



BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

The European Ombudsman: democratic empowerment or democratic deficit?

Authors: Tom Binder, Marco Inglese and
Frans van Waarden

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13	University College Dublin	Marco Inglese



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EXECUTIVE SUMMARY

This deliverable analyses the impact of the European Ombudsman in the European Union's democratic life through his power to investigate cases of maladministration committed by European institutions. Accordingly, this deliverable is structured as follows.

The first part is devoted to explore the creation of the European Ombudsman, the rationale behind his establishment, and the development of this 'personalised' body. The report then moves to an assessment of the European Ombudsman's investigative powers, coupled with a specific focus on the relations with his national peers. This section then proceeds by highlighting quantitative data on the complaints lodged to the European Ombudsman since his creation.

The second part verifies whether the European Ombudsman constitutes a case of democratic empowerment. Indeed, an assessment of the European Ombudsman's body of decisions shows that he is more and more acting not only as a 'watchdog' of European institutions but even of European agencies.

The third part provides a quantitative and qualitative analysis of the personal, geographical origin and subject matter of complaints complemented by the targets of inquiries. In particular, citizens of some States are more active than other in submitting a complaint, the Commission is still the most targeted institution, while the major allegation of maladministration pertains to access to documents and lack of transparency.

The fourth part investigates possible barriers that European citizens might encounter in lodging a complaint to the European Ombudsman. In this respect, considering the lack of locus standi before the European Ombudsman and the fact that the proceedings is free of charge and can be conducted in the language chosen by the applicant, we argue that there are no barriers to be overcome.

The fifth part, through an assessment of the few cases decided by the European Court of Justice and considering the specific relationship the European Ombudsman has with the Parliament, seeks to position him with the so-called trias politica.

In conclusion, this deliverable argues that the European Ombudsman has had and will have a positive impact on the democratic life of the European Union, has been successful in fostering the accountability of European institutions and will have a key role in monitoring future developments affecting European citizens.





1. INTRODUCTION

The European Ombudsman (hereinafter: EO) has been created by the Treaty of Maastricht in order to increase the accountability of European institutions in the eyes of European citizens. Strictly speaking, the EO is not an institution for the simple reason that he is not listed amongst the European institutions singled out in Article 13 TEU. Neither is he a European agency considering that, usually, agencies are tasked with executive or regulatory powers. So, which is the real nature of the EO?

The Treaty of Maastricht and its successors neither clarified nor defined the EO. Nonetheless, one can seek to reconstruct its position in the EU's architecture starting from an analysis of its powers and its case law. Before engaging in such an exercise, another aspect needs to be clarified, namely, the reasons why the (then) European Economic Community felt the need to create an EO. One can assume that the main reason lies in the evergreen rhetoric of democratic deficit, the lack of accountability and transparency of European institutions, in the perhaps obscure wording of Treaties' provisions as well as in the essentially bureaucratic and technocratic nature of the EU coupled with the idea that if EU institutions commit a wrongdoing there is no forum to make it good. Adding to this scenario the successful experience of Scandinavian ombudsmen, the idea of creating a EO surely fuelled the European integration process, especially at a time when the concept of European citizenship was formally introduced.

To meet the expectations of Member States and European institutions the creation of the EO needed to be detached from a consolidated supranational dynamics. Indeed, the EO is elected by the European Parliament and can be dismissed only by the Court of Justice (Article 228 TFEU). This procedure guarantees the impartiality and independence of the EO as an individual but tells nothing about his place in the EU architecture. Moreover, the very fact that he can hear cases of maladministration lodged by any EU citizens and any legal and natural person residing or having a registered office in the territory of the EU confirms the broad spectrum of his investigative powers. The wide scope of the EO mandate, encompassing 'bod[ies], institution[s], office[s] or agenc[ies]' (Article 228 TFEU) shows the importance attached to the introduction of an 'internal' actor tasked as a 'watchdog' of European institutions.

Against this background, this deliverable will be structured as follows. Firstly, we will offer an overview of the historical and legal background of the EO, thereby exploring his emergence and development. Secondly, we will engage in a detailed analysis of the powers the EO enjoys, paying also particular attention at the relationships with his national peers. Thirdly, making reference to the most recent data –contained in the 2015 Annual Report- we will describe the EO as a case of democratic empowerment. Thirdly, in light of the data collected and the interviews carried out by the authors of this deliverable, we will demonstrate that there are no relevant barriers for citizens willing to lodge a complaint before the EO. Fourthly, we will explore the position of the EO within the so-called trias politica in order to position him correctly at the overlapping crossroad between EU institutions and



EU agencies. We will then conclude our analysis stating that the EO represents a decisive step forward for the democratic accountability of European institutions and, through its enquiries and case law, it has decisively contributed to the creation of a true EU administrative culture.

At the linguistic level, the authors of this study decided to use 'he/his/him' when referring to the EO. By contrast, when explicitly referring to Mrs. O'Reilly we will use 'Ombuds(wo)man' and 'she/her/hers'.



2. THE EUROPEAN OMBUDSMAN

2.1 THE INSTITUTION OF THE OMBUDSMAN

2.1.1 ORIGINS OF THE INSTITUTION

The term “Ombudsman” derives from Swedish word “ombud”, which translates to “representative”.¹ The origins of the institution of the Ombudsman trace back to the year 1713, when the “King’s Highest Ombudsman” was established as an organ of the executive in monarchic Sweden.² Nearly a century later, upon establishment of the Swedish parliamentary Ombudsman in the year 1809,³ the institution transformed into an instrument of horizontal checks and balances between the legislative and the executive branch.⁴ However, it was a Danish adaption of the Ombudsman concept that would take the world by storm, and lay the foundations for our contemporary understanding of the institution. In the year 1953, the Danish Ombudsman office was established as a representative of the citizens.⁵ Thenceforth, the institution would no longer exclusively serve the rule of law, but uphold the democratic principle as well.⁶ At the beginning of 21st century, an approximated 120 Ombudsman institutions had been established worldwide.⁷

2.1.2 RATIONALE BEHIND THE INSTITUTION

In the course of the 20th century, the tendency of increased legal regulation of citizens’ daily lives coinciding with rapid growth of administrative systems became a commonality of virtually all European countries.⁸ As administrations expanded in terms of both regulation and organization, their relationships with citizens changed significantly.⁹ While contact between administrations and citizens

¹ Anne Peters, ‘The European Ombudsman and the European Constitution’ (2005) 42 *Common Market Law Review* 697, 697.

² *ibid* 697-8.

³ P. Nikiforos Diamandouros (ed), *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 14.

⁴ Anne Peters, ‘The European Ombudsman and the European Constitution’ (2005) 42 *Common Market Law Review* 697, 698.

⁵ *idem*.

⁶ *idem*.

⁷ *idem*. Today, the International Ombudsman Institute (IOI) pursues cooperation between more than 170 independent Ombudsman institutions from more than 90 countries worldwide. For more information, see: <http://www.theioi.org/> (last accessed 25 February 2017).

⁸ P. Nikiforos Diamandouros (ed), *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 17.

⁹ *ibid* 18.



became ever more frequent, the vast expansion of the former had weakened the relational position of the latter.¹⁰ Under these circumstances, it became increasingly more difficult for citizens to adapt to the expansive bodies of rules introduced by the administration, whilst political control was diminishing and the established mechanisms of judicial control frequently proved insufficient.¹¹ This development necessitated additional control over administrations, in order assure and advance the protection of citizens' rights.

To this end, the establishment and proliferation of the modern-day Ombudsman can be perceived as an institutionalized response to two complementary trends: on the one hand, it counteracted to the sizeable increase of administrative activity with a high level of regulation, paired with an extensive delegation of powers to administrative authorities; on the other hand, it accommodated the growing need for individual rights' protection *vis-à-vis* this "expansive apparatus".¹² As such, the institution of the Ombudsman not only provides for individual redress in specific cases, but also works systemically and continuously to improve the quality of administration in general.¹³ Indeed, the Ombudsman can be considered to serve feedback function aimed at a better performing administration.¹⁴

2.1.3 A 'PERSONALIZED' INSTITUTION

Normally, the institution is vested in an individual person: *the* [emphasis added] Ombudsman. This phenomenon – the 'personalization' of the institution – may be explained as an effort to counterbalance the increasing anonymity and bureaucracy that resulted from the aforementioned expansion of administration. Most illustrative, to this extent, is a statement made by Jacob Söderman – the first EO – during his solemn oath before the Court of Justice. He proclaimed that "the work of the Ombudsman should focus on helping [citizens] to exercise their rights fully and, in so doing, to give the [...] administration a more human face" [emphasis added].¹⁵ Accordingly, 'personalization' of the institution would serve the aim of closing the perceivable gap between citizens and the bureaucracy of administration.

¹⁰ *idem.*

¹¹ *idem.*

¹² Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697, 699.

¹³ *idem.*

¹⁴ cf A. Brenninkmeijer, 'Feedback for a better performing public sector' (2016) 35 *Zarządzanie Publiczne* 68.

¹⁵ P. Nikiforos Diamandouros (ed), *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 1.



2.2 THE EUROPEAN OMBUDSMAN: EMERGENCE, ESTABLISHMENT AND DEVELOPMENT

2.2.1 EMERGENCE OF THE EUROPEAN OMBUDSMAN

At the European Union level, a first proposal to establish an EO was tabled by the Legal Affairs Committee of the European Parliament, in the year 1979.¹⁶ However, the proposed resolution was met with opposition by the European Commission and the subsequently-elected European Parliament.¹⁷

Since the EU administration does not regularly take decisions that affect individuals, the social need for the protection of citizens' rights through control – the principal driving force behind the conception of national Ombudsman institutions – is perhaps not as evident at Union level.¹⁸ In fact, the purpose of the EO may rather be attributed to an internal need, for both increased control of the institutions' compliance with EU law and extended protection of the citizens, which had arisen in the Union.¹⁹ This internal need coincided with the desires “to mitigate the serious democratic deficiencies of European governance, to prevent further alienation of the sceptical public from an anonymous administration “up there in Brussels”, and to polish up the image of the EC/EU as a whole”.²⁰ Accordingly, enhancement of the relationship between the EU administration and citizens has, indeed, always been the *raison d'être* of the EO.²¹

By the year 1992, a more firmly and broadly established acceptance of the Ombudsman concept, the proliferation of human rights, and a more coherent as well as independent EU legal system based on both quantitative and qualitative expansion of Union regulation, had created a more viable environment for a proposal and negotiations on the establishment of the EO.²² Eventually, when the Maastricht Treaty was signed in 1992, the institution would become reality.²³

¹⁶ *idem*; European Parliament Resolution of 11 May 1979 on the appointment of a Community Ombudsman by the European Parliament [1979] OJ C 140, 153.

¹⁷ *ibid* 13.

¹⁸ *ibid* 18-9.

¹⁹ *ibid* 26.

²⁰ Anne Peters, 'The European Ombudsman and the European Constitution' (2005) 42 *Common Market Law Review* 697, 700.

²¹ *Idem*.

²² P. Nikiforos Diamandouros (ed), *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 26.

²³ Please note: the authors sometimes refer to the EO as an institution, not in the formal sense of Article 13 TEU listing the EU institutions, but in the literal sense of “an established official



2.2.2 ESTABLISHMENT OF THE EUROPEAN OMBUDSMAN

Article 138e(1) of the Maastricht Treaty prescribed that the European Parliament was to appoint an Ombudsman, empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having his registered office in a Member State, concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. By virtue of this provision, the European Parliament formally established the EO on 9 March 1994, through the adoption of its Statute.²⁴

2.2.3 DEVELOPMENT OF THE EUROPEAN OMBUDSMAN

In the course of the two decades that have passed since the establishment of the EO, he gradually evolved into “its present-day incarnation as an effective and respected institution charged with promoting the rule of law, good administration and the protection of human rights”.²⁵ By broadly interpreting the arguably ambiguous term of “maladministration”, as the failure of a public body to act in accordance with a rule or principle which is binding upon it, the Ombudsman entitled itself with extensive powers.²⁶ Under this broad interpretation of maladministration, the EO has strived for “fairness beyond legality”.²⁷

2.3 POWERS OF THE EUROPEAN OMBUDSMAN

The EO is vested with investigative powers to pursue his mission.²⁸ Those powers are singled out in his statute²⁹ and are further spelled out in the implementing provisions attached thereto,³⁰ whose more recent version came into effect on 1 September 2016 (Article 14.2).

organization having an important role in a society” that the Oxford dictionaries attributes to the word.

²⁴ European Parliament Decision of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties [1994] OJ L 113, 15.

²⁵ P. Nikiforos Diamandouros (ed), *The European Ombudsman: Origins, Establishment, Evolution* (Office for Official Publications of the European Communities 2005) 217.

²⁶ *ibid* 193.

²⁷ A.F.M. Brenninkmeijer, ‘Management and Fairness’ (2011) 4, available at: <https://www.nationaleombudsman.nl/uploads/jv_2011_management_and_fairness_-_engels_artikel.pdf> accessed 9 April 2017.

²⁸ A. Tsadiras, *Unravelling Ariadne's thread: the European Ombudsman's investigative powers*, in *Common Market Law Review*, 2008, pp. 757-770.

²⁹ What is commonly referred to ‘the European Ombudsman's Statute’ is nothing but the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties adopted on 9 March 1994 (OJ L 113, 4.5.1994, p. 15) and subsequently



First and foremost, the EO has the power to conduct enquiries to ‘clarify any suspected maladministration’ (Article 3.1). Therefore, targeted bodies and institutions shall be obliged to supply the EO with any information he has requested (Article 3.2) unless these information are deemed to be classified; be that the case, the EO has to be notified. However, if the EO is not given the requested assistance, he can inform the European Parliament through the Committee on Petitions.

Apart from those procedural steps, it can be said that the EO opens a constructive dialogue with the concerned body, institution or agency envisaging eliminating an instance of maladministration. When he believes that an instance of maladministration is present, he informs the concerned body and prepares a draft recommendation. Consequently, the concerned body has three months to respond through a detailed opinion on the allegations submitted by the EO. The EO then sends a report to the European Parliament.

It is clear that to efficiently perform those duties and to accomplish all the necessary procedural steps the EO shall be ensured the maximum level of independence (Article 8). Therefore, if he no longer meets that criterion or if he is guilty of serious misconduct, he may be dismissed by the Court of Justice at request of the European Parliament. To preserve his independence, he cannot engage in any other working activity –be it gainful or *pro bono*- during the term of his office.

The implementing provisions of the EO’s statute describe in concrete terms how he operates.³¹ In particular, the EO can ask the targeted body/institution to supply information and or documents and, if needed, to inspect them (Article 4.3 implementing provision). Moreover, he can even request either the involved officials or the complainant to testify (Article 4.6 implementing provision). In case they refuse to cooperate, the EO can inform the European Parliament (article 4.8 implementing provision).

If the EO considers that a complaint can be resolved, he shall seek a solution with the institution concerned (Article 5.1 implementing provision). If, by contrast, the EO considers that no maladministration occurred he can close the complaint with a decision setting out his findings (Article 6.1 implementing provision). If, again by contrast, there is maladministration the EO makes ‘appropriate recommendations’ to the institution concerned asking to provide an opinion on the appropriate recommendation previously submitted (Article 6.3 implementing provision). Only after this phase the EO can close his investigation (Article 7.1 implementing provision), thereby presenting

amended on 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and 18 June 2008 (OJ L 189, 17.7.2008, p. 25).

³⁰ Decision of the European Ombudsman adopting implementing provisions (OJ C 321, 1.9.2016, p. 1).

³¹ A. Tsadiras, *Navigating through the clashing rocks: the admissibility conditions and the ground for inquiry into complaints by the European Ombudsman*, in *Yearbook of European Law*, 2007, pp. 157-192.



his definitive findings. Moreover, if they are particularly relevant for public interest, the EO can forward them to the European Parliament (Article 7.3 implementing provision). The same procedure is applicable when the EO acts on his own initiative (Article 8.2 implementing provision). Finally, a complainant can request to review EO's decision with the exception of finding of maladministration (article 10.1 implementing provisions).

The procedural stages according to which the EO handles a complaint presents the character of an administrative procedure aimed at finding an amicable solution between two counterparties. Although one may consider the EO's powers to request document quite extensive, it is important to stress that the delivery thereof encounters the limit of secrecy, especially for highly sensitive dossiers.³² This is a key aspect due to the fact that the EO is increasingly engaged in enhancing the transparency of lobbyist groups, has been called upon to investigate the phenomenon of so-called revolving doors for top officials and negotiation of international treaties. The very fact that in case of non-disclosure the EO may refer a case to the European Parliament does not guarantee per se that, at the end of the day, the EO will get access to document.³³ This, in turn, might even affect the outcome of his enquiry.

However, vesting the EO with more intrusive powers would be counterproductive to the extent that his influence exactly derives from the very fact that other institutions, bodies and agencies spontaneously comply with his decisions. If one links these aspects to his remedial powers it is immediate to recognise how successful the EO experience has been.³⁴

2.4 FORMATION AND FUNCTIONING OF A NETWORK WITH NATIONAL OMBUDSMEN

As it is well known, the EO can investigate solely cases of maladministration committed by European institutions, bodies and agencies. This leaves a remarkable gap for European citizens dealing on a day by day basis with national administrations tasked to implement EU law. It is thus self-evident that, considering the EO's mission, national administrations do not fall within the remit of his purview. Therefore, even though admitting that the EO does not enjoy judiciary powers, citizens are hence deprived of a potential legal remedy. One has to acknowledge that in these hypotheses citizens might well have recourse to a judicial track, whereby national judges are deemed to be the first enforcers of

³² See Refusal to grant access to documents relating to the TTIP negotiations Case: 119/2015/PHP; Access to documents of the TTIP negotiations Case: 1777/2014/PHP; Transparency and public participation in relation to the Transatlantic Trade and Investment Partnership ('TTIP') negotiations Case: OI/10/2014/RA.

³³ M. E. De Leeuw, *The regulation on public access to European Parliament, Council and Commission documents: are citizens better off?*, in *European Law Review*, 2003, pp. 24-48.

³⁴ A. Tsadiras, *The European Ombudsman's remedial powers: an empirical analysis in context*, in *European Law Review*, 2013, pp. 52-64.



EU law according to the principles of equivalence and effectiveness (Article 19, paragraph 1, TEU). However, this solution is totally different from an EO involvement because that will inevitably lead to litigation and eventually to a judgment. EU citizens can overcome this problem approaching their own national ombudsman (hereinafter: NO). Noticeably, with the exception of Italy, all Member States have a national ombudsman.³⁵

Article 5 of the EO statute provides that ‘in so far as it may help to make his enquiries more efficient and better safeguard the rights and interests of persons who make complaints to him, the Ombudsman may cooperate with authorities of the same type in certain Member States provided he complies with the national law applicable’. Paragraph 2 adds that a similar form of cooperation could be envisaged also with national bodies in charge of human rights protection. This provision is complemented, regrettably without any further clarifications, by Article 12 of the implementing provisions. The steady cooperation between NOs and the EO led to the establishment of the European Network of Ombudsmen (hereinafter: ENO) in 1996. Before assessing the potentialities of this instrument it is of the outmost importance to describe what the ENO is. Firstly, the ENO is not a hierarchical structure; on the contrary, it represents a horizontal forum of cooperation between all the national actors tasked to deal with maladministration. Therefore, to make a comparison, the mechanism of cooperation between NOs and the EO is not based upon the fact that the formers refer a case to the latter –in order, for instance, to better interpret the provision invoked by the citizen or the norm allegedly breached- alike the preliminary ruling procedure (Article 267 TFEU). By contrast, the ENO is a network of peers delivering non-binding decisions and whose cooperation is growing year by year.³⁶ Amongst the tools used to better achieve these goals, it is noteworthy to cite the EO’s

³⁵ *Volksanwaltschaft* (Austria); *Le Médiateur fédéral / De federale Ombudsman* (Belgium); *Омбудсман на Република България* (Bulgaria); *Pučki pravobranitelj* (Croatia); *Γραφείο Επιτρόπου Διοικήσεως* (Cyprus); *Veřejný ochránce práv* (Czech Republic); *Folketingets Ombudsmand* (Denmark); *Õiguskantsler* (Estonia); *Eduskunnan oikeusasiamies* and *Oikeuskanslerinvirasto* (Finland); *Défenseur des droits* (France); *Petitionsausschuss* (Germany); *Ombudsman* (Greece); *Alapvető Jogok Biztosa* (Hungary); *Office of the Ombudsman* (Ireland); *Valsts Tiesībsarga birojs* (Latvia); *Seimo kontrolierių įstaiga* (Lithuania); *Ombudsman* (Luxembourg); *Office of the Ombudsman* (Malta); *Nationale Ombudsman* (Netherlands); *Rzecznik Praw Obywatelskich* (Poland); *Provedor de Justiça* (Portugal); *Avocatul Poporului* (Romania); *Kancelária verejného ochrancu práv* (Slovakia); *Varuh človekovih pravic RS* (Slovenia); *Defensora del Pueblo* (Spain); *Riksdagens ombudsmän - JO* (Sweden); *Parliamentary and Health Service Ombudsman* and *Northern Ireland Ombudsman* (United Kingdom).

³⁶ See Q8/2016/EIS - Query from the Finnish Parliamentary Ombudsman concerning the EU rules on rail passengers’ rights and the accessibility of restaurant cars to wheelchair users, decision of 24 January 2017; Q9/2016/MDC- Query from the Maltese Parliamentary Ombudsman concerning bird ringing as the sole recognised method of tagging birds for research purposes, decision of 24 January 2017.



newsletter that keeps updated NOs on the current development of EU law and share best practices. There is also an extranet service aimed at sharing answers to frequently asked questions and gathering an up-to-date list of national and regional ombudsmen across Member States, candidate countries, members of the European Economic Area and other European countries.

The current Ombuds(wo)man is putting great efforts to ameliorate cooperation between the EO and the ENO. In particular, she insisted on increasing the exchange of information and on facilitating access to expertise within EU institutions. Her coordinating role would also strengthen parallel investigations, that is, when instances of maladministration have been (allegedly) jointly committed by European bodies and national administration, as it happened in the inquiry regarding Frontex Joint Return Operations.³⁷ Not only would that coordinating effort increase the visibility of NOs and the EO but it would also lead to a common procedure and, possibly, to a similar outcome.

A key feature of cooperation is the transfer of complaints. Indeed, when a complaint regards national administrations and is mistakenly addressed to the EO, he can –provided that the complainant gives his consent- transfer it to the competent NO and vice versa. As Tsadiras notes ‘the regular exchange of complaints cultivates an environment in which the actors cease to perceive themselves as isolated institutions’.³⁸

This common effort will be relevant also for the exchange of information and sharing best practices, mostly done through the extranet. An important part of this has to be developed in order to timely respond to queries regarding EU law. The goal is to respond to NOs in a timely and quicker manner maintaining the horizontal cooperation between them up and running. This part will be implemented in the extranet and made available to NOs. Moreover, some queries will be directly forwarded to European institutions in order to give the most accurate replies possible. Another key aspect of the horizontal character of the ENO is the involvement of NOs in the EU decision making process. Indeed, when the European Commission launches a legislative proposal that touches upon citizens’ rights all Member NOs of the ENO can submit a joint contribution highlighting their expertise and their experience on dealing with newly regulated matters. However, this does not entail that they are part of the legislative process itself but solely that they can intervene on a voluntarily basis.

The relations between the EO and NOs can be thus described making reference to three distinct concepts: self-determination, voluntary participation and conditional cooperation.³⁹ The first refers to

³⁷ Proposals to improve the monitoring of Frontex Joint Return Operations Case: OI/9/2014/MHZ

³⁸ A. Tsadiras, *Rules of institutional "flat-sharing": the European ombudsman and his national peers*, in *European Law Review*, 2008, pp. 101-115, at 106.

³⁹ *Ibid*, at 110.



the fact that the EO and NOs negotiated their own relations on an equal footing and conceive themselves as peers. The second explains in operational terms their relations to the extent that, lacking any obligations and in the light of the vague meaning of Article 5 of the statute, the EO and NOs are free to set up their own functional arrangements as they wish to do so. Stretched to the extreme consequences, that would also entail that they are entitled to stop their cooperation. The third concept requires a more careful approach to the extent that, as Article 5 of the statute provides, the EO is bound to respect national law. In other words, the EO cannot exploit his role to investigate conducts originated at the national level but, on the contrary, is required to stick to his own mandate.

The soft cooperation between the EO and NOs is to be welcomed and, as the Ombuds(w)man pointed out needs to be strengthened. The path to be taken will surely draw upon the already successful experiences of sharing information, exchanging best practices and cultivating a citizen-friendly administrative environment. However, in doing so, two aspects need to be further analysed. Firstly, there might be a considerable difference amongst administrative laws and practices in the 28 Member States. Hence, the strengthened cooperation amongst the different actors of the network needs to ensure a high level of decisions' consistency. That, in turn, is a key for the success of the ENO. Indeed, only a ENO's thorough drafted decisions and submissions decision would ensure a highly level of spontaneous compliance. Secondly, whereas certain Member States share a common understanding of the presence of ombudsmen in their legal systems, others risk to be left behind. Italy represents a good example because there is no national ombudsman but a plethora of regional ombudsmen, competent to investigate –upon citizens' referral- grievances of maladministration committed by regional administrative bodies. Moreover, there are several ad hoc ombudsmen –e.g. banking ombudsman, juvenile ombudsman, detainees ombudsman etc.- vested with limited powers. Of course, those ombudsmen might well be confronted with cases of the EU implementing powers – it suffices to think to bank regulations and to compulsory information to be given to clients and customers- but it remains to be seen how they will interact with the ENO and the EO.

2.5 QUANTIFYING THE WORK OF THE EUROPEAN OMBUDSMAN

The annual reports published by the EO provide for a wealth of information on the various claimants he helps during the course of a calendar year. In 2015, the EO helped a total of 17.033 citizens.⁴⁰ That number is the accumulation of 13.966 advices given through the Interactive Guide on the Ombudsman's website, 2.077 registered complaints, and 1.060 requests for information replied to by the Ombudsman's services. The registered complaints are of particular relevance here, as they may constitute grounds for an inquiry. Following a steady increase during the first ten years after the

⁴⁰ European Ombudsman Annual Report 2015, available at < <http://www.ombudsman.europa.eu/activities/annualreports.faces> > accessed 11 May 2016.



establishment of the EO, the number of complaints registered has decreased gradually over the past ten years, as the following figure indicates.⁴¹

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Complaints registered	298	842	1.181	1.372	1.577	1.732	1.874	2.211	2.436	3.726	3.920

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Complaints registered	3.830	3.211	3.406	3.098	2.667	2.510	2.442	2.420	2.079	2.077	48.909

Table 1. Complaints registered per year.

Out of the 2.077 complaints registered during 2015, the EO opened 249 new inquiries. The remaining complaints either did not fall within his mandate, were inadmissible, or were admissible but did not constitute valid grounds for opening an inquiry. In addition, the EO opened 12 new own-initiative inquiries, bringing the total amount of inquiries opened in 2015 to 261. The numbers of inquiries opened have been fluctuating over the years since the establishment of the EO, as the following figure indicates.⁴²

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Complaints-based inq.	29	207	196	170	201	223	204	222	248	343	338
Own-initiative inq.	0	3	4	1	5	1	4	2	5	8	5
Total opened inq.	29	210	200	171	206	224	208	224	253	351	343

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Complaints-based inq.	258	303	293	335	323	382	450	341	325	249	5.640
Own-initiative inq.	9	6	3	4	12	14	15	9	17	12	139

⁴¹ Data gathered from Annual Reports of the relevant years, available at < <http://www.ombudsman.europa.eu/en/activities/annualreports.faces> > accessed 11 May 2016.

⁴² Idem.



Total opened inq.	267	309	296	339	335	396	465	350	342	261	5.779
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Table 2. Inquiries opened per year.

Including carry-over from previous years, in 2015, the EO closed a total of 277 inquiries, of which 261 were complaints-based inquiries and 16 were own-initiative inquiries. The numbers of inquiries closed over the years since the establishment of the EO are indicated by the following figure.⁴³

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Complaints-based inq.	0	101	99	184	202	233	250	243	178	247	302
Own-initiative inq.	0	1	2	1	1	4	3	5	2	4	10
Total closed inq.	0	102	101	185	203	237	253	248	180	251	312

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total
Complaints-based inq.	247	341	352	311	323	310	380	441	387	261	5.392
Own-initiative inq.	3	7	3	7	3	8	10	20	13	16	123
Total closed inq.	250	348	355	318	326	318	390	461	400	277	5.515

Table 3. Inquiries closed per year.

⁴³ Idem.



3. THE EUROPEAN OMBUDSMAN: A CASE OF DEMOCRATIC EMPOWERMENT?

Evaluating the EO as a case of democratic empowerment could reserve some surprises. When one looks at his origin, it is beyond doubt that the EO was created as a tool to attenuate the ever hovering democratic deficit present in the then European Economic Community. When one looks at his development, it could be said that, despite being a tool of democratic empowerment, he is anyway a part of the often blamed EU bureaucracy.

The increased importance of the EO's role goes hand in hand with the increased competences the EU has been entrusted with. Indeed, the EO was created with the Treaty of Maastricht and, at that time, the institutional and substantive landscape of the EU was different: the area of freedom security and justice was still underdeveloped and falling under the so-called third pillar, there was no clear-cut division of competences –not to mention a defined role for the principles of subsidiarity and proportionality-,⁴⁴ there were different decision making processes according to where the policy area was located –first, second or third pillar-, the protection of fundamental rights was ensured only through the jurisprudence of the CJEU and the European Council was not an institution. The creation of the EO was thus a welcome development, granting control over EU institutions. Indeed, responding to the needs to overcome the rhetoric of democratic deficit, lack of accountability and transparency, as we have seen above, the EO has been entrusted with extensive investigative powers to ascertain potential cases of maladministration committed by EU institutions. The rationale behind is to be traced in the promotion of the rule of law and of a solid administrative culture and practice.

By contrast, if one considers the development of the EU integration project and the challenges it has to cope with in the next years, the EO's role could be different. Looking at his body of decisions, one easily recognises that the real or, rather, the key mission of the EO is not limited to investigate cases of maladministration but also to make the EU administration more transparent. Furthermore, in contrast to the scenario in which the EO was created, nowadays the EU administration encompasses EU agencies, that is, bodies vested with pervasive regulatory and executive powers.⁴⁵ Therefore, the

⁴⁴ *Pillbox 38 (UK) Limited, trading as Totally Wicked v. Secretary of State for Health*, Court of Justice of the European Union, case C-477/14, judgment of 4 May 2016, ECLI:EU:C:2016:324; *Philip Morris Brands SARL and Others v. Secretary of State for Health*, Court of Justice of the European Union, case C-547/14, judgment of 4 May 2016, ECLI:EU:C:2016:325; *Republic of Poland v. European Parliament and Council of the European Union*, Court of Justice of the European Union, case C-358/14, judgment of 4 May 2016, ECLI:EU:C:2016:323.

⁴⁵ The agencification process has gone too far to give it account in this paper. For our purposes, and as a way of simplification, we solely list, amongst many other, the following agencies: European Medicines Agency (EMA) as established by authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (Text with EEA relevance) OJ L 136, 30.4.2004, p. 1–33 repealing regulation 2309/93; European Food Safety Authority (EFSA) Regulation (EC) No 178/2002 of the European Parliament and of the Council of



steady increase of EU competences and EU agencies enhanced the role of the EO as their watchdog. Since the 2011, the EO annual reports specifically distinguish the inquiries that target agencies from the otherwise catch-all 'rest' category.⁴⁶ Over the period 2011-2015 the percentage of EO inquiries that targeted EU agencies varies from 11.5% to 24.0%. Furthermore, the European Anti-Fraud Office (OLAF) deserves particular notice given that it was amongst the most targeted over the years, being subject of up to 3.3% of the inquiries in the year 2007.⁴⁷

The overlap between the national and the European dimension is a promising field of possible disputes. As happened in the case of Frontex,⁴⁸ one cannot rule out the hypothesis that national agencies –for instance, national medicine agencies- in implementing and executing EU rules might infringe the right to good administration. In such a case, national ombudsmen will be empowered to act but, considering the presence of the ENO, one cannot again rule out the intervention of the EO. Taking again as an example national medicine agencies and the European medicine agency (EMA) one can assume the following scenario. On the one hand, pharmaceutical undertakings could complain before the Ombudsman for maladministration committed by EMA in handling, as a way of simplification, their request to market, at the European level, a medicine. On the other, the same undertaking could complain, this time before a national ombudsman, of an alleged administrative malpractice committed by national medicine agencies in applying EU law. Even though those two cases could be solved according to different rules –e.g. national and European- it would be important to highlight the need of a constant dialogue amongst ombudsmen, through the ENO, in order to create a virtuous circle.

The combination of the upstream with the downstream approach seems to respect Article 51 of the Charter whereby its rights –and in our case the right to good administration (Article 41) and the right

28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety OJ L 31, 1.2.2002, p. 1–24; European Chemicals Agency (ECHA) Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC OJ L 396, 30.12.2006, p. 1–850; Consumers, Health and Food Executive Agency (CHAFEA) 2013/770/EU: Commission Implementing Decision of 17 December 2013 establishing the Consumers, Health and Food Executive Agency and repealing Decision 2004/858/EC OJ L 341, 18.12.2013, p. 69–72.

⁴⁶ See paragraph 4.3, table 10 below.

⁴⁷ Idem.

⁴⁸ See footnote 37.



to refer to the Ombudsman (Article 43)- ‘are addressed to the institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are implementing Union law’.

The EO’s decisions on EU agencies reveals that two sets of infringement are often dealt with: staff cases and access to documents. Both aspects are not new in the sense that the EO was originally created to investigate and solve this kind of complaints. However, what is more important is the follow up of the EO decisions. As the 2015 report shows, the rate of compliance is around 90% and is steadily increasing considering that in 2014 was around 80%.⁴⁹ This would, in turn, lead to a change in agencies internal policies.

The fact that non-binding decisions are spontaneously complied with gives the idea of how the EO can influence other EU bodies. To reach such a high rate of compliance, one has to acknowledge the intrinsic compelling reasoning behind an EO decision. To start with, it is well known that in the EU legal order precedents are not binding. Nonetheless, the jurisprudence of the CJEU reveals, on the one hand, that it is quite difficult to disregard its own precedent; on the other, that when a precedent is overruled, the CJEU is always very careful in depicting it as an exception to a well-established rule.⁵⁰

Transferring this consideration to the body of the EO’s decisions, our study does not show that EO overruled his own precedents. In our opinion, this is a highly beneficial finding for two orders of intertwined reasons. Firstly, the consistency and reliability of the EO’s decisions serve the purpose to make them predictable. Predictability, when it comes to non-binding decisions, in turn, enhances the legitimacy thereof and eventually leads to a higher level of compliance. In other words, should the EO overrule his own precedent that would lead, in the long run, to a decrease in the compliance rate. Secondly, the very fact that the EO’s decisions are consistent over time supported the development of a coherent body of decisions. That, in turn, spilled over in the creation of a code of good administration behaviour, currently adopted by the European Commission and the European Parliament. The code is not a legally binding instrument and partially overlaps with Article 41 of the European Charter of Fundamental Rights, a provision devoted to the right to good administration. However, the code goes further pointing out the public service principles that should guide EU civil servants: commitment to the European Union and its citizens, integrity, objectivity, transparency. Furthermore, Article 4 endorses the principle of the rule of law while Article 5 explicitly provides for an equal treatment clause. At a more practical level, Article 13 ensures that citizens’ letters are

⁴⁹ <https://www.ombudsman.europa.eu/activities/annualreports.faces> (last accessed 20 February 2017).

⁵⁰ The best possible examples are Court of Justice of the European Union, *Procureur du Roi v Benoît and Gustave Dassonville*, case 8/74, judgment of 11 July 1974, ECLI:EU:C:1974:82 against Court of Justice of the European Union, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, joined cases C-267/91 and C-268/91, judgment of 24 November 1993, ECLI:EU:C:1993:905.



replied in the same language with which they are written and Article 14 guarantees that every letter shall receive an acknowledgment of receipt as well as indicating the name of the competent official. More importantly, Article 18 codifies the duty to state reasons in cases where a decision could adversely affect the rights and interests of a private person. Article 19 stipulates that negative decisions should contain the indication that they can be appealed. Finally, Article 26 entitles citizens to complain to the EO where European institutions failed to comply with the code.⁵¹

⁵¹ The European Code of Good Administrative Behaviour is available at <https://www.ombudsman.europa.eu/en/resources/code.faces#/page/1> (last accessed 3 April 2017).



4. CATEGORIZATION OF PLAINTIFFS AND COMPLAINTS

In establishing who seeks recourse to the EO, and for what reason they do so, four distinctions can be made. First, regarding the applicant, distinction can be made between complaints lodged by natural persons (individuals), and those lodged by legal persons (companies, associations, etc.). This will be addressed as the personal origin of complaints. Second, also regarding the applicant, distinction can be made as to where a natural or legal person concerned is located. This will be addressed as the geographical origin of complaints. Third, regarding the complaint, distinction can be made as to the EU institution or agency that faces the allegation of maladministration. Fourth, also regarding the complaint, distinction can be made as to the subject matter.

4.1 PERSONAL ORIGIN OF COMPLAINTS

In determining who seeks recourse to the EO, the personal origin of complaints constitutes an important element. The annual report for 2015 did, however, not make any distinction to this extent. Out of the 387 complaints-based inquiries closed by the European Ombudsman in 2014, 335 (87%) originated from individual citizens, while 52 (13%) originated from companies, associations, and other legal entities. Over the past years, the EO annual reports have been using differing measures for indicating the personal origin of complaints, rendering a thorough temporal comparison complicated. The 1995 to 2007 reports present the personal origin of all registered complaints, while the 2008 and 2009 reports merely indicate the personal origin of the registered complaints leading to the opening of an inquiry during the corresponding year. By contrast, the 2010 to 2014 annual reports indicate the personal origin of the registered complaints leading to the closure of an inquiry during the corresponding year. The personal origin of complaints over the years since the establishment of the EO is indicated by the following figure.⁵²

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Individual citizens	28 (96.6%)	717 (85.2%)	1067 (90.3%)	1.237 (90.2%)	1.458 (92.5%)	1.539 (88.9%)	1.694 (90.4%)	2.041 (92.3%)	2.268 (93.0%)	3.536 (95.0%)	3.705 (94.5%)
Companies, etc.	1 (3.4%)	86 (10.2%)	95 (8.0%)	123 (9.0%)	113 (7.2%)	190 (11.0%)	169 (9.0%)	157 (7.1%)	168 (7.0%)	190 (5.0%)	215 (5.5%)
Total complaints	29 (reg.)	842 (reg.)	1.181 (reg.)	1.372 (reg.)	1.577 (reg.)	1.732 (reg.)	1.874 (reg.)	2.211 (reg.)	2.436 (reg.)	3.726 (reg.)	3.920 (reg.)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total

⁵² Idem.



Individual citizens	3.619 (94.5%)	3.056 (95.2%)	218 (74.4%)	283 (84.5%)	254 (77.9%)	253 (81.6%)	324 (85.3%)	340 (77.1%)	335 (86.6%)	N/A	N/A**
Companies, etc.	211 (5.5%)	155 (4.8%)	75 (25.6%)	52 (15.5%)	72 (22.1%)	57 (18.4%)	56 (14.7%)	101 (22.9%)	52 (13.4%)	N/A	N/A**
Total complaints	3.830 (reg.)	3.211 (reg.)	293 (open.)	335 (open.)	326 (closed)	310 (closed)	380 (closed)	441 (closed)	387 (closed)	N/A	N/A**

Table 4. Personal origin of complaints per year (N/A data not provided; N/A not applicable).**

4.2 GEOGRAPHICAL ORIGIN OF COMPLAINTS

Subsequently, distinction can be made as to the geographical origin of the complaints registered by the EO. As the 1996 to 1999 annual reports of the EO do not provide for any absolute numbers in this respect (merely graphics), the following figure indicates the geographical origin of the registered complaints in the year 1995, and the period 2000 to 2015.

	Complaints registered									
	1995	2000	2001	2002	2003	2004	2005	2006	2007	
Austria	4	88	34	45	50	69	75	81	75	
Belgium	33	126	153	220	199	268	252	241	182	
Bulgaria	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	91	
Croatia	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	
Cyprus	N/A*	N/A*	N/A*	N/A*	N/A*	59	57	44	46	
Czech Republic	N/A*	N/A*	N/A*	N/A*	N/A*	98	80	67	59	
Denmark	5	19	19	19	31	32	16	20	18	
Estonia	N/A*	N/A*	N/A*	N/A*	N/A*	7	4	7	4	
Finland	6	76	85	121	88	73	55	74	62	
France	32	279	234	213	320	303	380	335	251	
Germany	44	213	323	308	432	464	410	537	507	
Greece	6	46	51	109	100	129	134	105	106	
Hungary	N/A*	N/A*	N/A*	N/A*	N/A*	53	76	72	67	
Ireland	6	40	36	38	33	53	64	47	43	



Italy	30	193	189	191	196	269	215	207	182
Latvia	N/A*	N/A*	N/A*	N/A*	N/A*	9	13	12	8
Lithuania	N/A*	N/A*	N/A*	N/A*	N/A*	18	24	9	12
Luxembourg	2	36	33	25	38	40	33	54	44
Malta	N/A*	N/A*	N/A*	N/A*	N/A*	38	40	33	26
Netherlands	11	52	80	76	87	88	103	106	74
Poland	N/A*	N/A*	N/A*	N/A*	N/A*	285	346	228	214
Portugal	9	58	78	88	110	116	114	96	91
Romania	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*	162
Slovakia	N/A*	N/A*	N/A*	N/A*	N/A*	52	32	37	27
Slovenia	N/A*	N/A*	N/A*	N/A*	N/A*	38	47	44	39
Spain	37	222	259	354	284	482	775	781	351
Sweden	11	58	56	53	53	84	69	53	61
United Kingdom	51	141	112	144	140	195	197	147	156
Other countries	11	85	132	207	275	404	309	291	200
Unknown	N/A**	N/A**	N/A**	N/A**	N/A**	N/A**	N/A**	102	53

Complaints registered									
	2008	2009	2010	2011	2012	2013	2014	2015	Total
Austria	108	62	48	52	45	38	40	33	949
Belgium	229	207	207	190	182	153	147	149	2.931
Bulgaria	74	77	63	71	66	73	66	77	658
Croatia	N/A*	N/A*	N/A*	N/A*	N/A*	19	28	17	64
Cyprus	35	24	22	26	30	27	16	17	403
Czech Republic	66	59	63	64	42	29	36	30	693
Denmark	23	23	16	23	34	7	17	12	334
Estonia	7	17	9	3	7	6	3	5	79



Finland	49	42	39	31	25	34	33	25	918
France	240	235	171	167	138	135	98	118	3.649
Germany	546	413	375	308	273	269	219	234	5.875
Greece	110	91	65	53	74	67	78	48	1.372
Hungary	46	55	51	47	76	70	44	64	721
Ireland	45	40	32	38	50	47	61	43	716
Italy	219	183	132	97	118	108	125	105	2.759
Latvia	18	20	21	9	16	9	12	3	150
Lithuania	11	30	20	18	23	21	14	7	207
Luxembourg	33	29	34	29	39	34	20	35	558
Malta	36	25	9	7	14	7	11	6	252
Netherlands	78	59	60	44	51	67	41	42	1.119
Poland	270	235	214	233	235	248	208	172	2.888
Portugal	95	102	71	71	77	70	74	48	1.368
Romania	97	81	73	42	58	59	65	56	693
Slovakia	29	27	43	29	34	31	17	25	383
Slovenia	41	29	34	28	31	27	29	21	408
Spain	352	389	349	361	340	416	309	323	6.384
Sweden	52	42	32	41	38	35	23	22	783
United Kingdom	197	176	132	141	162	139	127	146	2.503
Other countries	221	157	131	137	138	82	103	114	2.997
Unknown	79	169	151	150	26	93	15	10	848

Table 5. Geographical origin of complaints per year (N/A* not a Member State of the EU).

A brief inspection of the table above, warrants some preliminary observations. For the vast majority of Member States, the year most complaints were submitted, constituted 2004, 2005, or 2006. Overall, apart from Spain, most complaints submitted to the European Ombudsman originate in France and Germany. Notably, as of 2005 (France) and 2006 (Germany), both countries display a continuous decline in complaints each year, until slight increases in complaints can be seen in 2015.



Another interesting development was the drastic reduction in complaints originating from Spain between 2006 and 2007.

Illustrative as these numbers may be, additional factors must be weighed in before further conclusions can be drawn. First, population shares must be taken into account. When dividing a Member State's share in the amount of complaints registered per year by its share in the EU population, it can be deduced from the outcome whether the amount of complaints registered is what you would expect on the basis of population share. Repeated, significant deviations from expectation (share of complaints / share of population = 1), may warrant an investigation into the cause of such anomaly. Second, the amount of inquiries opened by the European Ombudsman must be taken into account. When displaying the amount of inquiries opened as a percentage of the amount of complaints registered, a notably low or high value may warrant an investigation into the consequences of that anomaly. The following tables provide for a closer look at the geographical origin of complaints for the years 2012 to 2015.



	2012					
	%Pop.EU ⁵³	#C.R. ⁵⁴	%C.R. ⁵⁵	#I.O. ⁵⁶	% I.O./C.R. ⁵⁷	%C.R./%Pop.EU ⁵⁸
Austria	1.7%	45	1.84%	5	11.11%	1.08
Belgium	2.2%	182	7.45%	103	56.59%	3.39
Bulgaria	1.5%	66	2.70%	6	9.09%	1.80
Croatia	N/A*	N/A*	N/A*	N/A*	N/A*	N/A*
Cyprus	0.2%	30	1.23%	2	6.67%	6.14
Czech Republic	2.1%	42	1.72%	3	7.14%	0.82
Denmark	1.1%	34	1.39%	7	20.59%	1.27
Estonia	0.3%	7	0.29%	4	57.14%	0.96
Finland	1.1%	25	1.02%	4	16.00%	0.93
France	13.0%	138	5.65%	24	17.39%	0.43
Germany	15.9%	273	11.18%	39	14.29%	0.70
Greece	2.2%	74	3.03%	14	18.92%	1.38
Hungary	2.0%	76	3.11%	11	14.47%	1.56
Ireland	0.9%	50	2.05%	15	30.00%	2.28

⁵³ Population presented as percentage of total population within the EU, rounded to 1 decimal. Data retrieved from <http://ec.europa.eu/eurostat>.

⁵⁴ Number of registered complaints.

⁵⁵ Number of registered complaints presented as a percentage of the total number of registered complaints.

⁵⁶ Number of inquiries opened by the European Ombudsman.

⁵⁷ Number of inquiries opened presented as a percentage of registered complaints.

⁵⁸ Number of registered complaints presented as a percentage of the total number of registered complaints, divided by the population presented as percentage of total population within the EU. A value lower/higher than 1.00 indicates less/more complaints have been registered than one would expect based on the population numbers.



Italy	11.8%	118	4.83%	42	35.59%	0.41
Latvia	0.4%	16	0.66%	1	6.25%	1.64
Lithuania	0.6%	23	0.94%	4	17.39%	1.57
Luxembourg	0.1%	39	1.60%	23	58.97%	15.97
Malta	0.1%	14	0.57%	1	7.14%	5.73
Netherlands	3.3%	51	2.09%	12	23.53%	0.63
Poland	7.6%	235	9.62%	9	3.83%	1.27
Portugal	2.1%	77	3.15%	9	11.69%	1.50
Romania	4.0%	58	2.38%	11	18.97%	0.59
Slovakia	1.1%	34	1.39%	4	11.76%	1.27
Slovenia	4.0%	31	1.27%	7	22.58%	0.32
Spain	9.3%	340	13.92%	39	11.47%	1.50
Sweden	1.9%	38	1.56%	5	13.16%	0.82
United Kingdom	12.6%	162	6.63%	34	20.99%	0.53
Other countries	N/A**	138	5.65%	12	8.70%	N/A**
Unknown	N/A**	26	1.06%	N/A	N/A	N/A**

Table 6. A closer look at 2012 (N/A data not provided; N/A* not a Member State of the EU; N/A** not applicable).



2013						
	%Pop.EU ⁵⁹	#C.R. ⁶⁰	%C.R. ⁶¹	#I.O. ⁶²	% I.O./C.R. ⁶³	%C.R./%Pop.EU ⁶⁴
Austria	1.7%	38	1.57%	3	7.89%	0.92
Belgium	2.2%	153	6.32%	53	34.64%	2.87
Bulgaria	1.4%	73	3.02%	7	9.59%	2.15
Croatia	0.8%	19	0.79%	1	5.26%	0.98
Cyprus	0.2%	27	1.12%	3	11.11%	5.58
Czech Republic	2.1%	29	1.20%	3	10.34%	0.57
Denmark	1.1%	7	0.29%	3	42.86%	0.26
Estonia	0.3%	6	0.25%	1	16.67%	0.83
Finland	1.1%	34	1.40%	6	17.65%	1.28
France	13.0%	135	5.58%	18	13.33%	0.43
Germany	15.9%	269	11.12%	40	14.87%	0.70
Greece	2.2%	67	2.77%	14	20.90%	1.26
Hungary	2.0%	70	2.89%	8	11.43%	1.45
Ireland	0.9%	47	1.94%	10	21.28%	2.16

⁵⁹ Population presented as percentage of total population within the EU, rounded to 1 decimal. Data retrieved from <http://ec.europa.eu/eurostat>.

⁶⁰ Number of registered complaints.

⁶¹ Number of registered complaints presented as a percentage of the total number of registered complaints.

⁶² Number of inquiries opened by the European Ombudsman.

⁶³ Number of inquiries opened presented as a percentage of registered complaints.

⁶⁴ Number of registered complaints presented as a percentage of the total number of registered complaints, divided by the population presented as percentage of total population within the EU. A value lower/higher than 1.00 indicates less/more complaints have been registered than one would expect based on the population numbers.



Italy	11.8%	108	4.46%	39	36.11%	0.38
Latvia	0.4%	9	0.37%	2	22.22%	0.93
Lithuania	0.6%	21	0.87%	5	23.81%	1.45
Luxembourg	0.1%	34	1.40%	12	35.29%	14.05
Malta	0.1%	7	0.29%	0	0.00%	2.89
Netherlands	3.3%	67	2.77%	11	16.42%	0.84
Poland	7.5%	248	10.25%	11	4.44%	1.37
Portugal	2.1%	70	2.89%	3	4.29%	1.38
Romania	4.0%	59	2.44%	6	10.17%	0.61
Slovakia	1.1%	31	1.28%	0	0.00%	1.16
Slovenia	0.4%	27	1.12%	1	3.70%	2.79
Spain	9.2%	416	17.19%	34	8.17%	1.87
Sweden	1.9%	35	1.45%	8	22.86%	0.76
United Kingdom	12.7%	139	5.74%	20	14.39%	0.45
Other countries	N/A**	82	3.39%	10	12.20%	N/A**
Unknown	N/A**	93	3.84%	9	9.68%	N/A**

*Table 7. A closer look at 2013 (N/A** not applicable).*



	2014					
	%Pop.EU ⁶⁵	#C.R. ⁶⁶	%C.R. ⁶⁷	#I.O. ⁶⁸	% I.O./C.R. ⁶⁹	%C.R./%Pop.EU ⁷⁰
Austria	1.7%	40	1.92%	12	30.00%	1.13
Belgium	2.2%	147	7.07%	50	34.01%	3.21
Bulgaria	1.4%	66	3.17%	7	10.61%	2.27
Croatia	0.8%	28	1.35%	4	14.29%	1.68
Cyprus	0.2%	16	0.77%	2	12.50%	3.85
Czech Republic	2.1%	36	1.73%	1	2.78%	0.82
Denmark	1.1%	17	0.82%	3	17.65%	0.74
Estonia	0.3%	3	0.14%	1	33.33%	0.48
Finland	1.1%	33	1.59%	5	15.15%	1.44
France	13.0%	98	4.71%	11	11.22%	0.36
Germany	15.9%	219	10.53%	45	20.55%	0.66
Greece	2.2%	78	3.75%	24	30.77%	1.71
Hungary	2.0%	44	2.12%	5	11.36%	1.06
Ireland	0.9%	61	2.93%	10	16.39%	3.26

⁶⁵ Population presented as percentage of total population within the EU, rounded to 1 decimal. Data retrieved from <http://ec.europa.eu/eurostat>.

⁶⁶ Number of registered complaints.

⁶⁷ Number of registered complaints presented as a percentage of the total number of registered complaints.

⁶⁸ Number of inquiries opened by the European Ombudsman.

⁶⁹ Number of inquiries opened presented as a percentage of registered complaints.

⁷⁰ Number of registered complaints presented as a percentage of the total number of registered complaints, divided by the population presented as percentage of total population within the EU. A value lower/higher than 1.00 indicates less/more complaints have been registered than one would expect based on the population numbers.



Italy	12.0%	125	6.01%	38	30.40%	0.50
Latvia	0.4%	12	0.58%	0	0.00%	1.44
Lithuania	0.6%	14	0.67%	5	35.71%	1.12
Luxembourg	0.1%	20	0.96%	7	35.00%	9.62
Malta	0.1%	11	0.53%	2	18.18%	5.29
Netherlands	3.3%	41	1.97%	7	17.07%	0.60
Poland	7.5%	208	10.00%	7	3.37%	1.33
Portugal	2.1%	74	3.56%	6	8.11%	1.69
Romania	4.0%	65	3.13%	7	10.77%	0.78
Slovakia	1.1%	17	0.82%	1	5.88%	0.74
Slovenia	0.4%	29	1.39%	2	6.90%	3.49
Spain	9.2%	309	14.86%	19	6.15%	1.62
Sweden	1.9%	23	1.11%	9	39.13%	0.58
United Kingdom	12.7%	127	6.11%	24	18.90%	0.48
Other countries	N/A**	103	4.95%	7	6.80%	N/A**
Unknown	N/A**	15	0.72%	4	26.67%	N/A**

*Table 8. A closer look at 2014 (N/A** not applicable).*



2015						
	%Pop.EU ⁷¹	#C.R. ⁷²	%C.R. ⁷³	#I.O. ⁷⁴	% I.O./C.R. ⁷⁵	%C.R./%Pop.EU ⁷⁶
Austria	1.7%	33	1.64%	4	12.12%	0.97
Belgium	2.2%	149	7.42%	35	23.49%	3.37
Bulgaria	1.4%	77	3.84%	3	3.90%	2.74
Croatia	0.8%	17	0.85%	2	11.76%	1.06
Cyprus	0.2%	17	0.85%	3	17.65%	4.24
Czech Republic	2.1%	30	1.49%	6	20.00%	0.71
Denmark	1.1%	12	0.60%	3	25.00%	0.54
Estonia	0.3%	5	0.25%	0	0.00%	0.83
Finland	1.1%	25	1.25%	1	4.00%	1.13
France	13.1%	118	5.88%	20	16.95%	0.45
Germany	16.0%	234	11.66%	34	14.53%	0.73
Greece	2.1%	48	2.39%	12	25.00%	1.14
Hungary	1.9%	64	3.19%	6	9.38%	1.68
Ireland	0.9%	43	2.14%	6	13.95%	2.38

⁷¹ Population presented as percentage of total population within the EU, rounded to 1 decimal. Data retrieved from <http://ec.europa.eu/eurostat>.

⁷² Number of registered complaints.

⁷³ Number of registered complaints presented as a percentage of the total number of registered complaints.

⁷⁴ Number of inquiries opened by the European Ombudsman.

⁷⁵ Number of inquiries opened presented as a percentage of registered complaints.

⁷⁶ Number of registered complaints presented as a percentage of the total number of registered complaints, divided by the population presented as percentage of total population within the EU. A value lower/higher than 1.00 indicates less/more complaints have been registered than one would expect based on the population numbers.



Italy	12.0%	105	5.23%	22	20.95%	0.44
Latvia	0.4%	3	0.15%	0	0.00%	0.37
Lithuania	0.6%	7	0.35%	1	14.29%	0.58
Luxembourg	0.1%	35	1.74%	9	25.71%	17.44
Malta	0.1%	6	0.30%	0	0.00%	2.99
Netherlands	3.3%	42	2.09%	8	19.05%	0.63
Poland	7.5%	172	8.57%	2	1.16%	1.14
Portugal	2.0%	48	2.39%	1	2.08%	1.20
Romania	3.9%	56	2.79%	4	7.14%	0.72
Slovakia	1.1%	25	1.25%	5	20.00%	1.13
Slovenia	0.4%	21	1.05%	3	14.29%	2.62
Spain	9.1%	323	16.09%	27	8.36%	1.77
Sweden	1.9%	22	1.10%	4	18.18%	0.58
United Kingdom	12.7%	146	7.27%	21	14.38%	0.57
Other countries	N/A**	114	5.68%	5	4.39%	N/A**
Unknown	N/A**	10	0.50%	2	20.00%	N/A**

Table 9. A closer look at 2015 (N/A not applicable).**

Having inspected the four tables above, some interesting remarks can be made. In the first place, as regards the inquiries opened presented as percentage of the amount of the complaints registered: on the one hand, we see a few ‘usual suspects’ that repeatedly score very low. Latvia, Poland and Malta often have a small amount of inquiries opened (0-3% of the complaints registered). Irrespective of whether the complaint proved to fall outside the mandate of the EO, to be inadmissible, or to be admissible but not constituting valid grounds for opening an inquiry; fact remains that the natural or legal person concerned felt the need to complain, but was not helped by the EO. Repeated low scores on this factor, therefore, could arguably negatively affect the citizens’ trust in the EO. On the other hand, we see a few Member States that score significantly higher on this factor. Luxembourg (26-59% of the complaints registered), Belgium (23-57% of the complaints registered), and Italy (21-36% of the complaints registered) all have a relatively high percentage of inquiries opened out of complaints registered. Conversely, repeated high scores on this factor could arguably positively affect the citizens’ trust in the EO.



In the second place, as regards the amount of complaints registered for each Member State, set out against the corresponding populations shares: on the one hand, we see a few Member States that repeatedly have more complaints registered than one might expect on the basis of their population shares. Luxembourg (10-17x as many as expected), Belgium (3x as many as expected), Malta (3-6x as many as expected) and Cyprus (4-6x as many as expected), are the most notable examples to this extent. For some reason, natural or legal persons of these Member States seem to easily find their way to the EO. On the other hand, some Member States repeatedly have fewer complaints registered than one might expect on the basis of their population shares. Italy (0,4-0,5x as many as expected), France (0,5x as many as expected), and the United Kingdom (0,5-0,6x as many as expected) are notable examples to this extent. For some reason, natural or legal persons from these Member States do not easily seek recourse to the EO.

4.3 TARGETS OF INQUIRY

The following table indicates the Community or Union institutions and bodies that have been the subject of European Ombudsman inquiries over the years. The percentiles as well as the absolute numbers between brackets are given. For annual report for the year 1995 did not indicate any percentages. Therefore, the data for this year are omitted from the table. For all other years, where an institution or body indicates “N/A”, the amount of inquiries was either zero or insignificantly low. In the latter case, the institution or body has been included under “Other”. Notably, the European annual reports for the years 2003-2007 indicated subjects of inquiry as a percentage of the amount of inquiries dealt with, while the annual reports for all other years indicated the subjects of inquiry as a percentage of the amount of inquiries initiated (i.e. the former group includes carry-over complaints from previous years, and therefore presents larger absolute numbers). Please note, furthermore, that it was not until the year 2011 that the European Ombudsman annual reports started to distinguish a category “EU agencies” within the group “Others”.

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
EC	81% (187)	80% (163)	75% (129)	77% (163)	83% (185)	77% (179)	75% (171)	66.9% (245)	69.1% (375)	68.0% (430)
EU Agencies	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
EPSO	N/A	N/A	N/A	N/A	N/A	N/A	N/A	7.1% (26)	10.7% (58)	11.6% (73)
EP	8% (19)	9% (18)	16% (27)	12% (24)	7% (16)	7% (16)	9% (21)	10.7% (39)	8.9% (48)	9.2% (58)
EEAS	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
OLAF	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A



EIB	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Council	2% (4)	7% (14)	4% (7)	3% (7)	2% (4)	2% (5)	5% (12)	5.5% (20)	4.1% (22)	2.2% (14)
CJEU	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Other	9% (22)	4% (8)	5% (9)	8% (17)	8% (19)	14% (33)	11% (24)	9.8% (36)	7.2% (39)	9.0% (57)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
EC	65.6% (387)	63.8% (413)	66% (195)	56% (191)	65% (219)	58% (231)	52.7% (245)	64.3% (225)	59.6% (204)	55.6% (145)
EU Agencies	N/A	N/A	N/A	N/A	N/A	13% (52)	12.5% (58)	24.0% (84)	13.7% (47)	11.5% (30)
EPSO	12.5% (74)	13.5% (87)	7% (20)	9% (30)	10% (35)	11% (42)	16.8% (78)	7.1% (25)	9.4% (32)	10.0% (26)
EP	8.3% (49)	9.1% (59)	10% (28)	11% (38)	7% (22)	4% (16)	5.2% (24)	4.3% (15)	3.5% (12)	8.0% (21)
EEAS	N/A	N/A	N/A	N/A	N/A	N/A	3.0% (14)	4.0% (14)	3.8% (13)	4.6% (12)
OLAF	N/A	3.3% (22)	2% (7)	N/A	N/A	N/A	N/A	N/A	3.2% (11)	1.9% (5)
EIB	N/A	N/A	N/A	N/A	N/A	N/A	1.5% (7)	2.9% (10)	N/A	N/A
Council	1.9% (11)	1.2% (8)	3% (10)	4% (12)	2% (6)	3% (10)	N/A	N/A	N/A	N/A
CJEU	N/A	N/A	N/A	3% (9)	1% (4)	1% (3)	N/A	N/A	N/A	N/A
Other	11.7% (69)	9.1% (59)	13% (27)	17% (59)	16% (52)	13% (49)	8.4% (39)	8.0% (28)	8.5% (29)	9.2% (24)

Table 10. Targets of inquiry.

At a first glimpse, the above table may be mistaken for incomplete or little informative. On a closer inspection, however, the above table is illustrative of a tendency towards a greater reach of the EO's inquiries. While in the early years, the inquiries conducted by the EO predominantly targeted the European Commission, the European Parliament, and the European Council, more recently, other



institutions and bodies became more frequently scrutinized. Still, the European Commission is by far the most-often targeted institution, but its share in overall inquiries has dropped gradually and significantly from 81% in the year 1996 to 55.6% in the year 2015. It could be speculated that the agencification of the European Union has contributed to this decrease.⁷⁷ Naturally, the proliferation of European agencies charged with administrative functions would result in a diminishing percentage of inquiries aimed at the European Commission.

4.4 SUBJECT MATTER OF COMPLAINT

The following tables indicate the subject matters of the inquiries held by the EO over the past years. The EO annual report for the year 1995 does not contain sufficient information and, accordingly, this year is omitted from the table. Per the year 2008, the EO annual reports have used a differing categorization for these subject matters. Therefore, the years 1996-2007 and 2008-2015 have been separated. For each year, the percentiles and absolute numbers of inquiries covering these subject matters are given. As some inquiries may relate to more than one subject matter, the total percentages may exceed 100%. Moreover, on the one hand the annual reports for the years 1996-2002 indicate the subject matters as a percentage of the total amount of inquiries initiated. On the other hand, the annual reports for the years 2003-2007 indicate the subject matters as percentage of the total amount of enquiries dealt with, and the annual reports for the years 2008-2015 indicate the subject matters as a percentage of the total amount of enquiries closed. Arguably, this latter distinction proves nothing more than a semantic difference. In relation to the second table, it has been noted that the category “Institutional and policy matters” can relate to, for instance, conflicts of interest or delays and other shortcomings in the institutions’ procedures. Furthermore, the category “The Commission as “Guardian” of the Treaties” may relate to, for example, the Commission’s procedures as regards alleged infringement of EU law in a Member State.

	1996	1997	1998	1999	2000	2001
Lack of transparency, including refusal of information	13% (30)	25% (60)	30% (69)	23% (66)	28% (95)	29% (84)
Unfairness, abuse of power	7% (16)	9% (23)	13% (29)	11% (32)	11% (39)	10% (30)
Unsatisfactory procedures / procedural errors	13% (30)	13% (23)	11% (25)	11% (33)	8% (26)	11% (32)
Avoidable delay	6%	9%	7%	16%	24%	13%

⁷⁷ cf section 5 below.



	(15)	(22)	(7)	(45)	(84)	(37)
Discrimination	6% (15)	17% (42)	9% (21)	11% (31)	8% (27)	7% (19)
Negligence	5% (12)	9% (22)	16% (38)	10% (29)	7% (23)	11% (32)
Legal error	N/A	6% (14)	3% (17)	10% (29)	6% (20)	7% (19)
Failure to ensure fulfilment of obligations	36% (83)	8% (20)	5% (11)	3% (9)	2% (7)	1% (3)
Other maladministration	14% (32)	4% (9)	6% (14)	5% (15)	6% (21)	10% (30)

	2002	2003	2004	2005	2006	2007
Lack of transparency, including refusal of information	27% (92)	28% (90)	22% (127)	24% (188)	25% (190)	28% (216)
Unfairness, abuse of power	13% (45)	15% (48)	7% (38)	17% (132)	19% (141)	18% (135)
Unsatisfactory procedures / procedural errors	11% (40)	10% (33)	9% (52)	10% (78)	12% (91)	13% (102)
Avoidable delay	15% (53)	10% (33)	12% (67)	9% (73)	9% (71)	9% (69)
Discrimination	8% (26)	12% (39)	19% (106)	13% (103)	9% (65)	8% (63)
Negligence	10% (37)	5% (16)	6% (33)	6% (44)	8% (59)	8% (62)
Legal error	6% (21)	4,5% (15)	5% (26)	4% (29)	5% (36)	4% (35)
Failure to ensure fulfilment of obligations	2% (6)	4,5% (15)	7% (37)	5% (37)	4% (28)	3% (24)
Other maladministration	8% (26)	11% (37)	14% (78)	12% (89)	9% (68)	9% (72)

Table 11. Subject matters of inquiry 1995-2007.



	2008	2009	2010	2011	2012	2013	2014	2015
Request for information and access to documents (transparency)	26% (76)	31% (99)	33% (107)	25% (80)	21.5% (84)	25.6% (118)	21.5% (86)	22.4% (62)
Institutional and policy matters	17% (50)	14% (45)	14% (46)	11% (36)	11.5% (45)	17.6% (81)	16.0% (64)	21.7% (60)
The Commission as “Guardian” of the Treaties	17% (49)	9% (29)	16% (51)	15% (48)	21.5% (84)	19.1% (88)	19.3% (77)	20.2% (56)
Competition and selection procedures (including trainees)	14% (41)	16% (51)	12% (39)	14% (43)	21.0% (82)	14.8% (68)	19.3% (77)	15.5% (43)
Administration and Staff Regulations	10% (31)	16% (52)	12% (39)	19% (62)	16.7% (65)	16.5% (76)	11.3% (45)	13.0% (36)
Contracts	8% (25)	8% (24)	7% (24)	7% (23)	4.4% (17)	7.4% (34)	6.0% (24)	6.5% (18)
Awards of tenders or grants	8% (24)	6% (18)	6% (20)	8% (26)	6.7% (26)	9.5% (44)	8.3% (33)	6.1% (17)

Table 12. Subject matters of inquiry 2008-2015.

From the tables above it may be distilled that the allegations pertaining to “lack of transparency, including refusal of information”, a category seemingly overlapping with “request for information and access to documents (transparency)”, make up the biggest part of the inquiries held by the EO. Although the fluctuation in amount of inquiries per year, for each category varies, no evident tendencies can be seen.



5. POSSIBLE BARRIERS FOR CITIZENS TO ACCESS THE EUROPEAN OMBUDSMAN

The EO has been created as an open forum for the amicable settlement of disputes and for signalling cases of maladministration committed by the European Union institutions. In order to verify whether this openness is real, several parameters need to be taken into account. To start with, Article 20, paragraph d, TFEU stipulates that citizens of the Union have the right to apply to the EO; Article 24 TFEU essentially duplicates that provision. Article 228 TFEU specifies that any citizen of the Union or any natural and legal person having residence or having a registered office within the Union is entitled to make a complaint. Article 43 of the European Charter of Fundamental Rights (hereinafter: ECFR) adds nothing new to the joint reading of Articles 20, 24 and 228 TFEU.⁷⁸ Neither does it the Explanation on Article 43 which, in turn, laconically refers to the aforementioned provisions. By contrast, Article 2, paragraph 2, of the statute specifies that a complaint can be lodged also through a member of the European Parliament. Moreover, if the applicant so wishes, a complaint can be also lodged through a lawyer.

From the above analysis, it seems that the locus standi to bring a case before the EO is broad enough not to encounter any barriers whatsoever. It has to be pointed out that the procedure is entirely free of charge and that a complainant is entitled to lodge a complaint in any official language of the EU. Therefore, the EO will be obliged to respond in that language. Paradoxically, should the EO not respond in that language, he would be committing maladministration.

In order to lodge a complaint, it is sufficient to register an account –necessary for the verification of personal data - in the EO website and to download an application form⁷⁹. Alternatively, a paper form is also available and will need to be sent via snail mail. It goes without saying that those forms are available in any of the 24 official languages of the EU.

Which barriers might a citizen eventually encounter? An interview with an EO official⁸⁰ confirmed that it is extremely easy to submit a complaint but, notwithstanding that, the Ombuds(wo)man is promoting the easiness of the procedure via social media. However, it needs to be acknowledged that not every citizen will be in touch with EU bodies or institutions. The so-called agencification of the EU and the dismantling of the former pillar structure surely enlarged the possibility for citizens to interact with EU institutions, bodies and agencies. However, this does not automatically entail that there are

⁷⁸ I. Harden, *Article 43 – European Ombudsman*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The European Charter of Fundamental Rights. A commentary*, Hart Publishing, 2014, pp. 1121-1150.

⁷⁹ See <https://www.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces> (last accessed: 14 February 2017).

⁸⁰ The interview has been carried out by the authors of this study. Response received on 3 February 2017.



cases of maladministration even though the amount of registered complaints naturally arose to an all-time high of 3.920 in the year 2005.⁸¹ Moreover, the amount of inquiries closed by the EO per year, has increased gradually – although with slight fluctuation – to an all-time high of 461 in the year 2013.⁸²

Taking into account the simplicity of submitting a complaint and the very fact that grievances can be written in the claimant's language, there are two additional factors to be considered when assessing barriers to access to the EO. First and foremost, a citizen has to be aware of the EO very existence. For this reason, and due to the young age of this body, the Ombuds(wo)man is launching a renewed communication campaign aimed at improving her visibility. Indeed, Eurobarometer statistics depict that citizens are not aware of the existence of the EO.⁸³ Despite that, the EO annual report highlights that visibility is assured by some sensitive topics for EU citizens such as the issue of revolving doors for elite officials, the alleged non-citizen friendly Commission's attitude regarding the European citizens' initiative⁸⁴ and a recent decision on unpaid traineeship.⁸⁵ Furthermore, the very possibility to imagine submitting a complaint might be inferred from the presence of comparable national experiences. Italy is again a good example because, given the lack of an ombudsman but the presence of many regional ombudsmen, the amount of Italian applicants has increased until the mid-2000's, but faced a gradual decline ever since.⁸⁶ More significant, in this regard, is the fact that over the period 2012-2015 the amount of complaints registered by Italian citizens and companies, has correlated to merely 40% to 50% of the amount that one might expect based on the populations numbers.⁸⁷

The second point is not unsurprisingly related to the increase of EU policy areas and the dismantling of the pre-Lisbon pillar structure. Indeed, considering that, practically speaking, there is no locus standi before the EO, everyone could be in principle exposed to EU maladministration. Connecting this aspect to the agencification process, it now seems that legal persons are more and more active in

⁸¹ See paragraph 4.1, table 4 above.

⁸² Idem.

⁸³ Data available at <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Chart/getChart/chartType/gridChart/themeKy/7/groupKy/16/savFile/3> (last access 3 April 2017).

⁸⁴ The proper functioning of the European citizens' initiative (ECI) procedure and the Commission's role and responsibility in this regard. Case: OI/9/2013/TN.

⁸⁵ System of unpaid trainees in EU foreign delegations should end Case: 454/2014/PMC.

⁸⁶ See paragraph 4.2, table 5 above.

⁸⁷ See paragraph 4.2, tables 6-9 above.



calling upon the EO, as showed in cases related to the European Medicines Agency⁸⁸ and the European Food Security Authority.⁸⁹ Moreover, the EO has proven to be the adequate forum for disputes concerning the selection of EU personnel and as an effective way to improve the European Personnel Selection Office management of public competition.⁹⁰ This could be even more important if one considers that the Civil Service Tribunal has been dismantled in September 2016 and merged into the Court of Justice.⁹¹

The physical distance or closeness between the EO and EU citizens does not show an impact on barriers for two reasons: on the one hand, it is self-evident that those who are dealing with EU institutions are well accustomed to this sense of distance; on the other, the very fact that the EU in itself is neither a common international organisation nor a federal State enhances the idea that there are no gaps to be bridged. An illustrative example, to this extent, is that the amount of complaints registered by citizens or companies from Cyprus – the far south-eastern corner of the EU – was significantly higher than one might expect on the basis of population numbers over the period 2012-2015.⁹² Yet, another example – although not deducible from this finding – indicates that a perceived (physical) closeness to the Union, might lower the threshold for citizens and companies to approach the EO. Both Belgium and Luxembourg, the epicentres of the European Union, make up for a

⁸⁸ See Decision in case 1252/2014/JAS on the European Medicines Agency's refusal to grant access to EudraVigilance Case: 1252/2014/JAS.

⁸⁹ See Decision in case 48/2015/ANA on the European Food Safety Authority's alleged infringement of the complainant's procedural rights as regards a scientific opinion Case: 48/2015/ANA.

⁹⁰ Decision in case 1794/2016/EIS concerning the decision of the European Personnel Selection Office (EPSO) to exclude the complainant from an open competition for the recruitment of assistants in the audio-visual field Case: 1794/2016/EIS; Decision of the European Ombudsman closing her own-initiative inquiry OI/10/2015/NF concerning EPSO's procedure for dealing with requests for review made by candidates in open competitions Case: OI/10/2015NF;

Decision in case 92/2016/JN on EPSO's failure to properly address the complainant's concerns regarding his placement on a reserve list and technical issues with his EPSO account Case: 92/2016/JN.

⁹¹ Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union OJ L 341, 24.12.2015, p. 14–17 increased the number of the member of the General Court and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants OJ L 200, 26.7.2016, p. 137–139 dismantled the Civil Servant Tribunal thereby transferring its jurisdiction to the General Court.

⁹² See paragraph 4.2, tables 6-9 above.



significant bigger portion of the total registered complaints than one might expect on the basis of population numbers.⁹³ A potential cause for this phenomenon may be found in EU acculturation.

As a final remark, an underdeveloped issue not entirely clarified by available data would have been the level of education of claimants and their job position. That could also have had an impact on the language used to lodge a complaint. Indeed, taking into account the EO's competence, it could be speculated that solely those who are exposed to EU life will complain about it. And, as has been proven elsewhere highly educated people are more likely to be engaged in that.

⁹³ Idem.



6. THE EUROPEAN OMBUDSMAN: A CASE OF DEMOCRATIC DEFICIT?

The EO's influence over EU institutions and within the so-called *trias politica* depends on various factors and has been mostly shaped through the one-to-one relationship with the European Parliament. Indeed, the European Parliament elects the European Ombudsman (Article 228 TFEU) and approves the EO's annual report. A key instrument to determine the relationship between the Parliament and the EO will be the analysis of the functioning of the Committee of Petitions (hereinafter: the PETI Committee). Although the two are formally separated and have different goals, the PETI Committee proposes the motion, to be then voted by the European Parliament sitting in its plenary session, on the approval or rejection of the EO's activities. For instance, the 2015 PETI motion points out that the EO should closer investigate trilogues, should push for a renewed version of Regulation 1049/2001 regarding public access to documents,⁹⁴ should intervene in the scandal of the emission measurement in the automotive sector, should improve improving transparency on the Eurogroup meeting and, in particular, support its effort to make lobbying more transparent.⁹⁵ As a final note, the PETI Committee and the EO cooperated in the Frontex investigation advocating for a fundamental rights complaint mechanism.⁹⁶

A particular feature is also the personality of the individual elected as the EO.⁹⁷ Indeed, considering the above mentioned relationship between the EO and the Parliament and his role as watchdog of *good* (emphasis added) administration, it is crucial that the person in charge has a clear agenda, able to exert the necessary influence over the other institutions. Therefore, it needs to be in line with the current challenges the European Union and, more generally, the integration process is facing and, therefore, be adequate, flexible and adaptable. Not only have these qualities been singled out

⁹⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145, 31.5.2001, p. 43–48.

⁹⁵ Committee on Petitions, on the annual report on the activities of the European Ombudsman in 2015, 15 November 2016, (2016/2150(INI)).

⁹⁶ This finding has been confirmed through an interview carried out by the authors of this report with a MEP sitting in the PETI Committee. Response received on 22 February 2017.

⁹⁷ J. Söderman, *A thousand and one complaints: the European Ombudsman en route*, in *European Public Law*, 1997, pp. 351-361; P. N. Diamandouros, *The European Ombudsman and good administration post-Lisbon*, in D. Ashiagbor, N. Countouris, I. Lianos (eds.), *The European Union after the Treaty of Lisbon*, Cambridge University Press, 2012, pp. 2010-216. Mr. Söderman has been the first European Ombudsman (1995-2003) while Mr. Diamandouros has been his successor (2003-2013). Some criticisms on the European Ombudsman establishment have been put forward by K. D. Magliveras, *Best intentions but empty words: the European Ombudsman*, in *European Law Review*, 1995, pp. 401-408.



through *ex officio* investigations but also through a consistent body of decisions that eventually shaped other institutions' behaviour.

To start with, the EO is not a European institution. Indeed, Article 13 TEU lists European institutions and the EO is unequivocally omitted. The EO neither is a European agency for the simple consideration that he is not vested with executive or regulatory powers,⁹⁸ it suffices it to consider the different working methods and the mission of the European Medicine Agency or the European Food Safety Agency. By contrast, as it has already been demonstrated, the EO investigates cases of maladministration and promotes an amicable, non-binding, forum to settle disputes arisen between citizens and EU institutions, bodies and agencies. Therefore, the position of the EO is peculiar: on the one hand, is not an institution, yet having the closest possible relation with the only democratic one; on the other, he is not a judge, yet he settles disputes and can be dismissed only by the Court of Justice of the European Union (hereinafter: CJEU). Indeed, as we discussed above, the EO provides an amicable and non-binding solution to cases of maladministration. Therefore, even though, in principle, institutions could disregard the proposed solution, the rate of compliance with it is around 90%.⁹⁹ For what concerns the CJEU's powers to dismiss the EO, Article 228, paragraph 2, establishes that the Parliament is entitled to request such a dismissal if 'he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct'. To date, there are no cases dealing with this provision. However, at a speculative level, one may imagine that the EO could be dismissed whether he is engaged in a gainful activity, thereby violating his duty to independence. Moreover, one can also imagine cases of serious misconduct, leading to the paradoxical conclusion that the EO could be dismissed if he seriously and intentionally commits maladministration.

It may thus be difficult to correctly place the EO within the institutional architecture of the European Union. Legal literature sought to solve this dilemma recurring, on the one hand, to a constitutional-institutional approach,¹⁰⁰ on the other, in light of the case law of the CJEU.¹⁰¹

⁹⁸ *Ex multis*, E. Chiti, *The emergency of a community administration: the case of European agencies*, in *Common Market Law Review*, 2000, pp. 309-343; H. C. H. Hofmann, A. Morini, *The pluralisation of EU executive – Constitutional aspects of «agencification»*, in *European Law Review*, 2012, pp. 419-443; M. Shapiro, *Independent agencies*, in P. Craig, G. De Burca (eds.), *The evolution of EU law*, Oxford University Press, 2011, pp. 111-121; C. Tovo, *Le agenzie decentrate dell'Unione europea*, Editoriale Scientifica, 2016.

⁹⁹ European Ombudsman Annual Report, 2015, p. 29.

¹⁰⁰ A. Peters, *The European Ombudsman and the European Constitution*, in *Common Market Law Review*, 2005, pp. 697-743; A. Tsadiras, *Of celestial motions and gravitational attractions: the institutional symbiosis between the European Ombudsman and the European Parliament*, in *Yearbook of European Law*, 2009, pp. 435-457.



Peters argues that the added value of the EO in a highly dynamic constitutional environment is to be found in his capability to positively influence the respect for the rule of law, democracy, transparency and accountability. This is partly proven by the very fact that European institutions, and namely the Commission, spontaneously adopted a code of good administration, thereby following the specimen elaborated by the EO. Moreover, Peters reports that during the negotiations for the adoption of the European Constitution, the EO sought to attract for himself a competence to refer to the CJEU cases of violations of fundamental rights.¹⁰² This proposal did not encounter approval but sowed the seeds for the inclusion in the ECFR of a right to good administration.

Tsadiras describes the EO relationships with the other European institutions starting from the assumption that the EO succeeded in changing the terminology of the Treaty of Nice Article 195 TEC, replacing '*appointment*' (emphasis added), with the current formulation whereby he is '*elected*' (emphasis added) by the European Parliament. The acceptance of this change shows that the relationship between the EO and the Parliament is not hierarchical. Moreover, the very fact that the EO started to investigate more vigorously alleged cases of maladministration committed by the Parliament¹⁰³ increases the feeling of a truly independent body, acting within the remit of his statutory powers, moving within a well-structured institutional framework from which he is correctly excluded. Perhaps the very fact the EO neither is an institution nor is a judicial body *strictu sensu* enhances his accountability in the eyes of EU citizens.¹⁰⁴ An interview with an EO official¹⁰⁵ points out that on the European Ombuds(wo)man's agenda there are, amongst others, investigation on the so-called comitology, cases of revolving doors and a close eye on Brexit. In particular, the first two issues have often been at the core of citizens' negative attitudes –i.e. blaming Brussels- especially for the negotiation of international treaties –TTIP and CETA- and Mr. Barroso taking over a new position in a financial bank. The very fact that the Commission is the most targeted institution is also

¹⁰¹ M. Sukksi, *Case C-234/02 P, European Ombudsman v. Frank Lamberts, judgment of the full court of 23 March 2004, [2004] ECR I-2803*, in *Common Market Law Review*, 2005, pp. 1765-1881.

¹⁰² S. Karagiannis, *L'apport du Médiateur à la protection des droits fondamentaux*, in S. Karagiannis, Y. Petit (eds.) *Le Médiateur européen : bilan et perspectives*, Bruylant, 2007, pp. 89-133.

¹⁰³ *Ex multis* and amongst the most recent, Decision in case 1189/2016/JN on the failure by the European Parliament to answer correspondence, decision of 30 January 2017; Decision in case 896/2016/PMC concerning the European Parliament's failure to give valid justifications for not registering the complainant's petitions, decision of 28 November 2016;

¹⁰⁴ On a similar vein, K. Heede, *Enhancing the accountability of Community institutions and bodies: the role of the European Ombudsman*, in *European Public Law*, pp. 587-605.

¹⁰⁵ See above footnote 80.



demonstrated by the recommendation to the European External Action Service to suspend its practice of unpaid internship.¹⁰⁶

The CJEU's decisions might be helpful to shed light and to further clarify the EO's position. To do so, we will make reference to the EO's standing in direct actions.¹⁰⁷ These actions have a common element, that is, a differentiated *locus standi* for claimants: whereas EU institutions –i.e. those listed in Article 13 TEU- and Member States neither need to prove an interest to act nor to have been affected by a binding legal act, natural and legal persons must meet these requirements in order to be able to trigger a case. Furthermore, the act sought to be annulled has to bear legal effect on the claimant.

These requirements cannot be satisfied by the EO for two intuitive reasons: first and foremost, he is not an institution according to Article 13 TEU, therefore he cannot be considered a privileged applicant according to Article 263 TFEU. Secondly, the EO's decisions are not binding, thus, they cannot be challenged, in principle, before the CJEU. How to unravel this impasse?

In *Associazione delle cantine sociali venete*¹⁰⁸ the General Court (hereinafter: GC) held that the EO is not an institution within the meaning of Article 13 TEU, therefore the action for failure to act had to be dismissed. Indeed, when the EO makes a finding of maladministration submits a report to the European Parliament. However, that report does not produce legal effect given that it does not have a direct and individual concern for an applicant; therefore, it does not constitute a challengeable act.¹⁰⁹

The two *Lamberts* case (hereinafter *Lamberts I*¹¹⁰ and *Lamberts II*¹¹¹) raised a different question: can the EO be summoned in an action for damages? In *Lamberts I*, triggered as a result of an alleged misconduct during an internal competition aimed at promoting some Commission's temporary staff to permanent positions, the European Parliament and the EO argued the inadmissibility of the

¹⁰⁶ See above footnote 85.

¹⁰⁷ A. Tsadiras, *The position of the European Ombudsman in the Community system of judicial remedies*, in *European Law Review*, 2007, pp. 607-626.

¹⁰⁸ *Associazione delle cantine sociali venete v European Ombudsman and European Parliament*, Court of First Instance, case T-103/99, order of 22 May 2000, ECLI:EU:T:2000:135.

¹⁰⁹ *Ibid*, para. 46-50.

¹¹⁰ *Frank Lamberts v European Ombudsman*, Court of First Instance, case T-209/00, judgment of 10 April 2002, ECLI:EU:T:2002:94.

¹¹¹ *European Ombudsman v Frank Lamberts*, Court of Justice of the European Union, case C-234/02 P, judgment of 23 March 2004, ECLI:EU:C:2004:174.



complaint. The GC, by contrast, held the complaint admissible to the extent that the EO is a body separate from the European Parliament. From this statement, one may infer that the EO has his own standing and, in any event, could even commit a misconduct leading to his liability in an action for damages. However, the GC ruled that in *Lamberts I* the EO did not commit any breach of his duties. Despite a ruling essentially in his favour, the EO appealed the GC's judgment before the CJEU seeking annulment on the ground that the action should have been declared inadmissible. As Sukksi points out, it seemed that the EO '*sought to immunize himself from actions for damages in general*'.¹¹² The CJEU substantially upheld the GC's judgment on two grounds: first, the EO, as any European Union body, could be in principle called to respond in an action for damages and eventually to be liable; secondly, however, given the broad discretionary powers the EO is vested with, the aforementioned hypothesis remains rare. Irrespective of the likelihood of success of such an action, the EO's independence will not be affected.¹¹³

Lamberts I and *II* are useful to the extent that they clarify the EO's position in the institutional framework of the EU. It is well established that the EO is not an institution but, nonetheless, he has his own legal standing before the CJEU. Furthermore, he has to comply with all the bulk of EU law and can be even deemed liable in action for damages, should the conditions thereof be met.

The exact positioning of the EO in the EU institutional framework aimed at clarifying his potentialities as an influencer on the executive power, the legislative power and the judiciary power. To start with, it now seems self-evident that the EO is not in competition with the EU institutions and, in particular, he has neither the willingness nor the powers to replace the role of the CJEU. The EO's role in developing the rule of law, a citizen-friendly environment and a good administration culture cannot be compared with the tasks performed by a court of law entrusted with interpretative and enforcement powers. Even though the EO can amicably settle disputes, one has to admit that, given the lack of binding force of this settlement, the EO should not be considered as a forum for alternative dispute resolution *strictu sensu*. By contrast and *latu sensu*, if one looks at the decisions of the EO the rate of spontaneous compliance is very high. Indeed, a well-balanced and thoroughly written decision increases the likelihood to be respected because it would entail a higher level of persuasiveness. This is related to the fact that the EO cannot be called upon to investigate the CJEU in its judicial role but might well be involved in any other activities not linked with the performance of its judicial duty, e.g. staff cases or access to non-judicial documents. This, in turn, enhances the accountability of the EO himself who, in turn again, would surely benefit from the very fact that his decisions are highly considered and respected even though lacking binding force. There is thus a

¹¹² Sukksi above footnote 101, at 1769.

¹¹³ *Lamberts II*, para. 48.



virtuous circle according to which EU institutions, citizens and the EO himself benefit of this soft approach.

The influence over the legislative and executive power might respond to different needs and could be more difficult to be appreciated. Indeed, the EO does not act as a watchdog of the institutions regarding their political and legislative duties to the extent that he is only entrusted to investigate cases of maladministration. In correlation, this is proven by the fact that the EO cannot investigate activities performed by the CJEU in its judicial role but could very well be involved in cases dealing with, for instance, staff grievances and access to non-judicial documents.

A parallelism might be drawn with the scope of application of the ECFR, that is, to institutions, bodies, offices and agencies of the Union (Article 51). A classic example relies on the fact that the Commission's legislative proposals and, more generally, EU acts must respect fundamental rights as set forth in the ECFR. Thus, it is a longstanding practice to add a quite stereotypical clause stating that compliance. At a more speculative level, one may also argue in favour of a stricter test, thereby involving the EO consultation in subject matters touching upon EU administrative law. Another example may better explain this assumption. Let us assume that the EU is enacting a new piece of legislation on data protection or access to documents. First and foremost, during the ordinary legislative procedure the EO should be entitled to comment upon it, thus pointing out well in advance possible shortcomings. Secondly, be the legislation a regulation or a directive, it should include a clause making possible to have recourse to the EO in case of a regulation or to NOs in case of a directive, solely in cases of maladministration. This would enhance the EO's role in the institutional framework and increase his standing as a developer of norms of good administration.¹¹⁴

Finally, the position of the EO in the institutional framework could be assessed through an analysis of his relationships with the PETI Committee. The PETI Committee is one of the European Parliament Committees and is specifically entrusted to deal with the EO. Indeed, Article 220 of the European Parliament statute stipulates that the PETI Committee shall examine the cases of maladministration of which is informed by the EO as well as examining the annual report submitted by the EO. It could thus be said that the PETI Committee and the EO have been developing a constant dialogue, as confirmed by our interview. In particular, they both successfully advocated to insert a fundamental rights' protection mechanism in the recast of the Frontex directive.¹¹⁵

¹¹⁴ P. G. Bonnor, *The European Ombudsman: a novel source of soft law in the European Union*, in *European Law Review*, 2000, pp. 39-56; M. E. De Leeuw, *The European Ombudsman's role as a developer of norms of good administration*, in *European Public Law*, 2011, pp. 349-368.

¹¹⁵ See footnote 37.



DISCUSSION AND CONCLUSIONS

The EO plays a key role in the development of the EU rule of law, for everything that concerns the accountability of EU institutions and the development of the right to good administration as enshrined in the ECFR.

The personality of the EO and the political and legal contingencies in the EU scenario can have a decisive impact on his agenda. Our interview explains that the European Ombuds(wo)man has been active even on austerity policies and the migrant crisis.¹¹⁶ Regarding the former, she received complaints, in particular from Spanish citizens regarding mortgages, which, though not falling within the scope of her mandate, were thus referred to NO. However, the Ombuds(wo)man closely cooperates with the European Central Bank to ensure that decisions affecting the lives of citizens are taken in the most transparent manner. For what concerns the latter, the agentification of the EU increased the number of complaints directed against EU agencies. Interestingly though, FRONTEX has not directly been under fire, nevertheless joint operations –carried out in cooperation with national bodies- have been jointly investigated by the EO and the ENO. The Ombuds(wo)man’s suggestion to set up a complaint mechanism has been implemented in the new European Border and Coastguard regulation.¹¹⁷

The positive impact the EO has had is a direct consequence of his structure, power and role. Indeed, a more politicised Ombudsman would be easily under fire for a too close relationship with the Parliament, thus jeopardising his independence. A more judicial Ombudsman would, in turn, easily lose his independence and would become a less powerful copycat court. Even the idea of entrusting him with specific referring and interpretative powers –either toward the CJEU or from ENO- could in the long run be disadvantageous to the extent that would entail a hierarchical relation. This, in turn, would lead to an impoverishment of his independence and to a closer relation with the CJEU, thereby affecting his competence to hear cases of maladministration committed by the CJEU itself.

This study showed that the EO is an independent body able to softly influence the legislative and the judiciary branch of the EU to the benefit of citizens. His mandate should thus remain unaltered. It remains to be seen how the Ombuds(wo)man will cope with new challenges such as Brexit and the

¹¹⁶ The interview with an EO’s official has been carried out by the authors of this study. Response received on 3 February 2017.

¹¹⁷ Article 62 of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC OJ L 251, 16.9.2016, p. 1–76.



rights of citizens working for EU agencies based in the UK. For the time being, and pending the negotiation with the UK, the EO will have the possibility to control that the 'exit agreement' respects the rule of law and does not undermine the rights of EU citizens living in the UK as well as those of the UK citizens living in another Member State. This would not change the EO's role; on the contrary, it would raise the awareness that EU citizens have a non-judicial body able to hear their grievances.

The 2015 annual report¹¹⁸ indicates the key areas in which the European Ombudsman launched investigations, namely, whistle-blowers' protection, transparency in TTIP negotiations, trilogues and transparent law-making. The importance of these aspects for the democratic life of the European Union is also showed by the comments made by the PETI Committee, thereby stressing the need to investigate whether secure reading rooms are in line with the right to good administration, calls for greater transparency during Eurogroup meetings and the Commission's expert group (i.e. the infamous comitology), points out that the Commission needs to ensure more transparency in handling infringement procedure, urges the EO to investigate Member States' compliance with the ECFR suggesting that the EO should implement actions financed through EU funds, suggest the EO to list complaints received outside his mandate.¹¹⁹ In other words, the EO is well aware of the importance of his role and the potentialities enshrined therein, thereby upholding the rule of law and the principle of good administration in the EU legal order.

¹¹⁸ Available at <https://www.ombudsman.europa.eu/it/activities/annualreport.faces/en/67667/html.bookmark> (last accessed 18 February 2017).

¹¹⁹ European Parliament resolution of 24 November 2016 on the annual report on the activities of the European Ombudsman in 2015 (2016/2150/(INI)).



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