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# Maladministration and life beyond legality: The European Ombudsman's paradigm

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## ABSTRACT

The ambition of this article is to illustrate the attractions of thinking beyond legality and the ability of the concept of maladministration to modify established administrative dogma when utilised in a creative and persistent manner as the benchmark against which the legality and propriety of bureaucratic conduct is assessed. To achieve that objective the analysis focuses on the supranational legal order of the European Union and its Ombudsman. Within that context, the transformative force of maladministration is explored in two distinct areas of interest. On the one hand, the transparency of the European Union recruitment competitions has been considerably improved through the introduction of a number of non-justiciable norms that the European Union administration is expected to honour. On the other hand, citizens' involvement in the infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union has noticeably increased thanks to an array of soft law commitments on the part of the European Commission. The theme that runs through the analysis is the importance of maladministration when operating beyond the shadow of legality.

*Keywords:* maladministration, legality, European Union, recruitment competitions, transparency, Article 258 TFEU proceedings

[http://dx.doi.org/  
10.5339/irl.2015.11](http://dx.doi.org/10.5339/irl.2015.11)

Submitted: 19 May 2015  
Accepted: 11 August 2015  
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## I. INTRODUCTION

This article is concerned with the concept of maladministration and its transformative strength when employed in an imaginative and determined fashion as the yardstick against which the legality and propriety of administrative conduct is measured. The example chosen for the purposes of analysis is the European Union legal order and its Ombudsman,<sup>1</sup> but it is suggested that the pertinence of the issue under investigation extends beyond that supranational constitutional setting to other legal environments, be they international or domestic. The driving motivation behind the legal and political developments explored below is the desire to overcome the tight constraints of legality and utilise maladministration innovatively to instil a more participatory and citizen-friendly administrative culture into the bureaucratic mindset. That, in turn, highlights the institutional utility of extrajudicial mechanisms in realms falling beyond the reach of judges' jurisdictional grasp.

The inquiry will proceed in the following manner: initially, there will be a brief discussion of the European Ombudsman's mission, role and powers. The focus will then shift to sketching out the definitional contours of the maladministration concept as perceived and applied in the European Union space. This will be followed by analysis of the manner in which the creative employment of maladministration, as an extrajudicial review standard in the field of European Union recruitment competitions, has substantially bolstered their transparency and by extension strengthened their credibility through the imposition of soft law commitments upon the European Union administration. Following this analysis, consideration is given to the set of non-justiciable norms introduced through maladministration to review the procedural treatment and substantive assessment of infringement complaints by the European Commission under Article 258 of the Treaty on the Functioning of the European Union (hereinafter, TFEU).<sup>2</sup> The discussion will conclude with some general reflections on the significance of maladministration.

## II. THE EUROPEAN OMBUDSMAN

Any informed discussion of the maladministration's transformative strength in the constitutional configuration of the European Union requires adequate understanding of the Ombudsman's functions and the philosophy which permeates his overall mission.

The European Ombudsman has been inserted in the institutional fabric of the European Union with the Treaty on European Union signed on 7 February 1992 in Maastricht. The first incumbent of the office was elected by the European Parliament on 12 July 1995 and took office on 27 September 1995. The rationale for the introduction of the new institution has been consistently twofold. In legal terms, the Ombudsman endeavors to strengthen the protection of citizens' rights and interests in the Union territory through the creation of a non-litigious mechanism for delivery of administrative justice and the provision of a credible alternative to litigation before the Court of Justice of the European Union (CJEU). In political terms, the new institution seeks to promote public awareness and acceptance of the notably complex supranational structure of the European Union, narrow the gap between citizenry and EU administration, and put a human face to its publicly perceived labyrinthine bureaucratic structure.

With a view to attaining the above-adumbrated objectives, the European Ombudsman functions within a specific legal framework comprising of provisions that vary in nature and scope. Articles 24 and 228 of the TFEU, first, list the recourse to the European Ombudsman as an integral part of the Union citizenship, second, determine his role, third, set out his powers and, finally, place maladministration in the center of his investigative mission. Article 43 of the Charter of Fundamental Rights of the European Union elevates the Ombudsman option to the status of EU fundamental right. The Statute of the European Ombudsman, adopted by the European Parliament

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<sup>1</sup>The decisions of the European Ombudsman and the rulings of the Court of Justice of the European Union cited in this article can be found respectively at <http://www.ombudsman.europa.eu/en/cases/home.faces> and [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/), (last accessed September 22, 2015).

<sup>2</sup>It is opportune to note at this juncture that at the start of each parliamentary term the President of the European Parliament publishes in the Official Journal of the European Union a notice calling for nominations for the office of Ombudsman. Nominations must be supported by at least forty Members of the European Parliament who are nationals of at least two Member States. The European Ombudsman is elected by the Plenary of the European Parliament by secret ballot on the basis of a majority of the votes cast. As will be seen below, the Ombudsman's functions are regulated by provisions of the TFEU and his Statute, which was adopted by the European Parliament in 1994 and amended twice in 2002 and 2008.

in 1994,<sup>3</sup> and the implementing provisions drafted by the Ombudsman himself in 2002,<sup>4</sup> amplify Article 228 of the TFEU by detailing the Ombudsman's powers to initiate inquiries, investigate the facts of the case and remedy established instances of maladministration. Each of those three aspects will next be discussed in turn.

## 1. COMMENCEMENT OF INQUIRIES

The Ombudsman is tasked to investigate instances of maladministration in the activities of institutions, bodies, offices, and agencies of the European Union, with the exception of the CJEU acting in its judicial role. Inquiries commence either proactively on the Ombudsman's own volition or reactively in response to complaints launched with him.<sup>5</sup>

If the reactive path is opted for, a number of admissibility conditions must be satisfied cumulatively. More precisely, the following rules govern the admissibility of a complaint:

- (1) the complainant must be an EU citizen or a natural or legal person residing or having its registered office in an EU Member State;<sup>6</sup>
- (2) the complaint must concern an EU institution, body, office or agency;<sup>7</sup>
- (3) the complaint must not relate to activities falling within the judicial role of the CJEU;<sup>8</sup>
- (4) the complaint must concern an instance of maladministration;<sup>9</sup>
- (5) the author and the object of the complaint must be identified;<sup>10</sup>
- (6) there must not be a concluded or pending court proceeding on the subject matter of the complaint;<sup>11</sup>
- (7) there is a time limit of two years to file the complaint which begins at the time the facts on which the complaint is based came to the attention of the complainant;<sup>12</sup>
- (8) the requisite prior administrative approaches to the targeted EU entity have been made;<sup>13</sup> and, in the case of in-staff disputes, the available internal remedies have been exhausted.<sup>14</sup>

In addition to the above, the complaint must also provide "grounds for inquiry",<sup>15</sup> a notion which the Ombudsman approaches negatively. So, for example, grounds for inquiry are lacking when the allegations or the facts on which the complaint is based are being, or have already been, investigated by a competent body, and no important fresh evidence is produced.

There are three points that merit particular attention at this juncture. First, only EU entities fall within the Ombudsman's purview. Authorities established by international law or the domestic law of EU Member States escape the Ombudsman's mandate, even when they apply EU law. Secondly, *actio popularis* complaints<sup>16</sup> are allowed before the Ombudsman, since the complainant does not need to prove any personal involvement or interest in the subject matter of his complaint. Finally, the complaint must contain at least one allegation of an instance of maladministration committed by an EU authority. A fuller analysis of this finding is given in a subsequent section of this article. It suffices here to note that maladministration occurs not only when EU authorities contravene legally binding provisions, but also when they fail to observe non-justiciable commitments.

<sup>3</sup>The 1994 original text has thus far been amended twice, i.e., in 2002 and 2008.

<sup>4</sup>To date the 2002 version has been amended twice, i.e., in 2004 and 2008.

<sup>5</sup>For a detailed treatment, see, Alexandros Tsadiras, *Navigating through the Clashing Rocks: The Admissibility Conditions and the Grounds for Inquiry into Complaints by the European Ombudsman*, Yearbook of European Law 157-192 (2007) and Paul Craig, *EU Administrative Law* 739-761 (2ed. 2012).

<sup>6</sup>Art. 2(2) of the Decision of the European Parliament 94/262, 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, 1994 O.J. (L 113) 15-18, (hereinafter, Decision 94/262).

<sup>7</sup>TFEU art. 228(1).

<sup>8</sup>TFEU art. 228(1).

<sup>9</sup>TFEU arts. 228(1); and Eur. Stat. Ombuds. arts. 2(2); 3(1).

<sup>10</sup>Decision 94/262, art. 2(3).

<sup>11</sup>TFEU art. 228(1); and Eur. Stat. Ombuds. arts. 1(3); 2(7).

<sup>12</sup>Decision 94/262, art. 2(4).

<sup>13</sup>Decision 94/262, art. 2(4).

<sup>14</sup>Decision 94/262, art. 2(8).

<sup>15</sup>TFEU art. 228(1); and Decision 94/262, art. 3(1).

<sup>16</sup>*Actio popularis* complaints are those filed in the name of public rather than private interest.

## 2. POWERS OF INVESTIGATION

The Ombudsman's investigative scheme is characterised by two key features.<sup>17</sup> The first is the principle that he may utilise any investigative tool he considers appropriate for the examination of any particular case pending before him.<sup>18</sup> He may therefore carry out file inspections, conduct on-the-spot investigations, hear witnesses, commission studies,<sup>19</sup> appeal to the public for submission of observations on pending inquiries, in addition to a variety of other practices. If the targeted EU authority is unwilling to cooperate, the Ombudsman may accelerate the pressure by informing the European Parliament, which may make "appropriate representations".<sup>20</sup>

The second core feature is the classification of the Ombudsman's investigative powers into two groupings. Horizontally, the Ombudsman is entitled to contact EU authorities and request access to any information and document originating from them.<sup>21</sup> The Union authorities are expected to satisfy the Ombudsman's request, divulge the relevant information or document and permit the taking of copies of the whole file or of specific documents contained in the file. The aforementioned obligation is however subject to secrecy considerations.<sup>22</sup> Vertically, the Ombudsman is empowered to contact national authorities, which are obliged to provide via their Permanent Representations any information that may contribute to uncovering instances of maladministration by EU authorities. This authority is granted to the Ombudsman unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated, in which case the national authorities concerned may grant the Ombudsman access under the condition that he undertakes not to divulge the provided information.<sup>23</sup>

Two particular implications of the emerging two-dimensional scheme are noteworthy. First, while the Ombudsman is entitled to hear witnesses from EU institutions, he is not empowered to take testimonies from officials of national authorities. That investigative restraint emphasises the necessity of proper and efficient synergy between the European Ombudsman and his national counterparts for a combined, multi-level treatment of cases with both Union and domestic components. Secondly, the vertical investigative powers are more curtailed than the horizontal, given that the former is not only limited by secrecy sensitivities (like the latter) but also by "provisions preventing its [information] being communicated",<sup>24</sup> language that can be argued to permit challenges on confidentiality grounds.

## 3. REMEDIAL POWERS

The Ombudsman's remedial regime can be concisely outlined as follows:<sup>25</sup> once an instance of maladministration has been established, the Ombudsman will normally seek a friendly settlement between the complainant and the targeted institution.<sup>26</sup> If the nature of the case under investigation makes it inappropriate or the involved parties reject it, an amicable settlement will not be reached. In such an event, the Ombudsman must choose between terminating the investigation with a critical remark or pressing on with his inquiry by issuing a draft recommendation.<sup>27</sup> A critical remark is opted for when the instance of maladministration appears to have no general implications and cannot be eliminated anymore.<sup>28</sup> A draft recommendation will

<sup>17</sup>An incisive examination can be found in Anne Peters, *The European Ombudsman and the European Constitution*, 42 *Common Market Law Review* 697-743 (2005) and Alexandros Tsadiras, *Unravelling Ariadne's Thread: The European Ombudsman's Investigative Powers* 45 *Common Market Law Review* 757-770 (2008).

<sup>18</sup>Decision 94/262, art. 3(1).

<sup>19</sup>Art. 5(5) in the Decision of the European Ombudsman adopting implementing provisions, art 2, para. 1 (8 July, 2002), available at, <http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm>, (last accessed September 22, 2015), (hereinafter, implementing provisions).

<sup>20</sup>Decision 94/262, art. 3(4).

<sup>21</sup>Decision 94/262, art. 3(2)(1).

<sup>22</sup>Implementing provisions arts. 5(1), 5(2) and 5(4).

<sup>23</sup>Decision 94/262, art. 3(3).

<sup>24</sup>Decision 94/262, art. 3(3).

<sup>25</sup>For an extensive analysis see generally, Katja Heede, *European Ombudsman: Redress and Control at Union Level*, Kluwer Law International (2000); Päivi Leino, *The Wind is in the North: the First European Ombudsman (1995-2003)*, 10 *European Public Law* 333 (2004); Alexandros Tsadiras, *The European Ombudsman's Remedial Powers: An Empirical Analysis in Context* 38 *European Law Review* 52 (2013).

<sup>26</sup>Decision 94/262, art. 3(5); and implementing provisions art. 6(1).

<sup>27</sup>Implementing provisions art. 6(3).

<sup>28</sup>Implementing provisions art. 7.

be issued, if either of the above two requirements are not met. The targeted institution is expected to respond within three months.<sup>29</sup> In case of rejection, the Ombudsman will conclude the investigation with either a critical remark, if no further action is considered appropriate, or a special report to the European Parliament, if the established instance of maladministration is of the requisite significance.<sup>30</sup> The Committee on Petitions of the European Parliament is responsible for discussing the Ombudsman's special reports and its views are normally ratified by the Plenary by means of a Resolution.<sup>31</sup> The Ombudsman also issues annual reports, where he may stigmatise cases of faulty administrative conduct.

There are at least two particular aspects of the Ombudsman's remedial regime which deserve emphasis. On the one hand, it is readily apparent that his remedial action is guided by a non-adversarial and conciliatory ethos. Once an occurrence of maladministration has been proved, the Ombudsman's, (not only initial but also constant) task throughout the investigative effort is to achieve a friendly solution and bridge the psychological gap between the aggrieved complainant and the recalcitrant administrative authority. On the other hand, the single most defining feature of the Ombudsman's remedial machinery is the complete lack of any legally-binding capacity. The Ombudsman's remedial tools do not produce binding legal effects upon their targeted EU authorities and his decisions generate no enforceable rights for the complainants before courts. The consequential implication of that statement is that EU administration is free to introduce the measures necessary to remedy the established administrative wrongdoing and, if it refuses to do so, the Ombudsman cannot technically do anything beyond submitting a special report to the European Parliament and reprimanding the recalcitrant administrative authority in his annual report. Despite the inability to award legally binding remedies, the Ombudsman's conclusions are customarily accepted and implemented by the addressee institutions. That crucial finding is exemplified by the Ombudsman's achievements, which will be explored further below. What needs to be appreciated here is that those successes in the fields of EU recruitment competitions and the infraction process of Article 258 of the TFEU have been premised on the creative employment of the notion of maladministration by the Ombudsman. We shall therefore focus our attention on the intricacies of maladministration.

### III. THE CONCEPT OF MALADMINISTRATION

It is important to realise from the outset that maladministration is a rich concept, whose precise definitional contours vary depending on the background constitutional traditions against which it is projected.<sup>32</sup> As already explained, for the purposes of the present analysis, the EU constitutional setting has been chosen to frame our inquiry.

Maladministration is utilised by the European Ombudsman in two distinct ways. In procedural terms, it is employed as an admissibility criterion for the incoming complaints: the complainant ought to make at least one allegation of an instance of maladministration, otherwise his case will be rejected as inadmissible. In substantive terms, it serves as the benchmark against which the administrative conduct of the Union bureaucracy is assessed and the merits of each case are considered.

Despite its critical importance for the Ombudsman's mission, no definition of maladministration is found either in the TFEU or the Ombudsman's Statute. The first attempt to delineate the concept was made in the 1995 Annual Report, where the Ombudsman put together an indicative list of attitudes constituting maladministration: administrative irregularities and omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay, and lack or refusal of information.<sup>33</sup> In 1997 the European Parliament requested a clearer definition.<sup>34</sup> In response, the Ombudsman declared in his 1997 Annual Report that "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it"<sup>35</sup> and "when the Ombudsman investigates whether a Community

<sup>29</sup>TFEU art. 228(4); Decision 94/262, art. 3(6) and implementing provisions art. 8(3).

<sup>30</sup>Implementing provisions art. 8(4).

<sup>31</sup>Eur. Parl. R. P. Annex VII, XX.

<sup>32</sup>See generally on this point, K.C. Wheare, *Maladministration and Its Remedies*, (Stevens & Sons, 1973).

<sup>33</sup>[1995] EOAR 8.

<sup>34</sup>Eur. Parl. Res. on the annual report on the activities of the European Ombudsman in 1996, C4-0293/97- A4-0211/1997, at point 4.

<sup>35</sup>[1997] EOAR 23.

institution or body has acted in accordance with the rules and principles which are binding upon it, his first and most essential task must be to establish whether it has acted lawfully”.<sup>36</sup>

A careful look at the Ombudsman’s proclamations and investigative practice reveals that he comprehends maladministration as a double-layered notion. The lower, thick and stiff tier concerns legality and comprises the legally binding provisions of the primary and secondary European Union law, as well as the case-law of the Union courts. The upper, slim and flexible tier pertains to propriety and consists of rules and principles that the Ombudsman considers to regulate the European Union’s administrative attitude notwithstanding their inability to produce any binding legal effects. A prime example in this regard, is the Code of Good Administrative Behaviour, a text drafted by the Ombudsman himself which formally lacks any binding legal force but for the purposes of his investigations, is deemed to govern the delivery of Union administrative services.

The above-adumbrated definitional duality of maladministration influences the mutual demarcation of the jurisdictional realms occupied respectively by the European Ombudsman and the Union judiciary by introducing a pattern of concentric circles. The inner-ring comprises of matters falling under the rubric of legality and is shared by the Ombudsman and the Union judges. To avoid duplication of effort and clash of opposing decisions, Article 228(1), subsection 2 of the TFEU and Articles 1(3) and 2(7) of the Ombudsman’s Statute make sure that the judicial path takes precedence over the extrajudicial option and the Ombudsman may not question the wisdom of judicial review. The outer circle of the concentric jurisdictional arrangement pertains to propriety and remains the exclusive preserve of the European Ombudsman. It is not therefore fortuitous that he consistently endeavours to shift the boundaries of this area outwards through the introduction of an expanding range of soft law or non-justiciable commitments upon the Union administrative apparatus. That tendency to escape the myopic confines of legality and utilise maladministration’s outer ring innovatively reveals itself more abundantly in two distinct thematic areas: transparency in EU recruitment competitions and individual’s rights in the centralised infraction process of Article 258 of the TFEU. The two, in turn, will be considered next.

#### IV. TRANSPARENCY IN RECRUITMENT COMPETITIONS

Recruitment competitions provide the EU bureaucratic machinery with the workforce which keeps its cogwheels in motion. Prior to 1 January 2003, every EU institution was responsible for launching and managing its own competition. As of that date, the recruitment competitions in the EU have been organised in a centralised manner by the European Personnel Selection Office (EPSO).<sup>37</sup> Candidates failing the written or, subsequently, the oral tests for recruitment may either bring an action before the Civil Service Tribunal under Article 270 of the TFEU or submit a complaint to the European Ombudsman under Article 228, TFEU. The judicial path must be preceded, by the EU authority’s rejection of an appeal under Article 90(2) of the Staff Regulations, otherwise the action before the court will be inadmissible. By way of contrast, there is no obligation to exhaust the Article 90(2) procedure, if the extrajudicial alternative of the European Ombudsman is opted for.

Transparency in recruitment procedures is a broad concept. For the purposes of our analysis it is considered to denote access to the marked examination scripts and the evaluation criteria upon which the substantive assessment of the candidates’ performance is premised, including the correct answers. To demonstrate the transformative might of maladministration as a benchmark of review, a certain measure of comparison between the judicial route and the extrajudicial path needs to be introduced. We shall therefore first examine the EU judges’ outlook within legality and then explore the Ombudsman’s thesis within the propriety component of the maladministration concept.

##### 1. THINKING WITHIN LEGALITY

The leading case in the area under investigation is *De Mendoza Asensi v. Commission* of 12 February 2014.<sup>38</sup> The factual background to the dispute can be concisely described as follows:

<sup>36</sup>[1997] EOAR 24.

<sup>37</sup>Decision of the Secretaries-General of the European Parliament, the Council and the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions, and the Representative of the European Ombudsman of 25 July 2002 on the organisation and operation of EPSO, [2002] OJ L 197, p. 56.

<sup>38</sup>Case F-127/11 of 12 February 2014, *Gonzalo de Mendoza Asensi v. European Commission*, not yet published.

in March 2010, EPSO published a competition notice in the Official Journal of the European Union to constitute a reserve from which to recruit administrators. The applicant passed the admission tests online and subsequently sat for the exams held at an assessment centre in Brussels. A few months later, EPSO informed him that the selection board had decided that his results fell short of the minimum threshold and provided a document entitled “competency passport,” which listed the marks obtained for each of the tests, along with the selection board’s comments. In response, the applicant requested that the non-admission decision be reviewed and that he be granted access to several documents and pieces of information and, in particular, the questions on which he had failed, the reasons why his answers had been incorrect, and the assessment sheets used for the written and oral tests. The applicant’s request was rejected, which he then turned to the European Union Civil Service Tribunal alleging that EPSO infringed the obligation to state reasons laid down in Article 25 of the Staff Regulations, insofar as it refused to provide him with the requested information.

In its ruling, the Tribunal weighed the obligation to state reasons against the need to observe the secrecy surrounding the proceedings of selection boards in recruitment competitions. Within that context, selection boards were neither required to specify which of the candidate’s answers were considered inadequate nor to explain why that was so. Selection boards were not required, in discharging their obligation to state reasons, to provide candidates with their marked examination scripts, the reasons why their replies were judged erroneous, or the evaluation grids used for the written and oral tests, since those documents were an indispensable component of the selection boards’ comparative assessment and were therefore covered by the secrecy surrounding their proceedings. In light of the above, the mere communication to the candidate of the marks he had obtained in the various competition tests was, in principle, considered to constitute an adequate statement of the reasons on which the selection board’s decision was based. As a result, the applicant’s plea for additional documentation was rejected.

The above judgment exhibits the Tribunal’s readiness to acknowledge the special concerns applicable in recruitment competitions. However, although the ruling is lucid in its identification of the opposing pressures, (statement of reasons versus secrecy) it is far less convincing in its outcome of the balancing exercise. It is submitted that the Tribunal placed undue weight on the secrecy side of its judgemental scale with the consequential implication being the obvious curtailment of transparency and the attendant deterrence of potential litigants to challenge administrative wisdom. While the cogency of the judges’ ruling is disputable, its practical ramifications are not: within the realm of legality, EU bureaucracy is not burdened by any justiciable obligation to provide candidates in recruitment competitions with their marked examination scripts and the criteria on which the marking was based. Thankfully, life beyond legality proved more generous.

## 2. THINKING BEYOND LEGALITY

What was denied by judges in the field of legality, was eventually gained by the Ombudsman in the space of propriety: for the purposes of his inquiries, EU administration is expected to grant participants in recruitment competitions access both to their marked examination scripts and the evaluation criteria. Those achievements can only be understood in the light of the incremental accumulation of commitments over time. To improve clarity and understanding, our analysis will be divided into two temporal phases, the one predating and the other postdating EPSO’s genesis.

### 2.1. Pre-EPSO era

Secrecy in EU recruitment procedures was an early source of constant complaining to the European Ombudsman.<sup>39</sup> The plethora of pertinent complaints evidenced the candidates’ widespread frustration with the Commission’s enduring refusal to disclose the evaluation criteria,<sup>40</sup> divulge the identities of the selection board members<sup>41</sup> and allow candidates access to the

<sup>39</sup>See the Ombudsman’s speech in Oslo, 31 May 1997 and his speech at the 10th anniversary of the Court of First Instance, Luxembourg, 19 October 1999.

<sup>40</sup>Complaint 46/27.7.95/FVK/B-DE; complaint 659/24.6.96/AEKA/FIN/IJH; complaint 675/2.7.96/AL/FIN/KT; complaint 940/11.10.96/AS/SW/BB.

<sup>41</sup>Complaint 216/08.11.95/MH/A; complaint 252/22.11.95/TMF/VK; complaint 16/17.1.95/GS/IT; complaint 659/24.6.96/AEKA/FIN/IJH; complaint 850/3.9.96/IIA/FIN/KT.

marked copies of their own examination papers.<sup>42</sup> Due to instances similar to the one described above, in November of 1997, the Ombudsman launched an inquiry on his own volition requesting that he be informed whether the Commission would envisage (i) permitting applicants to take the written questions with them from the examination room, (ii) communicating the evaluation criteria to applicants who so requested, (iii) divulging to the applicants the names of the members of the selection board and (iv) allowing applicants access to the corrected copies of their own examination scripts.<sup>43</sup> In March 1998, the Commission replied by accepting the implementation of the first two points, however rejecting the remaining two. Discontent with that reaction, one year later the Ombudsman addressed a draft recommendation to the Commission requesting that it comply with all four points raised in his letter opening the investigation.<sup>44</sup> In its reply of July 1999, the Commission expressed its willingness to disclose the names of selection board members in recruitment competitions however, reaffirmed its refusal to permit candidates access to their examination scripts, be they marked or not. Faced with the Commission's waning but persistent obsession with secrecy, in October of 1999, the Ombudsman submitted a special report to the European Parliament recommending that the Commission, in its future recruitment competitions and as of 1 July 2000 at the latest, should grant candidates access to their own marked examination scripts upon request.<sup>45</sup> Crumbling under the increased pressure, the Commission eventually welcomed the Ombudsman's recommendation in December 1999, and as of 1 July 2000, it allowed candidates to obtain copies of their corrected examination papers.<sup>46</sup> The Commission's decision only concerned recruitment competitions and did not extend to any other type of selection procedure.

The candidates' access to their own marked examination scripts in recruitment competitions also proved to be a contentious issue for the European Parliament. Between April 1999 and January 2000, while his anti-secrecy battle against the European Commission reached its final and most crucial stage, the Ombudsman received a bundle of complaints challenging the Parliament's refusal to provide copies of their own marked examination papers to participants who so requested.<sup>47</sup> The Ombudsman's investigations culminated on 27 July 2000, in the adoption of four identical draft recommendations to the European Parliament to the effect that it should revisit its policy and provide the complainants with their corrected papers.<sup>48</sup> In its reply of November 2000, the European Parliament committed itself to permitting the requested access in recruitment competitions organised as of 1 July 2001; it left, however, the question hanging as to how participants in earlier competitions, including the instant complainants, would be treated. The Parliament eventually clarified its stance in April 2001, first by satisfying the complainants' requests and, second, to forward a copy of their own marked examination papers to any candidate who so wished from then on.<sup>49</sup>

The Council of the European Union was next to find its policy on access to marked examination scripts under the investigative scrutiny of the European Ombudsman. In December 2002, a German citizen, who had unsuccessfully participated in a competition for clerical assistants

<sup>42</sup>Complaint 675/1.7.96/AL/FIN/KT; complaint 773/29.7.96/SS/FIN/PD; complaint 940/11.10.96/AS/SW/BB; complaint 105/97/PD; complaint 142/97/PD; complaint 365/97/JMA; OI 674/COMLA/F/PD.

<sup>43</sup>Own initiative inquiry 1004/97/(PD)GG. For the manner in which secrecy related complaints were treated pending the outcome of the inquiry see complaint 365/97/JMA; complaint 466/97/PD; complaint 880/98/BB; complaint 1014/98/PD; complaint 1239/98/IP.

<sup>44</sup>Draft recommendation 1004/97/PD; press release No 3/99 of 22 March 1999.

<sup>45</sup>Special report 1004/97/(PD)/GG; press release No. 13/99 of 22 October 1999. The Ombudsman's report was endorsed by the Petitions Committee in October 2000 [see press release No 20/2000 of 12 December 2000 and Report of 12 October 2000 on the special report from the European Ombudsman to the European Parliament following the own initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures, PE 294.125, C5-0082/2000 – 2000/2048 (COS) Committee on Petitions] and the Plenary of the European Parliament a month later [see European Parliament resolution of 17 November 2000 on the special report from the European Ombudsman to the European Parliament following the own initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures, A5-0280/2000, C5-0082/2000 - 2000/2048 (COS)].

<sup>46</sup>Press release No. 16/99 of 15 December 1999. See also, complaint 1317/98/VK; complaint 884/99/GG; complaint 906/99/IP; complaint 679/2000/OV; complaint 324/2003/MF; and complaint 1917/2003/(BB)MHZ.

<sup>47</sup>Complaint 457/99/IP; complaint 610/99/IP; complaint 1000/99/IP; complaint 25/2000/IP.

<sup>48</sup>Draft recommendation 457/99/IP; draft recommendation 610/99/IP; draft recommendation 1000/99/IP; draft recommendation 25/2000/IP; press release No. 15/2000 of 31 July.

<sup>49</sup>Decisions on complaints 457/99/IP; 610/99/IP; 1000/99/IP; and 25/2000/IP. See also, press release No. 11/2001 of 18 May 2001 and complaint 697/2001/IP.

organised by the Council, launched a complaint requesting that she be given a copy of her own marked examination paper.<sup>50</sup> In April of 2003, following the Council's refusal, the Ombudsman issued a draft recommendation to the effect that the Council should grant the complainant access to her own marked examination script.<sup>51</sup> Succumbing to Ombudsman's pressure, the Council finally decided in July 2003, to provide the complainant with the requested copy as well as the evaluation sheet of the selection board.<sup>52</sup> The Council's new openness and friendly approach was reiterated a few months later in a similar case before the Ombudsman.<sup>53</sup>

## 2.2. EPSO era

The analysis of the developments which took place in this particular period will be structured around the key themes of access to marked examination scripts and evaluation criteria.

### 2.2.1. Marked examination scripts

EPSO's strategy, vis-à-vis its predecessors' commitment to allow candidates' access to their own marked examination paper, on the one hand, and the Ombudsman's reaction to EPSO's related tactics, on the other, are two intimately interwoven issues in which elements of continuity and change can clearly be discerned.

On *the continuity* side, EPSO appears to have largely respected the commitment entered into by its forerunners and has routinely provided candidates who so requested with copies of their own corrected examination scripts. Similarly, the Ombudsman appears to have maintained his pre-EPSO thesis that it is perfectly acceptable for the recruiting authority to provide copies of the unmarked examination paper and of the selection board's final evaluation sheet in substitution for the corrected examination script.<sup>54</sup>

On *the change* side, there appears to be a shift of focus from the *availability* of the selection board's evaluation sheet to the *adequacy* of the information it contains. Complaint 674/2004/(MF) PB was the turning point. In response to a request for a marked copy of his examination paper, the complainant received copies of his unmarked test script and of the evaluation sheet containing the selection board's comments. He argued that the practice of substituting the latter for the former prevented candidates from fully comprehending their mistakes and improving their performances in future competitions. The Ombudsman considered that the evaluation sheet must provide the candidate concerned with sufficiently clear and detailed information in order to enable him to understand the errors and weaknesses identified by the selection board in the candidate's paper.<sup>55</sup>

The adequacy rhetoric was soon extended to other types of tests<sup>56</sup> and eventually mutated into a discourse over the transparency of the evaluation criteria employed by selection boards in

<sup>50</sup>Complaint 2097/2002/GG.

<sup>51</sup>Draft recommendation 2097/2002/GG.

<sup>52</sup>Decision on complaint 2097/2002/GG; press release No. 16/2003 of 19 September 2003.

<sup>53</sup>Decision on complaint 2059/2002/IP. Of particular interest is Case T-371/03 *Vincenzo Le Voci v. Council* [2005] FP-I-A-00209, FP-II-00957, para. 126, where the Court of First Instance (now General Court) held that "in accepting the recommendation of the European Ombudsman in Case 2097/2002/GG the Council did not in any way undertake to disclose marked tests in future on a systematic basis, as the scope of that decision of the Council was limited to that particular case". The Ombudsman's view on the precedential force of cases 2097/2002/GG and 2059/2002/IP is diametrically antithetical to that of the European judges.

<sup>54</sup>See, in that respect complaints 2059/2002/IP, 324/2003/MF, 774/2003/ELB, 1899/2003/OV, 2028/2003/(MF)PB, 75/2004/(BB)(TN)BB, 413/2004/(MF)PB, 2400/2004/(JMA)TN, 1459/2005/GG, 1689/2006/JF. See also, 01/8/2006/BU, par. 26. The copies of the unmarked test paper and of the selection board's evaluation sheet must be requested within a given deadline (complaint 3406/2006/JF) and be provided in a timely manner [complaint 2179/2009/(TS) ELB]. For the sake of clarity, it is emphatically stressed that according to well established case-law access to the evaluation sheets prepared by individual examiners is prohibited, as they are considered preparatory documents leading to the final evaluation sheet of the selection board, see complaint 1899/2003/OV, par. 2.6 and complaint 2596/2007/RT, par. 3.3. The same veil of secrecy justifiably covers any personal comments made by the members of the selection board, see complaint 75/2004/(BB)(TN)BB, pars 1.6 and 4.7. A relevant request was made in complaint 1172/2006/(GK)PB, par. 2.8.

<sup>55</sup>Para. 1.8. The same dogma is repeated in a number of cases concerning translation tests: 1953/2003/(ADB)PB, 2961/2004/PB, 1733/2005/BU, 1744/2005/IP, 2053/2005/IP.

<sup>56</sup>See, e.g. complaint 1172/2006/(GK)PB, para. 2.6:

In his decision on complaint 674/2004/PB, the Ombudsman . . . noted that the evaluation sheet must provide the candidate concerned with sufficiently clear and detailed information in light of the

recruitment competitions.<sup>57</sup> It is not therefore fortuitous that the precise content of the evaluation sheets currently expected of selection boards has been determined, as will next be seen, in the course of an own initiative investigation into the candidates' access to the applicable evaluation criteria.

### 2.2.2. Evaluation criteria

The communication to candidates who so requested of the criteria used to evaluate their performances was one of the commitments made by the Commission in response to the 1997-1999 own initiative inquiry into the impenetrability of recruitment procedures. The advent of EPSO appears to have led to the renegotiation of that undertaking.

Early into the EPSO era, a number of complaints revealed renewed dissatisfaction amongst candidates with two key issues: first, the secrecy surrounding the evaluation criteria formulated by selection boards for the purpose of assessing written and oral tests and, secondly, the lack of information on the marks awarded for the separate parts of the tests.<sup>58</sup> The Ombudsman therefore decided, in October 2005, to open an own initiative investigation into those matters.<sup>59</sup> For the purposes of the inquiry, the concept of "selection criteria" was employed as a three-layered notion. It comprised of the following: (a) general criteria elaborating upon those already laid down in the competition notice;<sup>60</sup> (b) marking methods, such as the weighing of questions and the value of the answers given;<sup>61</sup> and (c) instructions concerning the correctness, adequacy, structure, (and so-forth) of candidates' replies to a specific test.<sup>62</sup> The EPSO agreed to communicate the criteria under (a) to candidates; however refused to disclose the criteria of (b) and (c) by invoking the case-law that acknowledged the secrecy of selection boards' proceedings as well as invoking a number of practical and administrative considerations.<sup>63</sup> The Ombudsman found those arguments unconvincing and in July 2008, he addressed a draft recommendation to the effect that EPSO should disclose to candidates, at their request, the evaluation criteria for written or oral tests and the detailed breakdown of marks awarded to them for their performance, under the condition, however, that the requested information was already available.

The sought-after development came to fruition on 2 December 2008, when the EPSO submitted its comments on the Ombudsman's recommendation. It explained that, although it could not give additional information to applicants who had participated in competitions already held, it was receptive to proposals fostering the transparency of recruitment competitions. It went on to state that, with respect to written tests in future recruitment competitions, EPSO would propose to the

#### Footnote continued

purposes identified in his above-mentioned inquiry. Furthermore, he explained how this requirement could be implemented in practice in relation to evaluation sheets concerning translation tests ... (t)he Ombudsman notes that the present case concerns an evaluation sheet prepared for the assessment of an essay aimed at testing the candidate's specialist knowledge, comprehension and drafting skills, as well as ability to analyse and summarise. In this regard, the Ombudsman considers that the basic requirement that sufficiently clear and detailed information must be provided to candidates applies to such an evaluation sheet.

A similar statement is made in complaint 1483/2006/SAB, pars 1.4 and 1.5.

<sup>57</sup>See, complaint 2589/2006/BU; complaint 2900/2006/BU; complaint 32/2007/JF; complaint 1143/2007/(MHZ)RT.

<sup>58</sup>See, complaint 2097/2003/(ADB)PB, paras. 2.4 to 2.9; complaint 2028/2003/(MF)PB, paras. 1.1 to 1.8; complaint 413/2004/(MF)PB, paras. 1.9 and 1.10 prompting the initiation of own initiative inquiry OI/5/2005/PB. Complaints 548/2003/MF, 1876/2003/ADB, 2168/2004/GG, 2899/2006/ELB are also of pertinence. For the treatment of complaints pending the conclusion of the own initiative investigation see the following: 1953/2003/(ADB)PB; 75/2004/(BB)(TN)BB; 2961/2004/PB; 3553/2004/(PB)WP; 575/2005/BB; 1733/2005/BU; 1744/2005/IP; 2053/2005/IP; 2937/2006/DK; 50/2007/DK; 801/2007/ELB; 1143/2007/(MHZ)RT.

<sup>59</sup>OI/5/2005/PB. Interestingly enough the investigation was assigned to the legal officer who had dealt with the complaints which triggered the own initiative inquiry.

<sup>60</sup>"For example, the criterion 'thorough knowledge' of a language might be specified by the selection board as implying, inter alia, the absence of spelling and grammar errors", letter of further inquiry addressed by the European Ombudsman to the Director of EPSO on July 3, 2007, p. 2.

<sup>61</sup>"For a translation test, the selection board may, for instance, decide that a serious vocabulary error ... leads to the deduction of one point, while a minor vocabulary error ... leads to the deduction of half a point". *Id.*

<sup>62</sup>"These instructions might include either authoritative rules to be respected by the markers ... or simple guidelines about ... what could constitute good or bad answers (usually the former) to the questions or tasks posed in the written test [for a translation test, these guidelines might consist of suggested translation choices for specific terms or phrases; for an essay test, it might consist of model answers ... ]". *Id.*

<sup>63</sup>For details, see paras. 1.3 and 1.4 of the Ombudsman's draft recommendation concerning OI/5/2005/PB.

selection boards the use of a model evaluation sheet which contained: (a) the evaluation criteria set out in the competition notice and the level of performance attained (ranging from excellent to insufficient), and (b) in addition to the global mark, the partial marks awarded by the board for each criterion specified in the competition notice. This new evaluation sheet could be obtained, upon request, by applicants who failed the written tests or who were not invited to an interview.<sup>64</sup> As to the oral tests, EPSO expressed its intention to introduce a similar rule for all future competitions. For instance, by introducing a measure that allows all applicants who have failed the oral test, (interview) or who are no longer featured on the reserve list, to request access to the breakdown of their marks for that test, in addition to the global mark that they will have already received.<sup>65</sup> Against this background, the Ombudsman concluded his own initiative investigation on 16 December 2008, expressing his satisfaction with EPSO's response.

Appreciation of the practical implications flowing from the 2005-2008 inquiry demands careful reading of EPSO's response. Three important issues deserve particular attention. The first relates to the *temporal scope* of EPSO's commitments. As is evident from the extracts quoted above, the measures which EPSO undertook to introduce a view to improve transparency of the evaluation criteria, exclusively concerned "future recruitment competitions" which was published as of 2 December 2008. EPSO's statements had therefore only prospective force. The retrospective component was not, however, late to come. In less than three weeks, on 19 December 2008, the European Ombudsman closed a case in which EPSO, further to a draft recommendation that was addressed five months earlier, eventually provided the complainant with the marks awarded by the selection board to the different parts of her oral test.<sup>66</sup> The crucial fact was that the complainant was an unsuccessful candidate in a competition announced in March 2004, well beyond the temporal reach of the 2008 commitment.

The second issue of interest pertains to the *personal scope* of EPSO's commitments. The new, open and friendly approach only concerned "applicants who failed the written tests or who were not invited to an interview"<sup>67</sup> and to "all applicants who have failed the oral test (the interview), or who no longer feature on the reserve list"<sup>68</sup>. Therefore, successful candidates fell outside the personal reach of EPSO's promises. That shortcoming was quickly remedied. In April 2009, the Ombudsman concluded the investigation of a complaint raising the question of successful candidates' access to their marks.<sup>69</sup> The complainant passed the tests of an open competition and his name was subsequently placed on the corresponding reserve list. He requested that he be informed of the marks he had obtained in the different tests. EPSO rejected his request by reference to its established practice of providing this type of information only to unsuccessful candidates. In response to the Ombudsman's effort for a friendly settlement, EPSO decided on 30 January 2009, to allow successful and unsuccessful candidates alike to have access to their marks in recruitment competitions.

The third point of significance concerns *the nature* of EPSO's commitments. Due consideration must be given to the fact that the Ombudsman's draft recommendation of July 2008, discussed disclosures of evaluation criteria and breakdowns of marks which already existed.<sup>70</sup> It is therefore apparent that the Ombudsman's conception of EPSO undertakings was cast in passive terms: EPSO was only required to permit access to already available information, without there arising any positive obligation to produce it in the first place.<sup>71</sup> With its December 2008 response, however, and the reference to the drafting of a model evaluation sheet containing

<sup>64</sup>01/5/2005/PB decision closing, para. 23.

<sup>65</sup>*Id.* at para. 24.

<sup>66</sup>Complaint 1000/2006/TN.

<sup>67</sup>Para. 23 of Decision 01/5/2005/PB.

<sup>68</sup>*Id.* at para. 24.

<sup>69</sup>Complaint 2346/2007/JMA.

<sup>70</sup>The precise wording of the draft recommendation is as follows: "EPSO should disclose to candidates, at their request, the evaluation criteria, if any, adopted by the selection boards for written or oral tests, and should furthermore disclose to candidates, at their request, the detailed breakdown of marks, if any, awarded to them for their performance" (emphasis added).

<sup>71</sup>That is clearly reflected in Complaint 1953/2003/(ADB)PB, paras. 2.21 and 2.22, where the Ombudsman held that:

the rules on public access to documents only apply to documents that already exist. They do not contain a right to request that documents should be drawn up. Moreover, the Ombudsman notes that, in view of the wide margin of discretion that the Selection Board enjoys when it evaluates the

specific information, EPSO appears to have taken, deliberately or not, that extra step on its own. As intuitively expected, the Ombudsman was eager to capitalise on that self-imposed, proactive component of EPSO's promises. Complaint 18/2010/IP provides an apt illustration thereof.<sup>72</sup> The complainant was excluded from an open competition and she received the selection board's evaluation sheet containing a short description of the content of the written test, the purpose of the evaluation, her aggregate mark and the global assessment of her test. The sheet did not, however, provide the detailed breakdown of her marks, given that the selection board decided not to award partial marks for each evaluation criterion. An array of reasons were put forward to explain that decision. The Ombudsman rejected them and reminded EPSO of its 2008 proactive commitment to propose to selection boards that they use an evaluation sheet which sets out the partial marks awarded by the board for each criterion specified in the competition notice. A critical remark inevitably followed along with a note that the Ombudsman was considering the possibility of opening yet another, third inquiry on his own volition into the level of transparency in EU recruitment procedures. Such an initiative has not thus far been taken.

## V. TRIANGULARISATION OF THE INFRACTION PROCESS

The second thematic area, which has benefited greatly from the Ombudsman's wonderings beyond the tight confines of legality, is that of Article 258 of the TFEU complaints. Some background knowledge is useful to better appreciate the findings of the ensuing discussion.

The enforcement of EU law takes place at two distinct levels (the principle of dual vigilance). At the national level and in decentralised fashion, private parties may have direct recourse to national courts with a view to vindicating their EU rights. At the supranational level and in centralised manner, the European Commission is tasked to ensure the proper application of EU law in the Union space. More precisely, Article 258 of the TFEU empowers the European Commission, acting as the Guardian of the Treaties, to commence infringement proceedings against Member States allegedly in violation of their EU obligations.

The infringement proceedings are laborious and time-consuming. Their structure can be concisely presented as follows:<sup>73</sup> the first formal stage of the process is the letter of formal notice, by which the Member State is informed that an infringement of an EU norm might be occurring. The Member State is normally given two months to reply. The next step is the reasoned opinion, by which the European Commission officially determines that the Member State is in breach of its EU legal obligations and requests that the situation be remedied within a given time limit, normally two months. If the Member State fails to comply with the reasoned opinion within the prescribed period, the European Commission has the discretion to bring the case before the CJEU.

Proceedings along the above lines can commence either on the Commission's own initiative or in response to a complaint. The European Commission has customarily recognised the importance of private parties as a prime source for detecting EU law breaches at the domestic level and encouraged individuals' participation in EU law enforcement.<sup>74</sup> Notwithstanding the acknowledged significance of private parties in identifying instances of state noncompliance, the Commission has consistently viewed the centralised law enforcement mechanism of Article 258 of the TFEU as a bilateral, rather than a trilateral, game between itself and the defaulting Member State in which individuals enjoy no formal status and are subsequently stripped of any legally binding rights. As will be discussed, the thesis advanced by the EU bureaucracy is perfectly aligned with the dogma promulgated by the EU judiciary.

*Footnote continued*

performance of candidates, the Board is, in principle, under no obligation, as a matter of law, or under principles of good administration, to establish model translations.

See also, complaint 1689/2006/JF, para. 1.6.

<sup>72</sup>Of relevance are also complaints 1251/2009/(CK)ANA, 14/2010/ANA, 1863/2010/VIK, 2050/2011/RT, 2430/2011/RT, 2022/2011/RT.

<sup>73</sup>See in that regard, [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/index_en.htm), (last accessed September 22, 2015).

<sup>74</sup>See, the Commission's annual reports on its monitoring of the application of EU law, available at, [http://ec.europa.eu/eu\\_law/infringements/infringements\\_annual\\_report\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm), (last accessed September 22, 2015)

## 1. THINKING WITHIN LEGALITY

A weighty case which fully encapsulates the EU judges' sentiments on the individuals' role in the infraction process, is *Star Fruit Company v. Commission* of 14 February 1989.<sup>75</sup> Star Fruit, a Belgian trader specialised in the importation and exportation of fresh bananas, considered that it had been adversely affected by the system for supplying the banana market in France which it believed was contrary to EU law. It informed the Commission accordingly and requested that infringement proceedings be initiated against France. When the request was eventually declined, Star Fruit took the Commission to the CJEU, arguing that the Commission's refusal to set the infraction process in motion against France under Article 258 of the TFEU amounted to a failure to act, which was reviewable under Article 265, TFEU.

The EU judges ruled the action inadmissible. It was clear, they held, from the overall scheme of Article 258, TFEU that the European institution had the right, and not the duty, to apply to the CJEU for a declaration that the alleged breach of obligations had indeed occurred. The Commission was therefore institutionally vested with the discretionary power to initiate such proceedings, if and when it considered it timely and appropriate. The latitude given to the Commission precluded individuals from requiring the EU institution to adopt a specific position on their complaints. In any event, by requesting the Commission to initiate proceedings under Article 258 of the TFEU, the applicant was actually seeking the adoption of an act which was not of direct and individual concern to it and which it could not, therefore, challenge by means of an action for annulment.

The judges' message is crucial and powerful. In conceptual terms, the Union judiciary approaches Article 258 of the TFEU proceedings as an elite, horizontal and bipolar bargaining process between the European Commission and the recalcitrant Member State rather than a participatory, triangular construct whereby private complainants are treated as equal interlocutors. In practical terms, the Luxembourg court left the European Commission with a broad margin of discretion in its treatment of Article 258, TFEU grievances, and consequently declined to acknowledge any substantive or procedural rights to individuals in the infraction process, since they are not formally viewed as parties thereto.<sup>76</sup> Once again, life beyond legality had more to offer.

## 2. THINKING BEYOND LEGALITY

What was declined by the judiciary in the realm of legality was introduced by the Ombudsman in the terrain of propriety: contrary to the established judicial dogma, the European Ombudsman employed the concept of maladministration in a determined fashion and triggered the introduction of an array of soft-law guarantees for Article 258 of the TFEU complainants that the Commission is expected to honour when handling infringement grievances. Those non-justiciable undertakings are currently set out in the European Commission's 2012 Communication on the handling of relations

<sup>75</sup>*Star Fruit v. Commission*, (247/87) [1989] E.C.R. I-291. See also, *Société nationale interprofessionnelle de la tomate (Sonito) v. Commission*, (87/89) [1990] E.C.R. I-1981; *Smanor v. Commission*, (T-182/97) [1998] E.C.R. II-271; *Petrie v. Commission*, (T-191/99) [2001] E.C.R. II-3677; *Commission v. Greece*, (C-200/88) [1990] E.C.R. I-4299.

<sup>76</sup>The academic commentary on the bipolar character of the infringement proceedings under TFEU art. 258 is vast; see e.g., Michael Erhart, *Der Europäische Bürgerbeauftragte – ausgewählte Rechtsfragen*, 5 *Journal für Rechtspolitik* 278 (1997); Carol Harlow, *European Administrative Law and the Global Challenge*, Robert Schuman Centre Working Paper No. 98/23, European University Institute (May 1998) available at, <http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Publications/WorkingPapers/9823.aspx>, (last accessed September 22, 2015); Richard Rawlings, *Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement*, 6 *Eur. L. J.* 4 (2000); Peter Bonner, *Institutional Attitudes in Context: A Comment on Rawlings' 'Engaged Elites—Citizen Action and Institutional Attitudes in Commission Enforcement'* 7 *Eur. L. J.* 114 (2001); Ian Harden, *What Future for the Centralized Enforcement of Community Law?* 55 *Current Legal Problems* 495 (2002); Rodolphe Munoz, *La participation du plaignant à la procédure d'infraction au droit communautaire diligentée par la Commission*, 472 *Revue du Marché Commun et de l'Union Européenne* 610 (2003); Paul Magnette, *Between Parliamentary Control and the Rule of Law: the Political Role of the Ombudsman in the European Union*, 10 *J. of Euro. Pub. Pol'y* 677 (2003); Anne Peters, *The European Ombudsman and the European Constitution*, 42 *Common Market Law Review* 697 (2005); C. Harlow and R. Rawlings, *Accountability and Law Enforcement: The Centralised EU Infringement Procedure*, 31 *Eur. L. Rev.* 447 (2006); Melanie Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU*, London: Routledge Cavendish (2009); Luca Prete and Ben Smulders, *The Coming of Age of Infringement Proceedings*, 47 *Common Market Law Review* 9 (2010); Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials*, (Cambridge University Press, 2nd ed., 2010); Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials*, (Oxford University Press, 5th ed., 2011).

with infringement complainants (hereinafter, “2012 Communication”). Sound understanding of the historical background to that text is instrumental in appreciating its content and its welcome deviation from the prevailing judicial thesis within legality.

## 2.1 Historical background

From early on, the European Ombudsman became aware of the citizens’ disillusionment with the Commission’s behaviour in the course of its Article 258, TFEU infringement investigations.<sup>77</sup> Numerous grievances concerned mainly the Commission’s attitude during the administrative phase of the infraction process, which preceded the possible referral of the case to the CJEU. Long delays in treating the complaints, lack of information on their investigation and refusals to make public the reasoning for acquitting the targeted Member States frustrated the existing complainants and discouraged the prospective ones. The Ombudsman’s response could be divided in three temporal phases.

The first began in October 1997, when the Ombudsman commenced an own-initiative inquiry with a view to luring the European Commission into introducing procedural guarantees for Article 258, TFEU complainants.<sup>78</sup> The effort paid out and eventually the EU institution formally undertook to: (i) acknowledge receipt of the submitted complaint; (ii) keep the complainant informed of the progress of the investigation; (iii) decide whether to file the case or to refer it to the CJEU within a year from the date of the complaint being registered; and (iv) allow the complainant to voice his views before the investigation is discontinued.<sup>79</sup>

The second phase commenced in January 2001, with the Ombudsman’s decision in complaint 995/98/OV. The case concerned the manner in which the European Commission treated an Article 258, TFEU grievance against the Greek authorities. The Ombudsman’s investigation revealed that the EU institution failed to communicate to the complainant adequate reasons for its decision to terminate the inquiry and to allow him to express his views before the closure of the case. On the basis of those findings, the Ombudsman invited the Commission to design a non-legally binding code regulating its treatment of infringement allegations under Article 258 of the TFEU. The Commission responded positively and issued the 2002 Communication, which described the procedural framework that the institution was committed to, and provided instruction to follow in its relations with complainants in the course of the infraction process.<sup>80</sup>

The final phase was triggered in April 2011 by the Ombudsman’s own-initiative inquiry OI/2/2011/OV, which prompted the adoption of the 2012 Communication. The facts of the inquiry were as follows: in April 2008, the Commission launched its EU Pilot project in order to facilitate the institution’s cooperation with the authorities of the Member States in the Article 258, TFEU investigations.<sup>81</sup> Along the same lines, in September 2009, the Commission introduced CHAP (Complaints Handling – *Accueil des Plaignants*) an electronic system for registering and managing complaints by private parties on the application of EU law by national authorities.<sup>82</sup> Following the above developments, the European Ombudsman commenced own-initiative inquiry, OI/2/2011/OV, and asked the Commission to clarify the impact of the EU Pilot and CHAP onto the commitments of the 2002 Communication. In March 2012, he issued a draft recommendation inviting the Commission to revise the 2002 Communication by incorporating the modifications the EU Pilot and CHAP had introduced. The updated 2012 Communication was adopted one month later.

The 2012 Communication is product, at least in part, of the Ombudsman’s pressure upon the Union bureaucracy in the outer ring of the maladministration concept and beyond legality. The text lists an array of non-justiciable commitments the institution is prepared to respect in its dealings

<sup>77</sup>See [1995] EOAR 11, 15 and 18; [1996] EOAR 17.

<sup>78</sup>Own initiative inquiry 303/97.

<sup>79</sup>See para. 9 of Decision 303/97/PD.

<sup>80</sup>Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, COM(2002) 141 final of 20.3.2002 [2002] OJ C244/5. There is an ongoing own initiative inquiry (OI/2/2012/VL) concerning the unavailability of the Communication in Irish and in the official languages of the Member States which acceded to the EU in 2004 and 2007.

<sup>81</sup>Further information on the EU Pilot project and the evaluation of its application thus far can be found at [http://ec.europa.eu/eu\\_law/infringements/application\\_monitoring\\_en.htm](http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm), (last accessed September 22, 2015).

<sup>82</sup>Details on CHAP are available inter alia in the Commission’s 28th Report on monitoring the application of EU law [COM(2011) 588], available at, [http://ec.europa.eu/eu\\_law/infringements/infringements\\_annual\\_report\\_28\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_annual_report_28_en.htm), (last accessed September 22, 2015).

with private parties when treating their Article 258, TFEU complaints. They are all welcome restraints on the Commission's discretionary powers as they trim the chances of arbitrary administrative conduct. Those non-legally binding guarantees will now briefly be explored.

## 2.2 The soft-law commitments

The first soft-law commitment that the Commission accepted was registering, in principle, any Article 258, TFEU complaint in the relevant central registry.<sup>83</sup> The importance of that undertaking must not be overlooked: the formal recording of the grievance strengthens the complainant's confidence in the transparency of the whole process and minimises the chances of 'unpleasant' complaints being brushed under the carpet. The registration principle is not, however, without exceptions. There exists a number of grounds justifying non-registration of infringement complaints, for instance, if the complainant fails to indicate the recalcitrant Member State, or the complaint concerns acts or omissions of private parties rather than national authorities, or sets out a grievance which clearly falls outside the scope of application of Union law. It is pertinent to emphasise that those grounds are construed restrictively, as they constitute derogations from the registration principle. The Commission ought to contact the complainant in writing, explaining the reason for non-registration and proposing any alternative means of redress at either national or supranational level, such as domestic or international ombudsmen or courts.

The next non-justiciable obligation on the part of the European Commission, is the acknowledgment of receipt of infringement complaints.<sup>84</sup> More precisely, the EU institution is required to issue an acknowledgement of all registered Article 258, TFEU complaints within fifteen working days of receipt, indicating the registration number, which must be quoted in any further related communication. That commitment prompts the Commission to establish a bridge of communication with the complainant and provide some reassurance to him that the process is set in motion. It is noteworthy that individual acknowledgements are replaced by a publication in the Official Journal of the European Union and on the Union's Europa server in cases where numerous complaints raise the same issue simultaneously. The Ombudsman's investigative record reveals that he is ready to excuse the Commission when it acknowledges, even belatedly, the receipt of the complaint or when it frankly apologises to the complainant for the omission and proceeds to the investigation of the case.<sup>85</sup>

Another extrajudicial guarantee relates to the Commission's communication with the complainant in the course of the infraction process.<sup>86</sup> In proactive terms, the EU institution should inform the complainant, in writing, of any crucial development in the investigation of his grievance, such as the initiation of contacts with the authorities of the recalcitrant Member State or the issue of a formal notice or a reasoned opinion. Again, in the event of a plethora of complaints raising the same issue, individual communication may be replaced by a publication in the Official Journal of the European Union and on the Union's Europa server. In reactive terms, the Commission ought to respond within fifteen working days from the date of receipt to any correspondence initiated by the complainant in the course of the inquiries. Keeping the complainant informed along the above lines turns him into a valid and active participant in the ongoing investigations, defies the bipolar assumptions of the EU judiciary, and triangularises the infraction process under Article 258 of the TFEU.

An additional undertaking by the Commission pertains to the timeframe for the investigation of Article 258, TFEU grievances.<sup>87</sup> As a rule, the EU institution should formally decide whether to terminate an investigation or to address a letter of formal notice to the targeted Member State within no more than one year from the date on which the correspondence was officially classified as an Article 258, TFEU complaint in the relevant registry of the Commission. If that deadline is exceeded, the Commission should accordingly inform the complainant, in writing, and explain the specific reasons which justify the delay, such as the complexity of the case, the importance of the issues raised, the need to pause in anticipation of a court ruling on pending cases affecting the course of investigation, and so on. Imposing a certain timeframe on the Commission's reaction to

<sup>83</sup>Point 3 of the Annex to the 2012 Communication.

<sup>84</sup>Point 4 of the Annex to the 2012 Communication.

<sup>85</sup>Complaint 132/95/IJH and complaint 1003/97/PD.

<sup>86</sup>Points 7, 9(3) and 10(5) of the Annex to the 2012 Communication.

<sup>87</sup>Point 8 of the Annex to the 2012 Communication.

infringement grievances and informing the complainant accordingly in cases of excessive delays, limits the institution's discretionary powers by placing them under welcome pressure to act promptly while increasing the complainants' trust in the timeliness and effectiveness of the investigative effort.

It is readily apparent that the undertakings adumbrated above are of procedural nature and seek to secure decent participation for private parties in the infraction process. However, Article 258, TFEU complainants are entitled to challenge before the Ombudsman, not only the procedural treatment of their grievances, but also, and most crucially, the substantive assessment of their submissions by the European Commission. That final substantive guarantee is linked to the so-called pre-closure letter.<sup>88</sup> Before terminating its inquiry, the Commission is principally required to justify in writing, its stance to the complainant and give him the opportunity to comment thereupon within four weeks. Depending on the strength of his submissions, the Commission will either file the case or continue its investigation. It is on the above commitment that the Ombudsman has largely premised his claim for authority to review the Commission's substantive assessment and evaluate the overall quality of its reasoning and conclusions.<sup>89</sup> The Ombudsman rejected the Commission's objections that the evaluation of its substantive findings are matters that fall outside the notion of maladministration and can only be reviewed by the CJEU.<sup>90</sup> The complainants' soft-law capacity to challenge the Commission's substantive stance on the merits of infringement cases directly contradicts the horizontal judicial thesis, as already defined, and tends to transform the bilateral architecture of the infraction process into a trilateral construct, whereby private parties justifiably interfere with the elite symbiotic relationship between the supervising EU entity and the supervised domestic authority.

## VI. CONCLUSIONS

Legality undoubtedly provides a welcome safety net for those adversely affected by administrative misconduct. However, it would be misleading to believe that hard law litigation before courts is the only option. Maladministration and its employment by extrajudicial mechanisms as a flexible benchmark against which the administrative attitude is assessed, provide a valuable alternative. More importantly, the propriety component of the maladministration concept can be creatively utilised to improve individual protection through the introduction of soft law guarantees in addition to the existing justiciable rights. Maladministration possesses transformative force and life beyond legality can indeed be rewarding, as the developments explored in the preceding analysis tellingly demonstrate. Two particular points in relation to the maladministration concept need to be made by way of conclusion.

On the one hand, it should be emphasised that stretching the boundaries of maladministration outwards to establish non-justiciable norms beyond the rigid confines of legality, is instrumental in winning and maintaining private parties' confidence in the effectiveness of extrajudicial mechanisms. It is readily apparent that the appeal amongst prospective applicants of institutions providing alternative, non-litigious means of redress would be severely damaged if the margin that separates the external, definitional boundaries of maladministration from those of legality, shrunk to the point where the demarcation line would be blurred. Individuals would surely lose much of their interest in resorting to routes alternative to courts, if both the judicial and non-litigious options were seen to employ identical or insufficiently dissimilar benchmarks of review.

On the other hand, it must be appreciated that keeping maladministration broad enough to distinguish itself from legality is for the institutions providing extrajudicial protection, not only an issue of institutional attractiveness, as explained above, but also, and most crucially, a matter of institutional survival. It is recalled that, customarily, the *raison d'être* (reason for existence) of non-litigious options is that they provide a useful and effective alternative to court litigation. The unimaginative employment of maladministration will inevitably weaken its propriety facet while shifting the legality component into prominence. That, in turn, will ultimately make the jurisdictional realms of courts and extrajudicial institutions coincide with the consequential implication being that the latter will end up duplicating the role of the former. Maladministration

<sup>88</sup>Point 10 of the Annex to the 2012 Communication.

<sup>89</sup>Complaint 2711/2009/PB.

<sup>90</sup>Complaint 3307/2006/(PB)JMA.

and life beyond legality are not simply catchphrases. They are necessary to prevent extrajudicial mechanisms from timidly functioning under the shadow of the judiciary and to ensure that the reasoning for introducing non-litigious alternatives is not robbed of much of its conviction.

### **Acknowledgements**

Thanks are due to the anonymous reviewers for their thoughtful comments on a previous version of the manuscript.