

# THE PROCEEDINGS OF THE EUROPEAN OMBUDSMAN

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## I

### THE EUROPEAN OMBUDSMAN: CONTROLLER AND CODIFIER

The European Ombudsman was first established in the Maastricht Treaty of 1992. However, the duties and functions of this new position were defined very loosely. The EC Treaty, as amended by Maastricht, merely states that the Ombudsman is appointed by the European Parliament<sup>1</sup> and is eligible for reappointment; that the office of the Ombudsman is incompatible with any other occupation; that the Ombudsman is given full independence and is bound to Parliament by a fiduciary relationship;<sup>2</sup> and

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1. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 195, 2002 O.J. (C 325) 1 [hereinafter EC TREATY] (establishing Ombudsman for European Community). The Treaty defines the general procedure for the appointment and operation of the Ombudsman and his relationship with other European Union bodies. In particular, it establishes that the European Parliament appoint an Ombudsman (defined as a singular person) after every general election. The mandate of the Ombudsman lasts for the term of the legislature and is renewable. In addition to the Treaty provisions, the Ombudsman is governed by a statute approved by Parliament and by provisions established in 1995 and modified in 1997, 1999, and 2002. Decision of the European Parliament 94/262 of 9 March 1994 on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, 1994 O.J. (L 113) 15-18 [hereinafter Decision 94/262]. Decision 94/262 provides that "the Ombudsman shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledged competence and experience to undertake the duties of the Ombudsman." *Id.* art. 6, para. 2. In addition, Decision 94/262 specifies that "when taking up his duties, the Ombudsman shall give a solemn undertaking before the Court of Justice of the European Communities that he will perform his duties with complete independence and impartiality and that 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." *Id.* art. 9, para. 2.

2. There is evidence of a fiduciary relationship between the Ombudsman and the Parliament in provisions requiring the Ombudsman to present annual reports on his activities to the Parliament. As of 15 March 2004, the Ombudsman has presented eight annual reports. The first report in 1995 covered only the six months from the statute's entry into force. This relationship is also apparent in the provisions of Parliament for the Ombudsman's appointment and for requests for dismissal from the Court of Justice if the person in office "no longer fulfills the conditions required for the performance of his duties." EC TREATY art. 195, para. 2. If the appointed person no longer fulfills the conditions required for the performance of his duties as Ombudsman, or if he is guilty of serious misconduct, the Parliament may ask the Court of Justice to declare that the Ombudsman be dismissed. Decision 94/262 art. 8. Further, the mandate of the Ombudsman ceases upon the expiration of the term of the legislature or upon his resignation or dismissal. In the event of the early cessation of the Ombudsman's duties, a successor is appointed within three months of the vacancy. *Id.* art. 7.

that Parliament establishes “the status and the general conditions” for the performance of the Ombudsman’s duties. In terms of activities, the Treaty merely states that the Ombudsman “is empowered to receive complaints from any other physical or legal person” residing or having its registered office within the European Union. Such complaints must concern “instances of maladministration” that occur “in the activities of Community institutions and bodies,” with the exception of the Court of Justice and the Court of First Instance acting “in their judicial role.”<sup>3</sup> The Ombudsman may conduct inquiries “for which he finds grounds” on the basis of such complaints unless the alleged facts are or have been the subject of legal proceedings before European Courts. If the Ombudsman confirms that there has been an instance of maladministration, he must inform the institution or the body concerned, which must provide the Ombudsman with an opinion within three months. Upon receipt of the opinion, the Ombudsman must prepare a report to the Parliament and must inform the person lodging the complaint of the outcome of the inquiry.<sup>4</sup>

The Treaty provisions have been incorporated into a European Ombudsman’s Statute (hereinafter the “Statute”) that has been approved by the Parliament. Implementing Provisions have been adopted as well and have been subsequently modified on several occasions by the Ombudsman himself.<sup>5</sup> These have since been reinforced by the inclusion of a “right to good administration” among the fundamental rights of European citizens.<sup>6</sup>

Nonetheless, it was apparent from the outset that the Ombudsman would perform a dual role. On the one hand, when investigating complaints, the Ombudsman considers himself a “controller” of Community administrative procedures, shedding light on procedures in which the liberties and rights of the EU citizens must be secured. By countering instances of “maladministration” and by attempting to ensure that certain general principles of procedure are followed for all European citizens, the Ombudsman seemed to have created a right to “good administration” even before it was officially codified. These duties of the Ombudsman are prescribed by law and executed through formal proceedings. At the same time, however, the Ombudsman has also been developing preventative measures against “maladministration” that extend far beyond the official scope of his mandate. These relatively informal activities are aimed at sharing information and encouraging cooperation between Community institutions and their counterparts at the national level. The Ombudsman has systematically pursued these activities and has eventually transformed them into his routine duties. For almost a decade now, the Ombudsman has been refining this duty to promote “good administration” by elaborating general principles, rules of conduct, and criteria of

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3. EC TREATY art. 195.

4. *Id.*

5. Available at <http://www.euro-ombudsman.eu.int/home/en/legal.htm>.

6. See, e.g., Treaty Establishing a Constitution for Europe, art. II-101, 2004 O.J. (C 310) 3 [hereinafter Constitutional Treaty] (establishing such a right); CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Dec. 12, 2000, art. 41, 2000 O.J. (C 364) 1 (establishing such a right). In a statement dated 28 February 2003, the Ombudsman asked the European Council to include the right to good administration among the constitutional rights of European citizens. The Council obliged and inserted the Charter of Fundamental Rights into the constitutional draft. The draft was approved on 18 June 2004, and was signed in October 2004.

good administration. These criteria have been published in various forms, including reports, speeches, letters, notes and press releases. However, nowhere is the promotion of “good administration” more apparent than in the *Code of Good Administrative Behaviour* (hereinafter “Code”), which incorporates general principles of procedure common to all Community institutions. The European Ombudsman drafted the Code in 1997 and has been encouraging all Community institutions to adopt it ever since. The Code, approved by the Parliament in 2001 and published in 2002, represents a preliminary attempt to codify general rules on Community administrative procedure, albeit in a “soft law” form. Therefore, one can claim that, gradually, the Ombudsman has taken on both the role of controller of “maladministration” and of codifier of “good administration.”

The close relationship between the Ombudsman’s activities and EC administrative procedures gives rise to several procedural and substantive issues. On a procedural level, “maladministration” is assessed through formal inquiries of complaints that may be considered “proceedings,” albeit in a non-technical sense. This raises the basic question of how to define these proceedings since the Treaty’s provisions are ambivalent and support several different, competing readings.

The Ombudsman is certainly not a judge, given that the provisions governing the Ombudsman are distinct from those that govern the Court of First Instance and the Court of Justice. Nonetheless, one could argue that the Ombudsman’s activities are “quasi-judicial” in character. This is because the Ombudsman not only plays a role in protecting the fundamental rights of citizens, but also because there are procedural rules for his activities that are similar those of the courts. Furthermore, the Ombudsman enjoys an impartial, third-party status similar to that of a judge.

On the other hand, by focusing on the Ombudsman’s role in balancing interests to resolve instances of “maladministration,” one could reach quite a different conclusion. In this light, the Ombudsman’s activities could be considered closer to those of an agency that oversees administrative decisions and conducts complex investigations, weighing both public and private interests. Thus, the role of the Ombudsman could be compared to appellate-level administrative proceedings, in which there is an exercise of discretion. Yet the “neutral” position of the Ombudsman and his role in ensuring that the proceedings of other EC institutions comply with a given standard, suggests that Ombudsman scrutiny is not identical to administrative review of agency decisions. Finally, as the Ombudsman negotiates between institutions and complainants to reach solutions by consensus, it could be argued that the Ombudsman operates within the framework of alternative dispute resolution methods.

The relationship between the Ombudsman and the fundamental right to good administration raises at least three other substantive issues. First, it may be argued that a right to good administration has existed since European citizens obtained the right of recourse to the Ombudsman in 1992. Even though this right is now enshrined through “rigid” codification in the Charter of Fundamental Rights and the Constitutional Treaty, there still is still ample room for its implementation through “soft laws.”

Second, the scope of the “maladministration” notion also raises important concerns. The term is used in the Treaty, although it is not defined. Finally, another issue

that is directly related to the definition of “maladministration” is the nature and the use of the Ombudsman’s powers.

## II

### OMBUDSMAN PROCEEDINGS: LODGING A COMPLAINT

Inquiry proceedings for instances of maladministration<sup>7</sup> generally begin upon the receipt of a written complaint<sup>8</sup> by the Ombudsman,<sup>9</sup> but they may also be initiated by the Ombudsman on his own.<sup>10</sup> The procedure for investigations is public, unless the complainant requests that it be treated confidentially.<sup>11</sup>

Preliminary proceedings occur in two phases. First, a determination is made as to whether the complaint is within the mandate of the Ombudsman. Second, a determination is made as to whether the complaint is admissible.<sup>12</sup> To assess whether a com-

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7. These instances are extremely varied. The most common complaints involve the absence or refusal to provide information or access to documents, poor response to complaints, avoidable administrative delays in rendering decisions, failure or delay in payment, discrimination or irregularities in recruiting procedures, failure to provide reasons for decisions, disputes over the performance of contracts, violations of the rights of complainants, and violations of the Commission’s role in examining complaints under former Article 226 of the Treaty. However, there are also complaints for violations of customs, citizenship, and competition laws by Community institutions. See OFFICE OF THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 2002 (2003) (articulating and indexing cases of maladministration and complaints); Press Release, Office of the European Ombudsman, Ombudsman Bows Out After Busiest Year Ever (Mar. 24, 2003), available at <http://www.euro-ombudsman.eu.int/release/en/2003-03-24.htm> (articulating and indexing complaints).

8. Decision of the European Ombudsman Adopting Implementing Provisions, art. 2, para. 1 (July 8, 2002), available at <http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm> [hereinafter Implementing Provisions]. There are no special formalities for making a complaint, although the identity of the complainant and the grounds for the complaint must be clearly identified for it to be admissible. Upon receipt of a complaint that is filed, registered, and numbered, the parties involved are notified in writing of the file number, the name of the officer handling the file, and a telephone number that may be used to obtain further information.

9. To assist the public, Parliament has prepared guidelines for complaints, which are available at [http://www.europarl.eu.int/petition/help\\_en.htm](http://www.europarl.eu.int/petition/help_en.htm). Decision 94/262 art. 2. A complaint form is accessible over the internet, and since 2002 over 50% of complaints have been filed by electronic mail or Internet forms. See ANNUAL REPORT 2002, at 11.

10. Procedures for inquiries initiated by the Ombudsman himself are no different from those provided for inquiries initiated on the basis of complaints. Nonetheless, the European Ombudsman has interpreted these powers relatively restrictively. There have been only eleven inquiries initiated by the Ombudsman on his own since 2000, and approximately twenty since 1995. From his very first months in office, the Ombudsman has maintained that inquiries should be conducted on his own initiative only if there are several complaints directed at a particular instance of maladministration, or when it appears that an institution which was the subject of numerous critical remarks and recommendations from the Ombudsman has been unresponsive. See, e.g., Decision of the European Ombudsman on Complaint OI/3/2001/SM Against the European Commission (Nov. 19, 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/01oi3.htm> (regarding management of the Ispra Community Research Centre); Decision of the European Ombudsman in the Own-Initiative Inquiry OI/5/99/IGH/GG Relating to the European Commission (Feb. 16, 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/99oi5.htm> (concerning delay in payment by the Commission); Decision of the European Ombudsman Closing Own-Initiative Inquiry OI/1/99/IJH as Regards the European Central Bank (Sept. 24, 1999), available at <http://www.euro-ombudsman.eu.int/decision/en/99oi1ecb.htm> (regarding the right of public access to documents). Therefore, thus far, inquiries initiated by the Ombudsman himself have always been based on prior complaints.

11. Decision 94/262 art. 2, para. 3; Implementing Provisions art. 10, para. 1.

12. EU TREATY art. 195; Implementing Provisions art. 3, para. 1. The definition of persons who can lodge a complaint (all citizens of Europe or any physical or legal person who lives in one of the Member States), the bodies that may be the subject of complaints (Community institutions, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role), as well as the reasons for a complaint (instances of

plaint falls within his mandate, the Ombudsman has defined both subjective and objective criteria. Subjectively, this analysis first establishes the claimant's standing (a valid claimant must be a citizen or resident of a Member State<sup>13</sup>), and acknowledges the institutions against which the complaint is being made. National administrations and judicial bodies of the European Union are not subject to scrutiny by the Ombudsman.<sup>14</sup>

The right to complain to the Ombudsman completes the list of European citizenship rights under the Constitutional Treaty.<sup>15</sup> It is of significant political importance because it reinforces the relationship that exists between the Ombudsman, the political institutions of the European Union, and European citizens. The right to complain to the Ombudsman is considered a general remedy, and thus has the same status as the right to petition Parliament and to write to all EU institutions as provided by Article 21 of the Treaty. Moreover, the right of complaint to the Ombudsman is a protective right that can be invoked directly by private persons against EU institutions.<sup>16</sup>

Article 195 of the Treaty extends this right to any physical or legal person that resides or has a registered office in the territory of one of the Member States. Article 195 also allows for complaints to be made by a Member of the European Parliament. Given the relatively wide grounds for complaints under the Treaty and their broad interpretation by the Ombudsman, who has often felt compelled to initiate inquiries on

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maladministration), are all essential elements of the Ombudsman's mandate. The Ombudsman has noted the same restrictions on his mandate, stating "a complaint is outside the mandate if: (1) the complainant is not a person entitled to make a complaint; (2) the complaint is not against a Community institution or body; (3) the complaint is against the Court of Justice or the Court of First Instance acting in their judicial role; or (4) the complaint does not concern a possible instance of maladministration." OFFICE OF THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 1997, at 17 (1998). It is worth noting that complaints to the Ombudsman may be made by persons who were not directly involved in the instance of maladministration. Though the notion of the Ombudsman's mandate does not appear in Decision 94/262, it has been set out in the Implementing Provisions.

13. *See, e.g.*, OFFICE OF THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 1998, at 17 (1999) (citing Complaint 398/98/HL and finding lack of standing and inadmissibility for complaint lodged by Romanian individual against Romanian authorities); ANNUAL REPORT 1997, at 16 (citing Complaint 1017/97/OV and finding lack of standing for Turkish citizen residing in United States and inadmissibility of complaint).

14. *See* ANNUAL REPORT 1997, at 20 (citing Complaint 989/97/OV and finding inadmissibility of complaint lodged against the Woluwe European School, a non-Community institution).

15. *See* Constitutional Treaty, art. II-103.

16. The Scandinavian model, upon which the European Ombudsman was substantially based, differs in this respect. In Scandinavian countries, the ombudsman is primarily a tool used by Parliaments to oversee administrations, although two distinct operational models have emerged from these jurisdictions. The first, the Swedish model, is characterized by probing powers of inquiry and intervention similar to those exercised by the courts. This model has only been adopted in Sweden and Finland, while the model that has been subsequently "exported" around the world is the one developed in Denmark. The Danish model, although it has several similarities to the Swedish ombudsman, has a more restrictive mandate. It has supervisory powers over purely administrative bodies, but it does not have "extra-judicial" powers or remedial powers. Nonetheless, it can provide remarks and recommendations and has powers of conciliation. An ombudsman was gradually introduced into the Community framework over the second half of the 1970s, when the European Parliament suggested that a Community ombudsman be one of the entitlements of European citizenship. Along with essential rights of citizenship, which included freedom of movement and of residence, electoral rights, and the right to petition Parliament, some members of Parliament wanted to include the right to lodge complaints to a body that could oversee instances of maladministration by Community institutions. Scandinavian countries were especially favorable to this request. In particular, Denmark provided the definitive framework for the articles in the Treaty relating to the Community Ombudsman.

his own after finding complaints inadmissible,<sup>17</sup> complaints to the Ombudsman are frequently compared to a kind of *actio popularis* (generalized rights of action). When assessing complaints, difficulties rarely arise in terms of standing.<sup>18</sup>

### III

#### THE SCOPE OF THE OMBUDSMAN'S POWERS OF INVESTIGATION: "COMMUNITY INSTITUTIONS" AND JUDICIAL ACTIVITIES

The array of Community institutions subject to the Ombudsman's powers is broad, considering that a number of those institutions—the European Central Bank,<sup>19</sup> agencies,<sup>20</sup> and other organizations<sup>21</sup>—are not listed among the institutions officially entrusted with carrying out the tasks of the Community under Article 7 of the EC Treaty.<sup>22</sup> The Ombudsman has begun to establish criteria for identifying the "Community institutions" that are within the scope of its mandate.<sup>23</sup>

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17. See, e.g., Decision of the European Ombudsman on Complaint OI/4/99/OV against the European Investment Bank, available at <http://www.euro-ombudsman.eu.int/decision/en/99oi4.htm> (involving complaint by non-resident, non-EU citizen against European Investment Bank dismissed for inadmissibility but self-investigated by Ombudsman).

18. In addition to physical persons and companies, the employees union of the Central European Bank, associations for the promotion of human rights (Statewatch), business associations (Norrbottnens Frihandelsforening, British Importers Association), law firms, university institutes, the European Environment Agency, and local entities of the Member States are among those entities that have lodged complaints to the Ombudsman. The distinction between the general and unspecified nature of interests that may be advanced through the Ombudsman and the specific nature of interests that are protected in a court or administrative proceeding is clear.

19. The European Central Bank has been the subject of five inquiries between 1999 and 2001 and six inquiries in 2002. See, e.g., Decision of the European Ombudsman on Complaint 199/2000/PB against the European Central Bank (Jan. 22, 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/000199.htm> (regarding pre-primary education allowances).

20. The first decision involving an agency was in 1997 against the European Environment Agency. Decision of the European Ombudsman on Complaint 800/97/VK against the European Environment Agency (Mar. 1, 1999), available at <http://www.euro-ombudsman.eu.int/decision/en/970800.htm>. Since 1999, approximately 6% of the complaints examined each year by the Ombudsman have involved agencies. As far as other bodies are concerned, in 2002 alone, Europol was the subject of six Ombudsman inquiries.

21. The European Training Foundation, the European Agency for the Safety and Health at Work, the Office for Official Publications of the European Communities, the Translation Centre for Bodies of the European Union, the European Centre for the Development of Vocational Training, the European Monitoring Center for Drugs and Drug Addiction, Europol, the European Foundation for the Improvement of Living and Working Conditions, the European Environment Agency, the European Agency for the Evaluation of Medicinal Products, the Office for Harmonisation in the Internal Market, the Community Plant Variety Office, and the European Monitoring Centre for Racism and Xenophobia were among the bodies subject to inquiries by the Ombudsman in 2001 alone. See generally ANNUAL REPORT 2001 (listing cases by institutions subject to investigation).

22. These bodies include the Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Regional Committee, the Economic and Social Committee and the European Investment Bank.

23. Entities that have been established and at least partially financed by Member States, with the aim of promoting Community interests, and those supervisory "bodies established under Community Law," such as those established under the Convention for the Fight against Corruption, are within this mandate. On the basis of these factors, the Ombudsman has found that the European University Institute of Florence is an "EU institution" within the meaning of the Treaty. Decision of the European Ombudsman on Complaint 659/2000/GG against the European University Institute (Nov. 24, 2000), available at <http://www.euro-ombudsman.eu.int/decision/en/000659.htm>. The cited convention was approved by the Council on 3 December 1998. Explanatory Report on the Convention on the Fight against Corruption Involving Officials of the

Several complaints of “maladministration” have been raised with the European Ombudsman regarding national administrations. Thus, these claims fall under the jurisdiction of national ombudsmen, where they exist. Nonetheless, in order to admit such complaints, the Ombudsman has developed informal relationships with national ombudsmen, attempting to ensure that their activities are compatible with his own.<sup>24</sup> In essence, the Ombudsman has sought to assume a coordinating role, enabling him to define the scope of the powers assigned under the Treaty.<sup>25</sup> This cooperation has led to the creation of a liaison network of various national and local ombudsmen,<sup>26</sup> and has established a mechanism for the reciprocal referral of complaints.<sup>27</sup>

As previously suggested, the Ombudsman’s direct and indirect powers of inquiry are a clear indication that the Ombudsman’s scope of action constitutes a new “EU administrative system.”<sup>28</sup> This system includes bodies (such as European agencies) that traditionally fall outside the core definition of European administration (the Commission) and extends to national administrations. However, there is a clear difference between the informal and non-binding relationships between the European Ombudsman and national ombudsmen and the formal and binding relationships between the Court of Justice and national courts, as well as between the Commission and the administrations of Member States.<sup>29</sup>

European Communities or Officials of Member States of the European Union, Dec. 3, 1998, 1998 O.J. (C 391) 1.

24. The Ombudsman does not appear to be in favor of formally extending the scope of its own powers, as such an extension would be contrary to the subsidiarity principle. See European Ombudsman Jacob Soderman, *THE CITIZEN, THE ADMINISTRATION, AND THE COMMUNITY LAW: GENERAL REPORT TO THE 1998 FIDE CONGRESS 34-35* (1998) available at <http://www.euro-ombudsman.eu.int/fide/pdf/en/fide.pdf>.

25. Decision 94/262 art. 5; Implementing Provisions art. 12. Through meetings and conferences with national ombudsmen from Member States, the Ombudsman has established a flexible and informal cooperation network between himself and similar bodies operating at the national level.

26. The Ombudsman considers this liaison network essential for the cooperation and harmonization of the activities of all entities involved in the protection of private interests against maladministration. To this end, since 1997, an information network, which now supports an official internet site, a permanent telephone inquiry line, and a daily update service, has been encouraging the development of “liaison letters.” These letters are intended as an information circular. The network has been expanded since 1997 to include national and regional ombudsmen as well. See The European Ombudsman Liason Network, available at <http://www.euro-ombudsman.eu.int/liaison/en/default.htm>.

27. This mechanism has been used in very few cases to date (twice in 1997, five times in 1998, twice in 1999, and six times from 2000 to 2003). It enables the Ombudsman to respond to the questions or requests for information regarding Community law raised by national ombudsmen and to decide cases that are brought to him by national ombudsmen. Since 1998, the Ombudsman, contrary to well-established principles, has not simply referred claims outside of his mandate to the competent national or Community authorities, but has transferred such complaints directly with the complainant’s consent. OFFICE OF THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 1998, at 278-86 (1999); OFFICE OF THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 1997, at 290-302 (1998); OFFICE OF THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 1996 § 5 (1997); OFFICE OF THE EUROPEAN OMBUDSMAN, ANNUAL REPORT 1995 § II.2.1 (1996). Over the course of 2001 and 2002, the network was gradually extended to the ombudsmen of EU accession states.

28. Mario Chiti, *Il mediatore europeo e la buona amministrazione*, 2 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 303 (2000).

29. When a jurisdictional question is referred to the Court of Justice by a national judge, the Court of Justice is obliged to adhere to the interpretation of Community law as formulated by the Court of Justice. EC TREATY art. 177 (as in effect 1992) (now article 234). On the basis of cooperation rules with the Commission for the application of Articles 81 and 82 of the Treaty, national competition authorities are obliged to provide information and cooperate with an inquiry. See Council Regulation No. 1/2003 of Dec. 16, 2002 on the Imple-

After determining that both the individual complainant and the Community institution fall within his jurisdiction, the Ombudsman must ensure that the facts in the complaint are not already subject to court proceedings. He may not proceed with his own inquiries on any issues before him that have already been brought before the Court of First Instance or the Court of Justice.<sup>30</sup> Nonetheless, the Ombudsman may open an inquiry into a matter already before the European Courts if the issues are not substantially the same. In the most sensitive cases, the Ombudsman's proceedings may be temporarily suspended,<sup>31</sup> until the conclusion of the court proceeding. Finally, the Ombudsman must check that the complaint alleges an instance of "maladministration" nominally within his mandate. Thus the first phase of the Ombudsman proceeding comes to an end.

#### IV

##### THE "ADMISSIBILITY" OF COMPLAINTS AND GROUNDS FOR INQUIRIES

In the second phase of inquiry proceedings, the admissibility of the complaint is assessed.<sup>32</sup> Five conditions must be met for a complaint to be admissible: (1) the author and the object of the complaint must be identified;<sup>33</sup> (2) the complaint must be made within two years of the date on which the facts that it is based came to the attention of the complainant;<sup>34</sup> (3) the complaint must have been preceded by appropriate administrative approaches to the institution or body concerned;<sup>35</sup> (4) the complaint cannot request that the Ombudsman intervene in cases before courts or question the soundness of a court's ruling;<sup>36</sup> and (5) in the case of complaints concerning work re-

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mentation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 001) 1-25 (noting such in Articles 11 and 20).

30. *See, e.g.*, Decision of the European Ombudsman on Complaint 1897/2002/BB against the European Commission (Feb. 18, 2003), *available at* <http://www.euro-ombudsman.eu.int/decision/en/021897.htm> (closing of inquiry after claimant revealed parallel proceeding in Court of First Instance).

31. *See, e.g.*, Decision of the European Ombudsman on Complaint 199/2000/PB against the European Central Bank (Jan. 22, 2001), *available at* <http://www.euro-ombudsman.eu.int/decision/en/000199.htm> (examining and determining issues not interfering with Court of Justice trial); Decision of the European Ombudsman on Complaint 579/99/JMA against the Council of the European Union (Sept. 5, 2001), *available at* <http://www.euro-ombudsman.eu.int/decision/en/990579.htm> (resuming temporarily suspended inquiry after Court of First Instance dismissed claim as inadmissible).

32. *See* Implementing Provisions art. 3, para. 1 (stating that additional documents or information may be requested before determination is rendered). *See also id.* at art. 3, para. 2 (providing that Ombudsman close and dismiss a complaint if outside his mandate).

33. Decision 94/262 art. 2, para. 3.

34. *Id.* at art. 2, para. 4. In the 1996 Report, the Ombudsman stated that a two-year period for filing a complaint after the complainant becomes aware of the facts should be considered, at least for the first few years of his duties. This could deviate from the facts on which complaints were based were, disallowing those complaints whose facts were so remote that they could not be verified and hence should not be considered by the Ombudsman. *See generally* ANNUAL REPORT 1996. *See also* ANNUAL REPORT 1997 at 27-28 (ruling Complaint 937/97/OV inadmissible due to delay in filing of complaint and extended period of time between filing and instance of maladministration).

35. Decision 94/262 art. 2, para. 4. *See, e.g.*, ANNUAL REPORT 1997 at 28 (ruling Complaint 11/36/97/IJH inadmissible due to complainant's previous failure to inform Commission of grievance).

36. Decision 94/262 art. 1, para. 3.



relationships between the institutions and bodies and their officials and servants, any opportunity to bring an internal complaint must have been exhausted.<sup>37</sup>

If a complaint is deemed inadmissible, the Ombudsman may suggest that the complainant seek recourse with another Community or national institution,<sup>38</sup> or he may even directly transfer the complaint to another competent body with the complainant's consent.<sup>39</sup> On the other hand, if a complaint is found to be admissible and if there are sufficient grounds to open an inquiry, the Ombudsman pursues the inquiry with an "investigation" phase, which generally begins within a month of the complaint's receipt.<sup>40</sup>

The notion of "grounds" for opening an inquiry has been progressively defined through practice. The Ombudsman may not open an inquiry if the complaint concerns minor irregularities, such as failure to reply to the complainant. Nonetheless, in such cases, the Ombudsman may still try to address the situation by placing an informal telephone call to the unresponsive institution.<sup>41</sup>

There are also cases in which the Ombudsman has found insufficient grounds to open an inquiry.<sup>42</sup> Whenever the Ombudsman determines that the opening of an inquiry is unjustified, he must inform the concerned person in writing.<sup>43</sup> The decision to open an inquiry is not discretionary, since it does not involve any consideration of public or private interests, but is based entirely on the factual existence of sufficient grounds.

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37. *Id.* at art. 2, para. 8.

38. This often occurs at the Commission through a petition to the European Parliament.

39. Implementing Provisions, art. 2, para. 3-5.

40. There are no predetermined time limits in the Implementing Provisions or in Decision 94/262 for the activities of the Ombudsman. Nonetheless, in his reports, the Ombudsman has acknowledged the application of certain standards for most cases. For preliminary inquiries, a response should be obtained within a week and a decision on admissibility should be obtained within a month of receipt of a complaint. Complaint procedures should normally be concluded within a year. ANNUAL REPORT 2001, at 13; ANNUAL REPORT 1999, at 1.

41. Since 1998, the Ombudsman has listed these solutions to cases as "resolved by the institution." ANNUAL REPORT 1997, at 29. This is a feature of the Ombudsman's activities that is very different from those of EU judicial institutions. The Court of Justice and the Court of First Instance clearly cannot refuse to address a dispute brought before them. Nor may they telephone interested parties to bring them to a friendly solution.

42. This may occur if, upon consideration of a complaint and accompanying documents or a "brief" assessment, the Ombudsman comes to the conclusion that the Community body did everything within its powers to address the situation. *See, e.g.*, "Complaint 283/98/OV" (finding insufficient factual grounds for opening inquiry against Commission for alleged breach of Community law). Regarding this case, the Ombudsman found that, on the basis of documents provided by the complainant, the Commission had decided to suspend the inquiry on the complaint in order to allow the Court of Justice time to issue rulings regarding issues on which the complaint was based. Moreover, on the basis of the complaint, the Commission had begun to review its practices, requested clarification from French authorities, and scrupulously informed the claimant of the legal issues related to his complaint. Having confirmed these facts, the Ombudsman determined that there were insufficient grounds to open an inquiry and duly informed the complainant. ANNUAL REPORT 1998, at 25. This was an exceptional case in which the Ombudsman found an absence of grounds for opening an inquiry as the issue brought before him had already been addressed by the Commission via a petition to the European Parliament. ANNUAL REPORT 1999, at 20.

43. Implementing Provisions art. 4, para. 2.

## V

## INVESTIGATIONS AND DECISIONS

If the Ombudsman decides to open an inquiry with respect to a complaint, he must provide a copy of the complaint to the Community institution concerned and request that an opinion be prepared within three months.<sup>44</sup> In the request, the Ombudsman may specify whether the opinion should address particular issues, and may allow for an extension of the three-month time limit if necessary.<sup>45</sup> The opinion of the institution is normally sent to the concerned person (unless the Ombudsman considers it unnecessary). The complainant, after a short period (usually one month), may provide comments to further define his own position.<sup>46</sup> At this point in the procedure, it is possible for the institution itself to take steps to settle the dispute in a manner that is satisfactory to the complainant. If this results from the opinion or the comments of the complainant, the case is closed as "settled by the institution."<sup>47</sup> The complainant may also decide to drop the complaint on its own if he or she is satisfied with the reasons that he or she has been given. However, this only occurs in approximately one out of every four-hundred-seventy cases submitted to the Ombudsman.<sup>48</sup>

If none of these solutions is obtained, the Ombudsman must determine whether to continue with his own inquiry and must communicate the grounds for his decision to the parties.<sup>49</sup> The Ombudsman's pursuit of the matter must be based on new facts arising from the institution's detailed opinion or the complainant's response. However, the Ombudsman does have relatively broad powers of investigation,<sup>50</sup> which have recently been strengthened by early 2003 amendments to the Implementing Provisions.<sup>51</sup>

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44. EC TREATY art. 195; Decision 94/262 art. 3, para. 1. The institution may also provide an opinion or a statement when necessary.

45. *See, e.g.*, Decision 94/262 art. 3, para. 1-6 (adopting specific provisions of Article 195 of the Treaty); Implementing Provisions art. 4, para. 3 (adopting provisions of Article 195 of the Treaty). It is interesting to note that there are very different procedures under Decision 94/262 from those which are firmly established in the Implementing Provisions. Under the Implementing Provisions, the institution's opinion is requested at the end of an inquiry. Under Decision 94/262, the institution could first make any observations that it found necessary.

46. Implementing Provisions art. 4, para. 4.

47. Between January 2000 and December 2003, out of approximately 8,500 cases, only 1,101 (12.87%) were determined to be within the mandate of the Ombudsman and thus merited an inquiry. The number of cases found to be within the mandate but did not give rise to an inquiry is even higher, at around 30%. Of the cases requiring an inquiry, 270 (3.1%) were "settled by the institution." *See, e.g.*, ANNUAL REPORT 1997, at 182-83 (resolving complaint concerning pay dispute between interns and Parliament through Parliamentary re-evaluation).

48. Between January 2000 and December 2003, only 18 of approximately 8,500 complaints submitted were withdrawn. *See* statistics available at <http://www.euro-ombudsman.eu.int/stats/en/text.htm>.

49. Implementing Provisions art. 4, para. 5.

50. *See, e.g.*, Implementing Provisions, art. 5, available at <http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm> (granting the Ombudsman access to restricted documents and oral witness testimony). In the 1998 Annual Report, the Ombudsman affirmed the need to remove the limits on his powers of inquiry by emphasizing the need to distinguish between public access restrictions to documents and restrictions on the Ombudsman. In fact, even if the Ombudsman strictly observes the adversarial principle and claims that he cannot base his decisions on documents or facts that have not been raised by the claimants, the possibility of access to confidential documents is nonetheless necessary. Such access is necessary for the Ombudsman to assess the truth and completeness of the responses that the Community institutions have provided during the inquiry. Only this possibility, which has now been provided for in the latest amendments to the Implementing Provi-

If an instance of “maladministration” is not found after an inquiry, the complainant and the institution or the body concerned are so informed, and the case is closed.<sup>52</sup> This was the case for a complainant who claimed that the behavior of officials during a Commission examination had led him to believe that he had been diplomatically slighted. The Ombudsman’s inquiries found that the exam commissioners had not acted inappropriately, and that, at the most, the commissioners had cordially greeted the candidate with a handshake. Accordingly, the Ombudsman found that there was no instance of maladministration.<sup>53</sup> Even in such cases, the involvement of the Ombudsman has a positive effect, because it clarifies to the complainant the grounds for the decisions of the EU institutions, thereby rendering them more transparent and politically accountable.

If, on the other hand, the Ombudsman finds that there has been an instance of “maladministration,” he will first attempt to reconcile the parties. If the parties decide to settle, the case is closed and archived as a “friendly solution.”<sup>54</sup> This often occurs when the institution acknowledges its wrongdoing, provides an apology to the complainant and offers compensation for any damages. From the standpoint of good administration, this is essentially an advantageous solution.<sup>55</sup> If, on the other hand, this does not occur, the Ombudsman may close the file by providing a “critical remark” to the institution. This could occur if the Ombudsman finds that the maladministration has no general or serious implications and therefore does not require any follow-up

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sions, fully assures the accountability and effectiveness of the Ombudsman’s review. *See, e.g.*, ANNUAL REPORT 1998, at 30-32 (noting need for accountability to EU citizens).

51. Not only may the Ombudsman request any necessary information from institutions subject to an inquiry, but he may also examine and copy any files provided by Community institutions in order to ensure that information provided is accurate. Community institutions that are subject to an inquiry must also submit to inspections if necessary and may only refuse access for security reasons. Decision 94/262 art. 3, para. 2; Implementing Provisions art. 5. Under Decision 94/262, if the institution concerned does not cooperate, the Ombudsman must inform the European Parliament. Moreover, the Ombudsman may ask officials and other servants of the Community to testify and may commission external experts for any additional assessments required for the inquiry. Officials are obliged to testify. However, their statements are proffered on behalf of their institutions, which may instruct its officials how to respond. Additionally, there are limits on the extent to which professional secrets may be communicated. Decision 94/262 art. 3, para. 3. *See also* ANNUAL REPORT 2001, at 23 (detailing means of obtaining testimony).

52. Over the 2000 to 2003 period, 441, or 5.1% of cases, were closed due to no finding of maladministration. *See* statistical data available at <http://www.euro-ombudsman.eu.int/stats/en/text.htm>.

53. *See* ANNUAL REPORT 1997, at 58-59 (providing detailed analysis of Complaint 252/22.11.95/TMF/VK against the European Commission).

54. Between 2000 and 2003, a friendly solution was obtained in 13 cases, or 0.15% of those assessed.

55. Decision 94/262 art. 3, para. 5; Implementing Provisions art. 6. The Ombudsman has considered the possibility of arranging regular, informal meetings among interested parties in such cases. ANNUAL REPORT 1997, at 32. The Annual Report 1998 referred to an agreement between the Ombudsman and the Secretary-General of the European Commission whereby it has become standard practice to arrange meetings with complainants and representatives of institutions regarding complaints to the Commission. ANNUAL REPORT 1998 at 27-28. A “friendly solution” was achieved regarding a complaint which concerned a four month delay by the Commission in settling an invoice for translation services. The complainant requested that measures be taken to avoid future recurrences and sought damages arising from the delay. After the Ombudsman’s inquiry, the Commission apologized and provided an explanation for the delay. The Commission also acknowledged that it was willing to pay interest on the delayed payment and that such payment had been offered to the claimant. The claimant accepted the apology and expressed his satisfaction with the result. Therefore, the Ombudsman closed the case. *See* ANNUAL REPORT 1997, at 196 (providing detailed analysis of Complaint 1038/25.11.96/WS/UK/JMA).

action.<sup>56</sup> From 2002 onwards, critical remarks have been complemented by an informal follow-up phase, in which the Ombudsman ensures that the institution has adopted measures that adhere to Ombudsman's remarks.<sup>57</sup>

In more serious cases, the Ombudsman formally examines the maladministration, and sends a draft recommendation to the offending institution.<sup>58</sup> The purpose of the draft recommendation is to establish guidelines for good administrative practice, in order to avoid the reoccurrence of the assessed instance of maladministration.<sup>59</sup> The draft recommendation must be sent to the institution concerned, which must provide an opinion on the draft recommendation within three months. The offending institution must implement the Ombudsman's report if so doing would correct the instance of maladministration or remedy any consequences flowing from the maladministration. The opinion generally consists of an acceptance of the decision of the Ombudsman and a report on the measures that have been implemented. If the institution is not adequately responsive, the Ombudsman will prepare a special report to the Parliament on the case and send a copy of it to the institution and the complainant.<sup>60</sup>

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56. Implementing Provisions art. 7. Over the 2000-2003 period, the Ombudsman provided critical remarks in 121 cases, which represented 1.41% of the total cases and 10.99% of cases subject to an inquiry. An example of a critical remark can be found in a complaint lodged against the Commission by a woman who was denied temporary employment promised to her by an employment agency. The offer had been withdrawn because the woman signed a *curriculum vitae* in which she stated that she had a university "diploma" in languages, when in fact she had a university "degree." The degree was a higher qualification than the diploma, and could not be considered as grounds for exclusion from the position. Moreover, on the basis of this discrepancy, the Commission decided to exclude the woman from future candidacies. Although the Ombudsman acknowledged that the woman should not have misstated her qualifications on her application, he found that the exclusion by the Commission violated the principles of proportionality and adequacy. There was no remedy available for the damage the woman incurred. However, the Commission confirmed that it would not exclude her candidacy in the future. Nonetheless, the Ombudsman decided to close the case by formulating a critical remark. ANNUAL REPORT 1997, at 210.

57. European Ombudsman Jacob Soderman, Speech to the Committee on Petitions Concerning the Presentation to the European Parliament of ANNUAL REPORT 2002 (Mar. 24, 2003), available at <http://www.euro-ombudsman.eu.int/speeches/en/2003-03-24.htm>.

58. Between 2000 and 2003, maladministration was found to have occurred in 45 cases, which represented 0.53% of complaints lodged and 4.09% of cases subject to inquiry. See statistical data available at <http://www.euro-ombudsman.eu.int/stats/en/text.htm>.

59. Implementing Provisions art. 8. An example of this type of solution is found in a complaint lodged against the European Environment Agency. ANNUAL REPORT 1996, at 79. A woman who applied for a position at the Agency was not given reasons why she failed the selection procedure. The woman complained to the Ombudsman, who found that the Agency was required to give reasons for its decision according to general principles established by the Court of Justice. Because the Agency disagreed with this ruling, the Ombudsman informed the Agency that the absence of reasons was an instance of maladministration and asked the Agency to provide an opinion. See Decision 94/262 art. 3, para. 6 (requiring opinion consisting of explanation of measures taken to address maladministration and accepting Ombudsman's recommendation). In this case, the Agency informed the Ombudsman that it had disclosed reasons for refusing the woman's candidacy. It should be noted that it is rare for the Ombudsman to use this technique because it is his most powerful tool of redress. As the Ombudsman has indicated, the excessive use of recommendations could eventually weaken their effect. For this very reason, the critical remark has been introduced as a weaker sanction and it has been used by the Ombudsman in several instances to close a case. European Ombudsman Jacob Soderman, The Role of the European Ombudsman, Address Before the Sixth Annual Meeting of European National Ombudsmen (Sept. 9, 1997), available at [http://www.euro-ombudsman.eu.int/speeches/pdf/en/jerus\\_en.pdf](http://www.euro-ombudsman.eu.int/speeches/pdf/en/jerus_en.pdf).

60. EC TREATY art. 195; Implementing Provisions art. 8, para. 4. From 1992 until the present, there have been eight Special Reports, with six occurring since 2000. Three of them involved inquiries that were instigated by the Ombudsman on his own initiative regarding, respectively, the right of access to documents and Community institutions, employment secrets, and the Code of Good Administrative Behaviour. Five originated

## VI

## JUDICIAL REVIEW OF THE OMBUDSMAN'S ACTIVITIES

The “observations” and “recommendations” from the Ombudsman’s inquiries, as well as the preparation of “reports,” are not binding on the institutions that they address. These actions by the Ombudsman do not impose legally binding restrictions, but rather serve to express opinions, to expose problem areas, and to suggest potential solutions. Therefore, the logical conclusion is that they cannot be challenged in court, as the Ombudsman has repeatedly maintained. Since the Ombudsman claims that his decisions are not binding, they cannot be directly prejudicial.<sup>61</sup>

The Court of First Instance has supported the Ombudsman’s position in this respect, but it has allowed claims<sup>62</sup> against the Ombudsman for compensation for damages<sup>63</sup> under former Article 288 of the Treaty. Nonetheless, the Court has emphasised that the Ombudsman may be held responsible for damages only “in very exceptional circumstances,” affirming that “neither a critical remark nor a report which may contain a recommendation with regard to the institution concerned is designed to protect the individual interests of the citizen concerned against damage which may arise as a result of maladministration on the part of a Community institution or body.”<sup>64</sup>

The Ombudsman’s determinations differ from those of classic administrative bodies in a number of respects.<sup>65</sup> By stigmatizing “maladministration” and by encourag-

from complaints, almost always on the basis of a recurring violation by institutions which previously had been the subject of an inquiry. The Ombudsman has also noted that even the possibility of granting this right to Parliament should be considered an *extrema ratio* in order to maintain the “political” efficacy of this recourse. If too many instances arise, Parliament may give less attention to the questions addressed to the Ombudsman. ANNUAL REPORT 1998, at 28.

61. In 2001, the Court of First Instance rejected a suit against the Ombudsman on these grounds. The Court stated that an Ombudsman report “does not, by definition, produce legal effects vis-à-vis third parties within the meaning of Article 173 of the Treaty [now Article 230], and is furthermore not binding on the Parliament, which is free to decide, within the framework of the powers conferred on it by the Treaty, what steps are to be taken in relation to it . . . [and, moreover,] is not capable of being classified, by reason of its form or of its nature, as a measure capable of being challenged in annulment proceedings.” Case T-103/99, *Associazione delle Cantine Sociali Venete v. Ombudsman and Parliament*, 2000 E.C.R. II-4165.

62. See Case T-209/00, *Lamberts v. Ombudsman and Parliament*, 2001 E.C.R. II-765 (regarding claim against Court of Justice). It is worth noting that in Case T-103/99, the Court denied the Ombudsman the status of “Community institution” under the Treaty, adhering to a strict interpretation of the term and limited the number of institutions entitled to make binding decisions under Article 230 of the Treaty. In Case T-209/00, however, the Court affirmed that, under Article 288 of the Treaty, “institutions” that may be liable for damages “must not be understood as referring only to the Community institutions listed in Article 7 [of the Treaty]. The term also covers, with regard to the system of non-contractual liability established by the Treaty, all other Community bodies established by the Treaty and intended to contribute to achievement of the Community’s objectives.” *Id.* Therefore, it would seem that the Ombudsman is not a Community institution under Article 230, although it is under Article 288.

63. In Case T-209/00, the Court emphasized the independence of actions for damages from actions for annulment, and acknowledged that, in principle, although the manner in which the Ombudsman deals with a complaint may not affect the outcome of a decision, it may be prejudicial to a complainant. *Id.*

64. Damages may be appropriate if, for example, a citizen is “able to demonstrate that the Ombudsman has made a manifest error in the performance of his duties likely to cause damage to the citizen concerned.” *Id.*

65. It is difficult to systematically compare the concept of the Ombudsman with the administrative traditions of continental European countries. Generally speaking, one should remember that the Ombudsman is, at least in terms of institutional structure, a very unique political-administrative entity. A more traditional conception might completely underestimate the importance of this aspect.

ing “good administrative behavior,” the Ombudsman does not reconcile interests that might be considered “individual” or “collective,” “public” or “private,” in the traditional sense. While the Ombudsman has broad powers of inquiry, he can only establish that maladministration has occurred and he can only encourage the Community institution to take steps to prevent such maladministration from reoccurring. Neither does the Ombudsman render decisions on the basis of a “carefully considered” hierarchy of interests (as is the case for the exercise of discretionary powers, when a decision often upholds primary interests at the expense of secondary interests).<sup>66</sup> And the Ombudsman does not seek to remedy a violation of certain predetermined interests (as is the case for the exercise of neutral powers used to prevent violations of rules).<sup>67</sup>

Rather, the Ombudsman encourages exchange of views and settlement by agreement. The Ombudsman decides whether there is a need to promote good administration with respect to a case or a concrete situation, a decision that can be based on the likelihood of obtaining favorable results—for instance, the institution's ability to remedy the particular instance of maladministration.<sup>68</sup>

## VII

### THE SUBSTANTIVE BASIS OF THE OMBUDSMAN'S MANDATE: THE NOTION OF “MALADMINISTRATION”

A formal definition of “maladministration” did not exist at the time the powers of the Ombudsman were first established. However, one has evolved through practice. The Ombudsman provided a preliminary definition<sup>69</sup> in its 1995 Report to the Euro-

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66. The classic example is the decision of a mayor acting in the interest of public safety (the primary interest) regarding a hazardous factory in an urban area. He may have several options in exercising his powers and discretion in the interest of public safety. The factory may have a historic or artistic value, a secondary interest that might favor restoration of the building. It might be possible to replace the building with a new economically advantageous industrial complex—a secondary interest that would favor demolition. The mayor's decision will determine the extent to which each of these secondary interests is protected. In this kind of situation, the interest of public safety is the “primary” or “fundamental” interest guiding the exercise of discretion, but the outcome will depend on the relative importance of the “secondary” interests involved.

67. A predetermined interest is one that may not be balanced against other interests. For example, there may be a provision stating that in the event of a serious disease on a farm, all the livestock on the farm must be slaughtered. There may also be a provision granting a veterinarian the right to assert his authority if the owner of the diseased farm does not immediately follow such an order. In this case, the “primary” or “predetermined” interest of preventing epidemics is valued over the farmer's economic interest in keeping his livestock. There is no room for less drastic action, such as quarantine or isolation. Such provisions cannot be defined or limited, but can only be followed or breached.

68. From this perspective, the Ombudsman's role could be considered as protecting some interests similar to those protected by judges and clearly distinct from interests of his subjects (which might be considered results-based interests). On the one hand, these interests (which include efficiency, transparency, and administrative correctness) depend on the satisfaction of all other results-based interests arising from the relationship between Community bodies and citizens. On the other hand, these interests are limited insofar as the protection of results-based interests can never be denied, as the system itself would collapse. For the Ombudsman's activities, these secondary interests operate as decisionmaking guidelines. Although they are based on the parameters of control over Community administrative activities, they also affect the various public-collective interests of national and Community administrations, as well as the interests of private parties.

69. As early as 1995, the Ombudsman found that an instance of maladministration exists “if a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding

pean Parliament: “[M]aladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.”<sup>70</sup> Based on this definition, the Ombudsman considers it an instance of maladministration whenever an institution or a Community body does not respect the Treaty rules as they are contained in binding Community legislation, the rules and principles of law derived from decisions of the Court of Justice and the Court of First Instance, or fundamental human rights law.

Criticism of this definition<sup>71</sup> has been lodged by, among others, the European Parliament and the Commission, for the legitimate application of Community administrative law could be mistaken for instances of “maladministration.” The problem is compounded by the tenuous distinction between invalid administrative acts, which are contrary to positive law, and inappropriate administrative acts, which are contrary to non-binding rules of good administration. The broad definition of maladministration offers good reason for concern.

This broad definition leads to significant overlap between investigations by the Ombudsman and investigations by the European Courts. The Treaty does not contain provisions detailing the activities that may be subject to investigation by the Ombudsman (excepting the general restriction on inquires over matters subject to court proceedings) and the means of formulating complaints. This absence is significant, as it suggests that, contrary to the activities of judges under Article 230 of the Treaty, the Ombudsman is not limited in his examination of specific activities and wrongdoings.<sup>72</sup> Moreover, as the Ombudsman is not a judge, he is not required to resolve the dispute or assess (with the binding effect of annulment or restitution) the legality of acts or activities of Community institutions.<sup>73</sup> The Ombudsman, considering a complaint of an instance of maladministration may require the institution concerned to provide a logical and coherent explanation of the alleged violation. Thus, the Ombudsman, unlike a

upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance. For example, the European Ombudsman must take into account the requirement of Article F of the Treaty on European Union that Community institutions and bodies are to respect fundamental rights. Many other things may also amount to maladministration, including: administrative irregularities; administrative omissions; abuse of power; negligence; unlawful procedures; unfairness; malfunction or incompetence; discrimination; avoidable delay; and lack or refusal of information.” ANNUAL REPORT 1995 § II.2. *See generally* European Ombudsman J. Soderman, *A Thousand and One Complaints—The European Ombudsman on Route* (Mar. 14, 1997) (analyzing same principles).

70. *See* ANNUAL REPORT 1998, at 16 (emphasizing that Ombudsman’s definition of “maladministration” has been adopted by bodies at national, regional, and local levels, as well as Parliament); ANNUAL REPORT 1997 at 22 (emphasizing same). *See also* Resolution C4-0270/98 of 16 July 1998 on the Annual Report of the European Ombudsman in 1997, 1998 O.J. (C 292) 168 (approving such definition officially).

71. ANNUAL REPORT 2001, at 18.

72. “The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.” EC TREATY art. 230. Moreover, “[I]t shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds that lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.” *Id.*

73. In other words, although conformity with the legal rules of behavior for Community institutions is an essential element of assessing maladministration, the Ombudsman is more concerned with addressing violations of non-legal rules due to the non-coercive nature of his role and the limits on his powers in comparison to the courts. *See* ANNUAL REPORT 1997, at 22 (emphasizing importance of behavioral conformity).

judge, does not directly decide breaches of the law or the damages that might have resulted from such breaches. In other words, the Ombudsman does not render decisions that remedy the legal injury to the complainant,<sup>74</sup> but formulates opinions aimed at encouraging amendments to the practices and rules applied by Community institutions.<sup>75</sup>

There are other limits on the "maladministration" subject to Ombudsman investigations. The Ombudsman does not examine questions related to the political decisions of the European Parliament and any commissions the Parliament might establish. Nor does the Ombudsman examine the legal acts adopted by the Parliament, such as directives and regulations. But what of the European Parliament's administrative proceedings? Initially, the Ombudsman opted for self-restraint; he took the view that his powers were to be exercised on behalf of Parliament, not against it.<sup>76</sup> More recently, however, the Ombudsman investigated an alleged instance of maladministration by the European Parliament itself. Notwithstanding the Parliament's invocation of a general prohibition on Ombudsman interference with its internal affairs, the Ombudsman relied on a decision of the Court of Justice to assert that the Parliament too was bound by the principles of good administration. On this basis, the Ombudsman found that Parliament had committed an instance of maladministration for not having informed a former Member of Parliament what he had done wrong before he was expelled from the parliamentary premises.<sup>77</sup>

The Ombudsman is also bound to defer to the discretionary decisions of Community administration, as long as administration remains within the limits of the law.<sup>78</sup> In

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74. In other words, although the Ombudsman is aware that "the highest authority on the meaning and interpretation of Community law is the Court of Justice," he considers that his own assessments with respect to these norms and principles made on behalf of Community institutions have a very different purpose than that of the highest EU authority. ANNUAL REPORT 1999, at 17. The Ombudsman has noted that "[T]he office of the European Ombudsman was set up in order to enhance relations between the Community institutions and bodies and European citizens. In cases where the institution explains that it has acted correctly in accordance with the rules and principles that are binding upon it, the citizen is sometimes satisfied with the explanation, or at least has a better understanding of the institution's actions." *Id.* The Ombudsman has even gone as far as to assert his authority to determine an instance of maladministration if the Commission misinterprets Community law. *Id.* at 21.

75. ANNUAL REPORT 1997, at 22. On the one hand, complaints to the Ombudsman should alleviate the need for recourse to the courts, as such complaints are time efficient and are a deterrent against clear violations of the rules that govern Community institutions. On the other hand, the Ombudsman does more than merely express his criticism on the operation of an institution. He also encourages the institution to address the general causes of the maladministration. His "recommendation projects" and his informal contact with the institutions go far beyond the capacity of a judge. If the Ombudsman was precluded from overseeing the legality of the activities of Community bodies, thus leaving such role to judges, it would be considerably more difficult to further preventative action against maladministration.

76. *See* ANNUAL REPORT 1997, at 23 (noting such self-restraint).

77. Additionally, the individual was not given an opportunity to plead his case before he was expelled. Decision of the European Ombudsman on Complaint 1250/2000/(JSA)/IJH (July 19, 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/001250.htm>.

78. In a 1997 speech, the Ombudsman stated, "[I]n the choice among a number of alternative solutions, the supervising body should not intervene. Such choices are for the public authority itself to make, in accordance with its goals and priorities. It must however be remembered that discretionary power is not the same as dictatorial power. In the exercise of discretionary power the general principles of law must be observed carefully. There must be no abuse of power, no discriminatory or arbitrary solutions, no procedural irregularities, nor [any] manifest failures to observe the rule of law. To me it is clear that 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. In fact, a great part of the daily work of an Om-



ascertaining the limits of the law, the Ombudsman applies the standards established by the Court of Justice.<sup>79</sup>

Notwithstanding these limits, “maladministration” is an expansive concept. Breaches of principles of good administration, courtesy, efficiency, timeliness, and accuracy are all considered forms of maladministration. While the Ombudsman initially took the view that the definition of “maladministration” should not be codified,<sup>80</sup> he has since developed rules for administration to follow. Thus, the previous “elusive” notion of maladministration has now been replaced with the *Code of Good Administrative Behaviour*.<sup>81</sup>

In 1999, the Ombudsman put forward a proposed Code, which he recommended be adopted by all Community institutions.<sup>82</sup> The Ombudsman also sent a special report to the European Parliament on the proposed Code.<sup>83</sup> The rules and principles of

budsman is about checking whether the discretionary powers of the administration have been properly exercised.” Soderman, *supra* note 59.

79. Such standards include the principles of consistency and good faith, the prohibition of discrimination, the principle of proportionality, equality, and the respect of fundamental human rights and freedoms. ANNUAL REPORT 1997, at 24. See also *supra* note 1 and accompanying text. The Council of Europe has stated that “an administrative authority, when exercising a discretionary power: (1) does not pursue a purpose other than that for which the power has been conferred; (2) observes objectivity and impartiality, taking into account only the factors relevant to the particular case; (3) observes the principle of equality before the law by avoiding unfair discrimination; (4) maintains a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues; (5) takes its decision within a time which is reasonable having regard to the matter at stake; and (6) applies any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.” COUNCIL OF EUROPE, *THE ADMINISTRATION AND YOU: A HANDBOOK* 362 (1996).

80. ANNUAL REPORT 1997, at 22.

81. The Annual Report 1998 gives examples of such principles. In regards to the contents of the Code, the Ombudsman has proposed that it contain general rules of substantive law and procedural principles. Among the legal principles, the Code should include the obligation to apply the law and rules of established procedure (legality), to avoid any kind of discrimination (equal treatment), to adopt measures that are proportional to their aim (proportionality), to avoid abuses of power, to ensure objectivity and impartiality (including the duty to abstain in the event of a conflict of interest), to respect legitimate expectations (legal certitude), and to act correctly and consistently. As for procedural principles, the Code should enshrine the obligation to respond to correspondence in the language of the citizen, to send an acknowledgement of receipt of the complaint (regardless of whether it is possible to provide an immediate reply), to indicate the official who is responsible for the file (by name and telephone number), to transfer a letter or a file to the competent service, to respect the right to be heard and to make statements before a decision is made (the right of defense), to render a decision within a reasonable time (including an implied rejection decision), to take into account only relevant considerations, to provide reasons for each decision, to indicated the possibilities of remedy or appeal for each negative decision, and to maintain adequate records of all documents received. ANNUAL REPORT 1998, at 19-21.

82. Draft Recommendation of the European Ombudsman in the Own-initiative Inquiry OI/1/98/OV (July 28-29, 1999), available at <http://www.euro-ombudsman.eu.int/recommen/en/oi980001.htm>.

83. Special Report from the European Ombudsman to the European Parliament Following the Own-initiative Inquiry OI/1/98/OV (Apr. 11, 2000), available at <http://www.euro-ombudsman.eu.int/special/pdf/en/oi980001.pdf>. The Special Report contains a standard code that enshrines some of the fundamental principles of good administrative behavior (legality, nondiscrimination, proportionality, absence of abuse of power, impartiality and independence, objectivity, upholding legitimate expectations, equality, and courtesy) and has a series of provisions setting out these principles in detail. These principles govern the entire series of procedures, from lodging a complaint (requiring that responses must be provided in the language of the complainant and that statements of receipt for correspondence are provided to competent authorities), to the investigation phase (guaranteeing the right to a defense and the right to hear interested parties during the inquiry), to the final decision (requiring that decisions be rendered within a reasonable time, that reasons for the decisions be provided, that a means of recourse against decisions be provided, and that all interested parties be notified of the decision). In addition, other provisions address issues of privacy and transpar-

the Code, which the Ombudsman believes should be uniformly applied to all Community institutions, should facilitate the immediate determination of instances of “maladministration” and establish standards for good administration to be constantly improved and updated. The Code includes a mixed array of basic principles of law (including “absolute” principles, such as reasonability and proportionality), as well as non-binding principles of good administration that are extremely detailed in nature.<sup>84</sup> According to the Ombudsman, although “invalid” activities are distinct from “improper” activities, both may be considered symptoms of maladministration.

In the report to Parliament, the Ombudsman acknowledged the considerable difficulty in obtaining uniform and timely results from administrations<sup>85</sup> and called for the Commission to formally adopt the Code as a regulation. The Ombudsman has since had some success, as evidenced by Article II-101 of the Constitutional Treaty (finally signed in 2004), which grants a “right to good administration” to all European citizens.<sup>86</sup>

At the end of 2001, the European Parliament approved the Ombudsman’s proposal for the Code with only slight amendments to two resolutions. Parliament also invited the Ombudsman to use the Code as a means of assessing instances of maladministra-

ency (providing that personal information be protected, that public access to documents be provided, and that all requests for information be addressed). Recourse to the Ombudsman is provided as a general remedy for a breach of the Code, which itself outlines possible types of maladministration. Further, the Code states that its provisions are subject to revision at least every two years.

84. The distinction between principles and specific rules is not relevant as far as the Ombudsman is concerned. The Ombudsman need only ensure the conformity of activities of Community institutions with a series of rules (the principles of “good administration”) that include all of the principles of law proffered by the Court of Justice (whether explicit or implied) and all of the principles of positive law (the violation of which is clearly an instance of maladministration). Such conformity also extends to non-legal rules that arise from the parameters that would normally apply to judges.

85. Despite its promotion by the Ombudsman, only eight Community administrations had adopted the Code as of April 2000. This is due to the Commission’s unresponsiveness on the issue. ANNUAL REPORT 2000, at 19.

86. The Constitutional Treaty states

Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies and agencies of the Union.

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 or business secrecy; and

(c) the obligation of the administration to give reasons for its decisions.

Every person has the right to have the Union 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. Every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language.

Constitutional Treaty art. II-101. In fact, this is a relatively simplified list given the principles contained in the Code which, in addition to restating the provisions that have already entered into force, also restates consolidated principles from the Court of Justice and the Court of First Instance. With regard to provisions already in force, *compare id.* art. II-101 §§ 2, 3, 4 with EC TREATY art. 253, 288, 21 (respectively). With regard to decisions of the Court of Justice and the Court of First Instance, *see, e.g.*, Case T-231/97, *New Europe Consulting v. Commission*, 1999 E.C.R. II-2403; Case T-167/94, *Nolle v. Council*, 1997 E.C.R. II-2379; Case T-450/93, *Lisrestal v. Commission*, 1994 E.C.R. II-1177; Case C-255/90 P, *Burban v. Parliament*, 1992 E.C.R. I-2253; Case C-269/90, *Technische Universität München v. Hauptzollamt München*, 1991 E.C.R. I-5469; Case 374/87, *Orken v. Commission*, 1989 E.C.R. 3283; Case 222/86, *UNECTEF v. Heylens*, 1987 E.C.R. 4097.

tion and called upon the Commission to develop a regulation. Indeed, the purpose of the Code is to give effect to the right to good administration that is enshrined under the Charter of Fundamental Rights, but is not considered binding by all Community administrations.<sup>87</sup>

## VIII

### IN AND OUT OF THE SHADOW OF EU GOVERNANCE

The Ombudsman's mandate is to further the European interest in good administration. This sets the Ombudsman apart from a number of other public institutions responsible for developing and applying administrative law. First, unlike courts or even some alternative dispute resolution bodies, the Ombudsman's critical remarks, recommendations, and reports are non-binding. Thus, even if the Ombudsman finds "maladministration," he may be unable to afford the complainant any relief. Rather, the Ombudsman promotes the general interest in good administration. For example, if a citizen complains to the Ombudsman that he has not been paid by the Commission for a translation, the Ombudsman will not determine that there has been a breach of contract law in that particular instance, but that the Commission, broadly speaking, failed to honor its obligations. Therefore, the Ombudsman's powers are both more limited than those of courts—he cannot guarantee that the complainant will obtain relief—and more expansive—he can encourage Community institutions to undertake institutional reforms that will afford injured parties remedies and prevent similar breaches in the future.

Second, Ombudsman proceedings are different from review of decisions within a single administrative agency. The Ombudsman does not have the discretion to make public policy determinations, as do the upper-level administrative officials entrusted with reviewing the decisions of lower-level officials.

Third, Ombudsman investigations are not control or supervisory proceedings akin to those of the Court of Auditors. The Court of Auditors operates "invariably" and "neutrally" to oversee and coordinate Community institutions. The Ombudsman, by contrast, cannot intervene directly in the affairs of European institutions. In summary, the Ombudsman's powers should be understood as the power to "stigmatize" maladministration, and to reach negotiated, flexible solutions to maladministration with Community institutions. And this set of powers, when applied properly, might attain even better results than traditional control methods.

The Ombudsman's broad mandate also makes it difficult to describe accurately the entire scope of its activities. The objects of Ombudsman inquiries include all those

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87. For example, the Council considers the Charter of Fundamental Rights to be a non-binding "political declaration." The Ombudsman's concern with the Charter of Fundamental Rights has less to do with its non-binding character than with the absence of an analytical overview of the principles of good administration. In this regard, the Code is a significant improvement, as it establishes guidelines for assessing maladministration in general terms and provides a partial definition for "maladministration." These principles were disseminated by the Ombudsman over the course of 2002: the Ombudsman sent a handbook containing the text of the Code to all Community institutions and corresponding bodies at the national and local levels. Soderman, *supra* note 57. However, it remains to be seen whether the Code will eventually be transformed into a binding law promoting good administration.

institutions, even national agencies when they apply European law, that are part of the “European administrative system.” The standards applied by the Ombudsman can be found both in formal acts (those provided by specific legislation with specific legal consequences) and informal ones, legally binding acts and non-binding ones. The Ombudsman attempts to guarantee that European administration adheres to a broad range of general legal and non-legal principles. While the Ombudsman initially favored a soft-law approach, one that would allow each institution to develop its own code of good behavior, the Ombudsman now advocates a European law that would include the Code of Good Administrative Behavior that was adopted by the Parliament in 2001. The change in the Ombudsman's strategy may well be rooted in his experience with the lack of good faith cooperation from Community institutions.

The Ombudsman has faced resistance from many quarters. When the Santer Commission came under parliamentary scrutiny in 1999 for maladministration, the Ombudsman was the natural institution to investigate the charges. But after lengthy negotiations with the Commission, the Parliament decided to appoint a committee of independent experts. This episode demonstrates that the Ombudsman does not occupy the central position in combating maladministration that the EC Treaty contemplates.<sup>88</sup> Moreover, those institutions that have been urged to adopt the Code of Good Administrative Behavior have been largely indifferent. With the exception of eight agencies, Community institutions have not adopted codes of good administrative behaviour of any kind. Indeed, the Council of Ministers has declared that it does not recognize the binding nature of the Charter of Fundamental Rights in 2001, and it has expressly refused to adopt a regulation having the same contents as the Code.

In addition to the Ombudsman's institutional problems, public awareness of the Ombudsman appears slim. According to a *Eurobarometer* poll in 2002, although 87% of those interviewed knew about recourse to the Ombudsman and the right to petition Parliament. But since the Ombudsman was first established in 1995, 70% of the complaints filed were found to fall outside of the Ombudsman's mandate.<sup>89</sup>

Given the severe institutional shortcomings of the European Ombudsman and the poor understanding of his duties among European citizens, the Ombudsman's “information strategy” does not appear to have been very effective so far. With dedication and activism, the Ombudsman continues to travel tirelessly year after year, participating in conferences, seminars, meetings, and visits with officials of Community and national institutions in all of the 25 Member States. Yet notwithstanding these efforts, the Ombudsman remains in the shadow of EU governance.

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88. See J. Ziller, *European Models of Government: Toward a Patchwork with Missing Pieces*, 54 PARLIAMENTARY AFFAIRS 102, 114 (2001).

89. See statistics available at <http://www.euro-ombudsman.eu.int/stats/en/text.htm>.