ECHR.[135] All this adds to the asymmetry.

It is therefore submitted that the next step in the development of the network could be to draft a non-binding Code, for instance a 'Code of good practice on EU law-related matters'. The Code would address a number of issues: most notably it would *encourage the national ombudsman offices to contact the EU Ombudsman on matters falling within the scope of EU law and receive an opinion*; provide for the *transfer of complaints according to the existing jurisdictional allocation*; and increase the overall *transparency and visibility of the Network*. It is not the purpose of this contribution to go beyond the above guidelines and draft such a Code, and it is acknowledged that such a proposal might be met with scepticism by some national offices. However, the case can be made that the benefits of an increased and more 'institutionalised' cooperation within the network outweigh the costs—and most notably the possible reluctance of some domestic offices to intensify their cooperation with the EU office. It is remembered that the current Ombudsman 'is keen to strengthen her coordination role in the Network by being an innovative and strategic source for ENO activities in areas of mutual interest'.[136] To tackle any observed asymmetries within the Network, every effort should be made so that all national ombudsmen and similar offices of the 28 member states endorse this Code. This will no doubt require meticulous preparation, appropriate resources and certainly extensive consultations.

Limitations of This Proposal and Further Justifications

The Code proposed in this contribution would not be legally binding, and therefore there is no need to discuss a possible legal basis.[137]

[135] See, in this regard, a very interesting survey and discussion on 'The role of ombudsmen and similar bodies in the application of EU law: 5th seminar of the National Ombudsmen of the EU member states and candidate countries' (2006) available at: bookshop.europa.eu/en/the-role-of-ombudsmen-and-similar-bodies-in-the-application-of-eu-law-pbQK7606674/?CatalogCategoryID=.SAKABst2ooAAAEj84cY4e5K

[136] 'Reforming the European Network of Ombudsmen' (n 118).

[137] Such as the one concerning an EU Law on administrative procedure, on which see Parliament's proposals (relying on Article 298 TFEU), available at: http://www.europarl.

Further, adopting such a Code arguably may be deemed to fall within the forms of cooperation envisaged by Article 5(1) of the Statute. The Code could state that national ombudsman institutions are encouraged to consult the European Ombudsman on a matter that comes within the scope of EU law, especially when the answer is not straightforward. *Encouragement* does not entail, of course, a compulsory process, and the establishment of some type of mandatory 'preliminary reference'. Also, the submission of an opinion by the European Ombudsman would concern cases where the *principal issue* of the alleged maladministration is the implementation of EU law by the national authority. There is no doubt, however, that the adoption of a Code would have the effect of prompting an increasingly higher number of queries on EU law, and eventually a higher degree of involvement by the European Ombudsman.

Furthermore, this non-binding opinion would not render the European Ombudsman a 'mentor', since the national or regional interlocutors would not be bound by that opinion—it is remembered that they are not bound by it under the current 'query' scheme either. Rather, it is the possibility of fully coordinated 'joint inquiries' (instead of the existing 'parallel investigations') that would interfere with the *modus operandi* of the national offices much more significantly. Indeed, what is proposed here does not touch upon competence. By contrast, one could envisage broader jurisdictional and investigatory conflicts if the proposal for full joint inquiries were to be implemented. After all, to return to an earlier example, the ECN despite its problems (accountability and transparency) and its formal, regulated and hierarchical construction, has nonetheless developed without the emergence of 'conflicts between network members' and 'varied speed' models, while building 'an extensive informal communication culture' between members.[138] Thus, a stronger coordination role by the European Ombudsman would not necessarily lead to antagonism. It could equally lead to a fruitful and mutually beneficial extra-judicial dialogue with national ombudsmen. That dialogue—on the basis of encouragement, rather than compulsion—would not threaten their independence,

europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2016/01-28/1081253EN.pdf, and, among others, Paul Craig, 'A General Law on Administrative Procedure, Legislative Competence and Judicial Competence' (2013) 19 *European Public Law* 505.

[138] Cengiz (n 130), in particular 668.

absent a hierarchical and legally binding framework (such as the ECN). It is also possible that, within the ENO, the Ombudsman could work with her peers to establish certain criteria on when the consultation would be beneficial; such criteria could be mentioned in the Code.

What additional benefits could stem from the production of a Code? The Ombudsman may often be more familiar with aspects of EU law than her national interlocutors (frequently via the help of the Commission's legal service, as already explained), and therefore the quality of the domestic recommendations on EU law-related matters could eventually increase. In such cases, the national ombudsman would have an ally to convince the administration to comply. Further, this could add somewhat to the EU's efforts to shorten the distance between citizens and the EU administration—in this case, seen through the lens of the domestic administration implementing EU law. The scheme could also progressively result in a more uniform application of EU law provisions across member states.[139] Moreover, the Ombudsman would become more aware of maladministration in the implementation of EU law[140] at the domestic level, thereby adapting, if appropriate, her proactive initiatives accordingly. For example, she could organise more targeted own-initiative inquiries and parallel investigations. Undeniably, the Newsletters and seminars organized by the Ombudsman serve this purpose—but more could be done in this direction, especially taking into consideration the varying practices of national ombudsman offices.

As to improvements in transparency terms, the Code could provide that national ombudsman institutions are encouraged (again, *not obliged*) to publish on their websites the outcome of cases transferred from the European Ombudsman's office, and vice versa. Also, the opinions on EU law provided by the Ombudsman could be published on the ENO's

[139] The proposed scheme could also (ideally) lead to an increased level of accountability vis-à-vis the national ombudsman. If the work of such ombudsman is assessed by a parliamentary committee, that committee could assess the performance of the national ombudsman taking into consideration the non-binding opinions of the European Ombudsman. The relations between institutions and bodies at the national level might not always be optimal, but eventually such a pressure to justify, for instance, why the European Ombudsman's approach was not followed, could produce beneficial results to citizens, whenever their case involves EU law.

[140] Much as the Commission is fully aware of information as regards facts before the National Competition Authorities; see Cengiz (n 130) 667.

website as a matter of course, rather than feature in an internal forum accessible only to ENO members.

It may be wondered whether there might be a link with the proposal advanced in the previous section. The answer is in the negative: the European Ombudsman should not transfer complaints from national ombudsman institutions to the CJEU. Beyond various problems of compatibility of such an idea with primary and secondary EU law, that would create jurisdictional conflicts and would evidently undermine the independence of the national offices. After all, the two proposals serve different aims: the referral to the Court concerns the compliance *within* the EU administration, while the development of a Code is concerned with improving the coordination of the offices on matters falling within the scope of EU law.

The development of such a Code presupposes, of course, additional resources. To that end, the comments in the introduction of the chapter are relevant. Lastly, because national ombudsman offices operate under a variety of mandates, the starting point cannot but be the 'jurisdiction' of the national ombudsman: the European Ombudsman cannot, of course, submit opinions on EU law on matters falling outside the personal and material scope of the mandate of her national interlocutor.

An Inter-connected Question: Which Authorities Should Be Viewed as 'European', for the Purposes of the Ombudsman's Mandate?

Article 228 TFEU may state that the mandate covers the Union institutions, bodies, offices and agencies, but no definition is provided in the Treaties as to what the terms 'bodies' and 'offices' mean (accepting that, for the EU institutions, the guidance is to be found in Article 13 TEU, while it is fairly straightforward to identify the EU agencies). This is crucial because if the entity is classified as a 'Union' one, it instantly falls under the Ombudsman's mandate. Otherwise the Ombudsman will seek to transfer the complaint via the ENO, if possible. Two initial examples are discussed below: the 'European schools' and the 'European University Institute' cases.

In 1995, the Ombudsman received a complaint concerning a European school in Brussels.[141] The Commission argued that the *legal basis* of the establishment of the school pointed to its intergovernmental character; only later on the Community participated in the Board of Governors, but without modification of the entity's status. Thus, the Ombudsman closed the case by deciding that the Commission could not be held responsible.[142] In 1997, the Ombudsman decided along similar lines on an almost identical case, while recognising that the Commission 'ha[d] some general responsibility' since it participated in the Board of Governors and subsidised the school; however, the school was considered to fall outside the mandate as a non-Community body.[143] However, in 2002 the Ombudsman's policy was marked by a change. The Ombudsman asked the Commission to submit an opinion, while recognising that its responsibility did 'not extend to questions concerning *the internal management of the Schools*'.[144] Further to a draft recommendation, he invited the Commission to accept its 'responsibility to promote good administration by the European Schools'.[145] Thus, the Ombudsman did not explicitly include the European schools under the mandate, but focused on the Commission's 'certain responsibility' to promote good administration. Eventually, that approach was not found objectionable by the Commission. Subsequently, in 2004 the Ombudsman concluded an own-initiative inquiry against the Commission concerning its 'certain responsibility' vis-à-vis the Schools; again, it was clearly mentioned that the schools are not a Community body.[146] The Commission provided a thorough response, demonstrating its commitment to raise the quality of administration therein, leading the Ombudsman to conclude that no maladministration could be found. In this context, one would deduce that, despite being formally outside the mandate, the European schools ultimately fall *de facto* inside the mandate, via the Commission's responsibility. This can be verified in additional cases; for example, in a case concerning the European school in Luxembourg, the Ombudsman

[141] Case 199/23.10.95/EP/B/KT, cited in Annual Report 1996, 35.

[142] Ibid., 36.

[143] Case 989/97/OV, cited in Annual Report 1997, 20.

[144] Case 845/2002/IJH, cited in Annual Report 2003, 181–182 (emphasis added).

[145] Ibid., 186. The Ombudsman concluded that the Commission eventually responded satisfactorily to the draft recommendation.

[146] Case OI/5/2003/IJH.

recommended to the Commission to introduce an appeal against the decisions of the Board of Governors.[147]

Let us now examine the two European University Institute (EUI) cases. In 2000, the Ombudsman received a complaint on the rejection of a PhD proposal by the Institute.[148] The initial critical question was whether the Institute could fall under the Ombudsman's mandate. The Ombudsman wrote a letter to the Institute opining that 'there were several arguments that seemed to allow the conclusion that the EUI was to be considered a Community body for the purposes of the Ombudsman's mandate', while asking the EUI to comment on this position; he also 'expressed his hope that the EUI would respond to the complainant's allegations'.[149] The President of the Institute hesitated to answer the legal question, but did reject the complainant's allegation, namely that the research proposal was rejected on racial grounds, pointing out that the decision was based on academic merit. The Ombudsman noted that the term 'Community body' was not defined in the Treaties or elsewhere.[150] He presented a number of arguments suggesting that the EUI should fall under the mandate.[151] However, since the President of the Institute deferred the legal question to the EUI's High Council, the Ombudsman did not position himself on the matter, merely stating that 'it [was] not excluded' for the Institute to indeed fall under the mandate.[152] The Ombudsman went on to find that no maladministration had occurred. Again, the Ombudsman did not provide a clear answer as to the boundaries of the mandate, but since the institution concerned was willing to provide the Ombudsman with justifications, he proceeded with the examination of the case.

[147] Case 2153/2004/MF (in this case concerning the increase in fees). The Commission eventually accepted to look into this matter, but the case lasted for almost four years, which relates to points made earlier in this chapter.

[148] Case 659/2000/GG.

[149] Ibid.

[150] Ibid., point 1.3.

[151] Ibid., point 1.5. These were: that the Institute promoted the Community interests according to the Staff Regulations (the other entities mentioned in the relevant provision fell under the mandate); the Union is competent in education, culture and research, while 'according to the Explanatory Report on the Convention on the fight against corruption […] the EUI [fell] within that Convention's definition of "bodies set up in accordance with the Treaties"'.

[152] Ibid., point 1.7.

However, in a later case concerning age limits in recruitment procedures, the result was not similar.[153] The Ombudsman submitted again an inquiry to the President of the Institute, but this time the President opined that 'the EUI had arrived at the conclusion that it did not fall within the competence of the Ombudsman. In its view, such competence would have to be established by its High Council in agreement with the Ombudsman'.[154] The President explained that the Institute 'was established by a "classical" international convention, and does not form part of the "*acquis communautaire*"'. On the EU's competence in education it was observed that 'the EUI was merely in a situation comparable to other European universities that participate in Community programmes'.[155] Still, the Institute agreed to grant an opinion on the matter but underlined that this would not 'create any precedent'. The Ombudsman welcomed this, but decided not to look into the case. Mindful of the principle of legal certainty, he declared that he had 'arrived at the conclusion that the EUI's view that it is not a "Community body" within the meaning of the European Ombudsman's mandate appear[ed] reasonable', and therefore that 'the Ombudsman [did] not consider that he [was] competent to review the allegation made by the complainant'.[156] The Ombudsman accurately pointed out that the Treaties do not allow the Ombudsman to supervise bodies via a *special agreement*. That being said, he also noted that 'future legal developments' could force him to re-examine this legal question (i.e. whether the EUI could fall under the mandate).

It is questionable whether this case was handled in a principled way. The crucial question is not whether the EUI's legal arguments were convincing; rather, the key issue is that in possibly grey zones such as this one the Ombudsman appeared to seek the consent of the institution/body concerned so as to deal with the case. This does not stem from the existing legal framework and, clearly, it is the Ombudsman's responsibility to decide on which entities constitute—now—an EU body or office.

[153] Case 2225/2003/(ADB)PB.
[154] Ibid., point 1.5.
[155] Ibid.
[156] Ibid., point 2.

Of course, many complaints are fairly straightforward and the first Annual Reports, in particular, contain many examples where the entity in question was a national or a non-Community entity, and therefore the case was transferred accordingly.[157]

> On the European schools cases, my enquiry was whether such practice, that is, to indirectly link those entities with the Commission, could be applied to other national entities as well. The former Secretary General highlighted the Commission's 'degree of effective influence' over the schools, while pointing out that the schools are not established by the Treaties. On the EUI, he observed that the Institute finally objected to the Ombudsman's dealing with complaints against it. This might be an uncomfortable position for the EUI, since the EU is subsidising it, but there was no mechanism at the time to ensure that the Institute complied, for instance, with fundamental rights.[158]

> An additional enquiry was posed as follows: Should therefore one conclude that, in cases where the alleged maladministration concerns an entity which is *not* established by the Treaties, then it is for this entity to decide on admissibility (the 'inside/outside the mandate question'), and not for the Ombudsman? In other words, is the consent of such entity a prerequisite for the Ombudsman to proceed?

> The Ombudsman decides. But of course, the Ombudsman listens to and evaluates the arguments of the entity concerned and the complainant. In the EUI case the Ombudsman accepted the EUI's arguments.[159]

[157] See, for example, complaints 17/97/BB and 1006/97/BB (transferred to the Finnish Parliamentary Ombudsman) and 650/97/PD (transferred to the national Ombudsman of the Netherlands), 705/97/VK (transferred to the Luxembourgish Parliament to be dealt with as a petition); all cited in Annual Report 1997, 282. It is noted that a number of such cases concerned obstacles to freedom of movement, at a time when the SOLVIT network did not exist. Again, the Ombudsman transferred these complaints to the Commission, the Committee on Petitions or the relevant national/regional ombudsman. See, in this regard, the examples in Annual Report 1998, 21–24. See also Case 218/98/OV against the Technical Centre for Agricultural and Rural Cooperation, cited in Annual Report 1998, 17. Simultaneously, entities involving some type of transnational cooperation could not, for that reason alone, be considered as Community bodies. The complaints against business centres in the European Business and Innovation Network and the European Molecular Biology Laboratory are indicative; see Annual Report 1997, 18–19. The reader is also referred to more recent complaints, such as 1557/2015/HK, 205/2013/HK or 528/2016/HK.

[158] Interview with the Secretary-General, 14.02.2012 (on file with the author).

[159] Ibid.

Let us also consider the SOLVIT centres, which provide solutions to problems associated with the cross-border implementation of EU law (in particular internal market law) by national public administrations.[160] One interesting question is whether an alleged maladministration by a national SOLVIT centre could be brought under the Ombudsman's mandate, owing to the crucial participation of the Commission in the SOLVIT scheme. According to the SOLVIT website, the Commission 'coordinates the network', 'provides the database facilities and, when needed, helps to speed up the resolution of problems', while transferring complaints to the network so as to avoid litigation, if it so considers.[161] As Lottini observed, in 2006 the Ombudsman produced a decision where he clearly took the view that SOLVIT centres form part of the national administration.[162] Yet, while the Ombudsman's position was 'formally correct', the particularities of the network (an 'integrated system', which has adopted 'common quality and performance standards') pose definitional problems as to the classification of these centres.[163] Similar questions could perhaps arise as far as certain Europe Direct centres are concerned, although the link with the Commission in that case is more tenuous.[164]

> When asked about SOLVIT centres or Europe Direct centres and the possibility to be classified as European, one former Director of the office observed:
>
> In these cases, '*there is a variety of approaches*'. '*I've seen decisions where the reader could get the impression that we consider these bodies as EU institutions or bodies and the more logical approach in my view would be to say that since they are to a large extent dependent on the Commission, any complaint against SOLVIT or Europe Direct can be understood as being directed at the*

[160] See: ec.europa.eu/solvit/index_en.htm; Micaela Lottini, 'Correct Application of EU Law by National Public Administrations and Effective Individual Protection: The SOLVIT Network' (2010) 3 *Review of European Administrative Law* 3.

[161] SOLVIT website (n 160).

[162] Lottini (n 160) 22 and case 1781/2004/OV cited therein. See also case 2263/2013/HK concerning a cross-border dispute between a Polish citizen and the UK Pension Service.

[163] Ibid., 23–24. The classification referred to therein concerns the national or the European administration.

[164] Chiara Valentini 'The European Union, Europe Direct Centres and Civil Society Organisations: An Enchanted Partnership?' in Chiara Valentini and Giorgia Nesti (eds) *Public Communication in the European Union: History, Perspectives and Challenges* (Cambridge Scholars Publishing 2010) 139–140.

Commission, and a solution could be found by opening an inquiry directed at the Commission. That's what we do in most of the cases. So, not directly, but given their closeness to the European Commission … if I may express myself in terms of science, they are orbiting like satellites around the European Commission.'

Question: '*So you do see potential there via the indirect control of the Commission?*'

'*Yes*'.[165]

Interestingly, the former Secretary General pointed out that questions vis-à-vis the Ombudsman's mandate could arise regarding bodies which, while established under national law, they are essentially set up by EU institutions, or EU institutions strongly participate in their operation.[166]

Moving to the SOLVIT centres, further to discussions with the Commission but also with national SOLVIT centres, the former Secretary General concluded that they constitute part of the national administration. However—and contrary to the courts, where a decision on admissibility is final—the Ombudsman is a flexible institution. In other words, if the Commission receives an increased number of complaints for a specific SOLVIT centre, the Commission will have to respond satisfactorily owing to its general responsibility for the SOLVIT scheme. In the event of an unsatisfactory response, the complainant could direct a complaint to the Ombudsman against the Commission. In such case, the Ombudsman will not investigate the national office but could 'encourage the Commission […] to exercise its practical influence'.[167]

The case on the websites of the Council Presidencies can be remembered, too: the Ombudsman underlined that these websites, whereas maintained by member states, are effectively linked with the Council.[168]

Different in nature questions (which will be considered here for reasons that will be seen in a moment) may arise further to the Ombudsman's ambitious initiative to look into the transparency arrangements of Eurogroup. The Ombudsman asked the President of Eurogroup whether specific steps had been taken with regard to requests for access to

[165] Interview with the Director of Directorate B, 14.02.2012 (on file with the author).
[166] Interview with the Secretary-General, 14.02.2012 (on file with the author).
[167] Ibid.
[168] See Case 1487/2005/GG; see further the discussion in Chap. 4.

Eurogroup documents under Regulation 1049.[169] The President, while thanking the Ombudsman and expressing his willingness to improve transparency, noted, nonetheless, that Eurogroup is 'an informal gathering of Finance Minsters', and thus 'cannot be considered part of the "institutions, bodies, offices and agencies" within the meaning of Art. 15(3) TFEU or Art. 42 of the Charter'.[170] Still, Dijsselbloem reiterated the '*political will* to adhere to the principles stated in Article 15(3) TFEU and Regulation 1049/2001'.[171] The Eurogroup is mentioned in Article 137 TFEU, which refers to Protocol No 14. That Protocol indeed provides that Eurogroup's meetings are informal.[172] Technically, the question as to whether the Ombudsman can investigate complaints against the Eurogroup has not received, to date, a comprehensive answer.[173] Even if the Ombudsman could not find a way to direct a complaint concerning, for instance, access to documents against Eurogroup, the flexibility of the Ombudsman would not prevent her from directing her inquiry against—for example—the Council, if that document related to Eurogroup were in the possession of the Council.

Where should the line be drawn? In 2012–2013, the Ombudsman received an interesting complaint against the 'European Financial Stability Facility' (EFSF).[174] Also relying on the *Pringle* judgment, he informed the complainant that the EFSF was a mechanism formed by member states using the Euro currency *outside the scope of Union law*.[175] Likewise, the Ombudsman emphasised that the 'European Stability Mechanism' (ESM)

[169] See the Ombudsman's letter, 'Recent initiative to improve Eurogroup transparency' available at: www.ombudsman.europa.eu/resources/otherdocument.faces/en/65359/html.bookmark

[170] Press release, 'Reply from the Eurogroup President to the European Ombudsman's letter on Eurogroup transparency' available at: www.consilium.europa.eu/en/press/press-releases/2016/05/31-peg-letter-ombudsman

[171] Ibid., (emphasis added).

[172] See Art 1 of Protocol 14.

[173] It is to be noted, however, that the CJEU has held that the Eurogroup is not a decision-making body (producing acts having legal effects vis-à-vis third parties) or a configuration of the Council, and accepted the Advocate-General's view that Eurogroup is not an EU body, office or agency within the meaning of Article 263 TFEU; see Joined Cases C-105/15 P to C-109/15 P, *Mallis and Others* v *Commission and European Central Bank*, EU:C:2016:702, para 61.

[174] Case 2113/2012/MF.

[175] Ibid., and Case C-370/12, *Pringle* v *Ireland*, EU:C:2012:756.

as an international financial institution also falls outside the mandate.[176] The Ombudsman added ('with regret'): 'this decision implies that, in setting up the EFSF and the ESM, the EU member states concerned made no provision for an ombudsman remedy in situations such as yours'.[177] However, different can be the answer when it comes to *EU institutions participating in ESM* or other *activities/instruments* established after the crisis (as opposed to the ESM mechanism as such): the Ombudsman's mandate covers the *activities* of EU institutions, bodies, offices and agencies, but it is not mentioned in the Treaty or elsewhere that when these institutions are not acting under the Treaties, they are excluded from the mandate.[178]

> The former European Ombudsman, when asked on who should decide on this classification and how easy it is to make such a decision, he replied:
>
> '*It's both fairly easy and difficult at the same time*'. The first step is to identify whether '*an institution, body, agency or office derives from the treaties or from secondary EU law or not*': if so, it is obvious that the entity falls under the mandate. '*When in doubt, you have to establish what the legal basis is*'. Nonetheless, '*EU institutions are different from intergovernmental institutions*'. The Ombudsman referred to the two aforementioned examples: the

[176] Case 2113/2012/MF.

[177] Ibid.

[178] Access to documents requests can be relevant, in this respect. See, for example, Case 167/2013/AN against the Council concerning access to a document (the legal opinion of its Legal Service) regarding the Fiscal Compact Treaty. An analogy may be drawn between this matter and the Opinion of Advocate General Kokott in *Pringle* (n 175, para 176) that the 'Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights'. The Court in that case did not expressly address this (plausible, under the formulation of Article 51 of the Charter) point, namely the applicability of the Charter to EU institutions when they act outside the scope of Union law. But see also Takis Tridimas, 'Fundamental Rights, general principles of EU law, and the Charter' (2014) 16 *Cambridge Yearbook of European Legal Studies* 361, at 388–389, arguing that 'action undertaken by the EU institutions pursuant to the ESM Treaty remains subject to the Charter', adding that 'the language of Article 51(1) of the Charter suggests that it applies to EU institutions irrespective of whether they act under EU law or under a mandate lawfully granted to them by the Member States'. This view has recently been confirmed by the Court in Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd* EU:C:2016:701, in particular para 67.

> European schools (it was decided that, in a restricted way, they fall under the mandate) and the European University Institute. In brief, he took the position that the legal basis of the entity is the guiding light. '*The Ombudsman will not bend the rules or be excessively proactive in trying to bring something under his mandate; he already has a huge number of institutions, agencies, bodies, or offices under his mandate*'. Accordingly: '*We will not aggressively attempt to interpret [a legal basis] in such a way as to bring them in … the Ombudsman has to be very careful about observing both the letter and the spirit of the EU rule of law*'.[179]

As Curtin and van Ooik observed, a helpful place to seek guidance on the term 'Community body' (now Union body) is the explanations to Article 51 of the Charter, which defines its scope of application.[180] Thus, the latest version of the Charter's explanations provides that the 'expression "bodies, offices and agencies" is commonly used in the Treaties to refer to all the authorities *set up by the Treaties* or *by secondary legislation*'.[181] These explanations accord with the Ombudsman's approach to—generally—look at the legal basis of the entity in question.

The Ombudsman's approach serves legal certainty: if the Ombudsman were to go beyond the legal basis and adopt other criteria (e.g. whether the entity in question contributes to the attainment of the Union's objectives), this would raise further difficult questions. In 2011, in a complaint against the European Banking Authority, which succeeded the Committee of European Banking Supervisors (CEBS), the 'Authority underlined that CEBS was a limited liability company established under the laws of England and Wales', and therefore governed by that law.[182] The Ombudsman found it useful to clarify his position on the scope of the mandate: he referred to the Court's case-law on Article 263 TFEU to point out that if 'the terms "institutions", "bodies", "offices" and "agencies", as used in Article 263 TFEU, must be understood as being *all encompassing*, the exact same terms, as used in Article 228 TFEU, must also be *all encompassing*'.[183] This position was further explained as follows:

[179] Interview with the European Ombudsman, 17.02.2012 (on file with the author).

[180] Deirdre Curtin and Ronald van Ooik, 'The sting is always in the tail. The personal scope of application of the EU Charter of Fundamental Rights' (2001) 8 *Maastricht Journal of European and Comparative Law* 102, at 106–108.

[181] See the Charter's explanations at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF (emphasis added).

[182] Case 2497/2010/FOR, point 5.

[183] Ibid., point 12 (emphasis added).

> [A]n entity falling within the institutional framework of the EU, that is, an entity established by the Treaties or an entity established by an act adopted in the implementation of the Treaties cannot escape judicial review by the Court in relation to any acts it adopts that are intended to produce legal effects vis-à-vis third parties. Nor can such an entity escape review by the Ombudsman in relation to any alleged instances of maladministration.
>
> If an existing institution, body, office or agency establishes functional units within its own organisational structure, any justiciable acts or alleged instances of maladministration by those functional units will be attributed to the institution, body, office or agency of which it forms part. Such functional units cannot be understood to be separate 'institutions, bodies, offices or agencies' within the meaning of Article 263 TFEU and Article 228 TFEU.
>
> However, if, through an act adopted in the implementation of the Treaties, a 'separate' entity is created, that entity will be subject to judicial review by the Court for any justiciable acts it adopts and will be subject to review by the Ombudsman for any alleged instances of maladministration. It would run counter to the principles set out above if an entity which exercises competences derived from the Treaties were deemed to fall outside the system of judicial control and the control of maladministration by the Ombudsman.
>
> The Ombudsman notes that the Commission's decision establishing CEBS did not give the CEBS legal personality. The Ombudsman does not consider that the absence of legal personality would alter the fact that CEBS' acts were subject either to the review of the EU Courts and the Ombudsman.
>
> Given that CEBS ceased to exist when the Authority was established on 1 January 2011, and it is not disputed that the Authority is subject to review by the Ombudsman, the Ombudsman does not consider it necessary to pursue this issue further in the present case.[184]

Entities established by an *act adopted in the implementation of the Treaties* may present such challenges at the admissibility stage, but the Ombudsman's approach is generally correct. The interesting question (which also stems from a number of aforementioned interviews) is whether the flexibility of the Ombudsman's mandate would enable her to indirectly supervise maladministration at the national level, including where EU institutions strongly participate in such operations. Of course, the complaint in such cases would not be directed at the national authority, *but at the EU institution, body, office or agency* which strongly participates

[184] Ibid., points 13–17.

in such activities. The abovementioned excerpts concerning the role of the Commission in SOLVIT serve as a useful example. It is noted that the Court (both the General Court and the CJEU) confirmed that Eulex Kosovo (a 'rule of law' mission in Kosovo) may not have legal personality to stand as defendant before the Court, is not an EU body, office or agency, but measures adopted by this entity with legal effects are attributable to the Commission.[185] Likewise, the Ombudsman would direct complaints concerning EU missions at the Commission, the Council, the High Representative, the European External Action Service or a combination of the above.[186]

The European schools cases (against the Commission) seem to confirm this approach. On the ESM and the new instruments of economic governance, again, the complaint would be directed against the EU institutions, and therefore not the ESM mechanism as such. It should be remembered that the Ombudsman's mandate covers the 'activities' of the EU institutions, not their acts—but it is not specified under which legal framework these activities should take place.

The question to be asked is what is to be gained should the Ombudsman decide to explore further areas where EU institutions are strongly involved, thereby opening an inquiry against the latter. The answer is fairly straightforward: to tackle 'accountability gaps'[187] that do emerge. For example, it is not logical to accept that activities related to the Council Presidencies should escape accountability, and the most appropriate position would be to direct these complaints at the Council, as the Ombudsman did. Similar challenges emerge with regard to EU institutions participating in the ESM framework, and most notably the Commission and the ECB.[188] The approach suggested here (and in some cases endorsed by

[185] See Case C-439/13 P, *Elitaliana SpA* v *Eulex Kosovo*, EU:C:2015:753.

[186] See, for example, the own-initiative inquiry (Case OI/12/2010/(BEH)MMN) on 'the issue of accountability for instances of maladministration in the activities of missions carried out within the context of the Common Security and Defence Policy', directed against the Council, the Commission, the High Representative and the European External Action Service, and the examples of other complaints concerning EU missions mentioned therein.

[187] The term has been used by Harlow and Rawlings (n (90) 543) to explain how the ENO as an accountability network could address such gaps. In this sense, the flexible approach with regard to the Ombudsman's mandate suggested here could contribute to addressing further gaps that may not be captured by the ENO.

[188] David Howarth and Aneta Spendzharova, 'Value for money? Financial accountability of the European Stability Mechanism', Presentation at the ECPR Regulatory Conference in

the Ombudsman,[189] too) will enable the latter to stay faithful to the 'legal basis' approach, while supervising otherwise unaccountable or insufficiently accountable entities, where such gaps emerge.

Lastly, it should be noted that 'composite' or 'mixed'[190] procedures have been found to present accountability problems, mainly insofar as judicial review is concerned.[191] These procedures are characterised by the '"interdependence" of national and EU authorities in the process of carrying out their administrative functions for the purposes of implementing EU law'.[192] Further research is needed to map the possible contribution of the Ombudsman to the several typologies of mixity that have been advanced.[193] That being said, it is anticipated that many of the abovementioned points could be of relevance to questions of accountability in composite procedures. Indeed, because the Ombudsman supervises *activities*, not acts, it might be easier for the Ombudsman to supervise preparatory work or intermediate steps in the decision-making process, instead of focusing solely on the authority which takes the final decision.

Overall, this section has argued that the cooperation between the European Ombudsman and her peers should intensify via the drafting of a non-binding Code. That Code could foster a culture of more extensive collaboration between the former and the latter, and encourage further ENO members to take advantage of existing opportunities. The same Code could also provide for a more transparent ENO. In addition, if and when necessary or appropriate, the flexibility of the Ombudsman

Tilburg, 6–8 July 2016. See more generally Mark Dawson and Floris de Witte, 'Constitutional balance in the EU after the Euro-crisis' (2013) 76 *Modern Law Review* 817, at 828–836.

[189] In this regard, see the Ombudsman's own-initiative inquiry concerning the Commission (Case OI/8/2014/AN) on the EU cohesion policy and the respect for the Charter, discussed in Chap. 4. The Ombudsman examined the extent of the Commission's responsibility when monitoring how EU funds are spent at the domestic level, under the principle of shared financial management. The Ombudsman emphasised that the 'fact that the Commission is not directly responsible for managing the funds should never be used as a reason for not acting if fundamental rights have been, or risk being violated'.

[190] Giacinto della Cananea, 'The European Union's mixed administrative proceedings' (2004) 68 *Law and Contemporary Problems* 197.

[191] Mariolina Eliantonio, 'Judicial review in an integrated administration: The case of "composite procedures"' (2014) 7 *Review of European Administrative Law* 65.

[192] Ibid., 68–69.

[193] See, for example, della Cananea (n 190) 199–205; Eliantonio (n 191) 68–77.

means that she could *indirectly* supervise instances of maladministration occurring at the national level or outside the framework of the EU Treaties, by addressing such complaints to the EU institutions strongly involved or coordinating such operations. Both proposals are compatible with the existing legal framework, they would fill some accountability gaps, and they would bring citizens closer to the broader EU administrative landscape (understood here as encompassing national authorities when implementing EU law).

Political and Administrative Matters: A Loose Dichotomy?

When it comes to the EU institutions and excluding the judicial function of the Court, the scope of the Ombudsman's mandate is primarily defined by two inter-connected terms: 'maladministration' and 'activities'. Insofar as the notion of maladministration is concerned, it was shown in previous chapters that a wide approach has been endorsed, certainly going beyond legality. Yet it was also underlined that the merits of legislation fall outside its scope. Previous chapters have also shown that the relationship with Parliament can, at times, be delicate, whereas the Council has raised objections to the scope of the Ombudsman's powers, particularly with regard to cases concerning the *process* under which legislation is being adopted. This section will build on the above dimensions of the mandate and revisit the distinction adopted by the office between matters administrative and matters political, with a particular focus on Parliament's Committee on Petitions. More specifically, it will be demonstrated that the Ombudsman, keen to arrive at the conclusion that the Committee falls outside the mandate, introduced an insufficiently defined—and partly contradictory with later cases—distinction between matters political and matters administrative. In addition, in areas where the Court has granted the Commission significant discretion (infringement proceedings), the Ombudsman intensified his or her scrutiny by going beyond the confines of judicial review, with a view to providing redress to individuals. The complaints against the Petitions' Committee, the legislative work of the Council and the Commission's role as the guardian of the Treaties will be used as examples to underline this inconsistency. The benefits of adopting a different stance on this matter will finally be considered.

On Political and Administrative Matters and on Discretion

As an ombudsman institution, the EU office in principle focuses on *administrative*, rather than *political* activities. And it is indeed possible to start thinking about 'administrative action' in a reverse way, that is, 'acts that are not legislative or judicial'.[194] In this context, the Ombudsman already in 1995 clarified, first, that the merits of legislation cannot be supervised by the Ombudsman and, second, that political decisions also cannot fall under the scope of the mandate.[195] In addition, it was also highlighted that complaints concerning the judicial function of the Court would be inadmissible.[196] However, while under Article 228 TFEU the judicial function of the Court is excluded from the mandate, the legislature—contrary to many parliamentary ombudsmen—*is not*. This is of particular significance when it comes to supervision of the European Parliament, the institution which elects the Ombudsman and monitors her work. Indeed, the inter-institutional collaboration with Parliament's Committee on Petitions has been one of the most delicate aspects of the Ombudsman's mandate, especially during the early days of the institution. That was so for two reasons: first, the possibility of 'jurisdictional' overlap was realistic; and second, as already mentioned, the EU Ombudsman—contrary to many ombudsman offices in the member states and elsewhere—has a constitutional mandate to supervise the Parliament.

With regard to the remit of the Committee on Petitions, every citizen or resident of the Union under Article 227 TFEU may submit (individually or collectively) a petition to that Committee 'on a matter which comes within the Union's fields of activity and which affects him, her or it directly'. This right also features in the Charter (Article 44), but without an explicit reference to the requirement that the matter complained for should affect the complainant directly. In any event, the Committee has applied a loose threshold for this requirement, which is practically of limited significance. As the right to petition is addressed to an institution of a 'political character', the deadline of two years (which applies to the Ombudsman) and the exhaustion of 'appropriate administrative approaches' do not apply.[197] The

[194] Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The emergence of global administrative law' (2005) 68 *Law and Contemporary Problems* 15, at 16.

[195] Annual Report 1995, 9, 15.

[196] Ibid., 8.

[197] Saverio Baviera 'Parallel Functions and Cooperation: the European Parliament's Committee on Petitions and the European Ombudsman' in The European Ombudsman (n 20) 128.

impact of the Petitions' Committee with regard to citizens' participation in the EU has not been particularly impressive. This is no doubt a question linked to visibility, too, especially when compared with the Ombudsman as a complaints mechanism.[198] It is not the purpose of this contribution to offer explanations for the reasons why this instrument, despite its importance, has not managed to become a convincing mechanism of citizens' input into the EU's decision-making or policy-making world.[199] Furthermore, the Lisbon Treaty introduced the European citizens' initiative which, although procedurally more complex, substantively partly overlaps, as an instrument, with the work of the Committee.[200] Many petitions concern 'possible non-implementation of Community legislation in a Member State, or proposals on European policies'.[201] Indeed, and contrary to the Ombudsman's ambit, petitions 'may well invoke Parliament's

[198] 'Table ronde: Le Médiateur européen: 10 ans d'activité' in Symeon Karagiannis and Yves Petit (eds) *Médiateur européen: Bilan et perspectives* (Bruylant 2007) 137 (comments by David Lowe). In its 2011 Report the Committee endorsed Parliament's proposal for a more friendly, visible and accessible website; see Report on the activities of the Committee on Petitions 2011 (2011/2317(INI)), PE483.811v02–00, 6. Despite the obvious benefits, this proposal has not materialised to date.

[199] One author refers to the absence of a 'primary legislative chamber' in the EU—since the European Parliament co-legislates with the Council in most areas—as a considerable obstacle; Michael Nentwich, 'Opportunity structures for citizens' participation: The case of the European Union' in Albert Weale and Michael Nentwich (eds) *Political Theory and the European Union: Legitimacy, Constitutional choice and Citizenship* (Routledge 1998) 127–128. Historically, it is interesting to note that during the (unsuccessful) discussions on the establishment of a 'Community' Ombudsman in 1978, the— then—Committee on the Rules of Procedure and Petitions provided an opinion which stressed that the establishment of an Ombudsman was not necessary and, instead, it was the right to petition the Parliament that had to be reinforced; see Parlement Européen, Commission du Règlement et des Petitions, 'Projet d'avis à l'intention de la commission juridique sur la proposition de nomination d'un ombudsman pour la Communauté, Rapporteur M. Hector Rivierez' (1978) PE 54.056, © HAEU, Florence, PE0 2979. However, Sir Derek Walker Smith, who led the Ombudsman initiative, responded to the Committee that petitions, 'an ancient and traditional right of the citizen', could not, in his view, respond to the need of shortening the distance between the citizens and the European Communities; see Comments by Sir Derek Walker-Smith on behalf of the European Conservative Group on the draft Opinion (PE 54.056) by Mr. Rivierez on the appointment of an Ombudsman for the European Community' (1978) PE 56.100, © HAEU, Florence, PE0 2979.

[200] On the citizens' initiative see also the discussion in the next section.

[201] Eddy Newman, 'The Policy-Relationship between the European Ombudsman and the European Parliament's Committee on Petitions' in The European Ombudsman (n 20) 145.

support against the activity of national administrations, when these are called upon to apply Community law'.[202]

Shortly after assuming office in 1995, the Ombudsman pointed out that:

> There are limits … to what may count as maladministration. All complaints against decisions of a *political* rather than an *administrative nature* are regarded as inadmissible; for example, complaints against the political work of the European Parliament or its organs, such as decisions of the Committee on Petitions. Nor, for example, is it the task of the Ombudsman to examine *the merits of legislative acts* of the Communities such as regulations and directives. …
>
> It has been agreed that the Ombudsman will not deal with a matter pending before the Committee on Petitions unless, with the consent of the petitioner, that Committee transfers it to the Ombudsman. Nor will the Ombudsman deal with a case that has already been examined and dealt with by the Committee on Petitions unless there are relevant new elements that justify recourse to the Ombudsman. Finally, the Ombudsman will consider inadmissible any complaint about decisions of the Committee on Petitions itself, since its decisions (like those of the European Parliament) are political matters.[203]

Thus, in 1996, the Ombudsman decided not to open an inquiry in a complaint submitted by an MEP concerning alleged 'poor administration' by the Committee, including delays in the treatment of petitions and 'discrimination against Dutch speaking citizens'. The rationale was that it was up to Parliament to settle this issue as the 'allegations raised political issues rather than a question of maladministration'.[204]

In 1997, the Ombudsman attempted to further clarify the 'limits of maladministration', touching upon both 'the exercise of discretionary administrative power' and 'the political work of the Parliament'.[205] On discretion, he observed that when an institution carries out *administrative* tasks, it may have by law a number of options; the Ombudsman generally

[202] Baviera (n 197) 134. See further on this point Eleanor Spaventa, 'The interpretation of Article 51 of the EU Charter of Fundamental Rights: The dilemma of stricter or broader application of the Charter to national measures', Study commissioned at the request of the Committee on Petitions, PE 556.930 (Publications Office of the European Union 2016).

[203] Annual Report 1995, 9, 15 (emphasis added).

[204] Case 420/9.2.96/PLMP/B, cited in Annual Report 1996, 14.

[205] Annual Report 1997, 26.

will not 'question discretionary administrative decisions', except to verify whether the institution concerned has acted 'within the limits of its legal authority', in accordance with the case-law of the Court.[206] Discretion is therefore delineated by these legal principles which ensure that arbitrariness and abuse of discretion does not occur.[207] Thus, it is clear that discretionary administrative decisions fall under the mandate; this was further illustrated in Chap. 4.

Again in 1997, the Ombudsman looked at the member state level to ascertain whether other similar ombudsman institutions supervised the political activities of Parliament, given that the Treaty was silent on this matter.[208] By 'applying a constitutional principle common to the member states', he opined that he would not inquire into 'the political activities of the European Parliament'.[209] Taking this further, he mentioned the high number of complaints against the Petitions' Committee, and concluded: '[s]ince the Committee is a political body dealing with petitions as a political task of the Parliament, these complaints were not considered to be within the mandate of the Ombudsman'.[210]

Keen to arrive at such conclusion, however, the Ombudsman arguably followed (or perhaps constructed) a path of reasoning which cannot be immune from scrutiny. Indeed, the Ombudsman did not explain which matters related to Parliament were political and which matters were administrative. Surely matters political cannot be exhausted to the legislative process (and Parliament's role therein): for example, it is not possible for the Ombudsman to supervise the Conclusions of the European Council. Yet, it will be remembered that the Ombudsman inquired into the openness of the Council's meetings when acting in its legislative capacity and, more recently, into the transparency of trilogues.[211] This point is returned to below. Put simply, it has not been explained yet why the Committee,

[206] Ibid.

[207] See Jacob Söderman's Speech on 'The role of the European Ombudsman' (1997) available at: www.ombudsman.europa.eu/speeches/pdfen/jerus_en.pdf. He explained: 'the question of whether or not discretionary power has been exercised within the limits established by general legal principles is a matter for judicial review, as well as a matter for the Ombudsman to supervise'.

[208] Annual Report 1997, 26.

[209] Ibid.

[210] Ibid., 27.

[211] See Cases 2395/2003/GG and OI/8/2015/JAS, discussed in Chap. 5.

when processing a petition, should not comply with the ECGAB as a matter of observing the principles of good administration.

To make matters more complicated for the Ombudsman, the Court has found that the admissibility decision of the Petitions' Committee is a matter which can fall under the scope of judicial review, as opposed to the decision as to how the Committee will pursue an admissible petition, which falls within its discretion of a *political nature*.[212] If the Committee was free to disregard petitions, this would affect the essence of a right granted to citizens by the Treaty.[213] More recently—and marking a certain departure from the earlier *Tegebauer* case—the Court expected of the Committee to provide a 'summary statement of reasons' to discharge its obligations because of its discretion of a political nature.[214] Still, the point on the review of the admissibility decision was confirmed:

> a decision by which the Parliament considers that a petition … does not meet the conditions laid down in Article 227 TFEU must be amenable to judicial review, since it is liable to affect the right of petition of the person concerned. The same applies to a decision by which the Parliament, disregarding the very essence of the right of petition, refuses to consider, or refrains from considering, a petition addressed to it.[215]

Especially because maladministration is broader than illegality, it is noteworthy that the Court has been more rigorous than the Ombudsman vis-à-vis the Petitions' Committee.

Thus, by electing to draw on the practices of other ombudsman institutions in the member states, the Ombudsman effectively limited the possibilities offered by what is now Article 228 TFEU. It is remembered that Article 3 of the ECGAB, which defines its material scope of application, refers to 'all the relations of the institutions and their administrations with the public'; this cannot but include the handling of a petition.

Let us now turn to the Council, the other co-legislator. In both cases—concerning the meetings of the Council when acting in its legislative capacity and the transparency of trilogues—the Council argued that such questions fall outside the notion of maladministration as political matters. In the first case, the Council pointed out that the adoption of

[212] Case T-308/07, *Tegebauer* v *European Parliament*, EU:T:2011:466, para 21.
[213] Ibid.
[214] Case C-261/13 P, *Schönberger* v *European Parliament*, EU:C:2014:2423, para 23.
[215] Ibid., para 22.

the Rules of Procedure 'was a political and institutional matter'.[216] The relevant provision of the Constitutional Treaty (not ratified at the time) proved, according to the Council, that 'the very fact that any such provision had been included in a (draft) constitution confirmed that the matter was not one of maladministration or administrative practice, but a legal and political question outside the scope of the Ombudsman's mandate'.[217] The Ombudsman responded as follows:

> The … present complaint did not concern the way in which the Council organised its internal procedures but the question as to whether the public could be excluded from the Council's meetings in its legislative capacity. … Article 1(2) TEU stipulates that decisions in the Union should be taken 'as openly as possible'. In these circumstances, the Ombudsman considered that the Council had not established that the issue of the access of the public to its meetings was a purely political one that should therefore not be subject to any scrutiny. … In order to avoid any possible misunderstanding, the Ombudsman considered it useful to add that the present complaint did not concern the legislative activity of the Council as such, but the question as to whether the meetings of the Council acting in its legislative capacity should be public.[218]

Further to the Council's insistence on the political nature of the issue, the Ombudsman added that:

> The Ombudsman takes the view that the Council's meetings are 'activities' of the Council in the sense of Article [228 TFEU]. Moreover, the Ombudsman finds it difficult to see why the adoption of the Rules of Procedure by the Council should not also be considered as an 'activity' of a Community institution. … Whilst [Article 240 TFEU] provides for the Council to adopt its own Rules of Procedure, it does not stipulate that the degree to which the meetings of the Council in its legislative capacity are to be open to the public should be regarded as a political choice and left to the discretion of the Council. … [Under Article 1(2) TEU] [t]here is no suggestion that the degree of openness should depend on the political will of the relevant institutions or bodies of the EU.[219]

[216] Case 2395/2003/GG, 'The Council's opinion'.
[217] Ibid. That provision was Article I-50(2) of the Constitutional Treaty.
[218] Ibid., points 1.3, 1.5.
[219] Ibid., 'The Ombudsman's evaluation of the Council's detailed opinion'.

In the recent own-initiative inquiry on the transparency of trilogues, the Council argued that the legislative function in the EU should be dissociated from maladministration as it is closely associated with the dual legitimacy that the EU enjoys under Article 10 TEU: direct legitimacy through the European Parliament, and indirect legitimacy through the Council. Thus, 'this institutional set-up clearly distinguishes the ordinary legislative procedure from administrative activities'.[220] Importantly, the Council submitted that 'the exercise of legislative powers is not limited to the adoption of political choices on the merits of legislative files. It also includes the choices according to which the legislators decide to organise the legislative process itself'.[221] Moreover, this 'relationship between "administration" and "legislation"' is 'commonly understood' in the legal orders of the member states as well.[222] The Council could not help but notice that the Ombudsman has applied a 'policy of self-restraint in relation to complaints concerning issues on which the Parliament … was exercising its "political" activity'; the example cited therein was, unsurprisingly, the Ombudsman's policy with regard to the Petitions' Committee.[223]

The Council effectively claimed that matters political are also matters which relate to the *process* by which legislation is being adopted. In light of the Union's commitment to the principles of openness and transparency, however, such process cannot automatically be dissociated from the notion of maladministration. This point (on the scope of maladministration) is returned to later in this section. Besides, it would have been inconsistent for the Ombudsman to accept the Council's claims, in light of the approach taken in the earlier (opened in 2003) inquiry on openness within the Council when acting in its legislative capacity. Thus, as Peers observed, the Council's response was 'totally unfounded' because:

> The Ombudsman [was] clearly not questioning the substantive outcome of the political negotiations in trilogues, or the decision to hold trilogues in particular cases, or the existence or organisation of the trilogue system as a whole. The investigation only concern[ed] the transparency of trilogues, and access to trilogue documents. Access to documents is clearly a question of (mal)administration, and the overall rules and practice on transparency (ie, whether there is a register of ongoing trilogues) necessarily hugely

[220] Council's Opinion in Case OI/8/2015/JAS, point 6.
[221] Ibid., point 7.
[222] Ibid., points 7–8.
[223] Ibid., point 12.

> influence the specific issue of access to documents in practice. So there should be no doubt whatsoever about the Ombudsman's competence to hold the investigation.[224]

It could also be argued that within the realm of administrative discretion policy choices should not be reviewable, too. In its role as guardian of the Treaties, the Commission has been criticised for 'elite regulatory bargaining' and a desire to avoid public scrutiny as to how it deals with the infraction process.[225] The Ombudsman was keen, nonetheless, to focus on the position of the individual and her rights (e.g. when complainants contact the Commission and notify it of violations of EU law), despite the very broad discretion that the Court has granted the Commission therein.[226] It was shown in Chap. 4 that the Ombudsman deals with both *procedural* and *substantive* aspects of the Commission's activities in the infraction process. Evidently, the choice of the office to look into the substance of the decisions and, in particular, whether the conclusions of the Commission were *reasonable*, *well-argued* and *thoroughly explained* was a bold step to hold the Commission to account. Simultaneously, it enabled the Ombudsman to (indirectly, and to a certain degree) consider also the merits of the Commission's handing of complaints of this sort.

> Theoretically, [the Ombudsman] examines the way the Commission makes its decision not to bring infringement proceedings against a member state. Though the control is only about the procedure, it may radically alter the content of the decision. In fact, the difference between content and form is very difficult to make out. […] There have been instances when the Ombudsman has accused the Commission of not having 'correctly assessed' the situation before making a decision. He has based his argumentation on the fact that the Commission examined some arguments and not others. In another case, the Ombudsman reproached the Commission with having failed to 'really balance the interests of the opposing parties'.[227]

[224] See 'The Council challenges the right of the European Ombudsman to conduct an inquiry into secret "trilogues" (in which most EU legislation is decided)' (comments by Steve Peers) available at: www.statewatch.org/news/2015/sep/eu-omb-council-response.htm

[225] Richard Rawlings, 'Engaged elites: Citizen action and institutional attitudes in Commission enforcement' (2000) 6 *European Law Journal* 4.

[226] Melanie Smith, 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process' (2008) 33 *European Law Review* 777.

[227] Paul Magnette, 'Between parliamentary control and the rule of law: The political role of the Ombudsman in the European Union' (2003) 10 *Journal of European Public Policy* 677, at 687.

The Ombudsman could have easily transferred the totality of these complaints to the Committee on Petitions—but he did not. The Ombudsman does, of course, proceed with caution in infringement proceedings, believing that when the Commission decides that no infringement has taken place, it is *not* exercising discretion. By contrast, it is exercising discretion when it decides 'not to investigate a possible infringement, to drop an investigation before it has been completed or not to refer an infringement to the Court', in which cases the Ombudsman will apply a 'reasonableness' standard to prevent arbitrariness.[228] This approach enables the Ombudsman to avoid giving the impression that he or she is substituting his or her judgment for that of the Commission on the question of infringement as such.[229]

By entering the sphere of 'reasonableness', often through the examination of the quality of reasoning, the Ombudsman may be accused of entering the sphere of political decision-making. Indeed, according to a 'traditional administrative law' approach, the purpose of law is to outline the outer limits of discretion, leaving the choice between the alternatives to politics.[230] Nonetheless, it is here where the role of the Ombudsman comes into play: through the concept of good administration, the quality of reasons[231] can be examined, too—and, at least insofar as the EU case is concerned, it is through the principles of good administration, which go beyond legality and the confines of judicial review, that the Ombudsman has been able to improve the Commission's responsiveness to individuals. The above goes hand-in-hand with the flexibility of an ombudsman institution, which can focus on good administration without producing binding decisions. It is also remembered that one of the subject matters of maladministration examined by the office concerns 'institutional and *policy* matters'.[232]

[228] Nikiforos Diamandouros, 'The European Ombudsman and the application of EU Law by the Member States' (2008) 1 *Review of European Administrative Law* 5, in particular 13–19.

[229] Ibid.

[230] See, for example, Juli Ponce, 'Good administration and administrative procedures' (2005) 12 *Indiana Journal of Global Legal Studies* 551, at 554. Courts have been invited, too, to apply a 'weak reasonableness test' to questions of substance and focus 'on the administrative process, notably by enforcing a widespread duty to give reasons and by assuring generous rights of participation'; see Eduardo Jordão and Susan Rose-Ackerman, 'Judicial review of executive policymaking in advanced democracies: Beyond rights review' (2014) 66 *Administrative Law Review* 1, at 7.

[231] Ponce (n 230).

[232] See the discussion in Chap. 4.

In light of the Ombudsman's efforts to improve the position of individuals in areas such as the infringement proceedings, and to render the legislative process more transparent, it is essential to investigate further the Ombudsman's position vis-à-vis the Committee on Petitions.

A Closer Look into the Relations with the Petitions' Committee

There must be other reasons, then, that the Petitions' Committee was singled out by the Ombudsman as a suitable example of a 'political matter'. Tsadiras, who insightfully explored the relationship between the two organs, observed that the two entities endorsed a 'concentric circles' approach: the inner circle consisted of 'maladministration' cases and was assigned to the Ombudsman, whereas the outer circle covered also policy questions or opinions and had to be dealt with by the Committee.[233] He concluded that the Ombudsman has progressively widened 'the orbital distance from his mother institution', thus achieving a shift in the 'institutional dynamics'.[234] The former Chair of the Petitions' Committee admitted that initially, the members of the Committee were very sceptical about the creation of an Ombudsman, owing to fears that their competence would decrease and the Committee could be 'outshone' by the Ombudsman; to that end, the first Ombudsman and the Chair of the Committee worked constructively to avoid possible tensions.[235] He added: 'Undoubtedly, without this clear rejection by the Ombudsman of a role in considering appeals against decisions of the Committee on Petitions, there could have been a constant source of friction between the Committee and the Ombudsman'.[236] A study has found that the institutional resistance for two decades to establish an ombudsman in the—then—Communities was

[233] Alexandros Tsadiras, 'Of celestial motions and gravitational attractions: The institutional symbiosis between the European Ombudsman and the European Parliament' (2009) 28 *Yearbook of European Law* 435, at 445. He also noted (at 441) that, contrary to other EU institutions, which preferred an independent Ombudsman with limited competences, Parliament in general was supportive of a dependent Ombudsman with significant competences.

[234] Ibid., 454–456. Compare also the discussion in Chap. 3 on the Ombudsman's independence.

[235] Newman (n 201) 144–145.

[236] Ibid., 151.

due to the antagonistic stance of the—then—Committee on the Rules of Procedure and Petitions, which effectively delayed the process.[237]

It has to be accepted, then, that the Ombudsman's approach was mandated by the practical and understandable (at the time when the decision was made) desire to avoid tensions with the Committee.

> On the relations with the Committee on Petitions and the European Parliament, the former European Ombudsman observed:
>
> '*The European Ombudsman is virtually alone in the entire European legal order as an Ombudsman who is empowered to exercise control over the Parliament*'. There are very few exceptions, but even in Denmark, which is considered as a '*classical model*', this '*is clearly absolutely out*'. '*It is out primarily because the Ombudsman … needs an important political ally in the constitutional order of each entity with which he has a privileged relationship, to which he can go … to ask for support to obtain compliance. … That special relationship can become obviously very delicate, if you also exercise control over Parliament. That is why, wisely in my mind, the overwhelming majority of the member states, do not allow that*'. Of course the situation in the EU is different. '*The Ombudsman* [the first Ombudsman] *decided, wisely I believe, to draw a distinction between matters administrative and matters political. … Much as in the case of the European Court of Justice, the European Ombudsman exercises control over the non-judicial aspects of the Courts … but may not exercise control over the judicial aspects, including the length of time that it takes the Court to decide, that is considered to be an integral part of the judicial process, in that same sense the European Ombudsman … decided that any issues which relate to the political world or the political activity of the Parliament are outside the mandate*'.[238]

This interesting position merits particular attention. To begin with, the above analysis has shown that such a clear distinction between administrative and political matters was, and is still, missing. That would not necessarily be problematic (as the next section will argue) had the Ombudsman refrained from relying on such distinction. Further, as already noted, the absence of supervisory powers over the judicial work of the Court stems directly from the Treaties; such an exemption regarding Parliament does not stem from the existing legal framework. The Ombudsman indeed

[237] Jean-Pierre Jarry, 'The European Parliament and the establishment of a European Ombudsman: Twenty years of debate, 1974–1995' (European Parliament Research Service 2015).

[238] Interview with the European Ombudsman, 17.02.2012 (on file with the author).

needs an ally because of non-enforceability, but it is questionable whether Parliament's support has always been the catalyst for the Ombudsman's strategy, especially in light of the 'approach based on law' endorsed by the office since its establishment. One can also think of other institutions/allies as well, and notably the Court; in this sense, the earlier proposal (in the third section of this chapter) on the possibility to refer a case to the Court is of relevance.

More generally, one wonders whether the European Ombudsman overly accentuates the link with Parliament and, indeed, whether he or she understands his or her role as being identical to a traditional 'parliamentary ombudsman'—despite the explicit legal provisions pointing at least in additional, different directions. Commenting on the limited use of special reports so as to capture Parliament's attention and interest (a practice that O'Reilly has not departed from, as opposed to her different approach to the use of own-initiative inquiries), Diamandouros opined that 'the moral authority of the Ombudsman is the fruit of a political alliance with the European Parliament'.[239] It is submitted that, while Parliament's support is indeed crucial on many occasions, the European Ombudsman has now stabilised his or her position within the EU institutional framework, to the extent that such alliance with the European Parliament is not an absolute (or the sole) prerequisite for compliance.[240] If the EU institutions often follow the Ombudsman's recommendations, that is mainly because of the work of the office and the techniques employed by the three office-holders to date, rather than owing to the 'threat' of a political collaboration with Parliament.

Another factor regarding the limited impact of the Committee is the lack of appropriate resources to pursue its work:

> The former Secretary General admitted that this was 'a long standing policy choice' of the institution, founded in a couple of reasons. Initially, the possibility of political tensions between the Ombudsman and the Committee was avoided, further to decisions made by Jacob Söderman. However, another reason emerged over time, namely the lack of resources of the Committee on Petitions; the European Parliament does not provide the appropriate resources to the Committee in order for the latter to deal with petitions rapidly and thoroughly. The Ombudsman has consistently supported more generous resource provision for the Committee, but ultimately it is up to

[239] Table ronde (n 198) 161 (comments by Nikiforos Diamandouros).
[240] See also Tsadiras' comments above at n 234.

> Parliament to decide on this issue. As a concluding remark, he emphasised that a possible scrutiny over the Committee would in any event create a situation that would not be 'useful', because the issue is a 'systemic' one.[241]

It cannot be excluded, however, that a closer scrutiny by the Ombudsman could lead Parliament to pay more attention to the Committee, and the important EU citizenship right that it guarantees.

To conclude, the Ombudsman was understandably quick *at the time* to accept that questions regarding the handling of a petition fall outside the mandate as political matters. Simultaneously, with regard to the other co-legislator, the Council, the Ombudsman (plausibly) examined openness in its meetings and, more recently, the transparency of trilogues. Turning to administrative activity involving policy choices, the Ombudsman has supervised delays in the Commission's handling of complaints concerning infringement proceedings—an area where the Court has granted the Commission exceptionally broad discretion. At times, the Ombudsman has been very critical of the Commission, while noting, of course, that he or she did not wish to circumvent the Commission's political judgment. The Ombudsman's overall stance vis-à-vis the Commission has been applauded by commentators because it served complainants' rights and proved a forum for accountability and reason-giving. Clearly, the policy choice to exclude complaints concerning the Petitions' Committee does not find much support in the Ombudsman's overall stance on admissibility, let alone the Treaty text. More understandable, perhaps—because duplication of redress is being avoided—is the Ombudsman's stance with regard to complaints that *are already being considered by the Committee*; in such cases, the Ombudsman exercising discretion will find that there are 'no grounds' to pursue an inquiry.

Revisiting the Distinction Between Political and Administrative Matters

It is not the purpose of this contribution to engage in the thorny debate on the limits of judicial review in discretionary decisions, and most notably in the question as to whether such review effectively leads to supervision

[241] Interview with the Secretary-General, 14.02.2012 (on file with the author).

of policy decisions.[242] For this is not needed: as already noted, the Ombudsman does not believe that discretionary decisions automatically fall outside the scope of maladministration, and on several occasions he or she has gone beyond the EU courts. Likewise, as the next section will also confirm, the Ombudsman does not believe either that matters involving economic considerations (staff, resources, etc.) or a cost-benefit analysis are excluded from the scope of maladministration.[243]

Thus, what is critical for the purposes of the Ombudsman's mandate is to revisit the distinction between matters political (falling *outside the mandate*) and matters administrative (falling *within the mandate*).[244] What we already know is that the Ombudsman cannot review the merits of legislation, but beyond this we do not have clear criteria as to which activities concern the legislative function proper or—more generally—the political activities within the EU architecture.

It may be suggested, then, that the Ombudsman could draw on the debate concerning the 'politics-administration dichotomy' and deduce some indicators. And yet such dichotomy, roughly based on a distinction between 'deciding' and 'executing', is probably an outdated concept in public administration.[245] Accordingly, courts have accepted that 'no clear line of demarcation [exists] between what is involved in policy and what is involved in administration'; differently put, 'there can be some

[242] Among the vast literature see, generally, D.J. Galligan, *Discretionary powers: A legal study of official discretion* (Oxford 1990); Ronald Dworkin, 'Hard cases' (1975) 88 *Harvard Law Review* 1057; S.H. Bailey and M.J. Bowman, 'The policy/operational dichotomy: A cuckoo in the nest' (1986) 45 *Cambridge Law Journal* 430; David Rosenbloom, 'Public administrators and the judiciary: The "new partnership" (1987) 47 *Public Administration Review* 75; Jordão and Rose-Ackerman (n 230); Stephen Breyer, 'Judicial review of questions of law and policy' (1986) 38 *Administrative Law Review* 363, in particular 382 *et seq*; Joana Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' (2016) 53 *Common Market Law Review* 419.

[243] See, for example, the Case on the Commission's policy to publish consultations only in English; Case 640/2011/AN. See also Case 3031/2007/(BEH)VL (discussed in Chap. 4) concerning the scholarships for the Erasmus scheme—among others.

[244] The Ombudsman would still have a number of options as to how the case will be pursued, including to suggest that, since a matter is being dealt with by the Petitions' Committee, there are no grounds for inquiries.

[245] See, for example, James Svara, 'The myth of dichotomy: Complementarity of politics in the past and future of public administration' (2001) 61 *Public Administration Review* 176. As the author explains, '[t]he complementarity of politics and administration is based on the premise that elected officials and administrators join together in common pursuit of sound governance' (ibid., at 179). See further Galligan (n 242) 118–120.

ambiguity about where policy ends and administrative acts begin'.[246] In the EU, in particular, the tripartite separation of powers model does not apply,[247] and especially a clear distinction between the legislature and the executive. Dimitrakopoulos argues that Article 228 TFEU 'concerns, at least in principle, the types of activities that are normally performed by the public administration, in particular, *activities involving implementation/execution of legislative rules*'.[248] The 'nature' and 'subject-matter' of the activity should be considered: for example, the Ombudsman held that the 'European Convention', which had the task to prepare and draft EU primary law (the Constitutional Treaty), performed political activities and as such it fell outside the scope of the mandate.[249] That being said, the *process* of adopting secondary legislation (as opposed to the merits/substance of legislation) may be a different matter, as the abovementioned cases concerning the Council demonstrated.

The lack of a specific direction on political/administrative matters does not come without cost. In 2006, the Ombudsman received a complaint concerning 'access to the list of names of all the members of the Additional Pension Scheme for MEPs', which he initially found to be within the mandate, and proposed a friendly solution to Parliament inviting it to re-consider its position.[250] The European Data Protection Supervisor (EDPS) essentially sided with the Ombudsman and invited Parliament to balance the right to data protection with the right of access to documents. Despite his insistence on the existence of maladministration, the Ombudsman in his conclusion took into account an additional element: that the Parliament's Committee on Budgetary Control in its report on the discharge procedure for the 2005 budget 'had insisted that the names of members of the "Voluntary Pension Fund" (i.e., the Additional Pension

[246] Eugene Biganovsky, 'The experience of the South Australian Ombudsman: "Policy—administration – jurisdiction of the Ombudsman' in Linda Reif (ed) *The international ombudsman anthology: Selected writings from the International Ombudsman Institute* (Kluwer 1999) 455 at 466, 471.

[247] According to Jacqué (among many others), the principle of institutional balance (Article 13(2) TEU) has been treated by the Court as a 'substitute for the principle of the separation of powers'; Jean-Paul Jacqué, 'The principle of institutional balance' (2004) 41 *Common Market Law Review* 383, at 384.

[248] Ioannis Dimitrakopoulos, 'Is an illegal Community act necessarily an instance of maladministration, in the sense of Article 195 EC?' (2009) 2 *Review of European Administrative Law* 45, at 47 (emphasis added).

[249] Ibid., 49, with reference to Case 1795/2002/IJH.

[250] Case 655/2006/(SAB)ID.

Scheme) should be made public, but this was subsequently rejected by a vote in the Plenary.'[251] The discharge procedure forms part of Parliament's political activities, the Ombudsman noted. Thus:

> [T]he contested refusal of access reflects a decision already made by Parliament, in the exercise of its *political functions*, to reject a proposal to disclose the list of names in question. Taking this into account, the Ombudsman sees no reasonable possibility that his further handling of this case would succeed in persuading Parliament to change its position … As regards the general public interest that maladministration be eliminated the Ombudsman notes that MEPs are directly elected by the peoples of Europe and are therefore politically responsible vis-à-vis the electorate as regards political decisions of the Plenary … This implies that, when such decisions are made, *the concept of political responsibility, rather than the one of possible maladministration*, comes into play.[252]

In this context, it may be useful for the European Ombudsman to draw on experiences of other institutions. To that end, it has been argued that if the ombudsman were to categorically determine specific areas as political matters (and consequently refrain from interfering with possibly grey, contested areas), this would undermine the effectiveness of the institution.[253] This is certainly understandable in light of non-enforceability of the ombudsman's decisions. What is more, it will often be contestable whether a policy was formulated at the political or the departmental (administrative) level.[254] Likewise, to 'label' 'accountability actions as either political or legal' is probably outdated, and this is precisely the area where the ombudsman and/or the concept of good administration have offered solutions.[255] Yet generally, political oversight or support by Parliament 'reduces the risk of ombudsmen straying too far into constitutionally inappropriate territory'.[256]

To return to the EU case, the Ombudsman cannot but supervise activities of Parliament, in accordance with the Treaty text. Especially in such circumstances, it may be wondered what is the added value that the

[251] Ibid., point 1.4.

[252] Ibid., points 1.5–1.9 (emphasis added).

[253] See, for example, Buck et al. (n 59) 210; R.D. Bakewell, 'The Ombudsman and politics' (1986) 45 *Australian Journal of Public Administration* 47, at 49–50.

[254] Bakewell (n 253) 49.

[255] Buck et al. (n 60) 220.

[256] Ibid., 210.

distinction between matters political and matters administrative brings. That is even more so since the EU office has inquired into the transparency in the adoption of legislation, and into the processes by which policy decisions are being made—or the 'administrative steps leading to a decision'.[257] When arguments of limited resources are being advanced by the administration, it is then the responsibility of the ombudsman to bring such lack of resources to public attention,[258] including when these concern the Petitions' Committee.

From the above remarks pertaining to the present inconsistency it follows that the Ombudsman could (i) adopt clearer guiding principles on the administration/policy dichotomy or (ii) refrain from relying on this distinction in the first place. This account would prefer the second option, while emphasising that this does not mean that the Ombudsman should review areas which, although falling outside the scope of the legislative process, clearly relate, nonetheless, to political choices or the substance of strategies/guidelines, and so on. Examples of this latter type of activity could include the Conclusions of the European Council or the substantive content—but not, for instance, the linguistic regime[259]—of the Commission's white and green papers.

If that approach were to be followed with a view to addressing existing inconsistencies, the Ombudsman would exercise self-restraint on political areas, such as the ones mentioned above, but would not frame her or his answer relying on a distinction which has never really been clarified, at least sufficiently. If the Ombudsman were to depart from this 'political/administrative' divide, the starting point would obviously be to admit complaints against the Committee on Petitions. Leaving tensions aside, this could have the effect of upgrading the work and impact of the Committee to the benefit of citizens. To return to Tsadiras' remarks,[260] if the Ombudsman has progressively established a distinct operational realm vis-à-vis the Parliament, perhaps the time has come for this to take place vis-à-vis the Committee, too.

The question as to why the Ombudsman should not be reviewing clearly political matters relates to points made earlier in this book, especially in Chap. 3. To recall, the Ombudsman does not have a political mandate but

[257] To refer to the practice of the South Australia Ombudsman; see Bakewell (n 253) 49.
[258] Ibid., 50.
[259] See Case 640/2011/AN (discussed in the next section).
[260] See above n 234.

is an independent EU body overseeing the quality of the EU administration. However, why self-restraint in such cases is preferable to the adoption of a clear distinction between administrative and political matters requires some further elaboration. As already noted, on many cases such clear distinction is often impractical, in the sense that it is difficult to identify the precise confines of political and administrative decision-making. If so, the fact that the Ombudsman's decisions are non-binding is a key element here: as noted in Chap. 2 and also in this chapter, non-enforceability acts as a 'safeguard' against 'activist' ombudsman offices intervening in 'political decision-making'.[261] This, coupled with Parliament's (regular) and the Court's (exceptional) supervision over the European Ombudsman's work are sufficient guarantees that this line may not be crossed. In addition, and to focus specifically on administrative decision-making (as opposed to, e.g., the *process* of adopting legislation which, in the author's view, was rightly included under the scope of maladministration), if the EU institutions received the message that any sort of policy choice would not henceforth be supervised, it is then foreseeable that arguments related to lack of staff, resources and so on (see Chaps. 4, 5 and 6) would feature even more prominently in the institutions' responses to the Ombudsman. If so, the benefit and flexibility of the extra-judicial institution would be sacrificed to the adoption of a rigid distinction between administrative and political matters.

To conclude, it may be wondered what precisely is going to be gained from the approach suggested in this account. To begin with, EU institutions presently invoke this distinction: for example, although the Council's remarks that transparency in the preparation of legislation is a matter falling outside the Ombudsman's mandate are probably unconvincing, they do unravel the Ombudsman's inconsistent approach vis-à-vis the Petitions' Committee. And the Ombudsman has to rely on her or his moral authority to convince: a sound approach to the limits of the mandate would help, in this regard. Moreover, in order to remain faithful to this distinction between matters administrative and political, it cannot be excluded that the Ombudsman may refrain from interfering (e.g. via an own-initiative inquiry) with certain institutions or other entities falling under the mandate post-Lisbon and, in particular, with

[261] Buck et al. (n 60) 40.

the European Council.[262] As things stand, in such a scenario it cannot be excluded that the European Council would invite the Ombudsman to specify which of its activities can fall under the Ombudsman's mandate, in accordance with the existing distinction. And yet while it is understood that the Conclusions of the European Council and, more generally, activities that relate to the European Council's core mission to 'define the general political directions and priorities' of the Union[263] cannot fall under the mandate, it is unclear why the European Council should be totally exempt, for instance, from the obligation to hold consultations with civil society under Article 11 TEU (see the next section). From the point of view of EU democracy, if the European Council was encouraged to take into consideration citizens' input, then that would no doubt signify an important development. After all, if member states wish to exclude specific matters or institutions from the Ombudsman's mandate, as they did with the judicial function of the Court, they could potentially revise Article 228 TFEU accordingly (although it must be acknowledged that treaty revisions are not, of course, the most straightforward of exercises). This would no doubt result in losses in terms of accountability and participation, but insofar as Article 228 TFEU is formulated in the present terms, arguably there is room for the Ombudsman to intervene.

On the political side, however, it is questionable whether the proposal advanced in this section would find support within the European Ombudsman's office. A certain degree of inconsistency is sometimes preferable to creating tensions. After all, the Ombudsman is politically accountable to the Committee (which, as already mentioned, is also a member of the ENO). At the very least, then, a proposal to amend the Statute with a view to excluding complaints against the Committee could be considered: it might not be the optimal solution for citizens, but—beyond gains in consistency—possibly it could enable the Ombudsman to depart from the unnecessary reliance on a distinction between matters political/administrative. A distinction which, when adopted, served no other purpose than to enable the Ombudsman to declare complaints against the Committee inadmissible.

[262] The former office-holder confirmed that, post-Lisbon, access to European Council documents could be one area of possible maladministration; see Nikiforos Diamandouros, 'The European Ombudsman and good administration post-Lisbon' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds) *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 210, at 211.

[263] Art 15(1) TEU.

The Ombudsman and Political Participation

This section will examine how the role of the Ombudsman can have an impact on improving citizens' participation in the EU, with a particular focus on the post-Lisbon Title 'Provisions on democratic principles'. As is known, the citizens' initiative and consultations feature therein. Much of the discussion will centre on decided cases as the Ombudsman's office has examined such complaints fairly recently. The possible reform of the Ombudsman's practice will, of course, also be considered. It is believed that the subject matter of these cases, closely associated with citizens' participation, and the limited number of complaints due to temporal limitations, render apposite the examination of these cases here, rather than in earlier chapters. The Ombudsman's communication policy will also be discussed, mainly from a normative point of view (since it has already been accepted that, generally, that policy has been very effective). Overall, the Ombudsman's approach in the field of participation is positively assessed. This section does not cover the question of transparency and the Ombudsman's contribution therein, although it reiterates the significance of transparency vis-à-vis citizens' participation.[264]

The Ombudsman and the European Citizens' Initiative (ECI)

The Treaty of Lisbon grants at least one million citizens from one-quarter of member states the right to invite the Commission to submit a proposal for a legal act.[265] It goes beyond the purposes of this contribution to assess the technicalities and potential of the ECI as a means to increase democracy in the EU.[266] Rather, the focus will be on the Ombudsman's role to facilitate the use of the instrument.

In January 2010, that is, before the adoption of the Regulation and during the consultation period launched by the Commission, the Ombudsman published on the website his 'contribution' to the

[264] See an extensive discussion on transparency cases in Chap. 5.

[265] Art 11(4) TEU and Art 24 TFEU; crystallised by Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ L 65/1, which entered into force in April 2012 (hereinafter the 'Regulation').

[266] See, among others, Michael Dougan, 'What are we to make of the Citizens' Initiative?' (2011) 48 *Common Market Law Review* 1807; Anastasia Karatzia, 'The European Citizens Initiative in practice: Legal admissibility concerns' (2015) 40 *European Law Review* 509.

consultation.[267] It was submitted therein that the registration of the proposed initiative should not be subject to an admissibility check by the Commission (a point not endorsed by the Regulation, according to Article 4(3)[268]) but the Commission, according to the principles of good administration, should provide the organisers with information before the registration, including on the scope of its powers.[269] Interestingly, it was also suggested that 'if the Commission agrees to present a legislative proposal following an initiative, it should also specify the date by which it intends to do so'.[270] Whereas—again—this idea does not feature in the Regulation, it is not possible to gauge the Commission's possible stance on this point, simply because the Commission has effectively refrained from pursuing further the three ECIs (to date) which have managed to gather the necessary level of support.[271] Is the Ombudsman able to supervise the Commission's legal and political conclusions under Article 10(1)(c) of the Regulation (the follow-up process)? Although the question is returned to below, in that response to the consultation the Ombudsman submitted that the admissibility decision 'is a matter of law', whereas the substantive decision on a successful ECI is 'likely to raise primarily political issues', and therefore the European Parliament is best placed to provide supervision in this regard.[272] However, in March 2012, after the adoption of the Regulation, the Ombudsman via a press release modified his position on this point.[273] It was specified therein that the Ombudsman 'could examine whether the Commission's conclusions are reasonable and thoroughly explained', but 'cannot examine the substantive follow-up which the Commission decides to give to citizens' initiatives' as this is 'a political matter for the European Parliament to monitor'.[274]

[267] European Ombudsman, Contribution to the Public Consultation on the European Citizens' Initiative, available at: www.ombudsman.europa.eu/resources/otherdocument.faces/fr/4592/html.bookmark

[268] Rightly so, in the author's view, because otherwise one cannot exclude requests to the Commission to register initiatives that would undermine, for example, fundamental human rights.

[269] European Ombudsman (n 267) 3–4.

[270] Ibid., 6.

[271] These were: 'Stop vivisection', 'One of Us' and 'Water and sanitation are a human right'; see further: ec.europa.eu/citizens-initiative/public/initiatives/successful

[272] European Ombudsman (n 267) 6.

[273] See Press Release 5/2012, 'The European Citizens' Initiative: the Ombudsman is ready to help, if problems arise' available at: www.ombudsman.europa.eu/en/press/release.faces/en/11342/html.bookmark

[274] Ibid.

> On the contribution of the Ombudsman to the consultation regarding the citizens' initiative (ECI) the former Secretary General observed that the political supervision of the Commission, including its legislative choices, is a matter for the European Parliament to deal with. However, the Ombudsman could be relevant in the second stage, if the Commission does not provide reasons. Whether these reasons are compelling or not, it is for Parliament to decide. Thus, it is 'not impossible' for the Ombudsman to get involved in the second stage, it is simply more likely for the Ombudsman to get involved during the first stage. He concluded, however, that every case has to be looked at *in concreto*.[275]

Perhaps the most substantive contribution by the Ombudsman to the overall functioning of the ECI took place via an own-initiative inquiry launched by O'Reilly, which received considerable attention and several submissions by citizens, organisers and civil society actors.[276] A point worth highlighting here is that the Ombudsman views the ECI in the context of the right to *participate in the democratic life of the Union* under Article 10(3) TEU; further, the Ombudsman pointed out that the ECI is a means 'by which the Commission can ensure that its decisions as regards legislative proposals are taken *as closely as possible to the citizens*'.[277] Similar considerations underpin the Ombudsman's approach to consultations, as will be shown below. This demonstrates that the Ombudsman does not believe that the right to participate in the democratic life of the Union is exhausted by the references to representative democracy under the earlier paragraphs of Article 10 TEU.

> In the Ombudsman's opinion, it would be a mistake to draw too sharp a contrast between participatory democracy, given effect—among other ways—through the ECI, and representative democracy at the EU level. They are mutually reinforcing concepts in the democratic life of the Union.[278]

As a result of the own-initiative inquiry, the Ombudsman addressed a number of recommendations to the Commission, including the following: that the Commission should work with Europe Direct centres so that clear information and support is provided to the drafters of an initiative,

[275] Interview with the Secretary-General, 14.02.2012 (on file with the author).
[276] Case OI/9/2013/TN.
[277] Ibid., point 7 (emphasis added).
[278] Ibid., point 9.

without, however, amending the substance of the proposals[279]; welcoming the Commission's decision to be transparent when rejecting the registration of an ECI, she encouraged it 'to provide reasoning that is more robust, consistent and comprehensible to the citizen'[280]; that the Commission should pay particular attention to the *public debate* generated via an ECI and, in this context, ensure that the two co-legislators and stakeholders are present in the debate at the European Parliament[281]; with regard to Article 10 of the Regulation, 'the Commission should explain its political choices to the public in a detailed and transparent manner. Otherwise, the Commission's position … risks being perceived as arbitrary rather than underpinned by proper legal and political considerations'[282]; that the online collection system should duly consider the needs of persons with disabilities wishing to support an ECI.[283]

The instances where the Ombudsman has recommended amendments to the existing legal framework have been infrequent,[284] and in any event they are more likely to be submitted in the context of own-initiative inquiries (which, by definition, examine systemic issues) rather than in the examination of individual complaints.[285] In the ECI own-initiative inquiry, the Ombudsman proposed amendments to Regulation 211 with regard to facilitating the right of EU citizens exercising free movement rights to sign an ECI, and concerning translation and funding problems as they emerged from the responses to the inquiry.[286]

However, the Commission has taken the view that, for the time being, the Regulation 211 does not require amendments.[287] Thus, in the follow-up to the Commission's response to her recommendations, O'Reilly generally welcomed the Commission's response and encouraged it to make further

[279] Ibid., points 10–13.

[280] Ibid., point 16.

[281] Ibid., points 21–22.

[282] Ibid., point 24.

[283] Ibid., point 28.

[284] The Ombudsman has to make sure that she or he does not substitute herself or himself for the will of the EU legislature as this is not the Ombudsman's constitutional role. That being said, in responses to public consultations *before* the adoption of legislation there is scope for the Ombudsman to share her or his views.

[285] Compare also the Case OI/6/2013/KM, discussed in Chap. 5 (on the revision of Regulation 1049).

[286] Ibid., points 33–36.

[287] See: www.citizens-initiative.eu/wp-content/uploads/2016/03/EC-FOLLOW-UP-TO-THE-REPORT-on-the-ECI.A8-0284-2015-1.pdf

improvements.[288] The fact remains, however, that relatively few individual cases have so far reached the Ombudsman. It appears that the organisers prefer—at least at this stage of development or crystallisation of the ECI legal framework—to contact the Court, either when the Commission refuses registration[289] or when they disagree with the Commission's final response to their ECI under Article 10 of the Regulation.[290] In one case, the Ombudsman found that the Commission's decision to refuse the additional extension of the collection period (the Commission had initially agreed to extend it by four months) was reasonable, compliant with the principle of equal treatment of ECIs and in any event the complaint had become obsolete as the 'Stop Vivisection' ECI had already gathered the necessary levels of support.[291] Elsewhere, the Ombudsman found that if the organisers use the Commission's online collection system services, then the Commission's position that the existing legal framework does not enable it to extend the deadline of 12 months was reasonable, even if a month is lost for purposes of verification.[292]

The Ombudsman's recommendations in the own-initiative inquiry, as well as the two abovementioned cases, demonstrate that the Ombudsman's scrutiny can be a tool that citizens and organisers may use when they encounter procedural problems in the ECI. The Commission appears to be fairly responsive to the Ombudsman's recommendations insofar as the procedural aspects of the ECI are concerned, and on some occasions it has gone beyond its legal obligations, for example by extending the deadline when organisers encountered technical difficulties or deciding to publish its reasons for the ECIs that were refused registration. The interesting question is as follows: could the Ombudsman supervise the Commission's final decision under Article 10 of the Regulation? The abovementioned press release by the Ombudsman appears to draw a distinction between the quality of reasoning ('reasonable and thoroughly explained') and the substance, a distinction which, as shown in earlier sections, is often a difficult one to be made. In the follow-up to the own-initiative inquiry the Ombudsman observed:

[288] See: www.ombudsman.europa.eu/en/cases/correspondence.faces/en/66223/html.bookmark

[289] See, for example, Case T-450/12, *Anagnostakis* v *Commission*, EU:T:2015:739.

[290] See Case T-561/14, *One of Us and Others* v *Commission* (pending).

[291] Case 2071/2013/EIS.

[292] Case 402/2014/PMC.

> As regards the Commission's political choices in the formal response to a successful ECI, I welcome the Commission's commitment to strive to further enhance its explanations where possible. Political choices are sometimes difficult and such choices clearly cannot satisfy everyone. However, I maintain the view that citizens deserve to be told the truth and that it is by being told the truth that citizens gain trust in the EU.[293]

As we await the Court's decision in *One of Us*, which concerns the reviewability of the Commission's final response to the ECI, should this issue arise the Ombudsman will have to decide whether the Commission's decision can be brought under the concept of maladministration. Obviously the abovementioned distinction between political and administrative matters does not help. Here, moreover, and contrary to the trilogues case, a possible review by the Ombudsman is more likely to touch upon the substance, rather than pertain—for example—to transparency considerations. That being said, if the Commission does not adopt or publish its Communication, or if it does so but without any reasons at all,[294] this *can* be examined by the Ombudsman. By contrast, if the Commission produces sound, coherent and thorough reasons, the Ombudsman cannot take this further. Lastly, if the Commission's reasons are very poor, the Ombudsman *could* bring the matter under the scope of maladministration, taking a more expansive view (than the Courts) on the right to participate in the democratic life of the Union and relying also on the ECGAB.

The Ombudsman and Participation via Consultations

In addition to introducing the citizens' initiative, the Lisbon Treaty constitutionalised the need, for EU institutions, to hold consultations—albeit what this means in legal terms is an open question.[295] The focus in this contribution will be on the role of the European Ombudsman, and the cases produced by the Ombudsman therein. The next section examines the role of the Ombudsman as an organiser of consultations.

[293] See above n 282, p. 2.

[294] See, in this respect, the interview with the former Secretary-General (n 275).

[295] Compare, among others, Joana Mendes, 'Participation and the role of law after Lisbon: A legal view on Article 11 TEU' (2011) 48 *Common Market law Review* 1849; Victor Cuesta Lopez, 'The Lisbon Treaty's provisions on democratic principles: A legal framework for participatory democracy' (2010) 16 *European Public Law* 123; Nikos Vogiatzis, 'The linguistic policy of the EU institutions and political participation post-Lisbon' (2016) 41 *European Law Review* 176.

The legal framework should firstly be presented. Article 11(1) TEU provides that the 'institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action', while the second paragraph of the same Article that the 'institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society'. The Commission, in particular, should 'carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent' (Article 11(3) TEU). These provisions should be read (at least according to the approach taken by the European Ombudsman) alongside Article 10(3) TEU, which states that '[e]very citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen'. Further, Article 17(3) TFEU states that the 'Union shall maintain an open, transparent and regular dialogue with these churches and [philosophical and non-confessional] organisations'.

In October 2012, the Ombudsman closed his inquiry on a complaint concerning the Commission's public consultation policy, the main allegation being that such consultation calls were only published in English.[296] Although the Ombudsman's intervention was not successful on this occasion, the case is important because it highlights the Ombudsman's role in an area (participation) where the Court has been reluctant to recognise rights to private applicants.[297] The complaint concerned a consultation on the financial sector taxation, but also the Commission's general linguistic policy in consultations.

The complainant alleged that the Commission did not have a specific 'policy nor clear guidelines on linguistic matters in consultation procedures', thereby contravening 'the principles of openness, transparency, good administration and non-discrimination'.[298] The Commission advanced justifications pertaining to resources and time constraints, but added that responses could be submitted in any official language. The complainant observed that it was 'absurd to expect citizens to reply to public consultations in any EU official language if they have not previously been able to read or understand the relevant consultation paper in their

[296] Case 640/2011/AN.
[297] See, for example, Case T-135/96, *UEAPME* v *Council*, EU:T:1998:128.
[298] Case 640/2011/AN, point 19.

own language'.[299] The Ombudsman aligned with the complainant and issued a draft recommendation to the Commission, followed by a critical remark. Of particular relevance here is the Ombudsman's effort to provide an analysis of the scope of Article 11 TEU, going beyond the existing case-law of the Court.

The Ombudsman underlined that the 'broad consultations' under article 11(3) TEU could not be restricted to English-speaking citizens because this would amount to 'unequal treatment'; furthermore, the Commission's practice prevented citizens from exercising their *right to participate in the democratic life of the Union*.[300] Importantly, the Commission's stance was *disproportionate*: 'the Commission's reason for not translating *anything* into *any language* at *any stage* of the Consultation process [was] clearly disproportionate'.[301] In order to minimise costs and effort, the Commission could at least provide 'translations upon request'.

The Ombudsman elaborated on the general linguistic policy of the Commission, viewed in light of its obligations under Article 11 TEU. He opined that the reference to 'regular dialogue' in the second paragraph of that Article 'implies […] engaging in a genuine debate on policy with civil society. The first step to that end is to inform and consult the latter concerning potential initiatives'.[302] The Ombudsman found 'utterly disappointing' the Commission's view that equality and proportionality were not affected by its policy, while diagnosing an incoherent approach; thus, via a draft recommendation the Commission was invited to 'draft clear, objective and reasonable guidelines' on consultation.[303] Furthermore, the Ombudsman in his first recommendation submitted that the 'Commission should, as a *matter of principle*, publish its consultation documents in *all the official languages of the Union*, or provide the citizens with a translation upon request'. Nonetheless, the Commission via its detailed opinion rejected the draft recommendation.

[299] Ibid., points 26–27.

[300] Point 32.

[301] Point 39 (emphasis original). The Ombudsman also referred to the well-known Case C-361/01, *Kik* v *OHIM* EU:C:2003:434.

[302] Case 640/2011/AN, point 45.

[303] Ibid., points 48, 53 and point 2 of the draft recommendation.

The Ombudsman was very critical of the latter's approach:

> [I]t is at the *preceding stage*, that is, when the Commission's mind has not yet been made up and its proposals have not yet been adopted as such, that citizens should be called upon to participate and to express their view(s) concerning future legislation and, in so doing, have an *impact on decision making in the EU*. EU law and the rights it grants to EU citizens *are not meant to remain a dead letter*. It is hard to imagine how citizens could actually enjoy a right guaranteed by the Treaty and have a direct say in the Union's affairs, if they are only aware of the Commission's position once it has been established and the formal legislative process has begun. This may be possible, to some extent, *for well-resourced lobbying organisations representing specific interest groups*, but not for the vast majority of ordinary citizens.[304]
>
> […]The Ombudsman acknowledges that Article 11(3) TEU indeed refers to consultations with '*parties concerned*' and that, in some contexts, this phrase refers to specific groups rather than to all citizens. However … in some public consultations the 'parties concerned' are, in the Commission's own view, European citizens in general. … Furthermore, in the Ombudsman's view, the specific requirements of Article 11(3) should not be read *as restricting the more general provisions* of Title II of the TEU, in particular Articles 9, 10(3) and 11(1), which clearly express the intention to *enhance democracy and public involvement in the Union's affairs*. The Commission's obligation to make it possible for all citizens to inform themselves about the subject-matters of its public consultations thus *flows directly from the democratic principles on which the Union is based*.[305]

The Ombudsman's stance demonstrates the willingness of the office to give the broadest of meanings to the *right to participate in the democratic life of the Union*. This despite the fact that, as the Ombudsman has also acknowledged in a complaint against the European Aviation Safety Agency (EASA), 'there is no subjective legally enforceable right to be consulted in a rulemaking process'. Nonetheless, the 'principle of participatory democracy is of particular importance in an area that has such a direct impact on citizens' daily lives', and therefore despite its wide margin of discretion in the field of dialogue, the EASA following 'principles of good administration' should 'consult as widely as possible'.[306] With regard to the Commission's consultations, the Ombudsman's reference to the 'Provisions on democratic principles' (Title II of the TEU) should

[304] Ibid., point 66 (emphasis added).
[305] Ibid., points 67–68 (emphasis added).
[306] Case 726/2012/FOR, point 32 of the draft recommendation.

be read as a confirmation of his or her institutional commitment to promote the Union's further democratisation, also via a broader understanding of European citizenship. This point was also discussed in Chap. 3. The Ombudsman considered the submission of a special report as the 'right to participate in European Union affairs is an essential aspect of the democratic functioning of the Union, of its openness and transparency and ultimately of the European citizenship as such'.[307] However, since Parliament had previously adopted a Resolution on that matter, he chose to inform its President instead. Additionally, he published a critical press release.[308]

In another case concerning the Commission, the Ombudsman reiterated that the publication of a questionnaire related to a periodic technical survey only in English was an instance of maladministration and prevented non-English-speaking citizens from exercising their right to participate in the democratic life of the Union.[309] Similar arguments were advanced by the Ombudsman in a complaint submitted prior to the entry into force of the Lisbon Treaty and alleging that the Commission should carry consultations with civil society for the publication of its Citizenship Reports.[310] The complaint was submitted by an NGO active on Union citizenship matters. The Commission was not opposed to the idea of consulting more meaningfully with civil society for the purposes of forthcoming Citizenship Reports, while observing that it was under no legal obligation to do so.[311] The Ombudsman accepted this view, and went on to examine whether the principles of good administration were breached.[312] He noted that it would certainly constitute good administrative practice to consult with civil society on these reports,[313] and on the basis of the Commission's commitment to do so in the future, he did not consider that further inquiries were justified.[314]

[307] Case 640/2011/AN, point 71.

[308] See Press release 17/2012, 'Ombudsman criticises Commission's restrictive language policy for public consultations', available at: www.ombudsman.europa.eu/en/press/release.faces/en/12029/html.bookmark

[309] Case 875/2011/JF, points 30–32.

[310] Case 406/2008/(WP)VIK.

[311] Ibid., point 22.

[312] Ibid., points 33–34.

[313] Ibid., point 36.

[314] Ibid., 'Conclusions'. The Commission in the meantime has improved its consultation practices with regard to its Citizenship Reports; see the Report on the 2015 consultation in European Commission, 'EU citizenship consultation 2015: Common values, rights and

Along similar lines, in December 2012 the Ombudsman published his decision on the consultation practice of the EASA.[315] A German amateur pilot had requested a copy of a particular call (on the implementation of rules for pilot licensing) in German, and the EASA responded that it was under no legal obligation to do so. The Ombudsman accepted that 'a balance had to be struck between the need to enable interested parties to understand and comment on [such notices], and the need for an economic use of public funds'.[316] Thus, a friendly solution was proposed for forthcoming notices: the EASA could provide translations upon request—or at least a translated summary of the main proposals.[317] After an unsuccessful draft recommendation, the Ombudsman reiterated that special reports cannot be submitted too frequently, and referred to the abovementioned Resolution by Parliament on multilingualism and public consultations (a Resolution concerning primarily, nonetheless, the Commission).[318] The case was closed with a critical remark, pointing out once more to the limited available modes of action.

Elsewhere, the Ombudsman confirmed that in 'technically complex' areas the margin of discretion of the EU institutions to give by 'appropriate means' (as Article 11(1) TEU states) citizens and associations the opportunity to express their views is broader.[319] In the case concerning the ECB President's membership of the Group of Thirty, the Ombudsman pointed out that Article 11 TEU applies to the ECB as well, and that the second paragraph of that Article 'implies that the dialogue should be balanced, affording diverse interlocutors an appropriate opportunity to debate issues of relevance to the work of the ECB'.[320] The Ombudsman added that 'efforts should be made to discuss the work of the ECB in diverse fora, in addition to … the Group of Thirty', but acknowledged that 'the ECB recognise[d] this principle and … applie[d] it by organising multiple seminars on issues relating to its work'.[321]

Let us now turn to Article 17(3) TFEU. In 2011, a complaint was submitted by an organisation representing 50 humanist organisations from more than 20 countries. The alleged maladministration was the refusal, on

democratic participation' (2016) available at: http://ec.europa.eu/justice/citizen/document/files/2015_public_consultation_booklet_en.pdf

[315] Case 3419/2008/(AF)(BEH)KM.

[316] Ibid., point 36.

[317] Ibid., point 40.

[318] Ibid., points 65–68.

[319] Case 2558/2009/(TN)DK, points 13–15.

[320] Case 1339/2012/FOR, point 82.

[321] Ibid.

the part of the Commission, to organise a dialogue seminar *inter alia* on equality, non-discrimination, human rights and 'concerns of the humanist and secularist community in Europe'.[322] The Commission acknowledged that Article 17 TFEU, alongside Article 11(2) TEU, implement the principle of participatory democracy in the EU.[323] The Ombudsman stated that the complaint was an opportunity to reflect upon the notion of participatory democracy post-Lisbon, and that the case was of relevance to other institutions involved in dialogue with civil society.[324] Mentioning also Article 21 of the Charter, he pointed out that the open dialogue cannot discriminate against certain religious or non-religious groups.[325] Further, the obligations of the institutions in terms of dialogue exceed 'granting funding for certain actions', and in any event if a request is rejected by an institution on the basis of Article 17 TFEU, a civil society organisation may still 'push' for dialogue on the basis of Article 11 TEU.[326]

Further, the Ombudsman attempted to delineate the meaning of the term 'regular' as follows:

> [T]here is nothing in Article 17 TFEU which implies that a precise balance must be struck between the different groups. The Ombudsman indeed is of the view that a formalistic approach, which would seek to strike a precise balance would be inappropriate and indeed impossible given the nature of the subject matter. This notwithstanding, if an analysis of the series of meetings were to indicate that the Commission's approach is *manifestly disproportionate*, there could be a cause for concern. The Ombudsman is not convinced, however, by the figures put forward by the complainant, that the Commission has adopted a manifestly disproportionate approach.[327]

That the Ombudsman is prepared to 'apply' a 'manifestly disproportionate' test in the context of extra-judicial scrutiny should be noted—particularly because Article 17 TFEU has not seen yet a clear interpretation by the Court.

The Ombudsman also underlined that the term 'transparent dialogue' does not necessarily mean that the institutions are obliged to produce

[322] Case 2097/2011/RA.
[323] Ibid., point 19.
[324] Ibid., point 29.
[325] Ibid., point 34.
[326] Ibid., points 35–36. See also point 56 quoted below.
[327] Ibid., point 41 (emphasis added).

detailed notes out of these meetings; good administrative practice suggests, nonetheless, the publication of the 'subject matter, the participants, and […] an account of the general content of the meeting'.[328] It was on the basis of the third element of Article 17(3) TFEU—'open dialogue'—that the Ombudsman found the Commission's stance problematic, and issued a critical and a further remark.[329] He noted, however, that the Commission enjoys wide discretion when determining its policy priorities, but invited the latter to 'outline its priority topics for discussion in dialogue seminars for the year in question'.[330]

The above cases suggest that the Ombudsman has taken the provisions on democratic principles seriously. Keen to offer an interpretation of the requirements imposed on the institutions by these provisions, or emphasising that principles of good administration (which are broader than legality) certainly apply to participatory democracy after the Lisbon Treaty, the Ombudsman has sought to give substance to the obligations of the EU institutions to engage with citizens and civil society. From the point of view of strengthening EU democracy, this approach is to be welcomed. The Ombudsman is certainly legitimised to give the broadest of meanings to these provisions, not least since she or he does not limit her supervision to the question of legality. After all, the Ombudsman's work on transparency complements her work on consultations and the citizens' initiative.

To return to the generally normative dimension of this chapter, further areas that the Ombudsman could examine include the following: whether the term 'appropriate means' under Article 11(1) TEU or the term 'regular' under the second paragraph apply differently to the institutions according to their nature (e.g. intergovernmental or supranational) and their level of interaction with citizens; what kind of additional obligations are imposed on the Commission under the third paragraph, which

[328] Ibid., point 42.

[329] With the further remark the Ombudsman invited the Commission to 'clarify its practices and rules in this area' and to 'draw up guidelines indicating how exactly it plans to implement Article 17 TFEU'. The critical remark referred to the Commission's argument that it wanted to respect national autonomy and subsidiarity; the Ombudsman responded that open dialogue is 'positive' and 'constructive' (ibid., point 48).

[330] Ibid., point 56.

provides that it should carry out *broad* consultations; what are the means by which citizens should engage with the institutions or participate in the dialogue (e.g. online, via seminars and events, via contributions to consultations, etc.). Likewise, it is important to monitor to what extent citizens' input is evaluated or taken into consideration. It is remembered that the obligation to conduct broad consultations, imposed on the Commission, should enable it to 'ensure that the Union's actions are coherent and transparent'. In any event, it would be an omission to limit the scope of application of Articles 11(1) and 11(2) TEU to the Commission, since those provisions refer to the 'institutions'. That point is returned to below.

The arguments advanced in this section or even the Ombudsman's involvement in areas such as participation 'rights' or principles might raise certain objections that the Ombudsman's focus, especially in light of the limited resources of the office, should be on more traditional areas of maladministration. This brings us back to the distinction between matters political and matters administrative, and the earlier point that, especially because the Ombudsman's decisions are not binding and owing to the broad definition of maladministration endorsed by the office, the Ombudsman can supervise areas that fall outside the scope of judicial review. Thus, the Ombudsman can be more flexible with regard to potentially political matters (or better with regard to procedural aspects of potentially political matters)—after all, if the Ombudsman does not use her flexibility to embed principles of participatory democracy, who will?[331] Further, of relevance here are aforementioned observations concerning the plethora of perceptions on the role and function of ombudsman institutions across Europe and beyond. Again, if we stick to a particular perception of a public sector ombudsman as understood within a domestic administrative and political system, it then becomes extremely challenging to find common ground as to the areas that the European Ombudsman should be pursuing.

[331] According to Smismans, the Commission's principles and standards of consultation (as they appear in non-binding documents) have resulted in a 'quite limited' and 'soft' 'proceduralisation of Commission consultation practices'; this means that the Commission enjoys broad discretion and that these principles 'cannot be relied on in court'. Still, they 'can generally only be used to challenge administrative practice via the softer mechanism of the European Ombudsman'. Stijn Smismans, 'Regulatory procedure and participation in the European Union' in Francesca Bignami and David Zaring (eds) *Comparative law and regulation: Understanding the global regulatory process* (Edward Elgar 2016) 129, at 143.

The Ombudsman as Organiser of Consultations

Whereas Article 11 TEU—contrary to Article 15(1) TFEU—refers to the EU *institutions*,[332] the Ombudsman's practice clearly demonstrates that the office considers the former article to be of relevance to it as well. To that end, the Ombudsman 'has established close contacts with Brussels-based umbrella organisations … and other NGO networks'.[333] The Ombudsman is aided by the Committee of the Regions and the Economic and Social Committee in order to 'reach out' to representative organisations, as well as by the European Network of Ombudsmen.[334] Similarly, the Ombudsman in her or his function as a problem-solving mechanism maintains a dialogue with the EU institutions and the EU administration via a series of proactive initiatives or events.[335] The Ombudsman is a flexible institution and can certainly be imaginative when considering additional avenues for political participation.[336]

The most effective way to receive the input of citizens and civil society is via an own-initiative inquiry. This is reasonable as such an inquiry signifies that there is a systemic problem that requires examination: thus, there is an opportunity to make an important contribution to problems that have been identified within the EU administration. Several well-known civil society actors respond to many of these inquiries. Recent examples of substantial public participation have concerned: the transparency of trilogues[337]; the protection of whistleblowers[338]; the human rights obligations of Frontex[339]; the responsibility of the Commission in the ECI[340]; fundamental rights in the implementation of the EU cohesion policy[341];

[332] Mendes (n 295) 1853–1854.

[333] Gundi Gadesmann, 'Open dialogue between institutions and citizens – the dialogue with NGOs and religious/philosophical associations', in Johannes Pichler and Alexander Balthasar (eds) *Open Dialogue between EU Institutions and Citizens: Chances and Challenges: Proceedings of a series of workshops on Article 11(2) TEU in Brussels 2011/2012* (Intersentia 2013) 120.

[334] Ian Harden, 'Open dialogue between institutions and citizens – the Ombudsman's perspective – Opening session – Workshop I' in Pichler and Balthasar (n 333) 125–127.

[335] Gadesmann (n 333) 121; Harden (n 334) 126–127.

[336] See, for example, the proposal before the first Strategy to launch on the website a 'suggestion box for improvements in the EU administration'.

[337] Case OI/8/2015/JAS.

[338] Case OI/1/2014/PMC.

[339] Cases OI/9/2014/MHZ and OI/5/2012/BEH-MHZ.

[340] Case OI/9/2013/TN.

[341] Case OI/8/2014/AN.

the Transatlantic Trade and Investment Partnership (TTIP) negotiations[342]—among others. Invitations for contributions are not, however, confined to own-initiative inquiries; for example, a broad consultation preceded and informed the formulation of the public service principles for EU civil servants.[343]

Partly explainable—as it is assisted by the General Secretariat of the Council[344]—is the very limited number of complaints concerning the European Council. However, in light of the valid claims concerning the executive dominance in the EU, especially after the crisis,[345] the extent of the European Council's engagement with citizens and civil society could certainly be the subject of a strategic inquiry.

Communicating with Citizens and Other Stakeholders

As observed in Chap. 3, the direct interaction with citizens and stakeholders is related to participation. In addition, ombudsman institutions need to rely on an effective communication strategy owing to the lack of enforceability of their decisions. In this context, the communication policy of the European Ombudsman has been particularly effective (especially in light of the limited available resources), especially since the arrivals of Diamandouros and O'Reilly. The office is organising 'strategic events' in Brussels, usually two per year, in spring and in autumn.[346] The Ombudsman has also proposed to replace seminars for liaison officers, national and regional ombudsmen, with one yearly bigger ENO seminar in Brussels.[347] This will be open to stakeholders and the EU institutions as well, and webstreamed live. Part of the seminar (break-out sessions) will be open to ENO members only. The ENO newsletters were abolished in 2015; an idea that is being discussed is that a yearly briefing could be produced, which would be a follow-up from the major seminar in Brussels.

[342] Case OI/10/2014/RA.

[343] See: www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/10281/html.bookmark

[344] See Art 235(4) TFEU.

[345] See, for example, Deirdre Curtin, 'Challenging executive dominance in European democracy' (2014) 77 *Modern Law Review* 1.

[346] Recent topics have concerned 'transparency in tobacco lobbying' and 'Refugees—rule of law—lobbying transparency: is Europe rising to the challenges?'.

[347] Annual Report 2015, 26.

The aim is to increase the ENO's visibility, attract media attention and offer possibilities of interaction with the public and other stakeholders.[348]

As the Ombudsman is a directly accessible, citizen-friendly and personal institution, it would be to the benefit of citizens and stakeholders if the office launched an online chat at regular intervals[349] as a means of communication, participation, and 'build[ing] trust'.[350] This would also help holding the Ombudsman to account.[351] Another option would be to strengthen the collaboration with Europe Direct, an easily accessible platform that provides advice on EU matters. In 2009, a year of constructive co-operation between the Ombudsman and Europe Direct, the possibility of 'a single telephone number to contact' the ENO was discussed, and Europe Direct centres were trained so as to provide information on the ENO.[352] Such initiatives could be further pursued. A link to Europe Direct can be found on the Ombudsman's website.

An Open Question: The European Ombudsman as an Institution of the Union Under Article 13 TEU?

The final section of this chapter poses the question as to whether the European Ombudsman could become an institution of the EU under Article 13 TEU. It is understood that the status of the 'institution' would consolidate the institutional presence and impact of the office, and also generate additional interest in its activities. Past experience with the European Court of Auditors (and its inclusion under what is now Article 13(1) TEU) suggests so. As Laffan pointed out, that development 'was clear recognition of the need to enhance the authority of the Court [of Auditors] and to elevate it to a status equivalent to those institutions over which it had auditing power'.[353]

[348] 'Reforming the European Network of Ombudsmen' (n 118).

[349] Some members of the office were involved in a similar activity in Bulgaria; see Annual Report 2008, 84.

[350] As has been the case in Ontario; see Stewart Hyson and Gary Munro, 'Ontario Ombudsman: A game of trust' in Hyson (n 115) 186, at 203.

[351] Ibid.

[352] Annual Report 2009, 75, 78.

[353] Brigid Laffan, 'Becoming a "Living institution": The evolution of the European Court of Auditors' (1999) 37 *Journal of Common Market Studies* 251, at 263. On the same institution

The last question addressed to the former European Ombudsman was whether he believed that the office should become one of the institutions under Article 13 TEU, given his wish to remain a relatively small-in-size office[354]:

> '*I certainly would welcome the Ombudsman becoming an institution … but I don't see … how this would affect the size. … If the European Union in its wisdom were to acknowledge the Ombudsman as an institution … it would certainly not be the first, because in a number of national legal orders, the ombudsman figures in the Constitution … if that kind of recognition were to be accorded to the [European] Ombudsman, it would enhance the institution's moral authority and moral presence and it would make it easier for him to, in fact, do more of the same. I am not expressing an institutional complaint … but … if this came to pass it would be essentially an application at the European Union level of practices that exist in a number of member states'.* But he insisted: '*the Ombudsman needs to protect very vigilantly the size from becoming industrial. You don't want an industrial operation*'.[355]

This account does not adopt a definitive position on this matter. Some initial observations should, nonetheless, be made. In its present form, Article 13(1) TEU includes institutions[356] focusing on audit and financial accountability (the European Court of Auditors); institutions whose activity may not always concern all the member states (the European Central Bank); or institutions which do not (at least formally) participate in or review the legislative process (the European Council).

The Ombudsman's mandate covers the totality of the EU administrative activity, along the lines and subject to limitations discussed in previous chapters. When the Treaty refers to 'institutions' in more abstract terms, it states *inter alia* that they should maintain an open dialogue with citizens and civil society,[357] and that the Union's institutional framework 'shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency,

see also María Luisa Sánchez Barrueco, *El Tribunal de Cuentas Europeo: La superación de sus limitaciones mediante la colaboración institucional* (Editorial Dykinson 2008).

[354] See the relevant excerpt in Chap. 4.

[355] Interview with the European Ombudsman, 17.02.2012 (on file with the author).

[356] As is known, Article 13(1) TEU also includes the four key players of the 'Community method': the Commission, the Parliament, the Council and the Court.

[357] Art 11 TEU.

effectiveness and continuity of its policies and actions'.[358] Although the precise legal significance of these provisions is not examined here, the case could be made that the Ombudsman serves the democratic values of the Union by shortening the gap between the citizens and the institutions, relying on the rule of law, embedding a culture of transparency, while promoting good governance. If anything, it is legitimate to pose the question as to whether Article 13 TEU could include the Ombudsman.

A possible inclusion of the Ombudsman in Article 13 TEU would further strengthen her status, a point obviously related to compliance, too. Differently put, this development would be viewed by other institutions as constitutional recognition of his or her work, thereby possibly increasing the legitimacy of disputable (in their view) decisions. Crucially, it would also consolidate the Ombudsman's *independence*, especially from the European Parliament; the complexities involved in the relationship between the Ombudsman and Parliament have already been explained. Presently, Article 228 TFEU features among the provisions relating to the European Parliament, that is, Section 1 of Chapter 1 of the 'Institutional Provisions' in the TFEU. If the idea discussed here were to be taken forward, this would obviously require a revision of the Treaties and the drafting of a new section within the abovementioned Chapter on the 'Institutional Provisions'. Simultaneously, the scope of Articles 263 and 265 TFEU[359] would have to be re-considered—in terms of the Ombudsman's standing before the Court, which may not necessary be an undesirable development.[360] It may not be anticipated that the Court would reduce the Ombudsman's discretion[361] in complaint-handling. Further, as previously explained, the Ombudsman has *not* endorsed an informal approach to complaints, being cautious to abide by procedural safeguards.

[358] Art. 13(1) TEU.

[359] In Case T-144/06, *O'Loughlin* v *European Ombudsman and Ireland*, EU:T:2006:237, the Court held that because the Ombudsman was not listed among the institutions, he could not be the subject of a failure to act, and therefore the application was inadmissible (see para 15). Post-Lisbon, however, Article 265 TFEU includes the bodies, offices and agencies of the Union which fail to act. That article does not, however, extend the right to *bring actions* to the Court for failure to act to the bodies, offices and agencies.

[360] The inclusion of the European Court of Auditors among the EU institutions eventually resulted in granting that Court (later on via the Amsterdam Treaty) the power to bring actions before the CJEU 'for the purpose of protecting [its] prerogatives'; see now Art 263(3) TFEU and Jan Inghelram, 'The European Court of Auditors: Current legal issues' (2000) 37 *Common Market Law Review* 129, at 137–138.

[361] On the Court's case-law concerning the Ombudsman see the discussion in Chap. 2.

Ultimately, however, in order for this question to be answered, a broader question should be posed: according to which set of criteria the list of Article 13(1) TEU has been drafted (or amended, after Maastricht and Lisbon)?[362] This question has not been sufficiently considered, and this is not the place for this path of enquiry to be pursued. In other words, the inclusion of the Ombudsman would probably depend on whether the membership of Article 13(1) TEU is too broad[363] or too narrow.[364]

Concluding Remarks

This chapter began by acknowledging that the flexibility of the ombudsman as an institution and the divergent mandates across Europe and beyond, mean that what one may see as a limitation for someone else may be a strength. It was also accepted that any proposals should duly consider the question of resources, while reactions from certain actors cannot be excluded. The office of the Ombudsman is continuously reflecting upon ways to increase its impact (the latest Strategy and annual management plans evidence this), while citizens and stakeholders also have

[362] The initial reflections in this paragraph are based upon initial discussions on this topic between the author and Maria Luisa Sanchez Barrueco.

[363] It could be too broad if Article 13 TEU should concern the institutional triangle of decision-making and the Court. Without commenting on the membership of Article 13 TEU, Christiansen, for example, observed that '[i]nstitutional balance, in a basic understanding of the term, is about the absence of any single institution among these three having fundamentally more weight and influence in the politics of the Union than the other two'; see Thomas Christiansen, 'The European Union after the Lisbon Treaty: An elusive "institutional balance"?' in Andrea Biondi, Piet Eeckhout, and Stefanie Ripley (eds) *EU Law after Lisbon* (Oxford University Press 2012) 228.

[364] It could be too narrow if other bodies may be included, such as the European Economic and Social Committee and the Committee of the Regions, both mentioned in the fourth paragraph of Article 13 TEU. On the administrative side, it is noted that the Ombudsman in the whistleblowers inquiry invited the following institutions and bodies to explain whether they had adopted relevant rules: the European Parliament, the Commission, the Council, the Court of Justice, the Court of Auditors, the European External Action Service, the European Economic and Social Committee, the Committee of the Regions, and the European Data Protection Supervisor. The Ombudsman explained that '[t]hese EU institutions and bodies—together with the Ombudsman—are represented in the *College of the Heads of Administration*, an inter-institutional body composed of top officials representing the said institutions' administration. The College … aims at ensuring a consistent interpretation and implementation of the Staff Regulations and of other administrative matters, taking decisions at the highest administrative level'. See OI/1/2014/PMC, fn 5 (emphasis added).

high expectations of the Ombudsman—as the consultations before the first Strategy demonstrated.

As a means to increase the options in the Ombudsman's toolkit and ultimately further improve compliance, in cases where the draft recommendation is not accepted and subject to the consent of the complainant, the Ombudsman could refer the case to the Court, provided that the maladministration in question falls under illegality. This would strengthen the rule of law and the principle of democratic accountability. It is an idea which, in different shapes and forms, has been advanced by former office-holders and is also not unknown to some national ombudsman offices. It must be stressed that the aim is not duplication of judicial review, hence the suggestion that this discretionary referral should be clearly *limited* by the legislature (e.g. via a number of referrals per mandate or otherwise). Rather, the aim is to grant the Ombudsman an additional significant instrument to push for compliance, alongside the special report, which is the most significant of the existing instruments. Ultimately, it is accepted that the more one considers the EU Ombudsman as a parliamentary ombudsman attached to the political process, the more a healthy distance from the judiciary appears reasonable. It was submitted, however, that the EU Ombudsman has clearly adopted an approach based on law, while the European Parliament *alone* cannot be considered the 'equivalent' of a domestic parliament.

Insofar as the geographical scope of the mandate is concerned, three inter-connected questions were discussed: the Ombudsman's lack of competence to deal with maladministration in the implementation of EU law at the national level; the development of the ENO and transparency concerns therein; and the question as to which entities are EU bodies and offices, for the purpose of the Ombudsman's supervision. It was also observed that citizens find it difficult to understand why an EU law-related matter at the national level cannot be dealt with by the European Ombudsman. This contribution argued that the present 'jurisdictional' allocation between the EU Ombudsman and her peers should remain unaffected. That being said, the culture of cooperation between the European Ombudsman and her peers within the ENO could certainly intensify, and become more principled and visible. In this sense, the drafting of a non-binding Code of cooperation/good practice could be the next step of collaboration—via which domestic institutions would be encouraged to contact the European Ombudsman for EU law-related matters, and transparency provisions would improve the ENO's external visibility. Moreover, it was explained

how the flexibility of the Ombudsman (scrutinising the *activities*, not the *acts* of the EU institutions, bodies, offices and agencies) could enable her to supervise areas that do not categorically fall under either the EU or the domestic administrations (such as the Commission's responsibility in the supervision of the SOLVIT network) or the scope of the EU Treaties (such as the participation of EU institutions in the ESM framework).

The chapter then considered the Ombudsman's distinction between political and administrative matters. It argued that such distinction was essentially adopted in order to enable the Ombudsman to avoid tensions with the Petitions' Committee. The usefulness of maintaining such dichotomy was questioned, acknowledging that the starting point would be the admissibility of complaints against the Committee. Drawing on the practice of other ombudsman institutions, and advancing the need for coherence, that section proposed that the Ombudsman depart from this 'divide'. This does not mean, nonetheless, that the Ombudsman should examine purely political matters, such as the merits of legislation or the Conclusions of the European Council.

Moreover, the chapter positively assessed the Ombudsman's contribution to embedding the right to participate in the democratic life of the Union, thereby supervising areas that the Court has been more reluctant to review. Of particular relevance, in this respect, are the Provisions on democratic principles of the Lisbon Treaty, containing articles on consultation and the citizens' initiative. Proposals to further explore the potential of these provisions were discussed (such as to push the less accountable intergovernmental institutions to be more open to dialogue and consultations). In the field of communication, initiatives announced by the current Ombudsman with a view to making the ENO events more relevant and visible to stakeholders and citizens were presented. Suggestions included the possibility of an online chat between the Ombudsman and citizens, and further cooperation with Europe Direct centres.

Lastly, the question as to whether the European Ombudsman should become an EU institution was reflected upon, an idea that would enhance the Ombudsman's status and moral authority. It was accepted, nonetheless, that answering this question depends on how broad or narrow, in terms of membership, Article 13 TEU should be.

CHAPTER 7

Conclusion

Revisiting the Previous Chapters

This book served a twofold purpose. First, it unravelled the scope of the Ombudsman's work, her or his method and achievements in the development of EU administrative law and in rendering EU governance more accountable and transparent. Second, it identified possible areas for improvement, and then opened the discussion on a possible reconceptualisation of the Ombudsman's mandate and practice.

The first aim of this concluding chapter is to briefly revisit some of the points and arguments in previous chapters. Regarding the Ombudsman's existing powers, Chap. 2 emphasised that applicants (who can be EU residents as well) can complain to the Ombudsman without *locus standi* requirements, as well as the Ombudsman's faculty to open an inquiry without the submission of a complaint. The inability to investigate member state authorities even when implementing EU law was a key factor in the conceptualisation and development of a loosely institutionalised European Network of Ombudsmen (ENO). The Ombudsman has been influential in the development of principles of good administration and EU administrative law; in this respect, it was underlined that the European Code of Good Administrative Behaviour (ECGAB) goes beyond the scope of Article 41 of the Charter, thus verifying the Ombudsman's consistent position that maladministration is broader than illegality. As to the Court's general review over the Ombudsman's work, especially via the action for

N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, European Administrative Governance,
DOI 10.1057/978-1-137-57395-7_7

damages, it is not undesirable that the Court has confirmed to a significant degree the Ombudsman's broad discretion in the context of investigations, a discretion which cannot, nonetheless, amount to complete immunity.

The work and potential of ombudsman offices is often discussed in the context of accountability, democracy and participation. So Chap. 3 initially argued, a chapter which effectively aimed at explaining the relationship between the role of the European Ombudsman and democracy in the EU. The reasons behind the establishment of the institution and its presence among the provisions on EU citizenship evidence how the Ombudsman was viewed as forming part of this debate. The accessibility of the office and the promotion of a broad understanding of European citizenship, which includes openness and participation, demonstrate how the Ombudsman contributes to *strengthening* democracy in the EU. Nonetheless, the chapter also pointed out *inter alia* that the Ombudsman does not have a political mandate or unlimited resources, which means that expectations should be realistic as to the scope or nature of the Ombudsman's possible contribution to democracy. The Ombudsman's legitimacy is aided by the election by the European Parliament and accessibility. Concerning independence, both from the EU institutions and the member states, the robust legal framework and, in particular, the existing institutional practice confirm that the Ombudsman is sufficiently independent. However, precisely because the Treaty provides that the European Parliament should elect and then monitor the Ombudsman *and* be subject to complaints that the Ombudsman will examine, the Ombudsman's independence from the European Parliament can, at times, become a more delicate matter. The Ombudsman's own accountability is generally ensured via the European Parliament, a transparent *modus operandi* and exceptionally by the Court, too.

The next chapter (Chap. 4) focused on the Ombudsman's method and the wide range of areas that the Ombudsman can supervise. Such depth of subject matters primarily stems from the first Ombudsman's decision to adopt a broad definition of maladministration, followed ever since. However broad that definition may be, the Ombudsman will not examine the merits of legislation, and cannot interfere with the judicial function of the Court. The Commission has consistently been the institution against which most citizens complain, which is indeed natural as the Commission services/activities constitute a substantial part of the EU administration. With very limited exceptions, most opened inquiries over the years (for example, approximately 20–25 % of inquiries over the last five years) have concerned transparency/requests for information. The Ombudsman's

method is primarily characterised by an approach based on law—which includes the regular citation of CJEU judgments and occasionally the interpretation of EU law where the Court did not have the opportunity to interpret a particular provision. But even when the Code (containing principles of good administration, many of which go beyond legality) is the reference point, interestingly the Ombudsman (and often complainants, too) will frequently prefer to cite relevant articles within the Code, rather than refer to broader notions of fairness, injustice, 'poor administration' and so on. Often, the review of the process might indirectly lead to a review of the substance; the Commission's discretion in its role as the guardian of the Treaties is the typical example here. The Ombudsman has examined several conflict of interest allegations, including on the appointment of special advisers and the composition of experts groups. Significant attention has been paid to embedding human rights, too, for example via own-initiative inquiries touching upon Frontex's responsibility. The Ombudsman follows the guidance of the Court regarding the discretion of the EU administration in the awards of tenders and grants, but where appropriate she or he has accentuated that good administration imposes additional burdens on the EU institutions. Especially after the establishment of the EPSO, the Ombudsman has worked closely with the Office to enhance the position and entitlements of applicants. Nonetheless, that chapter also demonstrated that in some significant cases the Ombudsman has not been particularly successful in securing compliance and/or the closure of the case within a reasonable time, which is one of the core reasons why citizens choose the extra-judicial avenue. Lastly, it was shown that occasionally the EU institutions may advance implausible arguments against a clearly substantiated case, which—again occasionally—may lead the Ombudsman to search for alternative methods of persuasion, being unable to rely extensively on instruments such as the special report.

With regard to transparency and access to documents inquiries, the Ombudsman does rely on the established case-law of the Court, especially when it comes to assessing the institutions' obligations under Regulation 1049. That being said, relying on strategic inquiries has enabled the Ombudsman to investigate areas that the Court could not easily 'reach', such as the transparency of trilogues or the protection of whistleblowers. After all, the Ombudsman has presented herself or himself as the 'guardian of transparency', and regularly organises events focused on improving transparency, like the 'International Right to Know Day'. Investigating individual complaints is also another crucial dimension of the Ombudsman's

work: the success rates can vary, often because the EU institutions concerned are traditionally more sceptical of openness (i.e. the Council) or because the case can be sensitive and directly involves member states (i.e. the UK's 'opt-out' from the Charter). The Ombudsman is a protagonist in the debate on the reform of Regulation 1049 and, where possible, areas of broader and systemic interest are being pursued, such as the quality of the Register of documents under Article 11 of the same Regulation. The role of NGOs is particularly pivotal in transparency and openness—hence the fruitful collaboration between civil society actors and the Ombudsman.

As the present chapter immediately follows Chap. 6, and to avoid unnecessary repetition, there is no need to revisit the critical reflection and the proposals on the Ombudsman's mandate or practice featuring therein. Thus, this paragraph will be confined to the following—more general—remarks. To begin with, it was accepted that, in light of the considerable diversity, in terms of mandate, of ombudsman institutions across Europe, but also of the particularities of the ombudsman institution and procedure as such (often quasi-judicial, often quasi-political), it is difficult to find universal agreement on how a revisited European Ombudsman's mandate should look like. Moreover, the provision of additional resources for the European Ombudsman's office and the possible reactions by some actors, both from within and beyond the EU administration, were acknowledged (this latter point is returned to below). However, the discussion in Chap. 6 should be seen alongside O'Reilly's agenda to increase the visibility and impact of the office, and that of the ENO, too. Ideas proposed before the adoption of the first Strategy, as well as in the context of the latest Annual Management Plan, unravel that an internal discussion regularly takes place within the office, which includes the collection of feedback and, of course, the monitoring of compliance. In this sense, the aim of the suggestions for improvement in Chap. 6 and that of the book, more generally, is to contribute to this discussion.

Further Reflections on the Ombudsman's Evolution, Role and Mandate

It is to be observed that each office-holder has left her or his distinctive mark on the development of the institution (albeit admittedly more time will be needed to evaluate O'Reilly's overall impact). With their largely complementary, and certainly not mutually incompatible, styles and preferences, they have taken their role of improving the quality of the EU administration seriously. Even if it was Söderman who introduced the

approach based on law, it was the same office-holder who produced the ECGAB and established the ENO. And it is not at all certain that any other adopted approach as the basis of the Ombudsman's function would have laid firmer foundations in order for Diamandouros and O'Reilly to explore further options and initiatives to expand the Ombudsman's reach and institutional presence. The reliance on law throughout the process of European integration (including a rather influential Court) may not be a choice immune from scrutiny, but arguably it would not have been easy for the Ombudsman to depart from this 'paradigm', especially in light of non-enforceability. Diamandouros did demonstrate creativity and flexibility in his approaches, and advanced a communication strategy which included a new website, an interactive guide, sharper decisions, frequent press releases, a new logo, new ideas to increase compliance—among others. During the last year of his work he put into effect the Ombudsman's social media presence, which has been further developed by O'Reilly. Alongside the above, Diamandouros expanded the ENO and its activities but without altering its main feature as an informal network with limited external scrutiny. In this context, O'Reilly appears not only to push for systemic change (notably via an increase in the number of own-initiative inquiries, a development which should be welcomed) but also and relatedly to touch upon areas that grant the office significant civil society and media attention. Examples of such interventions include the TTIP or the European citizens' initiative inquiries (and especially on TTIP, the Ombudsman's intervention was generally successful). Apart from transparency, another area that O'Reilly appears to prioritise is conflict of interest and ethical administration more generally. The Commission is therefore under pressure to open up its practices and adopt clear rules and guidelines therein. In addition, she appears to be aware of the challenges, but also the potential of the ENO, hence the statement to reform it.

Thus, this book generally assesses positively the approaches, efforts and methods of the three office-holders to date. It is remembered that the office of the European Ombudsman is a very small—and transparent—institution, employing approximately 85 members of staff, having to deal with complaints touching upon the totality of the EU administration. In this sense, the point made in Chap. 6 and earlier in this chapter about granting the Ombudsman additional resources is of relevance. Where areas for improvement have been identified, these are primarily related to the confines of the existing mandate. That being said, this account has questioned the advantages of maintaining the distinction between matters administrative and political (a matter obviously pertaining to the delicate

relations with the Petitions' Committee and Parliament, more broadly); it has underlined the problems of an informal ENO; and it is furthermore submitted that more could have been done by the office throughout these two decades of operation to address the delays that still do occur in sensitive cases. In addition, the Ombudsman was invited to find ways or take initiatives to scrutinise the intergovernmental institutions, which have seen their influence increase during the crisis; indeed, the dominance of executive, unaccountable governance has been duly noted by commentators[1] (this point is returned to below).

The above remarks bring to the fore the question as to whether the broad definition of maladministration endorsed by the first Ombudsman was a wise choice. The author will defend the Ombudsman's choice for flexibility here: the argument advanced by Söderman that only such flexible notion would enable the Ombudsman to go beyond the judiciary was reasonable, and will probably sound uncontroversial to any student or proponent of extra-judicial redress mechanisms as useful, if not indispensable, yet different in nature, complement to the courts. How flexible that notion may be is, of course, open to debate: some may submit that areas such as the right to participate in the democratic life of the Union or the transparency of trilogues raise legitimate doubts as to the limits of the Ombudsman's mandate. This contribution endorsed, however, the Ombudsman's willingness to take these (bold, some may find) steps (see Chap. 6), which does not mean, though, that more 'traditional' areas of maladministration should be neglected or that the Ombudsman should be reviewing purely political matters.

If this account clearly does not believe that the Ombudsman's decisions should be binding, it is, nonetheless, acknowledged that the further development of the relations with the Court is indeed advanced (compare the proposal to refer limited cases to the Court), and that the longstanding institutional practice vis-à-vis the Petitions Committee and occasionally the sensitivity vis-à-vis Parliament have been found partly problematic (compare, in particular, the discussion on the distinction between matters administrative/political, and certain of the cases related to Parliament in Chaps. 4, 5 and 6). In this regard, legitimate objections may be submitted by advocates of traditional parliamentary ombudsman institutions. In the EU, however, it is not at all clear that the EU Ombudsman is a parliamentary ombudsman (and the case-law of the Court probably suggests otherwise);

[1] See, for example, Deirdre Curtin, 'Challenging executive dominance in European democracy' (2014) 77 *Modern Law Review* 1.

the Ombudsman *does supervise* the Parliament, while overall following primarily *an approach based on law*. In addition, beyond the existence of a 'powerful' CJEU, one should acknowledge that the European Parliament is clearly weaker than domestic parliaments. Sufficient reasons exist, it is submitted, to defend a certain cautious (i.e. not leading to duplication of judicial review) proximity with the judiciary. The above should be viewed as part of a broader strategy to expand alliances beyond Parliament.

Further on the inter-institutional relations, it can be said that a workable equilibrium has eventually been achieved with the Commission, in the sense that the Commission now accepts that there will be scrutiny by the Ombudsman and that explanations will have to be provided throughout or after the investigation. It is not suggested that relations are ideal—but one should remember that a 'healthy distance' from the administration is always desirable for any ombudsman wishing to maintain her or his independence. If so, further work is needed, on the part of the Ombudsman, to convince the intergovernmental institutions that, often, they should be held to account as well. That is even more important after the EU crisis.

Insofar as transparency is concerned, the current Ombudsman's effort to focus on areas which relate to the process leading to the adoption of legislation (trilogues) or ethical administration (appointments of various office-holders, memberships of advisory/expert groups, etc.) is clearly increasing the profile of the office and has the potential to lead to systemic change. Although transparency is now publicised as one of the Ombudsman's top priorities, it has always occupied a prominent place on the Ombudsman's agenda. Thus, important initiatives were also undertaken therein by both Söderman and Diamandouros (see, for instance, the own-initiative inquiry on access to documents before the adoption of Regulation 1049[2] or the one concerning the Council's procedures for handling confirmatory applications under the said Regulation[3]). Accounts providing normative reflections should go, however, a bit further. Thus, considering the widespread criticism regarding the direction of EU governance especially after the crises, future areas of involvement could include a more meaningful scrutiny of intergovernmental EU institutions, including the European Council. Indeed, a question worth asking is whether that institution, beyond responding to very limited requests for access to documents (in light of its function), may have additional obligations in terms of good governance and citizens' participation (notably via consultations). Beyond

[2] Case 616/96/(PD)IJH.
[3] Case OI/3/2011/KM.

the above, the Ombudsman could examine additional pivotal questions related to Regulation 1049, such as the institutions' policy with regard to documents originating from member states.[4]

Empowering the Ombudsman: An Additional Path to the EU's Further Democratisation?

The academic literature was never short of proposals as to how the EU could or should become more democratic. Treaty reforms usually provide opportunities for such reflection, and the same occurred with the Lisbon Treaty and, in particular, its provisions on democratic principles. More recently, many have rightly observed that the EU's crises were also (or mainly, depending on one's perspective) political, hence the fresh proposals that may render the EU more democratic. This is not the place to enumerate, let alone elaborate on or assess, such proposals.

A non-exhaustive citation of some of these ideas may facilitate, nonetheless, the discussion that follows. Unsurprisingly, the proposals vary considerably: some hope to increase representation,[5] others focus on participation/deliberation,[6] direct democracy[7] or—more

[4] See Case 355/2007/TN(FOR), points 90–91, where the Ombudsman noted that he was considering launching an own-initiative inquiry on this matter.

[5] See, for example, Richard Bellamy and Dario Castiglione, 'Three models of democracy, political community and representation in the EU' (2013) 20 *Journal of European Public Policy* 206.

[6] To the extent that the citizens' initiative is an instrument of participatory, rather than direct, democracy see Louis Bouza Garcia, 'How could the new Article 11 TEU contribute to reduce the EU's democratic malaise?' in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds) *Empowerment and disempowerment of the European citizen* (Hart Publishing 2012) 253; other ideas have included the expansion of the *right* to petition to other institutions, see Miguel Sousa Ferro, 'Popular Legislative Initiative in the EU: *Alea Iacta Est*' (2007) 26 *Yearbook of European Law* 355, at 371–374. Many explore the possibility of a European public sphere; beyond Habermas' work see, for example, Thomas Risse, *A community of Europeans? Transnational identities and public spheres* (Cornell University Press 2010).

[7] See an exploration of the possibility (but also of legal and political difficulties) of an EU-wide referendum in Fernando Mendez, Mario Mendez and Vasiliki Triga, *Referendums and the European Union: A comparative inquiry* (Cambridge University Press 2014) ch 6; see also Andreas Auer, 'The people have spoken: abide? A critical view of the EU's dramatic referendum (in)experience' (2016) 12 *European Constitutional Law Review* 397.

generally —transparency[8]; certain proposals concern the domestic level (i.e. increasing the national control over EU action, frequently via an empowerment of national parliaments[9]), others concern the EU level (often relying on a stronger conception of—a complementary to national or regional—European identity[10]). In essence, there is no reason why the two avenues (strengthening the national and the EU level) cannot be combined[11]; it is remembered that the EU enjoys a dual channel of legitimacy under Article 10 TEU.

Now, whereas this book aimed at advancing pragmatic proposals while duly considering the existing EU constitutional and institutional framework, if adopted, these suggestions would result in a certain empowerment of the European Ombudsman's role or institutional presence. Basing these proposals on a number of shortcomings or limitations that have been identified entails a challenge: indeed, it is not possible to measure in advance the extent to which these ideas would lead to quantifiable

[8] See, for example, Deirdre Curtin, 'Overseeing secrets in the EU: A democratic perspective' (2014) 52 *Journal of Common Market Studies* 684.

[9] See, for example, Damian Chalmers, *Democratic self-government in Europe: Domestic solutions to the EU legitimacy crisis* (Policy Network Paper 2013). Several accounts explore the potential of national parliaments under the existing, post-Lisbon legal framework, such as Ian Cooper, 'A "virtual third chamber" for the European Union? National parliaments after the Treaty of Lisbon' (2012) 35 *West European Politics* 441; Marco Goldoni, 'Reconstructing the early warning system on subsidiarity: The case for political judgment' (2014) 39 *European Law Review* 647.

[10] Piketty and many others have advanced the idea of an additional European chamber, initially involving MPs from countries whose currency is the Euro—see Thomas Piketty et al., 'Our manifesto for Europe' (2014) available at: www.theguardian.com/commentisfree/2014/may/02/manifesto-europe-radical-financial-democratic. Habermas defends a wide reform of the Treaties in Jürgen Habermas, 'Democracy in Europe: Why the development of the EU into a transnational democracy is necessary and how it is possible' (2015) 21 *European Law Journal* 546. See also an account proposing a 'constitutional order based on conflict' in Mark Dawson and Florris de Witte, 'From balance to conflict: A new constitution for the EU' (2016) 22 *European Law Journal* 204. The European Parliament's Constitutional Affairs Committee proposed in 2011 the election of 25 (additional) MEPs from an EU-wide list; see Committee on Constitutional Affairs Press release, 'EP elections: choose an extra 25 MEPs from EU-wide lists, MEPs suggest' (2011) available at: www.europarl.europa.eu/news/en/news-room/20110418IPR18099/ep-elections-should-include-an-extra-25-meps-from-eu-wide-lists

[11] Conversely, favouring one option over the other may entail significant challenges (i.e. the creation of a 'super-state' or the false presumption that a 'net gain for democracy' at the national level will automatically occur); see an interesting analysis by Paul Craig, *The Lisbon Treaty: Law, politics, and treaty reform* (Oxford University Press 2013) 74–75.

improvements in EU democracy. This is probably inevitable as any normative effort of this sort cannot produce this type of 'results'. Thus, it was mentioned in Chap. 6 that the claims and proposals discussed therein effectively address the various dimensions, parameters or challenges of the mandate and invite further discussion and reflection on the way forward.

That being said, an additional observation can be submitted here. As this section has also shown—and perhaps for understandable reasons—the EU democracy question has centred so far on the most prominent of EU institutions (and lately perhaps on the role of national parliaments, too). Focusing on the main institutions is reasonable as those actors assume the largest share of responsibility when it comes to decision or policy-making. However, unless someone is prepared to prove that one particular large-scale amendment concerning, for example, one of the three institutions participating in the adoption of EU legislation, will satisfy whatever requirements appear to be necessary in order for the EU to become 'democratic', there is no valid reason to exclude less prominent institutions or actors from this discussion. This does not concern just the European Ombudsman; to give another example, the Committee of the Regions represents the regional level in the EU, yet there is very little academic discussion as to how that Committee could strengthen its institutional or constitutional presence in the EU architecture.[12]

Moreover, it is clear—and if it is not entirely obvious then it should be stressed—that this or any other possible set of proposals empowering the Ombudsman cannot by itself improve democracy in the EU. Thus, the Ombudsman is an avenue that needs to be combined with other proposals, plans or mechanisms in order to achieve results in democratic terms. Quantifying these results is an exercise that cannot be undertaken here. Perhaps it may be thought that Chap. 6 offered too pragmatic a reform to make a substantial link with the EU's further democratisation. Beyond underlining that there are limits to what an ombudsman office generally can or should do, it is also remembered that radical shifts in terms of institutional power have been the exception in the EU. Often, certain improvements, such as the way the European Parliament used Article 17(7) TEU

[12] Exceptions include the contribution by Christoph Hönnige and Diana Panke, 'The Committee of the Regions and the European Economic and Social Committee: How influential are consultative committees in the European Union?' (2013) 51 *Journal of Common Market Studies* 452; Simona Piattoni and Justus Schönlau, *Shaping EU policy from below: EU democracy and the Committee of the Regions* (Edward Elgar 2015).

to influence the Commission presidency in 2014, could set the scene for further, gradual steps. After all, as Mény put it, if 'we wish to make the European Union more democratic, we have to invent new paradigms, rules and institutions rather than try to duplicate national recipes'.[13] In addition, '[r]edressing the situation might be done through various small adjustments rather than by one or two large—but disappointing—changes', while 'progress can only result … from adjustments, tentative explorations, trials and errors'.[14] Indeed, it is often useful to be pragmatic rather than impressive, even if times of crisis quite naturally may prompt rather ambitious ideas and proposals. And indeed, many of these more ambitious ideas certainly sound promising (yet it is remembered that such an evaluation falls outside the scope of this chapter).Thus, the claim advanced here is effectively that past experience has shown that it is more challenging for bolder ideas to be implemented in the EU.

The last question to be considered in this concluding chapter is who could prompt institutional change, insofar as the European Ombudsman's mandate is concerned, and perhaps whether there is interest, within the office, in opening such a discussion. Simply put, what is the likelihood of these reforms materialising in the present institutional and political climate? The author believes that the present office-holder would be prepared to start this discussion—at least the statements (e.g. in the Annual Reports), press releases, or reform initiatives (e.g. of the ENO) suggest so. Perhaps the only exception would be the relations with the Committee on Petitions—for reasons already discussed in Chap. 6. That being said, it is not a foregone conclusion that national ombudsman offices and EU institutions would wholeheartedly endorse proposals for change, either concerning the mandate or the practice of the Ombudsman. It is remembered that the preference of the EU institutions (excluding Parliament) was to establish an independent Ombudsman without significant powers, while Parliament's preference was for a dependent (on the latter) Ombudsman with significant powers.[15] Although the relations with some EU institutions have improved (e.g. with the Commission, and especially the present Commission), these tendencies are likely to re-surface should

[13] Yves Mény, '*De la démocratie en Europe*: Old concepts and new challenges' (2002) 41 *Journal of Common Market Studies* 1, at 11.

[14] Ibid.

[15] Alexandros Tsadiras, 'Of celestial motions and gravitational attractions: The institutional symbiosis between the European Ombudsman and the European Parliament' (2009) 28 *Yearbook of European Law* 435, at 441.

such a discussion open. Regarding national ombudsman offices, sufficient time has elapsed since the creation of the ENO that probably enables the further development of cooperation, provided that sufficient resources are in place. In any event, the discussion on a possible reform of the Ombudsman's mandate could be initiated by the Ombudsman herself—possibly via an open call for contributions in the first place. Interesting submissions would thus be received, including by civil society actors familiar with the Ombudsman's work, thereby taking this project forward. Indeed, it falls upon the Ombudsman to communicate further the potential of the institution for a more open, accountable, and citizen-serving Union and, accordingly, to push for a realistic transformation of the mandate.

The Ombudsman has improved the quality of the EU administration and, for this reason as well, she could be empowered with additional tools and pursue new strategies or policies in order to make an even greater impact. Beyond the Ombudsman, discussing democracy and accountability in the EU is essential, particularly when it comes to less prominent or increasingly prominent (like the Ombudsman) EU institutions and bodies, especially in times of crisis, when serious reflection on the future of the Union is required.

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