Freedom of Information in the EU in the midst of Legal Rules, Jurisprudence and Ombudsprudence: the European Ombudsman as Developer of Norms of Good Administration

Dacian Dragos & Bogdana Neamtu*

European Ombudsman – Free access to information in the EU – Regulation No 1049/2001– Standard of assessment used by European Ombudsman – Legal norms versus norms of good administration and whether good administration can be understood outside legality – European Code of Good Administrative Behaviour and the rather ambiguous concept of maladministration – European Ombudsman as developer of norms of good administration in the area of free access to information – A rather limited role as developer of norms of good administration for the European Ombudsman in individual decisions – Role in 'translating' the case law into somewhat more accessible jargon and explaining how existing principles and norms of good governance apply to the circumstances of a specific case – Own inquiries as a policy instrument for advising EU institutions and agencies on how to deal with certain aspects pertaining to access to documents and transparency – Interesting interplay between European Ombudsman and the courts

Introduction

Increased demands for transparency and openness are challenging traditional ways of decision-making worldwide.[1] The right of access to documents is just

*The article is based on a presentation at The European Ombudsman's 20th Anniversary Colloquium, Brussels, 22 June 2015, <www.ombudsman.europa.eu/en/activities/calendarevent.faces/en/983/html.bookmark>. Previous partial and undeveloped findings were used also for a chapter in J. Ziller and H. Hofman, *Accountability in the EU: The role of the European Ombudsman* (Edward Elgar 2017).

[1] D. Curtin and P. Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU', (2016), <www.europarl.europa.eu/RegData/etudes/IDAN/2016/556973/IPOL_IDA(2016)556973_EN.pdf>, visited 5 October 2017; S. Szabo *et al.*, 'Linking Objective-Oriented

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one dimension of transparency, but without doubt the most important one.[2] The EU is not thwarted by this trend, especially due to the fact that law and policy processes seem to be cumbersome and are perceived to take an inordinate amount of time.[3] Despite the fact that it is quite hard to draw direct comparisons with national approaches in the realm of free access to documents, the EU is hardly a role model for its Member States. Critical voices argue that despite some progress, the EU is less transparent than many of its Member States, at least with respect to access to legislative documents.[4]

In the EU, free access to documents is regulated by Regulation (EC) No 1049/2001, adopted shortly after the Maastricht Treaty, which enshrined the principles of transparency of the decision-making process and free access to information into primary law,[5] thus consecrating public access to documents as an EU citizen's right (Article 255 TEC).[6] The Lisbon Treaty has brought important changes with regard to the right of access to documents in the EU. 'On the one hand, the treaty establishes a real fundamental right of access to documents and, on the other hand, it tightly controls the exceptions to a right whose scope has been generalized'.[7] In reference to the Lisbon Treaty, Regulation (EC) No 1049/2001 needs to be revised. In addition, the revised Regulation should reflect the experience achieved so far in its application, initiatives that the European institutions themselves have adopted in recent years to favour transparency and

Transparency to Political Leadership and Strategic Planning', special issue/December *Transylvanian Review of Administrative Sciences* (2016) p. 75; A. Roberts, 'Dashed Expectations: Governmental Adaptation to Transparency Rules', in C. Hood and D. Heald (eds.), *Transparency: The Key to Better Governance?* (Oxford University Press 2006) p. 107.

[2] European Ombudsman, 'Good Administration in Practice: The European Ombudsman's Decisions in 2013', (2014), p. 6 <www.theioi.org/downloads/9d5gm/EU_OM_Good%20administration%20in%20practice_Oct%202014_EN.pdf> visited 5 October 2017.

[3] S. van Bijsterveld, 'Transparency in the European Union: A Crucial Link in Shaping the New Social Contract between the Citizen and the EU' (Transparency in Europe II, proceedings of conference hosted by the Netherlands during its Chairmanship of the EU Council, 25 and 26 November 2004) p. 2, <www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Agenda__Bijsterveld-Paper.pdf>, visited 5 October 2017.

[4] Transparency International, 'EU Institutions are less Transparent than Many Member States' (EurActiv.com, 02 September 2015), <www.euractiv.com/sections/trade-society/eu-institutions-are-less-transparent-many-member-states-317240>, visited 26 August 2017.

[5] Ibid.

[6] M. Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press 2017) p. 32.

[7] H. Labayle, 'Openness, Transparency and Access to Documents and Information in the European Union' (2013) p. 11, <www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE_NT%282013%29493035_EN.pdf> visited 5 October 2017; *see also* Curtin and Leino-Sandberg, *supra* n. 1.

access to documents, and the case law doctrine of the European Court of Justice in this area.[8]

Guaranteeing compliance with and full implementation of the right of access to documents represents a significant challenge for national governments and the EU. Ombudsman-type institutions play a significant role in this respect.[9] At the EU level, the EU Ombudsman, together with the courts, plays an even bigger role due to the impasse on amending Regulation No 1049/2001. While courts tackle the issue of access to documents on a case by case basis, the EU Ombudsman has specific means to make his/her action more encompassing.[10] The EU Ombudsman represents the combination of an independently functioning mechanism of public scrutiny with a low-threshold mechanism to deal with complaints made by individual citizens.[11] The EU Ombudsman has also helped to give direction to standard-setting with regard to access to information.[12] Recent developments in the EU have pointed towards the interesting and innovative role assumed by the EU Ombudsman in ensuring transparency in the decision-making process of the EU. Emily O'Reilly, the current EU Ombudsman, has adopted a strategy of launching a suite of systemic investigations at her own initiative – this in departure from previous Ombudsmen, who used own-initiative investigations more sparingly.[13]

This article endeavours to investigate the role of the EU Ombudsman in the realm of free access to documents, with a focus on describing and analysing the underlying norms and principles which form the *ombudsprudence* in this field. The main research question we try to answer is whether the institution is involved in creating norms of good administration in individual decisions and 'own' inquiries and if so, to make an inventory of these norms. The relationship between these norms and existing case law will be also explored. The empirical research was inspired by a somewhat similar research project conducted in 2009 in the field of public tenders.[14] However, as opposed to the cited research, the authors of this study do not assume a normative position with regard to the role the EU Ombudsman should play.

[8] S. de Greuges de Catalunya, 'The Right of Access to Public Information' (March 2012), <www.sindic.cat/site/unitFiles/3151/Report%20access%20to%20public%20information.pdf> visited 19 February 2017.

[9] Labayle, *supra* n. 7, p. 31.

[10] Curtin and Leino-Sandberg, *supra* n. 1, p. 5.

[11] Van Bijsterveld, *supra* n. 3, p. 4.

[12] Ibid., p. 5.

[13] J. Crisp, 'Secretive "Trialogue" Talks to Agree EU Law Face Investigation', *EurActiv.com* (21 April 2015), <www.euractiv.com/sections/eu-priorities-2020/secretive-trialogue-talks-agree-eu-law-face-investigation-313936> visited 5 October 2017.

[14] M.E. de Leeuw, 'The European Ombudsman's Role as a Developer of Norms of Good Administration', 17(2) *EPL* (2011) p. 349.

The article first investigates possible models of ombudsman institutions at the national level from the standpoint of the standard of assessment used when solving complaints; how the EU Ombudsman fits into these categories; and how one can describe its ombudsprudence (the second section). The third section presents the methodology, which consists of content analysis of over 600 decisions and 18 of the EU Ombudsman's own inquiries for the period 2010-2017. The fourth section presents the main findings. The fifth section includes the main discussions on whether or not, in light of the empirical findings, the EU Ombudsman is the creator of norms of good administration in the area of free access to documents. The sixth section concludes the article.

The role of ombudsman institutions in advancing good administration

National Ombudsmen as creators of norms of good administration

This sub-section offers a brief discussion regarding the types of ombudsman institutions that currently exist in Europe. The main goal is to highlight whether a specific type of ombudsman is more likely to foster the role of this institution as creator of norms of good administration.

From the 1960s onwards, three main developments occurred regarding the ombudsman institution: frst, its proliferation at various levels (a trend often described as 'ombudsmania');[15] second, its diversification[16] – establishment of specialised ombudsmen;[17] third, significant changes in the functions originally associated with the ombudsman institution.[18]

Remac[19] offers an extensive inventory of the literature and argues that various authors identify various models and stages in the development of the ombudsman institution. The main models identified are: (a) Gregory (1997) distinguishes two main ombudsman models: a 'classical ombudsman of mature liberal democracies' and an 'ombudsman connected with regime transformations in new or emerging democracies'; (b) Reif (2004) also distinguishes two models of ombudsmen but

[15] A.M. Moure Pino, 'The European Ombudsman in the Framework of the European Union', 38(3) *Revista Chilena de Derecho* (2011) p. 426.

[16] M. Remac, *Coordinating Ombudsmen and the Judiciary* (Intersentia 2014) p. 3-4; R. Gregory and P. Giddings, 'The Ombudsman Institution: Growth and Development', in R. Gregory and P. Giddings (eds.), *Righting Wrongs. The Ombudsmen in Six Continents* (IOS Press 2000) p. 6-7.

[17] M. A. Marshall and L. C. Reif, 'The Ombudsman: Maladministration and Alternative Dispute Resolution', XXXIV/1, *Alberta Law Review* (1995).

[18] Gregory and Giddings, *supra* n. 16, p. 11.

[19] M. Remac, 'Standards of Ombudsman Assessment: A New Normative Concept?', 9(3) *Utrecht Law Review* (2013) p. 63-64.

she talks about a 'classical ombudsman', i.e. an ombudsman that complies with the definition of an ombudsman as proposed by the International Bar Association in 1978, and a 'hybrid ombudsman' that is vested with some additional authority; (c) Kucsko-Stadlmayer (2008) distinguishes three types of ombudsmen in connection with their powers: the basic or classical model, the rule of law model, and the human rights model. These broad categories do not offer much information with regard to the role played by the institution in creating norms of good administration. A more helpful classification is the one offered by Heede.[20] According to him, the main difference between the models is to be found in the primary function of the ombudsman: redress or control. A 'redress' ombudsman seeks to remedy an individual grievance by negotiating and mediating between parties while a 'control' ombudsman acts for the benefit of all citizens and is involved in rule development.[21] Next, the models are distinguished on the basis of the ombudsman's position in relation to other mechanisms of control and redress (overlapping or non-overlapping mandates).[22]

The distinctions drawn between the various models do not always take into account the legislative standard that applies to the ombudsmen's control. In order to assess the role of various national ombudsmen as creators of norms of good administration, it is important to identify their legislative standard of control and, closely related to this, their assessment criteria. Remac[23] distinguishes four legislative standards of control associated with four generations of ombudsman institutions (generations as defined from a historical, evolutionary perspective): legality (1st generation – oldest ombudsmen institutions in Europe, Sweden and Finland); general normative concept such as good administration or good government (2nd generation – Danish Ombudsman, Dutch National Ombudsman); human rights (3rd generation – Eastern Europe, after the fall of the communist regimes); and fighting corruption (4th generation – African counties). In practice, these legislative standards of control are frequently combined.[24]

The standard of assessment used by the ombudsman institutions is different from the legislative standard of control but should be understood in close connection with it. Remac[25] argues that a very general distinction should be made between legal rules that are assessment standards, or that are 'anything else'. Based on this distinction, his classification of assessment standards includes legal norms, other norms (good or proper administration), and human rights. Human rights,

[20] *Apud* de Leeuw, *supra* n. 14, p. 349-350; M.E. de Leeuw, 'The European Ombudsman's Role as a Developer of Norms of Good Administration', 17(2) *EPL* (2011) p. 349.

[21] de Leeuw, *supra* n. 14, p. 350.

[22] Ibid.

[23] Remac, *supra* n. 19, p. 63-67.

[24] Ibid., p. 66.

[25] Ibid., pp. 67-69.

despite being a separate category, operate in a similar way to legal rules, mainly because human rights are stated in laws. In systems where good administration is the main standard of assessment, ombudsmen provide content – in effect contribute materially – to the definition of good administration,[26] for instance by producing checklists for good administrative practice, publishing codes of good administrative behaviour or by taking initiatives aimed at tackling systemic maladministration.[27] The sets of norms they produce are inherently open-ended and subject to continuous update due to specific circumstances that may change and develop rapidly.[28] When providing content, depending on their philosophy regarding the mission and role of the institution, they can regard the law as an obligatory condition of good administration (placing in this case a high emphasis on legality); or they can take a more flexible approach, meaning that they regard the law as an existing standard to be complemented by other normative standards; or they may not consider the law at all relevant, mainly because the complaints they receive are not covered by it.[29]

Only ombudsmen whose main legislative standard of control is good administration can be included in the category of developers of norms. Other ombudsmen will be limited to applying existing legal provisions to the cases they are dealing with. However, even in the case of the former, there can be significant differences based on the degree of discretion and the ombudsmen's attitude regarding the interaction between the law and the standards they develop.

The EU Ombudsman as creator of good administration norms

The main question this sub-section tries to answer is how the EU Ombudsman fits into the previously analysed categories and whether it can be regarded as a developer of norms of good administration.

Institutional role of the EU Ombudsman

The main roles that the EU Ombudsman institution is entrusted with are to be found in the political debates predating its creation. From a political perspective, the main role of the institution is to help bridge the gap between citizens and the Union's institutions[30] by establishing a relationship based on transparency in

[26] N. Diamandouros, 'The Ombudsman Institution and the Quality of Democracy' (Occasional paper based on the lecture with the same title offered at the University of Siena, Italy on 17 October 2006) pp. 9-10, <www.circap.org/uploads/1/8/1/6/18163511/diamanduros.pdf> visited 5 October 2017.

[27] Ibid., p. 10.

[28] Ibid., p. 9-12.

[29] Remac, *supra* n. 19, p. 76.

[30] A. Tsadiras, 'Maladministration and Life beyond Legality: The European Ombudsman's Paradigm', 11 *International Review of Law* (2015) p. 2.

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the Community's administration and that promotes confidence between the institutions and the citizen.[31] From a legal perspective, the EU Ombudsman's main function is to strengthen the protection of citizens' rights (in line with Article 20 (2) lit. d and Article 24 TFEU) and interests in the Union territory vis-à-vis the Community institutions through the creation of a non-litigious mechanism for the delivery of administrative justice.[32] This mechanism was envisioned as an alternative to court litigation and it had to be cheap, flexible and accessible.[33] The EU Ombudsman is described as the only example of a fully-fledged, classical ombudsman at the international level.[34]

The EU Ombudsman is empowered to investigate instances of maladministration in the activities of institutions, bodies, offices and agencies of the EU, with the exception of the Court of Justice of the European Union acting in its judicial role. Besides dealing with individual complaints alleging maladministration, the EU Ombudsman can also conduct own-initiative inquiries into more structural problems of maladministration. In the case of the EU Ombudsman, the standard of review is not defined per se as good administration but rather as its opposite, maladministration.

Concept of maladministration

The concept of maladministration is a rather ambiguous one as it has no official definition in European law. In the 1995 Annual Report,[35] the EU Ombudsman put together an indicative list of elements constituting maladministration: administrative irregularities and omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay, and lack or refusal of information. In 1997, the European Parliament requested a clearer definition. In response, the EU Ombudsman declared in his 1997 Annual Report that 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it',[36] and that 'when the Ombudsman investigates whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, his first and most essential task must be to establish whether it has acted lawfully'.[37]

[31] R. Gregory, 'The European Union Ombudsman', in Gregory and Giddings (eds.), *supra* n. 16, p. 156–157.

[32] Tsadiras, *supra* n. 30, p. 2.

[33] de Leeuw, *supra* n. 14, p. 351.

[34] Moure Pino, *supra* n. 15, p. 433.

[35] European Ombudsman, 'Annual Report 1995' (22 April 1996), <www.ombudsman.europa.eu/activities/annualreports.faces>, visited 5 October 2017, p. 8-9.

[36] European Ombudsman, 'Annual Report 1997' (20 April 1998) p. 22–24, <www.ombudsman.europa.eu/activities/annualreports.faces>, visited 5 October 2017.

[37] Ibid.

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Maladministration should be understood as a double-layered notion: the first layer, which forms the basis of the concept, concerns legality and comprises the legally binding provisions of primary and secondary EU law as well as the case law of the Union courts. The second layer, more flexible and under continuous development, pertains to propriety and consists of the rules and principles the EU Ombudsman considers as regulating the EU's administrative attitude.[38] In a similar vein, Mendes argues that good administration, the opposite of maladministration, is also composed of three interconnected layers.[39] The first two layers include legal rules; the author distinguishes between procedural guarantees that are meant to protect the substantive rights of individuals dealing with EU bodies (1st layer) and legal rules that structure the exercise of the administrative function by reference to the public interest (2nd layer). Third layer includes non-legal norms. Good administration must therefore be regarded as a multifaceted concept and, depending on the context, one needs to distinguish among good administration as a fundamental right, principle or standard.[40]

The European Code of Good Administrative Behaviour - proposed by the EU Ombudsman in 1999 to the European institutions and then approved through a resolution by the European Parliament on 6 September 2001 - represents the main tool detailing the rules and principles by which the EU Ombudsman could assess cases of maladministration. In addition, the Code was intended to serve two other main purposes: to provide a guide for the staff of Community institutions and bodies regarding their relationship with the public and to inform citizens about their rights and the standards of administration they may expect.[41] In the literature there are two conflicting views with regard to whether or not the role of the Code was simply to explain in more detail what the Charter's right to good administration - enshrined in Article 41 - should signify in practice.[42]

Despite the different jargon in and philosophies behind the categorisation of the principles and rules in the Code, most authors admit that the Code takes account of the principles of European administrative law contained

[38] Tsadiras, *supra* n. 30, p. 6.

[39] J. Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behavior' (EUI Working Papers, September 2009) pp. 4–5, <http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3&isAllowed=y> visited 5 October 2017. Ibid.

[40] Ibid., p. 3.

[41] Ibid., p. 1.

[42] While Moure Pino, *supra* n. 15, p. 440 argues that this was the sole goal of the Code, Mendes, *supra* n. 39, p. 6 claims that the distinctive feature of good administration lies in the combination of and partial overlap between legality and the aspects of good administration that stand beyond it, and that this is why the Code should not be regarded as explicating the right to good administration as envisaged in Art. 41 of the Charter.

in the case law of the European Court of Justice and also draws inspiration from national laws; in addition it includes rules and principles which are not enshrined in law.[43] While some of the principles from the Code are clearly derived from and/or overlap with Community law, others have an extra-legal character – especially those referring to 'care and consideration in how citizens are treated' and 'the good functioning of the administrative service'.[44]

The EU Ombudsman's standards of assessment

One question that arises in the literature is if the standards used by the EU Ombudsman are completely independent from the law or whether, despite being something 'extra', they cannot be dissociated from the law. So far, two main divergent opinions have been identified. A first group of authors claims that the standards invoked by the EU Ombudsman should be completely separated from the law[45] since they have a strong ethical dimension that should be assessed within the context of each case. A second group of authors argues that while the EU Ombudsman brings something extra – in addition to the law – it is impossible to conceive of an action/decision that is unlawful but can otherwise be labelled good administration.[46] This is in accordance with the view of the EU Ombudsman institution, which puts legality at the core of good administration and argues that good administration cannot exist outside of legality.[47] As described below, the three successive European Ombudsmen have each perceived the link between legality and good administration somewhat differently. The current Ombudsman argues that 'the EU Ombudsman's mission should be understood as reaching well beyond a simple adjudicatory role';[48] the institutions should be a 'driver of change, a vehicle by which to tackle systemic problems' within the EU'.[49]

[43] de Leeuw, *supra* n. 14, p. 354; Mendes, *supra* n. 39, p. 12.

[44] de Leeuw, *supra* n. 14, p. 355.

[45] P.M. Langbroek and P. Rijpkema, 'Demands of Proper Administrative Conduct: A Research Project into the Ombudsprudence of the Dutch National Ombudsman', 2(2) *Utrecht Law Review* (2006) p. 81; M.E. de Leeuw, 'An Empirical Study into the Norms of Good Administration as Operated by the European Ombudsman in the Field of Tenders' (EUI Working Papers, 2009) p. 1, < http://cadmus.eui.eu/bitstream/handle/1814/11234/EUI_RSCAS_2009_20.pdf?sequence=3 > visited 5 October 2017; M. Remac and P.M. Langbroek, 'Ombudsman's Assessment of Public Administration Conduct: Between Legal and Good Administration Norms', IV/2 *The NISPAcee Jornal of Public Administration and Policy* (2011/2012) p. 87.

[46] Mendes, *supra* n. 39.

[47] European Ombudsman, *supra* n. 2, p. 2; Diamandouros, *supra* n. 26, p. 11.

[48] Speech by Ombudsman Emily O'Reilly given to the conference organized with the occasion of the 20th anniversary of the Ombudsman Office in Brussels, 22 June 2015.

[49] Ibid.

It is clear that the EU Ombudsman's standard for assessment includes both legal rules and other normative standards pertaining to the umbrella concept of good administration. It is, however, less clear whether it can be said that the EU Ombudsman conducts its reviews mostly based on other normative standards than legal rules. Various scholars[50] argue that whether the EU Ombudsman employs a rather legalistic approach depends on the specific thematic field in which the complaint is made. Thus, empirical research in the field of public tenders showed that complainants in this area are usually legal persons and are therefore rather interested in obtaining a legality review.[51] In other areas – such as transparency in EU recruitment competitions, or individuals' rights in the centralised infraction process of Article 258 TFEU – the EU Ombudsman, by expanding the realm of proper administrative conduct beyond the narrow confines of legality, has had a rather different role than in public tenders.[52] It has also been suggested in the literature that the EU Ombudsman's own understanding of the role played by the institution will determine how legalistic the review is. Thus, the first EU Ombudsman, Söderman, based on his experience as the national Ombudsman of Finland, adopted a narrow and legalistic approach, seeing the EU Ombudsman institution as a surrogate court (at least in his first years as EU Ombudsman).[53] The next incumbent, Diamandouros, argued that public bodies should not just act lawfully but should also be service-minded and ensure that members of the public are properly treated and be allowed to enjoy their rights fully.[54] The current EU Ombudsman, Emily O'Reilly, argues in a way similar to her predecessor Diamandouros that the main role of the institution is to make sure that all EU citizens and businesses are treated fairly, reasonably and sensitively by the EU administration and that their encounters with it are marked by civility and courtesy.[55]

Data and method

The research objective of this empirical study is twofold: (a) to analyse the role of the EU Ombudsman in guaranteeing free access to documents resulting from

[50] de Leeuw, *supra* n. 14, p. 365; R. Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement', in C. Kilpatrick *et al.*, *The Future of Remedies in Europe* (Hart Publishing 2000) p. 282-286.

[51] de Leeuw, *supra* n. 14, p. 359.

[52] Tsadiras, *supra* n. 30, p. 6.

[53] D. Chalmers *et al.*, *European Union Law: Text and Materials* (Cambridge University Press 2008) p. 344.

[54] Diamandouros, *supra* n. 26, p. 12.

[55] European Ombudsman, *supra* n. 2, p. 2.

individual decisions and its own inquires; and (b) to identify whether the EU Ombudsman's decisions and own inquiries create norms of good administration. Due to the exploratory nature of the research, we decided not to define creation of norms but rather to assess the decisions from the perspective of norms used/created along the following continuum: EU Ombudsman adheres to strict application of legal principles only; EU Ombudsman adheres to strict application of legal principles but also refers to principles of good administration; EU Ombudsman refers to generic principles of good administration; EU Ombudsman applies a specific principle of good administration, identified by reference to ECGAB; EU Ombudsman applies a specific principle of good administration, without reference to ECGAB; EU Ombudsman creates new principles of good administration; and other situations.

The field of free access to documents was chosen due to the fact that a large part of the Ombudsman's activity is focused on handling this type of complaint: from 2010 to 2016, the largest number of inquiries addressed to the EU Ombudsman had free access to information and documents as their subject.[56]

The research method used is content analysis of the individual decisions of the EU Ombudsman from 2010–2017 as well as its own inquiries which pertain to the area of free access to documents. The total number of decisions reviewed is just over 600 and the number of own inquiries is 18, both accessed directly from the website of the institution. The empirical research comprised several stages. The goal of the first stage was to produce a description and analysis of how five topical issues usually found in all freedom of information regulations (application, reply, information versus document, exceptions, and timelines) are reflected in the EU Ombudsman's decisions and how they compare with existing case law. Relevant case law was selected based on the literature.[57] During the second stage of the research, the decisions were revisited and re-examined from the perspective of the norms employed by the EU Ombudsman in each case. An Excel file was created containing the following aspects: type of maladministration that had been alleged; the assessment of the EU Ombudsman (whether or not maladministration was found; whether a specific principle of good administration was invoked; whether only legal norms were invoked; how the case was settled; further recommendations regarding good administration). The aim was to determine if the EU Ombudsman clearly spells out the principle of good administration involved in individual decisions and offers indications about how it

[56] Based on EO's annual reports, 21.5% of decisions regarded access to information and documents in 2014, 22.5 % in 2015, and 29.6% in 2016.

[57] Curtin and Leino-Sandberg, *supra* n. 1; Labayle, *supra* n. 7; U. Biskup and W. Rosch, 'Recent case-law of the Court of Justice of the European Union on Public Access to Documents: Regulation (EG) No. 1049/2001 and Beyond', 2 *Revue Internationale de la Gouvernements Ouvert* (2015) p. 47.

should have been applied by the institutions concerned in the specific case. Based on this, an analysis was made of the role of the EU Ombudsman as creator of norms of good administration.

Main findings

In this section, we present the main findings of the empirical analysis. As announced in the methodology, the findings are grouped into five main topics which are usually addressed in respect of freedom of information regimes. The decisions and contributions of the EU Ombudsman are outlined not only by reference to Regulation No 1049/2001 but also by reference to the case law. In the absence of an updated version of the Regulation, the case law has contributed significantly to the clarification of certain aspects pertaining to free access to information in the EU. The EU Ombudsman's activity, as creator of norms of good administration, cannot be assessed without assessment of the contribution made by case law.

Applications

One challenge encountered by EU bodies when confronted with requests for information has to do with the clarity and precision of the application itself. Article 6 of Regulation No 1049/2001 states that applications shall be made in any written form, including electronic form, in one of the languages of the EU, and in a sufficiently precise manner to enable the institution to identify the document. The concept of 'sufficiently precise manner' offers a wide range of discretion to EU bodies, which often motivate their refusal to provide access on the grounds that the application is unclear. In recent years, the number of requests entailing bulk applications (for all documents pertaining to a certain case, topic, etc.) has increased and, therefore, institutions have even more reason to reject applications based on a lack of clarity in the request. Since the case law in this area is limited, the contribution of the EU Ombudsman is significant. In a further remark on one case, it stated that 'if the Commission takes the view that a request for public access to documents is not sufficiently precise, it should inform the applicant of its view and assist the applicant in clarifying its request. Once a request for public access has been sufficiently clarified, the Commission should immediately commence its processing thereof. If only part of a request for public access has been clarified, the Commission should immediately commence processing that part of the request'.[58] Not only does the EU Ombudsman require institutions to make an attempt to clarify unclear requests but it also instructs them to grant disclosure of the parts of

[58] European Ombudsman Case: 465/2010/FOR, 30 November 2010.

a request that are already sufficiently clear.[59] Partial disclosure of documents will also be emphasised as a good administrative practice endorsed by the EU Ombudsman in the case of the documents covered by the exceptions given in Article 4 of Regulation No 1049/2001. In other cases, the EU Ombudsman stressed that it makes a finding of maladministration if an institution interprets a request too narrowly or refuses access as a consequence of failing to address an explanatory inquiry to the applicant.[60]

Vexatious or repetitive requests are often invoked by EU bodies as grounds for turning down access requests – this is recognised as a valid reason in the Code of Good Administrative Behaviour. In one recommendation, the EU Ombudsman referred to 'an appropriate level of service-mindedness, diligence and objectivity', the lack of which amounted to maladministration. Consequently, the EU bodies were encouraged to adopt guidelines in order to deal with complex information requests that were not obviously vexatious or frivolous. A refusal to grant access should be based on an objective approximate estimation of the time or resources that would otherwise need to be invested to fulfil the information request. The contribution of the EU Ombudsman is also important in that it stated that a refusal to grant access may be based exclusively on the exceptions to the 2001 Regulation,[61] and that a denial of access because of a repetitive request is an exception and the burden placed on the institution needs to be assessed in the context of each application.

Regulation No 1049/2001 does not have rules for transferring incorrectly addressed requests. However, some decisions[62] seem to suggest that such an obligation was extended by the EU Ombudsman as a matter of good administration emanating from the Code of Good Administrative Behaviour (Article 23). The EU Ombudsman found that the Commission's failure to forward a complainant's request for access to the Secretariat-General is an instance of maladministration.[63] In another section of the same decision, the EU Ombudsman conceded that the complainant should have been told, as a matter of courtesy, where the complaint needed to be submitted – a principle enshrined in Article 12(2) of the Code of Good Administrative Behaviour. Case law on these issues is for the most part absent; therefore, the EU Ombudsman plays an important role.

[59] Case: 272/2014/OV; *see also* the case law of the ECJ on partial disclosure: ECJ 14 November 2013, Joined Cases C-514/11 P and C-605/11, P *Liga para a Protecção de Natureza (LPN) and Finland* v *Commission*, para. 67.

[60] European Ombudsman Case: 671/2007/PB, 12 July 2010; Case: 465/2010/FOR, 30 November 2010; Case: 2293/2008/(BB)(FOR)TN, 17 December 2012; Case: 1453/2011/MMN, 29 August 2013.

[61] European Ombudsman Case: 2493/2008/(BB)(TS)FOR, 23 March 2012.

[62] European Ombudsman Case: 2632/2009/(SIT)(PF)JF, 12 August 2011; Case: 3163/2007/(BEH)KM, 05 January 2010.

[63] European Ombudsman Case: 2493/2008/(BB)(TS)FOR 23 March 2012.

Replies

The over-arching principle stressed by the EU Ombudsman concerning how institutions should reply to requests for access to documents is *courtesy*, as enshrined in Article 12 of the Code of Good Administrative Behaviour. In cases where communication with the complainant has been conducted in an improper manner,[64] the EU Ombudsman has stressed that not only does the dispute need to be resolved on merits, but also that the institution's conduct with respect to the applicant is of great importance. A courteous attitude on the part of the staff of institutions will serve to enhance trust between citizens and the European public administration. Institutions should take the necessary measures to sensitise their staff to the above requirements. Courtesy must also be observed if the institution itself is not able to fulfil the request directly, although the requested information can be retrieved from other sources known to it.[65] The courtesy obligations even apply to non-traditional means of communication, such as social media.[66]

All refusals, whether total or partial, must be accompanied by a clearly reasoned statement of the grounds of refusal. The subsection on exceptions will go into more detail on this aspect. The reply should contain meaningful information, and not simply discharge the duty to answer as a formality.[67]

Documents versus information

Regulation No 1049/2001 provides for access to 'documents of the institutions' while other freedom of information acts provide for access to 'information', thus requiring the production of new documents as the case demands. However, the Regulation does not require European institutions to create new documents in response to an application. In 2008, the EU Ombudsman made a significant contribution in this area when, in the course of an own inquiry, its practice was to consider the results of a normal search in the database to be a document in the sense of Regulation No. 1049/2001.[68] In other decisions, the EU Ombudsman reiterated that any 'meaningful' set of 'content' recoverable from a database constitutes an individual 'document'.[69] The expansion of the term document proposed by the EU Ombudsman in this case is in line with the case

[64] European Ombudsman Case: 884/2010/VIK 17 February 2011.

[65] European Ombudsman Case: 2470/2009/(TS)TN 02 December 2011.

[66] European Ombudsman Case: 947/2016/JN 24 July 2017.

[67] European Ombudsman Case: 349/2014/OV 17 March 2015.

[68] European Ombudsman, 'Public Access to to Information in Eu Data Bases' (2008), <www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/4160/html.bookmark> visited 5 October 2017.

[69] European Ombudsman Case: 2493/2008/(BB)(TS)FOR 23 March 2012.

law – the distinction between documents and information was addressed by the court in the *Hautala* case.[70] Advocate General Léger[71] argued that 'the distinction between documents and information seems to me to be purely formal. The right of access to a document concerns the content of the document and not its physical form. No one can claim that when making a request for access to documents he is seeking the document itself and not the information it contains. When applying for the disclosure of a document, the applicant implies that he is seeking all of the information contained in the document, which leaves him free to ascertain the information which is of particular interest to him'. He argued further: 'The nuance introduced by the Council imposes a somewhat artificial distinction between the container and the content or between the medium and the information'.

In the context of the same discussion – document versus information – the EU Ombudsman took the view that an annex to a document for which access has been requested is not a separate document, but rather an integral part of the document to which it is attached, so that the assessment of whether or not it may be disclosed should be made at the same time as the one concerning the main document.[72] The EU Ombudsman also made it clear that institutions cannot decide that a certain part of an existing document constitutes a 'sub-document', or is another document completely, simply because it contains a different kind, or type, of information. Furthermore, references to attachments should be treated as forming part of the document concerned, and should, therefore, not be excluded from an institution's analysis when dealing with a request for access to the document.[73] Internal documents, emails or other correspondence drafted in preparation of an official letter may also represent public documents.[74]

(Selected) exceptions

Types and scope of exceptions

Regulation No 1049/2001 provides in principle the widest access possible to documents,[75] while at the same time allowing for a number of exceptions to be defined in quite broad terms. It is no wonder that the very interpretation of these exceptions represents the core of the case law of the Court of Justice and the General

[70] ECJ 6 December 2001, Case C-353/99 P, *Council of the European Union* v *Heidi Hautala*.

[71] Opinion of AG Léger delivered on 10 July 2001, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CC0353> visited 5 October 2017.

[72] European Ombudsman Case: 1111/2012/AN 13 June 2013.

[73] European Ombudsman Case: 1633/2008/DK 07 June 2011.

[74] European Ombudsman Case: 122/2014/PMC 19 February 2015.

[75] ECJ 21 July 2011, C-506/08 P, *Sweden and MyTravel* v *Commission*, para. 73 and ECJ 17 October 2013, C-280/11 P, *Council* v *Access Info Europe*, para. 28.

Court.[76] Regulation No 1049/2001 includes two types of exception, absolute and relative. The absolute exceptions are found in Article 4(1)(a and b) while the relative ones are found in Article 4(2) and (3). The interests covered by absolute exceptions include public interests such as public security, defence and military matters, international relations, financial, monetary or economic policy of the Community or a Member State as well as private interests such as privacy and the integrity of the individual. Interests covered by relative exceptions include the protection of commercial interests; court proceedings; for the purpose of inspections, investigations, and audits; as well as documents for internal use in ongoing decision-making processes. For absolute exceptions, there is a two-step test: the document must be covered by an interest as outlined in the Regulation No 1049/2001, and disclosure would undermine the protection of that interest. The institution carries the burden of proof – it needs to show how and why the protected interest would be undermined. While doing this, it needs to strike a balance between the interests at stake. For the relative exceptions, a three-step test is required. The first two steps are similar but it additionally needs to be determined if an overriding public interest exists in the disclosure, which again calls for a balancing of interests.[77] The EU Ombudsman employs the same test put forward in the case law.[78]

Exceptions must be interpreted and applied strictly according to the case law.[79] In its decisions, the Ombudsman adheres to the principle that 'According to the settled case-law of the Community Courts, the exceptions to public access must be construed and applied strictly so as not to defeat the application of the general principle of access enshrined in Regulation 1049/2001'.[80]

According to the case law, when institutions deny access to a document they need to show that disclosure would specifically and actually undermine the protected interests[81] and also that there has to be a foreseeable and not purely

[76] See, for example, ECJ 29 June 2010, C-139/07 P, *Commission* v *Technische Glaswerke Ilmenau*, para. 51; ECJ 28 June 2012, C-404/10 P, *Kommission* v *Éditions Odile Jacob*, para. 111, and ECJ 28 June 2012, C-477/10 P, *Commission* v *Agrofert Holding*, para. 53; ECJ 21 September 2010, C-514/07 P, C-528/07 P and C-532/07 P, *Sweden e.a.* v *API and Commission*, paras. 69 and 70; ECJ 14 November 2013, C-514/11 P and C-605/11 P, *LPN and Finland* v *Commission*, para. 53.

[77] The test was developed in ECJ 1 July 2008, Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco* v *Council*, para. 43, in relation to legal advice.

[78] European Ombudsman Case: 2293/2008/(BB)(FOR)TN 17 December 2012.

[79] ECJ 18 December 2007, C-64/05 P, *Kingdom of Sweden* v *Commission*, para. 66; ECJ 1 July 2008, C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco* v *Council*, paras. 34, 35 and 36; *see also* ECJ 1 February 2007, C-266/05 P, *Sison* v *Council* [2007] ECR I-1233, para. 63.

[80] European Ombudsman Case: 582/2005/PB 11 July 2006; Case: 119/2015/PHP 04 November 2015.

[81] ECJ 3 July 2014, C-350/12 P, *Council* v *Sophie in't Veld*, para. 52.

hypothetical risk/threat that the protected interest is undermined.[82] The EU Ombudsman employs similar arguments.[83]

While this is the general rule, in the literature various authors[84] have discussed the so-called 'general presumptions' doctrine, according to which the Court of Justice has allowed a number of exceptions to the institutions' obligation to examine specifically and individually the documents to which access has been requested. In particular, the Court has ruled that 'it is in principle open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature, and provided that the institution establishes in each case that the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose'.[85] The Court of Justice has so far expressly acknowledged the possibility of relying on such general presumptions in a number of cases, namely, in procedures for reviewing State aid,[86] merger control procedures,[87] and proceedings pending before the EU Courts.[88] The General Court has further found that a similar general presumption can be relied upon for documents that pertain to infringement procedures.[89] The EU Ombudsman upholds this doctrine by simply citing the relevant case law and by assessing whether the documents for which access has been refused fall into the categories outlined in the case law.[90]

International relations

The Courts and the EU Ombudsman hold a similar opinion on this exception. The European Court of Justice has said that the risk of jeopardising international relations must be reasonably foreseeable and not purely hypothetical[91]

[82] ECJ 4 May 2012, T-529/09, *Sophie in't Veld* v *Council*, EU:T.2012:215, para. 20; ECJ 6 December 2012, T-167/10, *Evropaiki Dynamiki et al.* v *Commission*.

[83] Case 119/2015/PHP; Case 3106/2007/(TS)FOR; Case 98/2012/ER.

[84] Curtin and Leino-Sandberg, *supra* n. 1, p. 6; Biskup and Rosch, *supra* n. 57, p. 60-61.

[85] ECJ 1 July 2008, Cases C-39/05 P and C-52/05 P, *Sweden and Turco* v *Council* [2008] ECR I-4723, para. 50.

[86] See ECJ 10 June 2010, Case C-139/07, *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885.

[87] ECJ 28 November 2013, Case C-404/10 P, *Commission* v *Editions Odile Jacob* and ECJ 28 June 2012, Case C-477/10 P, *Commission v Agrofert Holding*.

[88] ECJ 21 September 2010, Case C-532/07 P, *Sweden* v *API and Commission* [2010] ECR I-8533.

[89] ECJ 14 November 2013, Case T-29/08, *Liga para a Protecçao de Natureza (LPN)* v *Commission* [2011] ECR II-6021.

[90] European Ombudsman Case: 98/2012/ER 27 September 2013; Case: 2004/2013/PMC 05 November 2015; Case: 2781/2008/(TS)FOR 04 April 2013.

[91] ECJ 21 July 2011, Case C-506/08 P, *Sweden* v *MyTravel and Commission*.

and that the institution must show that the document requested specifically and actually undermines the interest protected by the exception.[92] Both courts and the EU Ombudsman showed sensitivity to these claims, acknowledging the discretion of EU bodies in this area. However, the tendency was to find that the institutions had implemented the provision too broadly.[93] On the other hand, the case law and EU Ombudsman's decision show that international relations as a policy field should not be treated as a categorical exception. In other words, the exception on international relations does not apply simply because the subject matter of a document 'concerns' international relations. On the contrary, it is necessary to show that, based on the content of a document, its disclosure would undermine the public interest as regards international relations.[94]

Protection of commercial interest

With regard to commercial interests, the EU Ombudsman has found that such requests for information pose the following problems: not all information about a company is commercially sensitive, so a test should be performed each time to conclude whether the exception applies.[95] The goal is to determine whether the disclosure would undermine the commercial interest of the company. Although there are cases where the refusal was duly reasoned,[96] in many cases the EU Ombudsman found insufficient reasoning of refusal.[97] Also, opposition lodged by an economic operator regarding disclosure is not binding on the EU's institutions (which can 'overrule' a third-party's objections).

Inspections, investigations, and audits

With regard to ongoing investigations, the EU Ombudsman has stressed the fact that the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Furthermore, institutions need to prove, for each individual document, that disclosure would undermine the

[92] ECJ 28 November 2013, Case C-576/12 P, *Ivan Jurasinovic* v *Council of the European Union*, para. 45.

[93] ECJ 4 May 2012, Case T-529/09, *Sophie in 't Veld* v *the Council supported by the Commission (In 't Veld I)*; ECJ 12 September 2013, Case T-331/11, *Leonard Besselink* v *the Council*; European Ombudsman Case: 119/2015/PHP 04 November 2015; Case: 2393/2011/RA 22 July 2013.

[94] European Ombudsman Case: 119/2015/PHP 04 November 2015; OI/10/2014/RA 06 January 2015; Case: 689/2014/JAS 02 September 2015.

[95] European Ombudsman Case: 1701/2011/ANA 24 June 2013; Case: 676/2008/RT 07 July 2010.

[96] European Ombudsman Case: 1922/2014/PL 30 August 2016.

[97] European Ombudsman Case: 676/2008/RT 07 July 2010; Case: 181/2013/AN 16 February 2015.

investigation[98] and provide clear reasoning on the motives for non-disclosure.[99] At conclusion of the investigation, the commission should be proactive in disclosing the documents and not wait for another request.[100] The EU Ombudsman merely applied the case law of the European Court of Justice on this matter. Thus, the Court of First Instance[101] was the first one to state in *Franchet and Byk* v *Commission* that 'the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect "the purpose of inspections, investigations and audits", applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits'.[102] Many requests regard infringement procedures, and in its case law the Court has recognised certain types of document as benefiting from a general presumption of confidentiality,[103] among them the documents concerning an infringement procedure under Article 258 TFEU during its pre-litigation stage.[104] The Ombudsman is of the opinion that this reasoning also applies, by analogy, to documents concerning investigations brought under Article 260 TFEU, since Article 260 also has as its purpose to ensure that the Member State concerned brings itself into compliance with EU law.[105] A general recommendation of the EU Ombudsman regarded the need for various agencies to clarify the rules in their rules of procedure on public access in the case of ongoing complaints.[106]

Documents/information pertaining to the decision-making process

Article 4(3) refers to documents which may be excluded from disclosure because this might undermine the institution's decision-making process. Summarising the EU Ombudsman's findings in such cases, it could be said that although some refusals were justified,[107] in many cases EU bodies have offered insufficient reasoning for a refusal when it was grounded on the protection of the decision-making process – and this amounts to maladministration.[108] Also, access was

[98] European Ombudsman Case: 3699/2006/ELB 06 April 2010; Case: 725/2014/FOR 01 October 2015; Case: 248/2016/PB 31 October 2016.

[99] European Ombudsman Case: 2004/2013/PMC 05 November 2015.

[100] European Ombudsman Case: 685/2014/MHZ 12 January 2015; Case: 349/2014/OV 17 March 2015.

[101] ECJ 6 July 2006, Joined Cases T-391/03 and T-70/04, *Franchet and Byk* v *Commission*.

[102] European Ombudsman Case: 1506/2014/JAS, 17 September 2015.

[103] ECJ 16 July 2015, Case C-612/13 P, *ClientEarth* v *Commission*, para. 57.

[104] ECJ 14 November 2013, Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, para. 65.

[105] European Ombudsman Case: 1506/2014/JAS 17 September 2015.

[106] European Ombudsman Case: 755/2014/BEH 12 June 2014.

[107] European Ombudsman Case: 292/2016/AMF 05 July 2017.

[108] European Ombudsman Case: 2781/2008/(TS)FOR 04 April 2013.

often granted after intervention by the EU Ombudsman. The EU Ombudsman in this respect echoes case law – in *Council* v *Access Info Europe*[109] the court ruled that the general interest in obtaining access to Council documents took precedence *a priori*, with the identity of the Member States participating in the legislative process featuring as an aspect of democratic transparency.

The EU Ombudsman's main recommendation is proactive dissemination of such documents where there is an interest[110] and proactive disclosure once the decision-making process is over.[111]

Third party consent

Article 4(4) refers to another possible ground for refusal, namely a lack of third party consent when documents originating from a third party are held at the EU level. Often cases involving third party consent lead to significant delays in responding to the applicant due to lengthy consultation with the third party.[112] In a recent decision[113] (further remarks), the EU Ombudsman has summarised the view of the institutions on how EU bodies should approach such a situation step by step: if a third party needs to be consulted, there needs to be a proper deadline established for that response; if the third party does not respond within the set deadline, the institution should proceed to an examination of the documents without any need to carry out new consultations; third-party reservations cannot by themselves provide the grounds for a disclosure refusal;[114] and the third-party's request to find out the identity of the applicant has no bearing and may not delay the response of the third party.[115]

Third party consent is a pressing issue in disclosing documents regarding the Transatlantic Trade Investment Partnership. The EU Ombudsman launched an own inquiry into the issue of the Partnership more transparent,[116] and one recommendation concerns third party consent (the US in this case) – the US should be informed of the importance of making common negotiating texts in particular available to the EU public before the Transatlantic Trade Investment Partnership agreement is finalised. The Commission should also inform the US that it will need to justify, to the satisfaction of the Commission, any request to prevent the disclosure of a given document.

[109] ECJ 17 October 2013, Case C-280/11 P, *Council of the European Union* v *Access Info Europe.*

[110] European Ombudsman Case: 2914/2009/DK 14 March 2012.

[111] European Ombudsman Case: 2186/2012/FOR 16 June 2015; Case: OI/8/2015/JAS 12 July 2016.

[112] European Ombudsman Case: 2073/2010/AN 01 December 2011.

[113] European Ombudsman Case: 1743/2013/TN 20 May 2014.

[114] European Ombudsman Case: 369/2013/TN 28 July 2016.

[115] European Ombudsman Case: 2266/2013/JN 02 March 2015.

[116] European Ombudsman Case: OI/10/2014/RA 06 January 2015.

Partial disclosure

Significant progress was also made in the area of *partial disclosure* due to the EU Ombudsman. The institution strengthened this approach by requiring institutions to assess whether they could grant the complainant partial access to internal documents pursuant to Article 4(6) of Regulation No 1049/2001, with failure to do so amounting to maladministration.[117]

The exception to exceptions: the overriding public interest in disclosure

Articles 4(2) and 4(3) of Regulation No 1049/2001 provide that an institution must not release a document to the public if one of the interests set out in those provisions applies, unless there is an overriding public interest in disclosure. The contribution of the case law on this matter is important. First, the interest has to be a public interest – defined in the case law as 'an interest that is objective and general in nature and not indistinguishable from individual or private interests that would outweigh for example the need to protect the interests of individual companies (…)'.[118] In other words, the interest being a public interest means that any request for access to the institutions' documents is likely to fail if the applicant seeks information for his/her own sake, for example in order to prepare an action for damages.[119] Second, the institution in question needs to examine, of its own accord, whether such an overriding interest exists. As observed in the literature, 'it is difficult to identify a case where the Court would have been convinced about the existence of a public interest in disclosure that would have effectively reversed the outcome, even if attempts have been made for example in relation to environmental matters (*LPN* case), the use of public funds (*Dennekamp*) the protection of public health (*Spirlea*) and constitutional issues (*Besselink*)'.[120]

EU Ombudsman decisions on overriding public interest mirror the case law. The EU Ombudsman has made it rather clear that EU institutions must carry out a full analysis to determine whether an overriding public interest in disclosure exists.[121] It is certainly correct that an institution that has received a request for public access must weigh the arguments put forward by an applicant in relation to overriding public interest, but the institution concerned should also, *ex officio,* carry out its own examination as to whether there is an overriding public interest in disclosure.[122] To this effect, the EU Ombudsman welcomes any internal

[117] European Ombudsman Case: 1861/2009/(JF)AN 15 February 2011; Case: 1403/2012/CK 28 August 2013.

[118] ECJ 20 March 2014, T-181/10, *Reagens SpA* v *Commission.*

[119] ECJ 25 September 2014, T-669/11 and T-306/12, *Spirlea* v *Commission*.

[120] Curtin and Leino-Sandberg, *supra* n. 1, p. 6.

[121] European Ombudsman Case: 1039/2008/FOR 03 November 2010.

[122] European Ombudsman Case: 172/2010/ANA 23 November 2010; Case: 119/2015/PHP 04 November 2015; Case: OI/3/2014/FOR 08 June 2016.

guidelines or rules that the institutions may decide to implement in order to ensure that its services are aware of the obligation to carry out said examination.[123] This recommendation – addressed to the EU institutions – is where the EU Ombudsman departs from case law.

Deadlines for answering the application

In its own investigations, the EU Ombudsman has observed that there are excessive delays[124] in answering requests for information, especially by the Commission. Intervention by the EU Ombudsman often leads to apologies for the delay followed by disclosure of the document.[125] This situation shows how important the moral authority of the Ombudsman can be and how effective the alternative dispute resolution mechanism is.

The EU Ombudsman has started a series of its own inquiries on this topic, some regarding EU agencies.[126] The EU Ombudsman stated that such practices could give rise to instances of institutional maladministration if they are not addressed in a structured manner. The purpose of its own inquiries was therefore to establish concrete steps that could help the institutions reduce or eliminate delays. Some recommendations simply concerned better institutional management – such as providing additional training to selection board members that handle complaints, and on the practicalities of dealing with requests for review; and giving greater responsibility to permanent selection board members of the European Personnel Selection Office in coordinating how selection board decisions are recorded.[127]

In cases where the institution receives complex requests, the approach suggested by the EU Ombudsman would be for the EU institution and the applicants to enter into informal agreements that aim to achieve a fair solution. The requester needs, however, to agree with the proposed solution. Extensions should be well grounded.[128]

As a point of general good practice, the EU Ombudsman has also specified that institutions should give the complainant an indication of how long it will take to deal with the application, and an explanation when the deadline needs to be

[123] European Ombudsman Case: 3106/2007/(TS)FOR.

[124] European Ombudsman 11 months for instance – see Case: 2058/2011/(BEH)JN 23 July 2013; Case: 119/2015/PHP 04 November 2015.

[125] European Ombudsman Case: 2351/2012/JAS 23 June 2016; Case: 1402/2014/DK 21 November 2016.

[126] European Ombudsman Case: OI/6/2013/KM 11 March 2015; Case: OI/10/2015/NF 21 December 2016.

[127] Ibid.

[128] European Ombudsman Case: 1869/2013/AN 03 November 2014.

extended,[129] especially considering the fact that there is no sanction for not respecting the deadline for answering requests.[130]

Discussions

This section discusses in more detail: (a) whether the EU Ombudsman is truly a creator of norms of good administration; (b) which principles and norms of good administration are used most frequently by the EU Ombudsman in individual decisions and in its own inquiries; and (c) which types of assessment are performed by the EU Ombudsman.

EU Ombudsman – creator of norms of good administration?

As stated in the introduction, we did not assume the normative stance in our research that the EU Ombudsman needs to be a developer of norms of good administration. We hoped, however, to be able to conclude that this was the case, mostly due to recently revived interest in the literature in the concept of Ombudsprudence. Based on our empirical research we discovered the following:

(a) With respect to individual decisions, the EU Ombudsman has a rather limited space in which to manoeuvre. In the first place, there is a large body of case law – especially with regard to certain topics such as exceptions from disclosure – which cannot be circumvented. Second, there is already a document in place that specifies the principles of good administration (European Code of Good Administrative Behaviour). While certain new principles can be derived from the EU Ombudsman's decisions and inserted into the code (see the following sub-section), their number is rather limited. We agree with the assumption that emerges from the literature that this list of good administrative principles is open-ended, subject to continuous adaptation based on changing conditions. In the decisions examined, we did not notice however any particularly stringent need to constantly upgrade the list of principles to be included in the Code.

(b) A significant role for the EU Ombudsman can be observed in the decisions (approximately 20% of the individual decisions we scrutinised) that include 'further remarks': general observations derived from a specific case. These can include: (a) concrete norms or practices dictating how EU institutions should behave in order to avoid maladministration – for example, the EU

[129] European Ombudsman Case: 1199/2016/DR 16 June 2017.
[130] European Ombudsman Case: 339/2011/AN 19 January 2012.

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Ombudsman instructs the Commission that it could systematically inform interest representatives, in advance of meetings with Commission staff members, that it intends to release their names if so requested in the context of applications for access to documents under Regulation 1049/2001;[131] (b) Policy guidelines for the EU institutions on important topics pertaining to free access to documents – for example lobbying. The EU Ombudsman instructs the Commission that it should consider improving the Joint Transparency Register based on Organisation for Economic Co-operation and Development principles regarding Transparency and Integrity in Lobbying, as well as a methodology for increasing the degree of comparability of the declarations on the Register.[132]

(c) The contribution of the EU Ombudsman is most evident in cases where it explains the meaning of a certain principle/norm of good administration in the context of a specific case. It can hardly be argued that this is an instance of norm creation; however, it is crucial for the advancement of greater transparency because public servants now clearly understand how they should behave. The role of the EU Ombudsman in these cases consists of expanding the interpretation of certain principles of good administration already included in the European Code of Good Administrative Behaviour.

(d) The EU Ombudsman's contribution is also significant in the recommendations stemming from its own inquiries. During the investigated period, most recommendations resulted from a program of visits to the EU agencies launched by the EU Ombudsman in May 2011 with the aim of promoting good administration and sharing best practice. The EU Ombudsman offered, in most cases, guidelines on how to increase transparency by: (a) making their commitment to the principles set out in the European Code of Good Administrative Behaviour more visible to Union citizens by providing a link to that Code on their website (unless the agency has its own Code); (b) creating a dedicated website page that identifies the rules that apply to, and the responsible contact person for, requests for access to documents; publishing an annual report on the handling of requests for public access to documents; establishing a public register of its documents; (c) disclosing the names of selection board members; (d) adopting concrete measures on conflict of interest issues set out in their Founding Regulation in order to comply with their legal obligations.[133]

[131] European Ombudsman Case: 277/2012/RA 02 July 2013.

[132] Ibid.

[133] European Ombudsman Case: OI/12/2011/(JSA)JF 27 May 2013; Case: OI/12/2012/EIS 27 May 2013; Case: OI/13/2011/(JSA)JF 05 June 2013; Case: OII/11/2012/ANA 20 June 2013.

(e) There are instances where the EU Ombudsman finds innovative, out of the box ways of dealing with a certain complaint. In one case[134] the complainant submitted a request for access to documents to the European Central Bank. The complainant requested access to a letter allegedly sent by the European Central Bank to Spanish authorities and '*containing indications, recommendations, guidelines*' on budgetary matters (the 'Letter'). The complainant was mostly interested in finding out if the Letter contained any indication that the Spanish constitution was about to be changed. Upon inspecting the Letter, the EU Ombudsman accepted that it was not unreasonable to treat that document as covered by the exceptions laid down in Article 4(1)(a). In an attempt to resolve the complaint even more informally, the EU Ombudsman asked, on the occasion of a meeting with the President of the European Central Bank, for his consent to inform the complainant of something the Ombudsman was only aware of having inspected the Letter, namely, that it did not hint at changes to the Spanish Constitution. The President immediately agreed to this request and the Ombudsman's services informed the complainant accordingly on 18 June 2012. The complainant confirmed that, in light of this additional information, he considered his complaint settled.

Based on the observations made above, the EU Ombudsman cannot be described as a true creator of norms of good administration for individual decisions and its own inquiries. This does not, however, make its role in advancing transparency any less significant. With respect to individual decisions, its role consists in 'translating' the case law into somewhat more accessible jargon and explaining how existing principles and norms of good governance apply to the circumstances of a specific case. The intervention of the Ombudsman has led in many cases to wider disclosure of information or documents.[135] With regard to its own inquiries (sometimes also to the further remarks included at the end of individual decisions) the EU Ombudsman goes a step further and assumes a policy function – the role of which is to advise the EU institutions and agencies on how to deal with certain aspects pertaining to access to documents and transparency. The recommendation for proactive transparency is a result of its own inquiries, and the EU Ombudsman has followed through on its application, criticising institutions for not observing it, as need be.[136]

[134] European Ombudsman Case: 2016/2011/AN 19 July 2012.

[135] *See* for instance European Ombudsman Case: 520/2014/PMC 24 February 2016; Case: 1398/2013/ANA 31 March 2016; Case: 2049/2014/NF 15 March 2016.

[136] European Ombudsman Case: 852/2014/LP 06 December 2016.

Principles and norms of good administration employed by the EU Ombudsman

Based on the categorisation of the principles of good administration discussed in the literature,[137] it can be argued that a first category of norms employed pertains to the category of rules of administrative practice in line with the idea of providing good service to the public. Perhaps the most often invoked rule from this category refers to the *obligation to act courteously*.[138] Other rules refer to *language rights*,[139] recommendations on how to keep *adequate records*[140] and on how to *handle erroneously addressed requests* (transfer/redirect).[141] These rules concern for the most part factual behaviour and organisational matters. The EU Ombudsman employs two very different approaches. By the first approach, the European Ombudsman clearly indicates when he/she applies these norms and also explains what they imply in the particular circumstances of a case. This approach – in which the EU Ombudsman uses extra-legal rules (rules which, for the most part, are not enshrined in legal texts) has the advantage that institutions clearly understand how they are expected to behave under certain circumstances. Clear indication of the norm employed is also useful in cases when the EU Ombudsman extends the scope of a certain duty – Article 13 of the Code, for example, comprises the obligation to respond to the applicant in his/her own language. The EU Ombudsman has, however, argued that it is also good practice to carry out surveys and public consultations which are meant to offer input for legislative changes in all the languages of the Union.[142] There are, however, also situations in which the EU Ombudsman employs more general norms of good administration, not limited to the specific circumstances of a case. The EU Ombudsman will simply state that 'the principles of good governance require certain conduct', without actually mentioning which concrete principle he/she is referring to. This practice of the EU Ombudsman is in our opinion questionable and not very conducive to increasing the institutions' compliance with these principles.

A second category of norms employed by the EU Ombudsman refers to procedural and substantive rights derived from Community law. In the area of free access to documents, the most frequently norm taken from this category is the

[137] de Leeuw, *supra* n. 14, p. 354-355 and Mendes, *supra* n. 39, p. 6-7; L. Grolman, 'Life Beyond Legality: Lessons from the EU and UK for an Australian Charter or Principles of Good Administration' (1 June 2014) p. 19, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568293 > visited 5 October 2017.

[138] European Ombudsman Case: 1817/2010/RA 19 September 2013.

[139] European Ombudsman Case: 1972/2009/ANA 11 December 2012.

[140] European Ombudsman Case: 0262/2012/OV; Case: 0217/2008/(IP)FOR 04 November 2014.

[141] European Ombudsman Case: 3163/2007/(BEH)KM 05 January 2010.

[142] European Ombudsman Case: 640/2011/AN 04 October 2012; Case: 875/2011/JF 27 June 2013.

duty to state reason. This obligation is encountered in any case where an institution imposes a restriction on the 'widest access possible' to documents. For example, in a significant number of cases the EU Ombudsman[143] has reiterated the idea that the discontinuance of correspondence because of repetitive requests must be carefully justified in accordance with the circumstances of each case. According to the EU Ombudsman, there is no general presumption that a certain number of subsequent emails represents vexatious behaviour. Most situations invoked by the Ombudsman in connection with the duty to give reason pertain to the exceptions outlined in Article 4 of Regulation No 1049/2001. The EU Ombudsman has in numerous decisions emphasised that it is good administrative practice to demonstrate that the requested documents fall within the categories listed in Article 4 of Regulation No 1049/2001 (as a general rule this means that all documents pertaining to the request are first identified[144]). Moreover, institutions need to offer detailed enough explanation of the grounds for refusal – they must explain in the context of each case how disclosure will undermine the protected interests. The EU Ombudsman acknowledges that the institutions enjoy wide discretion in determining whether certain documents are exempted and he/she usually accepts the explanation of the institution as long as it is presented convincingly and is well grounded. It is important to note that the EU Ombudsman often provides an indication in his/her decisions of how EU institutions should conduct the test for the identification of an overriding public interest. In almost all cases regarding refusal due to exempted information, the EU Ombudsman seems to rely heavily on the case law of the European Court of Justice in order to justify his/her findings and proposed solution. This is also in response to the legalistic arguments put forth by the EU institutions.

Another principle of good administration that turns up rather frequently in the EU Ombudsman's decisions deals with *the timeliness of replying to requests for access*. Regulation No 1049/2001 sets strict time limits both for replying to the initial request and to confirmatory applications. In most cases the European Ombudsman will make a decision along the following lines: 'It is good administrative practice properly to reply to confirmatory applications for access and to do so within the relevant deadlines foreseen in Regulation 1049/2001. The institution's failure to do so in the present case constitutes an instance of maladministration'.[145] It is interesting to note that the Ombudsman does not limit his/her evaluation to simply observing whether the time limits set by law are complied with. In a small number of cases the Ombudsman performs a careful and in-depth examination of whether or not a claim that an extended period is needed

[143] European Ombudsman Case: 0454/2006/(IP)MF; Case: 1825/2009/IP 15 November 2010.
[144] European Ombudsman Case: 122/2014/PMC 19 February 2015.
[145] European Ombudsman Case: 271/2010/GG 18 March 2011.

to process the request can be justified by the factual circumstances of the case (access to more than 300 documents). In one instance, the Ombudsman found no maladministration despite delay by the Commission[146] (this decision will be examined below, in this section). In another case,[147] the EU Ombudsman argued that if the institutions could not reply within the set time limits and, 'at the same time, when uncertain factors may lead to a situation where requests have to be prioritized, the Ombudsman finds it reasonable for EPSO to give priority to requests the reply to which will affect to a greater extent the rights and interests of candidates (in a public tender procedure)'. The EU Ombudsman remarked that no further inquiries were necessary – without actually revealing whether prioritising certain replies over others counted as maladministration.

A third category of norms and principles used by the EU Ombudsman in its decisions and own inquiries is not currently included in the European Code of Good Administrative Behaviour. While it is rather difficult to argue that they are actually novel, the frequent reiteration of these norms and principles in its Ombudsprudence reveals their importance to the EU Ombudsman. For example, the EU Ombudsman recommends *ex officio* re-examination of a request once the circumstances of the institution that refused the request have changed (for example a decision-making process or a round of international negotiations becomes finalised). The EU Ombudsman argues that it is conducive to good administration to not put the complainant in the position of having to reapply for information. It is debatable whether EU institutions will be willing to implement this recommendation. Based on the EU Ombudsman's decisions, it also follows that it is good administrative practice, at least with regard to access to documents, to forward the request directly to the person responsible for performing those duties (currently, Article 22(5) of the Code contains the obligation to transfer the letter or complaint to the competent service of the institution). In a number of cases, the EU Ombudsman urges EU bodies to conduct a comprehensive examination of the circumstances of each case: especially when they need to decide if an exception from free access applies, or in other cases which refer to exceptional circumstances which are to be applied strictly (discontinuance of correspondence if it is vexatious or repetitive). The EU Ombudsman states that, as a general rule, the institution needs to identify all the documents pertaining to the request before deciding if an exception applies. This cannot be done in the absence of a comprehensive and carefully conducted evaluation. In previous research, de Leeuw[148] argues in favour of a broader principle – namely, active and adequate gathering of information. This principle clearly includes elements pertaining to other principles such as the principle

[146] European Ombudsman Case: 1869/2013/AN 03 November 2014.
[147] European Ombudsman Case: 1906/2011/TN 14 February 2013.
[148] de Leeuw, *supra* n. 45, p. 31.

of objectivity as well as the principle of care. Finally, the EU Ombudsman makes reference to pro-active transparency or pro-active disclosure. This includes, according to the EU Ombudsman, the duty of institutions to provide information on their own initiative about procedures or activities that could be of relevance to the general public. This recommendation is particularly important with regard to highly sensitive information which generally tends to be regarded by institutions as exempt from disclosure. Pro-active disclosure and communication means that the institutions can in certain cases select the information that is suitable for publication thus opening policy areas that in the past have been marked by secrecy (US-EU negotiations, trialogues, etc.) to the public. Currently, Article 22 of the Code refers only to the duty of institutions to provide information upon request. In the study by de Leeuw,[149] she argues in favour of the inclusion of the principle of active and adequate provision of information. This wording covers the pro-active disclosure of information as well as the duty to act with care and precision.

Final considerations: what type of assessment performed by the EU Ombudsman?

A final question that we try to answer in this section concerns the type of review performed by the EU Ombudsman – more specifically whether he/she employs legal norms, principles of good administration, or a combination of both. Before answering this question, certain aspects need to be emphasised. First, free access to documents is not a highly legalised policy area, and numerous complaints regard factual behaviour and organisational matters. This means that extra-legal principles forming the outer layer of good administration is likely to occur. Second, Regulation No 1049/2001, which comprises the applicable rules for granting access to EU documents, is outdated and in need of serious revamping. The entry into force of the Lisbon Treaty has brought important changes which need to be incorporated. Third, free access to information/documents is a field that can benefit from the influence of best practices from other jurisdictions, both national and international. It is therefore a normal state of affairs that, to a certain extent, the EU Ombudsman's norms are infused with principles, or interpretations of certain principles, from other jurisdictions.

In light of the research findings and based on these observations, we conclude that the review conducted by the European Ombudsman in the area of free access to documents is based for the most part on principles of good administration.

As already discussed in the second section of this article, it is rather clear that the EU Ombudsman does not envision good administration outside of existing legal provisions, as demonstrated by the following case:[150] inquiries were made

[149] Ibid.

[150] European Ombudsman Case: 2006/2011/ER 24 July 2013.

concerning the European Personnel Selection Office's refusal to provide an applicant in a staff selection procedure with a copy of her corrected test papers, and another applicant in a staff selection procedure with comments concerning her performance in a practical test. In view of recent cases before the EU Civil Service Tribunal, where the European Personnel Selection Office's refusal to grant access to corrected tests and to practical test papers was deemed legal by the court, the Ombudsman concluded that no further inquiries were justified. Such a review would clearly be labelled as legalistic. However, even in this case, the EU Ombudsman remarked that the Selection Office should seek to maximise the amount of information it gives in the competency passport, which is currently the only document that gives applicants any idea of how they had been assessed. With this remark, the EU Ombudsman applied the principle of transparency and pro-active dissemination of information. There is, however, at least one decision made by the EU Ombudsman in which, in our opinion, the EU Ombudsman found no maladministration despite the existence of contrary case law in that respect.[151] This could be interpreted as a step in the direction of what in the literature has been labelled unlawful but proper behaviour.[152] In the cited case, the applicant requested a large volume of documents. The Commission took the view that in light of Article 6(3) of Regulation No 1049/2001 it 'ha[d] the possibility to postpone the tight deadlines of the Regulation, provided it has explained the specific circumstances and proposed a reasonable time frame'. Based on the case law, the time limits imposed by Regulation No 1049/2001 cannot be changed and Article 6(3) concerns only the content or the number of documents applied for (Case C-127/13 P). The Ombudsman's assessment clarified that in the case at hand, in strictly legal terms, the Commission was not entitled to extend the time frame established in Regulation 1049/2001. The next paragraph (22) from the EU Ombudsman's decision is, however, compelling and therefore is reproduced in its entirety:

> 'The Ombudsman's assessment of a complaint, however, goes beyond purely legal arguments and includes considerations of reasonableness, fairness and good faith. From this perspective, an applicant who agrees on a "fair solution" with an institution accepts that it is not reasonable to expect a comprehensive decision within the statutory time limits. In these circumstances, the institution's failure to decide on access in relation to all of the requested documents within the statutory time limits cannot be regarded as maladministration. The question thus arises, whether, in cases in which there has not been any agreement on a "fair solution", as in this case, an institution's failure to decide the access application within the statutory time limits, necessarily amounts to maladministration'.

[151] European Ombudsman Case: 1869/2013/AN 03 November 2014.
[152] Grolman, *supra* n. 137.

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Based on our research we identified cases in which illegal behaviour was also deemed improper. In these cases, the EU Ombudsman conducted both a review based on legality as well as a review on the basis of principles of good administration. For example, in one case[153] the European Parliament refused to provide a journalist with information regarding allowances paid to specific Members of the European Parliament. The EU Ombudsman, after consulting with the European Data Protection Supervisor, came to the conclusion that 'the public had a right to be informed about the MEPs' behavior. The European Parliament, following the investigation by the EU Ombudsman, agreed to provide some information about allowances on its website but refused to grant access to the requested information. The Ombudsman regretted that the Parliament had chosen to justify its refusal to fully accept his draft recommendation by relying on a legal interpretation of Regulations 1049/2001 and 45/2001 which weakens the principle of transparency and which was rejected by the Court of First Instance'. In conclusion, the Ombudsman maintained his finding of maladministration regarding most aspects of the case.

Conclusions

Due to an outdated Regulation in the area of free access to documents at the EU level, we are currently witnessing an interesting give-and-take between the courts and the EU Ombudsman, whose decisions and other tools are currently replacing legislative action. Curtin and Leino-Sandberg[154] criticise this situation, arguing that neither the courts nor the EU Ombudsman can replace the systematic character of revisions that would be brought by an update to Regulation No 1049/2001; nonetheless, the role of the courts and of the EU Ombudsman is significant.

Based on our research, we were able to assess the role of the EU Ombudsman in relation to the courts. The EU Ombudsman usually takes a legalistic approach that mirrors case law, certainly with respect to aspects that are the subject of a rich case law and settled based on legal principles (for example exceptions from disclosure). In these situations, EU Ombudsman decisions merely cite case law and its own contribution is rather limited. The EU Ombudsman's real contribution, however, can be seen with regard to aspects that have not been exhaustively addressed in case law (language rights, transfer of applications, how to offer replies in a polite manner, timeliness, etc.). It is in these decisions that one notices the difference between the courts and the EU Ombudsman. In these cases, the EU Ombudsman employs norms of good administration pertaining to courtesy, duty to be service-minded, fairness. The EU Ombudsman has often suggested strategies for resolving

[153] European Ombudsman Case: 3643/2005/(GK)WP 14 July 2008.
[154] Curtin and Leino-Sandberg, *supra* n. 1, p. 5.

complaints informally – including, for example, negotiation in the event a request is highly complex, implying that the applicant will have a long wait before a reply is given.

In light of our research it is important to discuss whether the EU Ombudsman's individual decisions are the appropriate place to look for norms of good administration. Approximately 20% of the analysed decisions finish with a 'further remarks' section. It is here that the EU Ombudsman departs from the circumstances of the specific case and offers instructions for proper administrative behaviour in similar situations. Even if this does not create new norms of good administration it clearly adds to the interpretation of existing norms. The EU Ombudsman's contribution to the development of norms of good administration is made not so much through decisions in individual cases as through its own inquiries and reports drafted following visits to EU agencies. There is, however, an interplay between these two disparate tools at the disposal of the Ombudsman: the principles or norms following from the EU Ombudsman's own inquiries and reports are often mentioned in individual cases, whilst in other situations, individual complaints have triggered the other control mechanisms that the EU Ombudsman can employ.

The type of the review performed by the EU Ombudsman is based on the norms and principles of good administration, although in most cases these are interpreted within an overarching framework of legality. This does not, however, diminish the role of the EU Ombudsman in advancing free access to documents in the EU. Besides handing down the actual decision in a case, the EU Ombudsman has other mechanisms available that can be either used to offer redress in a specific case or to address broader systemic issues. This function needs to be highlighted as it is obvious that the EU Ombudsman performs a different and complementary role to the one exercised by the courts, despite the fact that the principles they use are sometimes similar or even identical.