

## THE EUROPEAN OMBUDSMAN AND THE EUROPEAN CONSTITUTION

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### 1. Introduction

The European Ombudsman has been in function since 1995.<sup>1</sup> His office now offers 456 million Europeans in 25 Member States the opportunity to address themselves to the Ombudsman in 21 Treaty languages. This paper analyses the Ombudsman institution from a constitutionalist perspective. It explores the significance of the European Ombudsman institution for a functioning European constitution. To prepare the ground, section 2 gives a very short survey of the history, the mandate, the types of activities and the workload of the European Ombudsman. Section 3 discusses the Ombudsman's role as a constitution-maker and his proposals in the Constitutional Convention. In section 4 the focus is on the Ombudsman's functions within the European institutional balance. Section 5 analyses his contribution to the concretization and implementation of basic constitutional principles (democracy, rule of law, and fundamental rights).

### 2. The European Ombudsman in a nutshell

#### 2.1. *The Ombudsman idea*

The term "Ombudsman" comes from Swedish "ombud", meaning "representative". In Sweden, in 1713, the institution of the "King's Highest Ombuds-

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1. Homepage: [www.euro-ombudsman.eu.int](http://www.euro-ombudsman.eu.int). Book-length treatments include Marias (Ed.), *The European Ombudsman* (Maastricht, 1994); Hamers, *Der Petitionsausschuss des Europäischen Parlaments und der Europäische Bürgerbeauftragte: Zu den aussergerichtlichen Beschwerdeeinrichtungen in der Europäischen Gemeinschaft* (Pfaffenweiler, 1999); Meese, *Das Petitionsrecht beim Europäischen Parlament und das Beschwerderecht beim Bürgerbeauftragten der Europäischen Union* (Frankfurt am Main, 2000); Heede, *European Ombudsman: Redress and Control at Union level* (The Hague etc., 2000); Juvéanal, *Les recours non juridictionnels dans l'ordre juridique communautaire* (Aix-en-Provence, 2001); Guckel-

man”<sup>2</sup> was established as an organ of the executive in a monarchic State. In 1908, a parliamentary Ombudsman of Sweden, acting on behalf of the parliament, was established as an instrument of horizontal checks and balances between the legislative and the executive branch. In a third mutation after World War II,<sup>3</sup> the institution was conceived as a representative of the citizens, thereby serving no longer solely the rule of law, but the democratic principle as well.<sup>4</sup>

In this shape, the Ombudsman idea spread around the globe.<sup>5</sup> The first wave of expansion occurred in the 1960s<sup>6</sup> and early 1970s, when ombudsmen were installed in many Member States of the EC. This was a reaction to the dramatic expansion of the welfare functions of the State. As of the mid-1970s, the demise of dictatorial states in Western Europe (Spain, Portugal, Greece) triggered the establishment of ombudsmen in these countries. Finally, after 1989, ombudsmen mushroomed in the post-communist States of Eastern Europe, some of which became EU Members in 2004. Obviously, in the last-mentioned groups of States, the installation of ombudsmen formed part of the national political strategy of coping with regime change, to mark the beginning of a new era under the rule of law and democracy, and to prevent new dictatorship. Today, approximately 120 national ombuds-institutions function worldwide. There are also ombudsmen for specific subject areas such as consumer protection, children’s rights, data protection, small business issues, or the military forces. Moreover, ombuds-institutions have been installed in the course of the international administration of territories, e.g. in Bosnia and Hercegovina pursuant to the Dayton General Framework Peace Agreement of 1995.<sup>7</sup>

berger, *Der Europäische Bürgerbeauftragte und die Petition zum Europäischen Parlament: Eine Bestandsaufnahme zu Beginn des 21. Jahrhunderts* (Berlin, 2004); Barth, *Bürgerbeauftragter und Petitionsrecht im Prozess der europäischen Verfassungsgebung* (Tübingen 2004). See for a bibliography of books, theses and articles on the European Ombudsman the list in [www.euro-ombudsman.eu.int/bibliog/en/default.htm](http://www.euro-ombudsman.eu.int/bibliog/en/default.htm), visited on 1 Sept. 2004.

2. Some years later renamed “Chancellor of Justice”.

3. In 1953, a Danish Ombudsman office was installed, which became the model that spread around the world.

4. Magnette, “Entre contrôle parlementaire et ‘état de droit’: Le rôle politique du médiateur dans l’Union européenne”, 51 *Revue française de Science Politique* (2001), 933, at 934.

5. See Diamandouros, “The European Ombudsman and the European Constitution”, in Curtin, Kellermann and Blockmans (Eds.), *The EU Constitution: The Best Way Forward?* (The Hague, 2005, forthcoming); Magnette, *supra* note 4, at 934.

6. In 1962, the first Ombudsman office established outside the Nordic countries was in New Zealand.

7. Gemalmaz, “Constitution, ombudsperson and human rights chamber in ‘Bosnia and Hercegovina’”, 17 *Netherlands Quarterly of Human Rights* (1999), 277–329.

The Ombudsman idea is a response to two complementary trends: on the one hand, it reacts to the significant increase of national (or even supra- or transnational) administrative activity with a high level of regulation, e.g. in the social and environmental sector, together with an extensive delegation of powers to administrative authorities. On the other hand, a growing need for individual rights' protection *vis-à-vis* this expansive apparatus is felt. In this setting, the Ombudsman provides individual redress and works systemically to improve the quality of administration in general. His work is reactive and proactive, and covers both the legal and the political plane<sup>8</sup> (see section 4). In order to properly fulfil these functions, an ombuds-institution must satisfy four basic conditions:<sup>9</sup> it must offer a fair procedure, it must be accountable to the public, it must work effectively, and – probably most importantly – it must be independent from the executive branch.<sup>10</sup>

## 2.2. *The constitutional foundations of the European Ombudsman*

The idea of a European Ombudsman was launched already in the 1970s, the period of “Ombudsmania” in Western Europe, but was only realized with the Treaty on European Union in 1992.<sup>11</sup> The creation of this new office was directly linked to the introduction of European citizenship. The European Ombudsman was intended 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

8. See on this “dual role” of the Ombudsman: Heede, “Enhancing the accountability of Community institutions and bodies: The role of the European Ombudsman”, 3 EPL (1997), 587, at 588.

9. Diamandouros, *supra* note 5.

10. See on independence as the central feature, Harden, “When Europeans complain: The work of the European Ombudsman”, 3 *Cambridge Yearbook of European Legal Studies* (2000), 199–237, at 202; Harley Johnson, “Ombudsman – essential elements”, in Hossain et al. (Eds.), *Human Rights Commissions and Ombudsman offices: National Experiences throughout the World* (The Hague, 2000), p. 785, at p. 786.

11. The first Ombudsman, the Finnish national Jacob Söderman, took up his work in September 1995. After 2 periods of office, he was succeeded by the Greek P. Nikiforos Diamandouros on 1 April 2003, with a staff of 30 persons. See on the genesis of the European Ombudsman, Heede, *European Ombudsman*, op. cit. *supra*, note 1, at pp. 10–20; Guckelberger, op. cit. *supra* note 1, at pp. 78–83. See for the political problems surrounding the appointment of the first Ombudsman Magliveras, “Best intentions but empty words: The European Ombudsman”, 20 EL Rev. (1995), 401, at 407–408. See for the Ombudsman’s own account of the first year of office, Söderman, “A thousand and one complaints: The European Ombudsman *en Route*”, 3 EPL (1997), 351–361.

the image of the EC/EU as a whole.<sup>12</sup> Ever since, the enhancement of the relationship between the European administration and the citizen has been the *raison d'être* of the European Ombudsman.<sup>13</sup>

The legal bases of the Ombudsman in the EC Treaty are Articles 21 and 195.<sup>14</sup> Pursuant to the latter provision, the European Parliament adopted in 1994 the European Ombudsman Statute (hereinafter: the Statute) in the form of a parliamentary decision. The Statute governs the performance of the Ombudsman's duties.<sup>15</sup> Under Article 14 of the Statute, the Ombudsman adopted Implementing Provisions.<sup>16</sup>

The Treaty establishing a Constitution for Europe ("Constitutional Treaty"/CT) of 29 October 2004<sup>17</sup> contains four Articles relating to the European Ombudsman. These provisions basically correspond to the relevant existing Treaty provisions. Besides technical modifications, some points of emphasis were shifted, either through the wording or through the splitting up and the positioning of the provisions within the Constitutional Treaty.<sup>18</sup> The Ombudsman as an institution is sketched out in Article I-49 CT "The European Ombudsman".<sup>19</sup> This provision forms part of Title VI: "The democratic life of the Union". In contrast, the Ombudsman is not mentioned in Title IV

12. Bono, "Maastricht et les citoyens: le médiateur européen", 64 *Revue française d'administration publique* (1993), 639–649, at 648; Baviera, "Les pétitions au Parlement européen et le Médiateur européen", 445 *RMC* (2001), 129, at 135; Tierney, "European citizenship in practice? The First Annual Report of the European Ombudsman", 2 *EPL* (1996), 517, at 517.

13. See CONV 466/02 CONTRIBUT 176 (by Söderman, "The place of the European Ombudsman in the future Constitution of the European Union", 17 Dec. 2002).

14. Unmodified ex-Art. 138(d) of the 1992 version of the EC Treaty.

15. Decision of the EP on the Regulations and General Conditions Governing the performance of the Ombudsman's duties of 9 March 1994 (O.J. 1994 L 113/15), Annex X A. to the Rules of Procedure of the EP. Minor amendments concerning the budgetary treatment of the Ombudsman were made on 14 March 2002 (O.J. 2002, L 92/13).

16. Current version: decision of the Ombudsman adopting Implementing Provisions of 8 July 2002, in force since 1 Jan. 2003 = Annex X. B. to the Rules of Procedure of the EP, [www.euro-ombudsman.eu.int/lbasis/en/provis.htm](http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm), visited on 18 Aug. 2004. Hereinafter: Implementing Provisions.

17. CIG 87/2/04 REV 2 of 29 Oct. 2004 [europa.eu.int/constitution/constitution\\_en.htm](http://europa.eu.int/constitution/constitution_en.htm), visited on 10 Nov. 2004.

18. Additionally, the right to good administration has been enshrined as binding law in the Constitutional Treaty (Art. II-101 CT, see in detail below, 5.5).

19. Art. I-49 CT: "A European Ombudsman elected by the European Parliament shall receive, investigate and report on complaints about maladministration within the Union Institutions, bodies or agencies. The European Ombudsman shall be completely independent in the performance of his or her duties." Art. 195(1) EC and Art. 48 Draft Constitution (DC) use "appointed", which was only in the CT replaced for "elected". See for the reasons below, 4.4.

(“The Union’s Institutions”). Article I-49 CT reproduces part of Article 195(1) EC and is a foundational, general norm. The Ombudsman’s election, mandate, independence and the proceedings are spelled out in Article III-335 CT.<sup>20</sup> Two further provisions relate the European Ombudsman to the citizens: Article I-10 CT “Citizenship of the Union” lists citizens’ rights, one of which is the right to apply to the European Ombudsman (para (2)(d)).<sup>21</sup> This provision corresponds to Article 21 EC. Finally, Article II-103 CT enshrines the right to refer to the European Ombudsman as a European fundamental right, as already embodied in Article 43 of the non-binding EU Charter of

20. Art. III-335 CT: “(1) The European Parliament shall *elect* a *European Ombudsman*. *In accordance with Articles I-10(2)(d) and I-49*, he or she shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the *Union’s* institutions, bodies, offices *or agencies* with the exception of the Court of Justice *of the European Union* acting in its judicial role. In accordance with his *or her* duties, the European Ombudsman shall conduct inquiries for which he or she finds grounds, either on his or her own initiative or on the basis of complaints submitted to him or her direct or through a member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he or she shall refer the matter to the institution, *body, office or agency* concerned, which shall have a period of three months in which to inform him or her of its views. The European Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries. The European Ombudsman shall submit an annual report to the European Parliament on the outcome of his or her inquiries. (2) The European Ombudsman shall be elected after each election of the European Parliament for the duration of its term of office. The European Ombudsman shall be eligible for reappointment. The European Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she is guilty of serious misconduct. (3) The European Ombudsman shall be completely independent in the performance of his or her duties. In the performance of those duties he or she shall neither seek nor take instructions from any institution, body, office or agency. The Ombudsman may not, during his or her term of office, engage in any other occupation, whether gainful or not. (4) *A European law of the European Parliament* shall lay down the regulations and general conditions governing the performance of the Ombudsman’s duties. The European Parliament shall act on its own initiative after seeking an opinion from the Commission and after obtaining the consent of the Council.” The italic phrases differ from Art. II-237 Draft Constitution (DC) of 18 July 2003 (CONV 850/03). In Art. III-335(4) CT, several phrases have been deleted from the former para 4 of Art. III-237 DC, presumably in order to emphasize the respective independent power of the European Parliament.

21. Art. I-10 CT: “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have: ... (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the Institutions and advisory bodies of the Union in any of the Constitution’s language and to obtain a reply in the same language.”

Fundamental Rights.<sup>22</sup> Although this provision contains elements of Article 195(1) EC, its novelty is the language of rights, which is not present in the Treaty law as it stands.

The Treaty of Amsterdam (1997) brought the third pillar within the Ombudsman's mandate: according to Article 41(1) TEU, Article 195 EC is applicable to police and judicial cooperation in criminal matters.<sup>23</sup> In contrast, a similar reference to the second pillar (Common Foreign and Security Policy) is missing in Article 28 TEU. The Constitutional Treaty demolishes the "pillar" structure of the Union. This means that the Ombudsman's mandate is broadened to include all the Union institutions, bodies, offices and agencies.

### 2.3. *The Ombudsman's "jurisdiction" razione materiae and razione personae*

The Ombudsman's constitutional mandate is to combat "maladministration".<sup>24</sup> According to an authoritative definition, "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it."<sup>25</sup> The "rules and principles" referred to in this definition are both legal and non-legal norms. This means that the Ombudsman's application of the standard of maladministration includes a review of lawfulness,<sup>26</sup> but goes beyond it. In other words, there is an overlap with justiciable questions which are also dealt with by courts.<sup>27</sup>

22. Art. II-103 CT: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the European Court of Justice acting in its judicial role." This provision modifies Art. 43 of the Charter of Fundamental Rights only in technical respects. See for the technical amendments ("institutions, bodies, offices or agencies of the Union", instead of Community institutions) CONV 726/03 (Cover Note from the Praesidium to the Convention, re: Charter of Fundamental Rights, Draft text of Part II with comments, 26 May 2003). "Offices" was added at an even later stage.

23. See decision on complaint 785/2002/OV of 17 Dec. 2002 on refusal of access to certain documents of a conference on terrorism: Refusal justified for the protection of public security.

24. French: "*mauvaise administration*", German: "*Missstände*". Art. 195 EC; Art. III-235 CT.

25. The European Ombudsman, Annual Report 1997, 23 (O.J. 1998, C 380/13); welcomed by the European Parliament in its Resolution on the annual report of the European Ombudsman in 1997 (C4-0270/98), O.J. 1998, C 292/168, at para 2.

26. Maladministration includes unlawful activity and errors of legal reasoning and interpretation, failure to respect a legal rule or principle, the principles of good administration or fundamental rights. See for a classic example *Newbury Bypass*, Complaint 206/27.10.95/HS/UK and 25 others complaints against the Commission, Annual Report 1996, 58, at p. 64.

27. Usher, *General Principles of EC Law* (London, 1998), at p. 100.

The Ombudsman can deal only with maladministration by Union bodies, not by Member States' authorities.<sup>28</sup> This limitation of the Ombudsman's review was introduced in order to avoid overlap with national ombudsmen or similar bodies.<sup>29</sup> It is important, because Union law is generally implemented by the Member States. Centralized European administration is the exception and limited to specific fields, such as competition law, State aid or social policy. Furthermore, "administration" means executive-branch activity. Judicial,<sup>30</sup> legislative and political action<sup>31</sup> is not subject to the Ombudsman's review. "Standing" for an application to the Ombudsman is granted to "any citizen of the Union or any natural or legal person residing or having its registered office in a Member State" (Art. 195(1) EC; Art. III-335(1) CT).<sup>32</sup>

#### 2.4. Ombudsman inquiries: Some data

Article 195 EC (Art. III-335 CT) characterizes the activity of the Ombudsman as conducting inquiries, not only on the basis of complaints, but also on his own initiative. Since the European Ombudsman began to work in 1995, he has conducted in total (only) 24 own-initiative inquiries (up to the end of 2003).<sup>33</sup> These were launched in instances where the Ombudsman suspected systemic problems.<sup>34</sup> The main bulk of inquiries arise from individual com-

28. See Art. III-335 CT: "... concerning instances of maladministration in the activities of the Union's institutions, bodies, offices or agencies ... ." In contrast, petitions to the European Parliament may also relate to Member State action.

29. Guckelberger, *op. cit. supra* note 1, at p. 102

30. See the wording of Art. II-103 CT, similarly Art. III-335(1) CT (and previously Art. 195(1) EC): "... with the exception of the European Court of Justice acting in its judicial role."

31. Of course the line between ostensibly a political administrative activity and political action is blurred (see below, 4.2.).

32. The same category of parties is entitled to address a petition to the European Parliament (Art. 194 EC; Art. III-334 CT). Note that the right to good administration (Art. II-101 CT) is incumbent on "every person", and not limited to Union citizens and residents. If the right to good administration comprises access to the Ombudsman, the institutional provision on the Ombudsman must be construed broadly (beyond its wording) in the light of the fundamental rights' guarantee.

33. Details of the own initiative proceedings are set out in Art. 3 Statute, *supra* note 15; Art. 9 Implementing Provisions, *supra* note 16.

34. Recent examples: Own initiative inquiry into good administration of the European schools for children of staff (decision of 19 July 2004 (IO/5/2003/IJH)); Draft recommendation of 24 May 2004 to the European Commission in own initiative inquiry OI/1/2003/ELB into the internal dispute resolution procedures available to national experts who are seconded to the Commission; freedom of expression of Commission officials (OI/1/2001/GG); age limits for EU recruitment competitions (OI/2/2001/(BB)OV); parental leave for EU officials (OI/4/2001/

plaints. In the first full year of function (1996), the office received 842 complaints.<sup>35</sup> Eight years later, the number had tripled (2,436 new complaints received in 2003).<sup>36</sup> In total, the Ombudsman has so far dealt with more than 13,000 complaints.<sup>37</sup> In 2003, the Ombudsman dealt with 2,611 cases (including those brought forward from previous years), in 20 percent of which the Ombudsman opened inquiries.<sup>38</sup> Additionally, the Ombudsman started five own-initiative inquiries in 2003. By comparison, the ECJ dealt with 1,468 cases in 2003 (of which 494 were closed), and the Court of First Instance with 1,338. Most complaints are directed against the Commission,<sup>39</sup> whose decisions often have a direct impact on the citizens.<sup>40</sup> Complaints are also directed against the other institutions (Art. 4 EC; Art. I-19 CT) and against bodies such as the European Personnel Selection Office (EPSO)<sup>41</sup> or the European Anti-Fraud Office (OLAF).<sup>42</sup> Complaints frequently concern late payment, contract disputes, arbitrary discrimination and, most often, access to documents.

ME) (see summaries in Annual report 2002, p. 196 et seq.); judicial protection in tender procedures (IO/2/2002/IJH).

35. Annual Report 1996, Statistics. See for the first year of office, Tierney, *supra* note 12, at p. 517–529.

36. Figure from *The European Ombudsman, Annual Report 2003* (unpublished, available at the Ombudsman office), Annex 1.1, at p. 315.

37. Most of those complaints originate from the big Member States such as Germany, France or Spain. However, in relation to the total EU population, the citizens in the big Member States do not complain so much. The number of complaints from smaller Member States such as Luxembourg or Belgium is rather over-proportionate. See for a geographical analysis of complaints Annual Report 2003 (*supra* note 36), Annex 4.2., at p. 323.

38. In more than half of these cases, the Ombudsman gave advice. In a third of the cases, no action was possible.

39. 67% of those complaints led to an inquiry in 2003 (Annual Report 2003, *supra* note 36, Annex 3.2., at p. 320).

40. Complaints against the Commission from May to July 2004 concerned issues such as the payment of outstanding amounts or damages under contracts with the Commission (e.g. translation contracts, agreements on energy or development projects, services), problems with the co-financing of an NGO by the Commission, the selection procedure in competitions, outstanding payments of subsidies, public procurement (publicity of Commission calls for tenders, handling of bids, allegedly unfair rejections of proposals by the Commission etc.), reimbursement of funds in the context of programmes financed by the Commission, but also access to environmental information.

41. See also the recent own-initiative inquiry concerning competitions organized by EPSO, OI/2/2004/GG on the difficulty of the recruitment tests.

42. See the so-called “Blue Dragon case”, decision of 22 July 2004 on complaint 1769/2002/(IJH) ELB concerning alleged fraudulent diversion of funds that were intended to benefit the Blue Dragon company.



### 2.5. Ombudsman complaint proceedings

When an individual complaint is addressed to the Ombudsman, he first examines whether it is within his mandate. This requires, as we saw, that the complaint is directed against a Union body, as opposed to a Member State's administration, and that it concerns a possible instance of maladministration.<sup>43</sup> Secondly, the complaint must meet further criteria of admissibility as laid down mainly in the Statute, in particular the exhaustion of administrative steps.<sup>44</sup> Third, even if the complaint is within the mandate and admissible, the Ombudsman still has a discretionary power to make an inquiry into a complaint or to close the file.<sup>45</sup> Generally, the Ombudsman finds sufficient grounds to initiate inquiries only in about a quarter of the cases.<sup>46</sup> On average, about half of the inquiries reveal no maladministration. If however the inquiry reveals an instance of maladministration, the Ombudsman "as far as possible co-operates with the institution concerned in seeking a friendly solution to eliminate the maladministration and to satisfy the complainant."<sup>47</sup> In practice, this cooperation may lead to a settlement by the institution to the full satisfaction of the complainant.<sup>48</sup> Another outcome may be a so-called "friendly solution" in the form of a compromise acceptable to both sides, e.g. *ex gratia* payments without admission of liability.

43. E.g. in 2003, three quarters of the complaints were outside the mandate for various reasons, mostly (92%) because the complaints were not directed against a Community institution or body (Annual Report 2003 (*supra* note 36), Annex 1.3.2, at p. 317). If the complaint is outside the mandate, the Ombudsman may help the complainant by transferring the complaint, e.g. to a national Ombudsman, to the European Commission or to the European Parliament or by at least advising the citizen to contact a competent body.

44. Under Art. 2(4) of the Statute, *supra* note 15, the complaint is "preceded by the appropriate administrative approaches to the institutions and bodies concerned." Officials and servants lodgings complaints related to their work relationship must exhaust the existing internal remedies (Art. 2(8) of the Statute, *supra* note 15). These are in particular the procedures referred to in Art. 90(1) and (2) Staff Regulations of Officials of the European Communities of 1 May 2004, which basically require a complaint to the appointing authority.

45. Art. 195(1) EC; Art. 4(1) and (2) Implementing Provisions, *supra* note 16.

46. For instance, in 2003, the Ombudsman initiated an inquiry in 26% of the admissible complaints, whereas he found no or insufficient grounds for inquiry in more than 73%. 363 inquiries were dealt with (Annual Report 2003 (*supra* note 36), App. 1.3.2., at p. 318 and Item 3, at p. 320).

47. Art. 6 Implementing Provisions, *supra* note 16.

48. Example: Following a complaint to the Ombudsman, Stockholm University received a final payment due under a research project (1173/2003/(TN)IJH), Annual Report 2003 (*supra* note 36), at p. 11.

If a settlement or a compromise is impossible (e.g. when the matter is no longer acute<sup>49</sup>) or unsuccessful, the Ombudsman has two forms of decision at his disposal. The softer (and more frequently used) one is the critical remark addressed to the institution, which the Ombudsman issues in cases with no general implications and no need for follow-up action.<sup>50</sup> The sharper tool is a draft recommendation when the instance of maladministration is particularly serious, can still be eliminated, or has general implications.<sup>51</sup>

If the Union body fails to respond adequately to the draft recommendation,<sup>52</sup> the Ombudsman may, as a last substantive step, draw up a Special Report to the European Parliament.<sup>53</sup> This makes sense in situations where the Ombudsman expects his position to be backed by the European Parliament. From 1995 to summer 2004, only eight Special Reports have been issued (the most recent one in December 2002),<sup>54</sup> covering issues such as access to documents (three Special Reports), the codification of principles of good administration in form of a code or a binding regulation (two Special Reports), and recruitment procedures and employment within the Union (three Special Reports).

## 2.6. *The network of Ombudsmen*

The European Ombudsman forms part of a European network of ombudsmen.<sup>55</sup> Today, 24 of 25 Member States of the Union have national ombudsmen or a functionally equivalent body.<sup>56</sup> In the ten new Member States, the

49. This constellation is frequent, because a complaint to the Ombudsman does not have a suspensive effect. This is an important limitation of the effectiveness of his individual redress function (e.g. regarding recruitment procedures).

50. Art. 7 Implementing Provisions, *supra* note 16. The critical remark may be supplemented by "further remarks", although this is not foreseen in the Implementing Provisions. See, e.g., the decision on complaint 1288/99/OV, summary in Annual Report 2002, p. 98 et seq.

51. Art. 3(6) of the Statute, *supra* note 15; Art. 8(1) Implementing Provisions, *supra* note 16.

52. The institution so informed by the Ombudsman should give a "detailed opinion" within three months (Art. 3(6) of the Statute, *supra* note 15).

53. Art. 3(7) of the Statute, *supra* note 15; Art. 8(4) Implementing Provisions, *supra* note 16.

54. All Special Reports are posted on the Ombudsman's web-site. [www.euro-ombudsman.eu.int/special/en/default.htm](http://www.euro-ombudsman.eu.int/special/en/default.htm), visited on 2 Sept. 2004.

55. From the outset on, the European Ombudsman hoped to create strong links with his national counterparts. See Boyron, "Current developments, European Community Law, I. Constitutional Aspects", 46 ICLQ (1997), 701, at 702.

56. See for the EU with 15 Members before enlargement European Parliament (authored by

establishment of ombudsmen has been an important step in the transition from communist rule to democracy. The most recent ombuds-institution was created in Luxembourg.<sup>57</sup> Germany has no federal Ombudsman, but its parliamentary petitions committee<sup>58</sup> is similar. Moreover, Germany has a parliamentary commissioner for the armed forces (*Wehrbeauftragter*).<sup>59</sup> Italy is the only Member State possessing neither an Ombudsman office at the national level nor a parliamentary committee on petitions; there are, however, active ombudsmen at the regional level.

Although ombuds-institutions and similar bodies in Europe vary in form and function,<sup>60</sup> they share important features. Their legal basis is mostly the constitution, not just statute law.<sup>61</sup> They are appointed by national parliaments or on the basis of a parliamentary proposal. In most countries, the Ombudsman office requires no particular qualifications. He is generally elected for a period of four to six years. In general, the activities of local and national governments and public institution fall within the ombudsman's field of competence. In all European countries, ombudsmen are completely independent of the political authority and enjoy immunity. The ombudsmen

Crespo Allen), DG for Research, Working Paper: European Ombudsman and National Ombudsmen or similar Bodies – Comparative Tables, POLI 117 EN, (Luxembourg, 2001). [www.europarl.eu.int/workingpapers/poli/pdf/117\\_en.pdf](http://www.europarl.eu.int/workingpapers/poli/pdf/117_en.pdf), visited on 21 Sept. 2004. See for the respective debate in Switzerland, Siegwart, "Ombudstellen und Mediation", 103 *Schweizerisches Zentralblatt* (2002), 561 et seq. The proposal of a parliamentary committee to install a Swiss Ombudsman was discussed by federal bodies, State governments and by political parties. In February 2004, the committee decided not to table the proposal in the parliament's plenary session, basically for financial reasons.

57. Established by an Act of 2003, the *médiateur* took office in January 2004.

58. Art. 45c(1) German Basic Law; the individual fundamental right to petition is enshrined in Art. 17 Basic Law.

59. Art. 45b German Basic Law.

60. The varying denominations of the office all over the world point to the multiple functions: German "Bürgerbeauftragter", Austrian: "Volksanwalt", French: "Médiateur", Spanish and South-American: "Defensor del Pueblo", British: "(Parliamentary) Commissioner". See for terminology, country surveys and functional comparisons, Caiden (Ed.), *International Handbook of the Ombudsman*, 2 Vols (Westport, Conn. 1983); Pickl, "Europäische Ombudsmann-Einrichtungen aus rechtsvergleichender Sicht", in Matscher et al. (Eds.), *Europa im Aufbruch, Festschrift Fritz Schwind zum 80. Geburtstag* (Wien, 1993), p. 193 et seq; Marias, *supra* note 1; Reif (Ed.), *The International Ombudsman Anthology: Selected Writing from the International Ombudsman Institute* (The Hague, 1999); Hossain et al. (Eds.), *supra* note 10; Crespo Allen, *op. cit. supra* note 56.

61. 17 of the 25 EU Member States have a constitutional foundation for the Ombudsman and/or of the right to petition. See "The constitutional status of ombudsmen and the right to petition in Europe" of 13 Jan. 2003, in [www.euro-ombudsman.eu.int/letters/en/default.htm](http://www.euro-ombudsman.eu.int/letters/en/default.htm), visited on 3 Sept. 2004.

have considerable powers of investigation (documents and evidence) but do not have any direct means of action. Most ombudsmen can propose to parliament (or to the government, in the case of France) that it repeal, reform or adopt legislative texts. All the ombudsmen can submit particular problems to the national parliaments and they also submit an annual report on their activities.<sup>62</sup>

The European network of ombudsmen was established already in 1996 and today covers 90 offices in 30 countries, including the candidate States and the Schengen area.<sup>63</sup> Cooperation through the network covers both complaint handling (transfers) and information to the citizens.<sup>64</sup> Such transfers are important, because the mandate of the European Ombudsman is limited to maladministration by Union institutions, whereas the bulk of EU law is applied by Member State authorities. It is therefore desirable that the European Ombudsman can swiftly refer complaining citizens to those national and regional ombudsmen. Against this background, the European Ombudsman advocates the strengthening of non-judicial remedies, such as ombuds-institutions, in the Member States. This would offer the citizens more remedial options, would strengthen subsidiarity, spare the Union institutions from overload, and contribute to administrative capacity building in the Member States.<sup>65</sup> Along the same lines, the European Ombudsman proposed to the Constitutional Convention the adoption of an Article on ombudsmen-cooperation and transferrals. The proposal was intended to ensure cooperation in a spirit of trust between the European Ombudsman and the ombudsmen and bodies dealing with petitions established in the Member States, and to allow national ombudsmen to transfer a case involving fundamental rights under Union law to be dealt with by the European Ombudsman.<sup>66</sup> This proposal did not, however, find any resonance.

62. Crespo Allen, *supra* note 56, at p. 7–8.

63. Annual Report 2003, *supra* note 36, at p. 14.

64. In 2003, 1.6% of all complaints were transferred, mostly to a national or regional Ombudsman (25 cases in total), Annual Report 2003, *supra* note 36, Annexes 1.3.1. and 2, at p. 316 and 319.

65. Diamandouros, *supra* note 5.

66. CONV 221/02 CONTRIB 76, “Proposals for Treaty changes” of 26 July 2002 register.consilium.eu.int/pdf/en/02/cv00/00221en2.pdf, visited on 23 Aug. 2004. See also speech by Söderman on 25 Feb. 2003 at the European Policy Centre, Brussels, “The Convention, the Charter and the Remedies”.

### 3. The Ombudsman in the Constitutional Convention of 2002/2003

The European Convention<sup>67</sup> presented to the Member States' governments the Draft Constitution (DC) of 18 July 2003,<sup>68</sup> which was the basis for the Treaty establishing a Constitution for Europe of 29 October 2004 (Constitutional Treaty/CT).<sup>69</sup> In the Convention, the European Ombudsman had the status of an observer.<sup>70</sup> He submitted three formal contributions to the Convention<sup>71</sup> and gave numerous speeches in the plenary of the Convention, in working groups of the Convention, in the European Parliament and in various other fora.

It is striking that the Convention Praesidium's "Skeleton" of the Draft Constitution of 28 October 2002<sup>72</sup> contained no reference to the Ombudsman. This seems to be an indication of either a low priority of the Ombudsman issue or of its uncontestedness. Not surprisingly, the European Ombudsman reacted to this omission with general reflections on the place of the European Ombudsman in the Constitution.<sup>73</sup> He argued that the Ombudsman must be mentioned in the European Constitution, because in most countries the existence and mandate of the national Ombudsman are considered sufficiently important to be mentioned in the constitution. He suggested placing the Ombudsman provision in the part of the Constitution dealing with the institutional framework.<sup>74</sup> This proposal was not fully realized. As in the EC Treaty, the European Ombudsman is not mentioned in the Chapter on the institutional framework of the Union.<sup>75</sup> The European Ombudsman also asked for the parliamentary nature of the Ombudsman to be mentioned,<sup>76</sup> which was not done either. Last but not least, he suggested having

67. 1 March 2002 to 10 July 2003; materials available at [european-convention.eu.int](http://european-convention.eu.int), visited on 5 Jan. 2005.

68. CONV 850/03.

69. *Supra* note 17.

70. See the very short survey without any account of the ombudsman's proposals, in Annual Report 2003, *supra* note 36, at p. 266–67.

71. CONV 221/02 CONTRIB 76 (*supra* note 66); CONV 466/02 CONTRIB 176 (*supra* note 13); CONV 505/03 CONTRIB 206 "The functioning of the Institutions" of 23 Jan. 2003.

72. CONV 369/02.

73. CONV 466/02 CONTRIB 176 (*supra* note 13). See for further criticism e.g. the speech by Söderman, Round Table on the Future of Europe on 18 Nov. 2002. See also CONV 438/02 CONTRIB 159 (Contribution by Tomlinson, Member of the Convention: "The European Ombudsman should be included in the draft constitutional Treaty" of 28 Nov. 2002).

74. CONV 466/02 CONTRIB 176 (*supra* note 13).

75. See section 4.4. for the systematic position of the Ombudsman provisions.

76. CONV 466/02 CONTRIB 176 (*supra* note 13).

the Ombudsman “elected” by the European Parliament, not “appointed”, as in the EC Treaty. The new phrase should be a constitutional guarantee of independence.<sup>77</sup> This proposal was adopted in the Constitutional Treaty.<sup>78</sup>

Apart from the Ombudsman’s proposals on the institutional provisions on his office, the Ombudsman made four principal proposals: on fundamental rights, on a chapter on remedies, on a European administrative law, and on a network of ombudsmen and bodies dealing with petitions in the Member States.<sup>79</sup> A resolution of the national ombudsmen of the EU, which was submitted to the Convention as a contribution, dealt with the same four issues.<sup>80</sup> These will be discussed in detail in section 5.

#### 4. The Ombudsman and the European institutional balance

The institutional balance,<sup>81</sup> as a European constitutional principle, is to some extent a functional equivalent of the classic principle of separation of powers in State constitutions: it modestly contributes to the realization of checks and balances, and thereby ultimately fosters the containment of power to the benefit of the citizens.<sup>82</sup> To the same ends, good administration requires, *inter alia*, a clear and reasonable distribution of functions to appropriate institu-

77. See Amendment Form, Suggestion for amendment of Art. 35, by Diamandouros; also Verbatim Record of the Convention’s plenary session of 24 April 2003, pp. 29–30: [www.europarl.eu.int/europe2004/textes/verbatim\\_030424.htm](http://www.europarl.eu.int/europe2004/textes/verbatim_030424.htm), visited on 5 Jan. 2005.

78. See Art. I-49 and Art. III-335 CT. The new wording was introduced only in the Intergovernmental Conference.

79. These proposals were made at numerous occasions. The principal document is CONV 221/02 CONTRIB 76 (*supra* note 66). See already the speech by Söderman, Round Table on the Future of Europe on 18 Nov. 2002 (criticism of the so-called skeleton draft) also CONV 350/02 WG II 14 (Summary of the meeting held on Friday 4 October 2002, where Söderman presented CONV 221/02 CONTRIB 76), of 17 Oct. 2002).

80. Resolution adopted by the national ombudsmen and similar bodies of the Member States of the EU, meeting at their fourth seminar, held in Athens on 7–8 April 2003, forwarded to the Convention on 28 April 2004, [europa.eu.int/futurum/documents/contrib/doc080403\\_en.pdf](http://europa.eu.int/futurum/documents/contrib/doc080403_en.pdf), visited on 24 Aug. 2004, forwarded to the European Convention as a contribution by the European Ombudsman (CONV 699/03).

81. Case 9/56, *Meroni v. High Authority*, [1958] ECR 9, at 44: “[T]here can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty ...”. See recently Case C-233/02, *French Republic v. Commission*, judgment of 23 March 2004, nyr, para 40; Case C-257/01, *Commission v. Council*, Opinion of A.G. Léger of 27 April 2004, para 55.

82. Jacqué, *Cours général de droit communautaire*, *Collected Courses of the Academy of European Law I-1* (1991), 237, at 293.

tions.<sup>83</sup> The Ombudsman forms part of the institutional balance, although he is not mentioned as an institution or other body in Articles 7–10 EC. In the Treaty’s institutional part (Part Five “Institutions of the Community”), the Ombudsman figures in the section on the European Parliament. This systematic position has remained the same in the Constitutional Treaty.<sup>84</sup>

This section analyses the tasks of the Ombudsman in relation to the other institutions.

#### 4.1. *The functions of the Ombudsman institution*

The Ombudsman has, first, an individual redress function. In this regard, he complements the Union and Member State courts, and the parliamentary petitions committee. As the Court of First Instance put it: “... in the institution of the Ombudsman, the Treaty has given citizens of the Union, ... an alternative remedy to that of an action before the Community Court in order to protect their rights. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings.”<sup>85</sup> Ombudsman proceedings are flexible. They may in some instances be quasi-judicial (review of legality: both in substance and procedure), but generally, they display typical features of mediation (non-binding decision, consensual settlement, win-win types of solutions, no costs for the parties, swiftness of procedure).<sup>86</sup>

The second task of the Ombudsman (separable more from a theoretical than practical point of view) is to control the administration in general, to enhance its accountability and to help improve its quality. With a view to this systemic role, individual complaints to the Ombudsman are not conditioned upon specific standing requirements. An *actio popularis* is admissible. Most importantly, the Ombudsman’s proactive, systemic function is supported by his own-initiative power. That role of the Ombudsman comprises, first, capacity-building. The Ombudsman seeks to strengthen the capacity of the Union administration, but also (via the network of national ombudsmen) the

83. An institution’s lack of competence is a ground of illegality (Art. 230 EC) and constitutes maladministration. See on “lawfulness” as an element of good administration Art. 4 of the Code on Good Administrative Behaviour (a model code issued by the Ombudsman in 1999). [www.euro-Ombudsman.eu.int/code/pdf/en/\\_en.pdf](http://www.euro-Ombudsman.eu.int/code/pdf/en/_en.pdf), visited on 16 Aug. 2004.

84. Art. III-335 CT is in Part Three, Title VI, Chapter I “Provisions Governing the Institutions”, Section 1 on the institutions, Subsec. 1 “The European Parliament”.

85. Case T-209/00, *Frank Lamberts v. European Ombudsman and European Parliament*, [2002] ECR II-2203, para 65.

86. The French translation of Ombudsman as “*Médiateur ‘public’*” is therefore appropriate.

capacity of Member States' public authorities to observe the law, to respect principles of good administration and human rights.<sup>87</sup>

The Ombudsman's systemic role includes incitement of legal and administrative reform, although the European Ombudsman is not a formal law-maker.<sup>88</sup> In the past, he has been quite successful in triggering reforms of the transparency regime, and in improving the procedural position of complainants in Article 226 procedures (see below, 4.4.). The Ombudsman was also a driving force for the insertion of a fundamental right to good administration in the Charter of Fundamental Rights, and he is working towards binding and uniform rules on good administrative behaviour (see below, 5.5.1.). The Ombudsman's primary tool for rule-making is the Draft Recommendation.<sup>89</sup> Of course, an Ombudsman recommendation is in itself mere "soft law", both in substance and in legal authority.<sup>90</sup> But it is precisely this softness and flexibility which enables the Ombudsman to propose even radical reforms, which can not (yet) be realized in a hard legal act or a binding court judgment.

Obviously, the Ombudsman's functions overlap with the other institutions' functions to some extent. This functional overlap makes it imperative that all European institutions work together in good faith. Indeed, the Ombudsman has a duty of cooperation with the other European institutions.<sup>91</sup> In turn, the other institutions are obliged to cooperate with the Ombudsman, in particular when the Ombudsman exercises his specific powers of inquiry *vis-à-vis* the other institutions (inspection of documents and testimonials).<sup>92</sup> Compared to the national ombudsmen, these powers are limited by unusual exceptions.<sup>93</sup>

87. Diamandouros, *supra* note 5.

88. The "legal source-function" of the Ombudsman is emphasized by Bonnor, "The European Ombudsman: a novel source of soft law in the European Union", 25 EL Rev. (2000), 39–56; Bonnor, "Ombudsmen and the Development of Public Law", 9 EPL (2003), 237–267 (in a comparative study of the Swedish and the Danish Ombudsman).

89. Art. 2(1) of the Ombudsman Statute, see *supra*, 2.2.

90. Bonnor, "European Ombudsman", *supra* note 88, at p. 41.

91. Case C-234/02 P, *European Ombudsman v. Lamberts*, judgment of 23 March 2004, nyr, para 82.

92. Under Art. 3(2) of the Statute, *supra* note 15, "the Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give access to the files concerned. They may refuse only on duly substantiated grounds of secrecy. ... Officials and other servants of the Community institutions and bodies must testify at the request of the Ombudsman; they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty to professional secrecy."

93. See the exceptions in Art. 3(2) of the Statute, *supra* note 15. See for a critical analysis Guckelberger, *op. cit. supra* note 1, at p. 126–131.



But the Ombudsman's critique<sup>94</sup> and his quest for an extension of his powers of investigation *vis-à-vis* the institutions<sup>95</sup> have so far not led to amendment of the Ombudsman Statute.

#### 4.2. *The Ombudsman and the European Parliament*

As already mentioned, the EC Treaty and also the Constitutional Treaty link the Ombudsman to the European Parliament<sup>96</sup> merely by the textual placement of the core provision on the Ombudsman (Art. 195 EC; Art. III-335 CT). The Ombudsman Statute is formally a decision of the European Parliament. Moreover, the Ombudsman is appointed (under the Constitutional Treaty: "elected"<sup>97</sup>) by the Parliament. Election by the legislature is a central element of the original Nordic Ombudsman model, as well as of the Danish export version. Its purpose is not subordination to the legislature, but to guarantee the Ombudsman's independence from the executive.<sup>98</sup> Finally, the Ombudsman is answerable to Parliament. But his obligation to report individual decisions and to submit an annual report to the Parliament must be assessed in the light of the constitutional guarantee that the Ombudsman is "completely independent in the performance of his duties" (Art. 195(3) EC; Art. I-49 CT). Consequently, parliamentary supervision, including the possibility to dismiss the Ombudsman upon request of the Parliament, relates only to the Ombudsman's overall functioning and allows sanction for "serious misconduct" (Art. 195(2) CT; Art. III-335(2) CT). This scheme does not subordinate the Ombudsman to parliament.<sup>99</sup> The Ombudsman is in the

94. In his Annual Report 1998, the Ombudsman expressed the view that the limitations are unnecessary and inappropriate as a matter of principle. In the following years, problems have arisen in some few cases with regard to hearing of witness and inspection of files (concerning only Commission documents). See the speech by Söderman on 24 May 2000 before the Committee on Constitutional Affairs of the EP, note prepared for Mme Almeida Garrett concerning the possible revision of Art. 3(2) of the Statute of the Ombudsman.

95. The Ombudsman asked for removal of the institutions' possibility to refuse the Ombudsman access to files, and of the duty of officials and servants to speak only under instruction. He proposed a liberation of Community officials from their duty of professional secrecy, so that they would have an unqualified obligation to testify. See speech by Söderman to the Committee on Constitutional Affairs of the EP on 5 March 2001 ("Modification of Article 3 of the Ombudsman's Statute"); EP, Committee on Constitutional Affairs, Draft Report on the amendment of Article 3 of the Statute of the European Ombudsman.

96. See for comparative analyses of the two institutions Hamers, *op. cit. supra* note 1, Meese, *op. cit. supra* note 1, Guckelberger, *op. cit. supra* note 1 and Barth, *op. cit. supra* note 1.

97. See on this amendment *supra*, section 3.

98. Harden, *op. cit. supra* note 10, at p. 202.

99. *Cf. Lamberts, supra* note 91, paras 43–47.

present and future institutional design not an auxiliary organ of the Parliament.<sup>100</sup>

A special issue in this context is the Ombudsman's relationship to the parliamentary petitions committee.<sup>101</sup> European citizens and residents enjoy two parallel rights, namely the right to complain to the Ombudsman and to petition to the European Parliament (Art. 21 EC; Art. I-10(2) lit. d) and Art. II-104 CT). Such a two-track model exists in many Member States as well.<sup>102</sup> At the EU level, the two remedies are not exactly congruent in scope. On the one hand, any complaint to the Ombudsman alleging maladministration could be equally submitted as a petition to the European Parliament. The inverse is not true, mainly because the Ombudsman's mandate does not cover action of the Member States, whereas, petitions may relate also to Member States' implementation of Community law. Many citizens lodge complaints against Member State action. If these are addressed to the Ombudsman, he transfers them to the committee on petitions. (A joint decision-procedure on the admissibility of complaints<sup>103</sup> would not be compatible with the legal limits of the Ombudsman's mandate.) Conversely, the petitions committee transfers suitable petitions to the Ombudsman. In fact, the number of transfers is quite low.<sup>104</sup>

With regard to the field of congruent "jurisdiction" of the Ombudsman and the committee on petitions, it is generally assumed that the petition track is more appropriate for political issues. This means that the Ombudsman should deal, as a rule, with citizens' individual complaints with little or no political implications.<sup>105</sup> This division of labour is justified by the political nature of the committee on petitions, and its political experience and influence which are needed to address matters of principle with political reper-

100. See on the academic debate on this question Guckelberger, *op. cit. supra* note 1, at p. 95–96 with further references.

101. See Baviera, "Essai de division de compétences entre le médiateur européen et la Commission des pétitions du Parlement européen", in Marias (Ed.), *supra* note 1, 107–121.

102. See Crespo Allen, *op. cit. supra* note 56.

103. Suggestion of the European Ombudsman in a speech to the Committee of Petitions concerning the presentation to the European Parliament of his Annual Report 2001 of 8 April 2002 at p. 4.

104. Harden, *op. cit. supra* note 10, at p. 212.

105. As a rule, the Ombudsman refers those issues which he considers to have intense political implications to the committee on petitions. For example, complaints relating to the havary of the oil tanker *Prestige*, deploring the insufficiency of Community legislation and the failure of measures were considered by the European Ombudsman to fall outside his mandate. The citizens were advised to petition to the European Parliament (European Ombudsman Press Release No. 32/2002 of 13 Dec. 2002).

cussions.<sup>106</sup> Moreover, the European Parliament, elected directly by the European citizens, enjoys direct democratic legitimacy. In practice, the overlap of “jurisdictions” plays no significant role.<sup>107</sup>

A different issue is the question of mutual review of the two bodies. As mentioned earlier, the European Parliament is not competent to review the substance of an Ombudsman decision in an individual citizen’s complaint.<sup>108</sup> Conversely, a faulty decision of the committee on petitions could – in terms of the Treaty – be subsumed under “maladministration”. It would then be within the scope of Ombudsman review, because the committee is – unlike the Union courts – not explicitly exempt from the Ombudsman’s mandate. However, the Ombudsman refuses to conduct inquiries on petitions by the European Parliament, because he does not consider himself as investigator of the European Parliament.<sup>109</sup>

#### 4.3. *The Ombudsman and the courts*

A central issue is the relation between the Ombudsman as a non-judicial redress mechanism and the courts. From the point of view of aggrieved citizens, resort to the Ombudsman may be an attractive alternative to raising a formal action before a Community or national court.<sup>110</sup> It avoids the well-known disadvantages of judicial procedures, i.e. costs, delay, formality, and tension. In contrast, the Ombudsman procedure is free of charge, informal and flexible, swift, and it is non-adversarial. Complainants do not have to meet any requirements of standing, such as legal interest. Moreover, the Ombudsman’s standard of review is broader than judicial review and not limited to pure legality-control. On the other hand, the Ombudsman does not issue binding decisions, and in the event of non-compliance with an Ombudsman recommendation, no enforcement action or other follow-up procedure is possible. Another important difference between the Ombuds-

106. Speech by Söderman on 27 Nov. 2002 to the Committee on Petitions of the Chamber of Deputies of Luxembourg; speech by Söderman on 25 Feb. 2003, *supra* note 66. See in scholarship, e.g., Guckelberger, “Das Petitionsrecht zum Europäischen Parlament sowie das Recht zur Anrufung des Europäischen Bürgerbeauftragten im Europa der Bürger”, 56 DöV (2003), 829–838, at 838.

107. Harden, *op. cit. supra* note 10, at p. 212.

108. See also in relation to this *Lamberts, supra* note 91, paras. 43–47.

109. See as a recent random example the decision of the Ombudsman in complaint 1590/2004/ELB of 25 June 2004.

110. See Davis, “Quasi-Judicial review: The European Ombudsman as an Alternative to the European Courts” 1 *Web Journal of Current Legal Issues* (2000), [webjcli.ncl.ac.uk/2000/issue1/davis1.html](http://webjcli.ncl.ac.uk/2000/issue1/davis1.html), visited on 6 Sept. 2004.

man and the courts is the Ombudsman's ability to set his own agenda and to initiate inquiries without having to wait for a complaint.

On the other hand, the Ombudsman's individual redress activity resembles judicial action in some respects. Citizens have "a subjective right to refer to the Ombudsman complaints",<sup>111</sup> which resembles the fundamental right of access to courts. As in the judicial realm, legal (administrative) remedies must be exhausted first, and time-limits apply.<sup>112</sup> The Ombudsman examines first the admissibility and then the merits of a claim, and his inquiry is bounded by the allegations and claims. Although the Ombudsman does not often quote his own precedents, he uses ritual formulas which help creating his own case law. Finally, the Ombudsman procedure is normally public (similar to a trial), and the Ombudsman is independent, like a judge. Observers have even criticized the European Ombudsman's "legalistic" approach,<sup>113</sup> which arguably somewhat dilutes the specificity of the Ombudsman as a means of alternative dispute resolution. Given the fact that the Ombudsman may in functional terms substitute the courts, and that both forums have specific advantages and shortcomings, it is laudable that the EC Treaty leaves it to the citizen to decide which of the two is likely to serve his interests best.<sup>114</sup> Given their functional similarity, it is logical that the two remedies cannot be pursued at the same time. If a citizen chooses the judiciary, the Ombudsman proceeding is subsidiary. The Ombudsman may not conduct inquiries on facts which are or have been "the subject of legal proceedings" (Art. 195(1) EC; Art. III-335(1)(2) CT).<sup>115</sup> This clause refers not only to Community courts, but also national courts anywhere in the world.<sup>116</sup> Moreover, the European Ombudsman accepts that under Article 220 EC (Art. I-29 CT), the Court of Justice is the primary organ entrusted with legal interpretation and application of Union law. The Ombudsman follows the case law of the Union courts, although he does not quote the case law on a regular basis.

111. *Lamberts*, *supra* note 85, para 56.

112. Both requirements in Art. 2(4) Statute, *supra* note 15. However, an own-initiative inquiry is still possible later.

113. Rawlings, "Engaged elites, citizen action and institutional attitudes in Commission enforcement", 6 *European Law Journal* (2000), 4, at 15 and 17.

114. *Lamberts*, *supra* note 85, para 66.

115. See also Art. 1(3) Statute, *supra* note 15: "The Ombudsman may not intervene in cases before courts or question of the soundness of a court's ruling". Under Art. 2(7) of the Statute, the Ombudsman has to declare complaints inadmissible when he learns that a legal proceeding has been started. A *different* issue is Ombudsman control of the judicial activity as such. Art. 195 EC stipulates that the Ombudsman may not scrutinize the courts, because judicial proceedings are not administration and therefore no "maladministration" is possible.

116. Heede, *op. cit. supra* note 8, at 591; Harden, *op. cit. supra* note 10, at 230.

In Söderman's words: "the jurisprudence of the Courts in Luxembourg ... will safely guide the Ombudsman's ship on the heavy seas of good and bad administration."<sup>117</sup>

If a citizen chooses resort to the Ombudsman and is not satisfied, subsequent judicial remedies remain open in theory.<sup>118</sup> In practice, this option is obstructed by the rule that the time limits for judicial proceedings are not interrupted by complaint to the Ombudsman.<sup>119</sup>

#### 4.4. *The Ombudsman and the Commission*

The Ombudsman and the Commission are both non-judicial actors which are, *inter alia*, entrusted with a controlling and supervisory function. The Commission is currently the so-called guardian of the Treaties (Art. 211 EC). Under Article I-26 CT it "shall ensure the application of the Constitution". Unlike the Ombudsman, the Commission's guarantee function is not limited to the EU administration, but extends to all "branches" of EU government and to the Member States' application of EU law. In controlling other parts of the EU administration (not the Commission itself), the Ombudsman generally accepts the legal assessments of the Commission and does not seek to replace them by its own judgment.<sup>120</sup> The functional balance between the European Ombudsman and the Ombudsman network on the one hand and the Commission on the other can best be identified by examining two salient legal problems.

##### 4.4.1. *The Ombudsman as a custodian of the infringement proceedings*

Infringement proceedings are the pre-litigation phase of the procedures for non-compliance lodged by the Commission on the basis of Article 226

117. Söderman, *op. cit. supra* note 11, at 354.

118. The Ombudsman's finding of no maladministration is not *res iudicata* (Harden, *op. cit. supra* note 10, at 221). Under Art. 2(5) of the Statute, the Ombudsman may advise the person lodging the complaint to address it to another authority. However, the Ombudsman is under no obligation to advise the individual that he may bring an action before Community courts, to inform him of other legal remedies and of the time-limits he has to observe with regards to actions before the courts. It is not incumbent on him to advise the complainant to pursue any particular remedy. *Lamberts, supra* note 91, paras. 25 and 80. See also Case T-33/99, *Méndez Pinedo v. ECB* (order 2d chamber) [2000] ECR-FP-I-A-63 (summary) and II-273 (Spanish original), para 36.

119. Art. 2(6) of the Statute, *supra* note 15. Case T-33/99, *Méndez Pinedo, supra* note 118, para 26.

120. Annual report 1999, at p. 19: "it is therefore likely that in most cases, the Ombudsman will find no reason, at the end of his inquiry, to question the Commission's considered interpretation of a legal provision."

EC<sup>121</sup> (Art. III-360 CT<sup>122</sup>). This provision empowers the Commission to take action against a Member State failing to fulfil its “obligation[s] under the Treaty”, respectively “under the Constitution”. One of these obligations is to respect the European fundamental rights (either as “general principles of Community law”, or as explicit guarantees enshrined in the Constitutional Treaty). The details of the infringement proceedings have been shaped by Commission practice. The Commission has been eager to preserve the features of selectivity, secrecy, and effectiveness.<sup>123</sup> Most importantly, the Commission’s decision as to whether or not to refer a breach of EU law to the EJC is within its discretion.<sup>124</sup> Although the Commission acknowledges the vital role played by the complainant in detecting infringements of Community law,<sup>125</sup> individuals affected by a breach of Community law have no procedural or substantive rights *vis-à-vis* the Commission. They cannot force the Commission to adopt a particular position, and they can notably not bring an action of annulment for the Commission’s refusal to take action.<sup>126</sup> The underlying view of the nature of the infringement proceeding is that this procedure is not intended to provide individuals with a means of redress, but that it is a primarily political mechanism within a “bilateral” relationship between Union and Member States, for ensuring State compliance.<sup>127</sup>

121. Definition in Commission’s 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 March 2002, O.J. 2002, C 244/5, at p. 6 (Principle 1. “Definitions and Scope”).

122. Art. III-360 CT: “If the Commission considers that a Member State has failed to fulfil an obligation under the Constitution, it shall deliver an opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”

123. Harden, “What future for the centralized enforcement of Community law?”, 55 *Current Legal Problems* (2002), 495, at 502–504.

124. See Case C-422/92, *Commission v. Germany*, [1995] ECR I-1097, para 18; Case C-191/95, *Commission v. Germany*, [1998] ECR I-5449, para 46; Case C-212/98, *Commission v. Ireland*, [1999] ECR I-8571, para 12.

125. Commission’s communication on relations with the complainant, *supra* note 121, at p. 5.

126. Actions to this end instituted by individuals against the Commission are dismissed by the Court. Case C-247/87, *Star Fruit v. Commission*, [1989] ECR I-291, para 12; Case C-87/89, *Société nationale interprofessionnelle de la tomate (Sonito) v. Commission*, [1990] ECR I-1981, para 6.

127. Commission’s communication on relations with the complainant, *supra* note 121; Case C-141/02 P, *Commission v. max.mobil Telecommunication Service*, Opinion of A.G. Poiares Maduro of 21 Oct. 2004, para 56; in scholarship Craig and de Búrca, *EU Law*, 3rd ed.

This is where the Ombudsman comes in.<sup>128</sup> Individuals have regularly complained to him about the Commission's procedures. Typical grievances are excessive delay for the processing of complaints, lack of information about the further treatment, closure of the case without warning or explanation, or suspicions of political interference, which the Ombudsman has criticized in numerous decisions.<sup>129</sup> Additionally, the Ombudsman launched his own initiative inquiry into the infringement procedure.<sup>130</sup> Ombudsman pressure<sup>131</sup> induced the codification of procedural safeguards in a Commission Communication in 2002, which improves the transparency, sets time limits, and offers possibilities for a hearing,<sup>132</sup> but which – somewhat inconsistently

(Oxford, 2003), p. 308; Erhart, "Der europäische Bürgerbeauftragte – ausgewählte Rechtsfragen", 5 *Journal für Rechtspolitik* (1997), 278, at 280.

128. See on the legal position of the individual in infringement proceedings and on the Ombudsman's role in this context Mastroianni, "The Enforcement Procedure under Article 169 and the Powers of the European Commission: Quis Custodiet Custodes?", 1 *EPL* (1995), 535–539 (arguing for a reform of the infringement procedure, notably for transparency); Erhart, *op. cit. supra* note 127, at 280–285; Kunzlik, "The enforcement of EU environmental law: Art. 169, the Ombudsman and the Parliament", 6 *European Environmental Law Review* (1997), 46–52; Bonnor, (2000) *op. cit. supra* note 88, 47–50.

129. Harden, "What future for the centralized enforcement?", *supra* note 123, at p. 499; OI 303/97/PD, decision of 13 Oct. 1997, para 3. Recent random examples: Complaint 2185/2002/IP of 27 April 2004 (with critical remark on the Commission's undue delay in pursuing its inquiries); complaint 841/2003/(FA)OV, decision of 10 May 2004 (no maladministration in the way the Commission supervised the transposition of Community insurance law into national legislation; complaint 701/2003/IP of 9 June 2004 (with critical remark on the Commission's failure to register a complaint); complaint 1671/2002/GG, decision of 21 June 2004 (settlement after Commission's acceptance of draft recommendation); complaint 2333/2003/GG, decision of 19 May 2004 with critical remark on Commission's failure to deal with the complainant's infringement complaint within a reasonable period of time (here: 5 months delay).

130. See Decision of the European Ombudsman in the own initiative inquiry OI 303/07/PD into the Commission's administrative procedures in relation to citizens' complaints about national authorities of 13 Oct. 1997. This initiative has been triggered by *Newbury Bypass*, Complaint 206/27.10.95/HS/UK and 25 other complaints against the Commission, Annual Report 1996, 58–66. In this case, 26 complaints had alleged maladministration by the Commission in deciding not to open infringement proceedings against the UK, which had not carried out an environmental impact assessment on a road project.

131. The Ombudsman had suggested that the Commission adopt a code to handle Art. 226 complaints. See speech by Söderman to the European Convention on 25 June 2002.

132. Commission's communication on relations with the complainant, *supra* note 121. Safeguards comprise, *inter alia*, the recording of complaints, the acknowledgment of receipt, the furnishing of a standard complaint form, information in writing after each Commission decision of the steps taken, a right to ask for explanation or clarification by the Commission officials on the spot (!) and at the citizen's own expense. The document also sets a time limit of one year as a general rule for the investigation of claims. Complainants will be informed in

– explicitly refuses to acknowledge any subjective legal rights of complainants.<sup>133</sup>

However, even under the premise that the “objective” character of the infringement proceeding, manifested in the Commission’s discretion and the absence of a substantive legal position of the individual, precludes an actionable legal right of citizens, the Commission’s discretionary power is in a legal community not unlimited. Otherwise it would amount to mere arbitrary power.<sup>134</sup> The role of the Ombudsman in this context is to *scrutinize the limits of Commission discretion*.<sup>135</sup> General limits of discretion as established by the case law of the Court of Justice are consistency, good faith, avoidance of discrimination, compliance with the principles of proportionality, equality and legitimate expectations and the respect of human rights and fundamental freedoms.<sup>136</sup> Moreover, it can be argued that the complainant in infringement proceedings is *de facto party* to an administrative proceeding and that consequently the normal rules and principles of administrative procedure, such as openness and the duty to give reasons, apply.<sup>137</sup> In any case, the Commission’s Communication of 2002 has spelled out the above-mentioned specific procedural guarantees.

The Communication is a mere soft law document. Nevertheless, the Commission acknowledges that non-compliance with that document will constitute maladministration and may give rise to an affected citizen’s complaint to the European Ombudsman.<sup>138</sup> This is logically consistent, because malad-

writing of the decision taken by the Commission in connection with their complaint (issuing of a formal notice opening proceedings against the Member State or decision to close the case). Prior to closing the case, the Commission will give written notice to the complainant setting out the grounds and inviting the complainant to submit any comments within four weeks. Finally, Commission decisions on infringement cases are published within one week.

133. The Communication insists on the “bilateral nature of the infringement procedure”, Commission’s communication on relations with the complainant, *supra* note 121, at p. 6.

134. See Council of Europe, Recommendation No. R (80) 2 adopted by the Committee of Ministers on 11 March 1980, concerning the exercise of discretionary powers by administrative authorities, available via [www.coe.int/T/E/Legal\\_affairs/](http://www.coe.int/T/E/Legal_affairs/), visited on 15 Sept. 2004.

135. Leading case is the Ombudsman decision on complaint 995/98OV – *Thessaloniki Metro*, decision of 30 Jan. 2001. In this decision, the ombudsman did not question the existence of discretion, but recalled that discretionary power is not the same as dictatorial or arbitrary power. An institution must act within the limits of its legal authority when making a discretionary decision (see *id.*, esp. paras 1.7–1.9.).

136. *Cf.* Ombudsman decision *Thessaloniki Metro*, *supra* note 135, para 1.8.

137. Harden, *op. cit.* *supra* note 123, at 512 and 508. This conception does not necessarily imply a so-far unknown actionable citizen’s right to force the Commission to take action.

138. Commission’s communication on relations with the complainant, *supra* note 121, at p. 8, principle 14: “Where a complainant considers that, in handling his/her complaint, the Com-



ministration is broader than illegality and because complaints to the Ombudsman do not need to be based on a claim of a violation of individual and “hard” legal rights.

#### 4.4.2. *National Ombudsmen as an alternative to Article 226 proceedings?*

The prospect that the Commission will be overwhelmed with cases due to the Union’s enlargement, has led observers to consider national ombudsmen as an alternative to the Commission’s infringement proceedings.<sup>139</sup> This suggestion is based on the assumption that the administrative stage of the infringement proceedings and Ombudsman proceedings are functionally interchangeable non-judicial remedies, which is according to the traditional conception of an “objective” and “bilateral” infringement procedure not the case. However, the affected citizens’ themselves probably do not share the traditional view, but instead apply to the Commission because they seek an informal and flexible remedy. In this perspective, “Art. 226 [appears] as a quasi-Ombudsman remedy.”<sup>140</sup> To address national ombudsmen instead of the “quasi-Ombudsman” might be especially attractive for citizens who complain of disregard for their European fundamental rights. It is therefore laudable that the Commission in its Communication of 2002 pledges, “where necessary”, to “inform the complainant of any possible alternative form of redress, such as recourse to national courts, the European Ombudsman, a national Ombudsman or any other national or international complaints procedure.”<sup>141</sup> It would be even more effective for the Commission to forward the complaint directly to the alternative mechanisms. Granting priority to local, non-judicial remedies would realize the principle of subsidiarity in the field of law enforcement and would avoid overloading the Commission.<sup>142</sup>

#### 4.4.3. *Conclusion: Ombudsman pressure towards a change of paradigm in infringement proceedings*

In conclusion, it seems fair to say that the Ombudsman’s activity has had some impact on the quality of infringement proceedings. It is in part due to the Ombudsman that the Commission has established procedural rules which

mission has been guilty of maladministration by failing to follow any of the above measures, he/she may refer the matter to the European Ombudsman”.

139. See notably Harden, *op. cit. supra* note 123, at 512–514.

140. Harden, *ibid.*, at 506.

141. See Principle 4, “Acknowledgement of receipt” in the Commission’s communication on relations with the complainant, *supra* note 121, at p. 6. This clause follows the European Ombudsman’s suggestion in OI 303/97/PD, decision of 13 Oct. 1997, para 12.

142. Harden, *op. cit.*, *supra* note 123, at 512; Diamandouros, *supra* note 5.

*de facto* grant various procedural rights to complainants, while still paying lip-service to the principle of “bilateralism” and “objectivity” of the infringement proceedings. Similarly, the Commission’s acknowledgment that ombudsmen proceedings are a viable alternative to the Article 226-track implies a novel conception of the infringement proceedings.

Most importantly, Ombudsman scrutiny of the limits of discretion moves the individual complainant somewhat into the foreground. Officially, the Ombudsman scrutinizes in the Article 226 context only the *procedural safeguards* guaranteeing that the handling of citizens’ complaints to the Commission is carried out under due regard for the above-mentioned standards and principles, regardless of the nature of the action to be undertaken by the Commission. Formally, the Ombudsman’s scope of inquiry does not therefore include the Commission’s discretionary decision to launch the judicial stage of the Article 226 procedure.<sup>143</sup> However, it can be doubted whether the procedural issues can be neatly separated from the question which type of action is appropriate. Arguably, the Ombudsman’s approach focusing on procedural propriety also touches on the substance of the Commission decision. The ostensibly formal character of control does not guarantee the “neutrality” of the Ombudsman’s intervention.<sup>144</sup> In the long run, we may come to acknowledge that the “sound administration of justice and the proper application of the [European Constitution]” require “that natural or legal persons who request the Commission to find an infringement of those rules should be able, if their request is rejected either wholly or in part, to institute proceedings in order to protect their legitimate interests”, as the Court of First Instance put it (albeit limited to the context of competition rules).<sup>145</sup> Ombudsman activity has contributed to this development.

143. See Ombudsman decision 161/99/IJH of 13 Sept. 2000, para 1.5.; Ombudsman decision on complaint 1194/2000/JMA of 7 June 2001 para 1.5.

144. Magonette, *supra* note 4, at pp. 943–944. According to Rawlings, *op. cit. supra* note 113, at p. 6, the Ombudsman is a means of side-stepping the failure of the Court to police the Art. 226 process effectively.

145. Case T-54/99, *max.mobil v. Commission*, [2002] ECR II-313, paras. 54 and 56. The CFI limited this dictum to the special infringement proceedings in the field of public undertakings under Art. 86(3) EC and distinguished the proceedings under Art. 226 EC. However, the A.G. interpreted this judgment as a general attack on the Commission’s discretionary power and feared the advent of subjective rights of the individual in infringement proceedings (Case C-141/02 P, *max.mobil*, *supra* note 127, Opinion, para 55).

## 5. The European Ombudsman and European constitutional principles

This part analyses the Ombudsman's contribution to the safeguarding and implementation of basic constitutional principles and their emanations. The Constitutional Treaty mentions the Ombudsman in Part I, Title II ("Fundamental Rights and Citizenship of the Union") and in Part I, Title VI ("The democratic life of the Union"). This rightly signals that the Ombudsman is supposed to foster both the Union's commitments to the rule of law (including human rights, access to justice, and good administration), and its democratic aspirations (linked to European citizenship and transparency).<sup>146</sup>

### 5.1. *The Ombudsman and the rule of law*

The EU is "a Community based on the rule of law".<sup>147</sup> "Rule of law" here means that the EU is governed by the law and not by power. The activity of all European bodies must be duly authorized by legal rules, and effective remedies must be provided against illegal action. The redress function of the European Ombudsman is one building block of that European rule of law.<sup>148</sup> His activity is directed at preventing illegality and remedying infringements. He thereby contributes, alongside other institutions, such as the Community courts or the Commission, to safeguarding the lawfulness of Union administration. In this context, two issues deserve scrutiny: first, which types of remedies are desirable under the European rule of law, and second, can the Ombudsman's activities themselves be subject to judicial control?

#### 5.1.1. *A chapter on remedies in the Constitutional Treaty?*

The rule of law requires remedies. The European Ombudsman proposed to the Convention to insert a chapter on remedies into the Constitutional Treaty. He even considered this to be his "first and foremost" objective in the process of constitution-making.<sup>149</sup> That chapter should have set out the possibilities for judicial and non-judicial redress when Community rights are not

146. See on the promotion of these constitutional principles the Resolution adopted by the national ombudsmen (2003), *supra* note 80. See also Diamandouros, *supra* note 5.

147. Opinion 1/91 on the draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079, para 21.

148. Heede, *op. cit. supra* note 8, at 588; Guckelberger, *op. cit., supra* note 1, at p. 13; *What can the European Ombudsman do for you?: A guide for Citizens* (Strasbourg, 2002), at p. 21.

149. Speech by Söderman to the European Convention on 24 June 2002; see also his speech on 25 Feb. 2003, *supra* note 66.

respected, should have enumerated judicial remedies (proceedings in the Court of Justice and in national courts and tribunals, the right to petition the European Parliament, and the right to complain to the European Ombudsman), and finally should have mentioned the right to complain to an independent Ombudsman or body dealing with petitions in each Member State.<sup>150</sup> A controversial element of the Ombudsman's proposal on remedies was the power of referral. The European Ombudsman suggested that he could be charged with referring to the ECJ cases of principle involving fundamental rights.<sup>151</sup> This idea draws on the Spanish, Portuguese and Austrian examples, where the national ombudsmen can refer matters to their constitutional court.<sup>152</sup> It was not taken up by the Convention.

Another problematic aspect was the Ombudsman's proposition to mention non-judicial remedies in the Member States. The European Ombudsman had regularly endorsed this idea in previous years.<sup>153</sup> His insistence can be explained by the fact that reliance on and improvement of the network of national ombudsmen is important for the European Ombudsman, because of his limited mandate. However, the Union does not possess the authority to prescribe to the Member States which concrete types of remedies they must establish in their national legal order. It is therefore prudent that the Constitutional Treaty merely states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Art. I-29(2) CT). Apart from this provision, the idea of a chapter on remedies found no resonance in the Constitutional Treaty.

Finally, the Ombudsman propagated in the Constitutional Convention the introduction of an explicit right to complain to the Ombudsman.<sup>154</sup> The reason for this request is that Article 21(2) EC merely states that citizens "may apply to the Ombudsman". This option is not formulated as a subjective right (in contrast to the right to petition to the European Parliament under Art.

150. CONV 221/02 CONTRIB 76, *supra* note 66.

151. The proposal was: "If the European Ombudsman considers, after carrying out an inquiry in accordance with [Article 195 EC], that a Member State or a Community institution or body is failing to respect a fundamental right binding in Community law, he may bring the matter before the Court of Justice." CONV 221/02 CONTRIB 76, *supra* note 66.

152. See Crespo Allen, *supra* note 56, at p. 8.

153. See already the Annual Report 1998, at p. 11: "Furthermore, the right to complain to national ombudsmen and to petition to parliaments in cases of conflicts with the administration involving Community law should also be mentioned in the Treaty. Each Member State should have an obligation to ensure that its legal structure includes an effective and appropriate non judicial body to which citizens may apply or this purpose".

154. CONV 221/02 CONTRIB 76, *supra* note 66; CONV 466/02 CONTRIB 176, *supra* note 13; speech by Söderman to the European Convention on 8 Nov. 2002.

21(1) EC), and much less as a fundamental or human right. Fortunately, the Court of First Instance interpreted this provision, despite its loose language, as conferring on European citizens and residents a “subjective right to refer to the Ombudsman”.<sup>155</sup> It is laudable that the Constitutional Treaty now makes this qualification explicit by mentioning the right to apply to the Ombudsman as one of the rights linked to citizenship (Art. I-10(2)(d) CT). Moreover, this right is upgraded as a human right forming part of the Fundamental Rights Charter as embodied in the Constitutional Treaty (Art. II-103 CT). This European fundamental right has three components: the Ombudsman must receive and take note of the complaint and must respond to the citizen. Citizens are not entitled to an investigation. Conversely, the Ombudsman is not bound to reach a specific result or a solution, but merely under an obligation to use his best endeavours.<sup>156</sup>

#### 5.1.2. *Judicial review of Ombudsman activity?*

This section deals with the question: who watches the watchdog? The Ombudsman himself is a body established by the Treaty. The European rule of law requires that the Ombudsman himself, as all other Union bodies, acts under, not above the law. Although the Ombudsman enjoys wide discretion, there are limits (which have so far never been overstepped by the Ombudsman). Moreover, the Ombudsman himself forms part of the Union administration. This means that he himself must comply with the requirements of good administration.<sup>157</sup> For instance, the procedure before the Ombudsman must be completed within a reasonable time, to be determined according to the circumstances of the case.<sup>158</sup> However, the unquestionable subjection of the Ombudsman to the law as matter of substance is distinct from the procedural question of justiciability. This means that the rule of law does not strictly require judicial review of all aspects of the Ombudsman’s activity.

To begin with, the Ombudsman’s findings in a case should not be subject to citizens’ actions for annulment under Article 230 EC (Art. III-365 CT) or for failure to act (Art. 232 EC; Art. 367 CT). A formal explanation for the non-availability of these actions is that in both Treaty provisions, the Ombudsman is not mentioned as a possible defendant. If, *arguendo*, the Om-

155. *Lamberts, supra* note 85, para 56.

156. Cf. *Lamberts, supra* note 91, paras 50 and 82. Consequently, a complainant can not argue that the Ombudsman has not fulfilled the mission entrusted to him on the sole grounds that the Ombudsman concluded that it was not possible to find a solution.

157. *Lamberts, supra* note 85, para 76.

158. See Art. 17 of the European Code of Good Administrative Behaviour (*supra* note 83).

budsman could be associated to the European Parliament from a functional perspective, an affected citizen might think of claiming illegal action or failure to act on the part of the Parliament. However, both under Article 230(4) EC and under Article 232(3) EC, a natural or legal person can only institute proceedings relating to acts which are (or should be) addressed to him or which concern (or would concern) him as a third party directly and individually.<sup>159</sup> These conditions are not satisfied in the context of the Ombudsman's activities. If the Ombudsman finds maladministration, he reports to the Parliament and possibly makes recommendations. Both the report and the recommendations are legally non-binding. Moreover, these acts do not concern the citizen, who is technically a third party, "directly and individually". Report and recommendation are therefore not challengeable acts in terms of Article 230(4) EC (Art. III-365 CT) and correspondingly not the possible object of a proceeding for failure to act under Article 232(3) EC (Art. III-367 CT).<sup>160</sup>

Immunity of the Ombudsman's substantive findings from review by the courts is plausible also from a policy perspective. Citizens can choose between judicial remedies and the Ombudsman. They have the opportunity to institute legal proceedings directly. The principle of effective legal protection does not demand a redoubling of fora. Just as the Ombudsman cannot review the substance of judicial proceedings, the courts should not review his findings in substance. Otherwise, the idea of alternative means of dispute settlement is betrayed.<sup>161</sup>

A different solution might be appropriate with regard to purely procedural decisions of the Ombudsman. Article 230 EC could be construed extensively so that the Ombudsman's decision to reject a complaint as inadmissible could be actionable. Thereby the Ombudsman would be treated on the same footing as the EP when it rejects a petition as inadmissible.<sup>162</sup>

A different issue is actions for damages founded on the Union's non-contractual liability as a result of the alleged mishandling of a complaint by the Ombudsman. The Court has always considered the action for damages under Article 288 EC (Art. III-431(2) CT) to be an autonomous form of action

159. Art. III-365 and III-367 CT add to the current Treaty provision regulatory acts which do not entail implementing measures to the actionable acts. But this does not alter the situation with regard to the Ombudsman activity, which is not regulatory.

160. Case T-103/99, *Associazione delle Cantine Sociali Venete v. European Ombudsman and European Parliament*, judgment of 22 May 2000, [2000] ECR II-4165, esp. paras 41–51. (Appeal to ECJ withdrawn). See also Harden, *op. cit. supra* note 10, at 220–21.

161. Harden, *op. cit. supra* note 10, at 222; Guckelberger, *op. cit. supra* note 1, at pp. 143–144.

162. Guckelberger, *op. cit. supra* note 1, at p. 143.

(whose admissibility therefore does not pave the way for other types of action). In the context of an action for damages, it is irrelevant whether the critical act is legally binding or not. It is therefore consistent that the ECJ has, in a recent ruling, declared an action for damages against the European Ombudsman admissible in principle.<sup>163</sup> The Court justified this finding with a standard *effet utile* argument: to deny the availability of this type of action with regard to the Ombudsman would render ineffective the procedure provided for in Article 235 EC (Art. III-370 CT) conferring jurisdiction on the Court of Justice in disputes relating to compensation for damages.<sup>164</sup>

However, the Court's review in an action for damages is quite limited, because according to well-established case law, a right to reparation arises only from sufficiently serious breaches of Community/Union law. This condition will only rarely be met in the context of the Ombudsman activity, because the Ombudsman enjoys a very wide discretion as regards the merits of complaints and the way he deals with them. Only a flagrant, manifest breach of the Ombudsman's obligations or a grave disregard of the limits on his discretion would constitute a serious breach of Community/Union law in terms of Article 288 EC (Art. III-431 CT). Consequently, only in very exceptional circumstances will a citizen be able to demonstrate that the Ombudsman has committed a sufficiently serious breach in the performance of his duties likely to cause damages.<sup>165</sup> This solution represents a reasonable compromise between respect for the rule of law on the one hand and consideration for the Ombudsman's specific functions on the other. Moreover, judicial review of the activities of the Ombudsman does not interfere with the powers of the European Parliament *vis-à-vis* the Ombudsman, because these do not amount to a review of his performance in dealing with citizens' complaints.<sup>166</sup> And finally, (limited) judicial review of the Ombudsman does not call into question the Ombudsman's independence, because a finding of liability leading to damage occasioned by the Ombudsman's activity concerns not the personal liability of the Ombudsman, but that of the Union.<sup>167</sup>

163. *Lamberts*, *supra* note 91.

164. *Ibid.* para 61.

165. *Ibid.*, para 52.

166. *Ibid.*, paras 43–47.

167. *Ibid.* para 48.

## 5.2. *The Ombudsman and fundamental rights*

### 5.2.1. *The Ombudsman's enforcement of Charter rights*

European fundamental rights were first codified in the European Charter of Fundamental Rights (CFR). The European Ombudsman was both an observer in the Charter Convention and able to address that Convention.<sup>168</sup> On 7 December 2000, the Charter was “welcomed” by the European Council in Nice.<sup>169</sup> Despite the Charter’s lack of binding legal force, the Ombudsman pledged from the outset on to “mak[e] ... the Charter a living reality”.<sup>170</sup> He has made frequent reference to it in his speeches and Annual Reports and has criticized EU institutions for their failure to observe many rights contained in the Charter.<sup>171</sup> Most importantly, the Ombudsman has used his own-initiative power for a pro-active approach in enforcing Charter rights. Own initiatives have related – *inter alia* – to age limits for EU recruitment competitions,<sup>172</sup> to parental leave for EU officials,<sup>173</sup> to judicial protection in tender procedures,<sup>174</sup> and to the freedom of expression of Commission officials.<sup>175</sup> In November 2003, the Ombudsman opened an own-initiative inquiry into the subject of the integration of persons with disabilities (Art. II-81 CT) with regard to recruitment, careers, working environment etc. in relation to the Commission.<sup>176</sup>

Moreover, the Ombudsman has consistently taken the view that failure to apply the Charter is maladministration, independently of the Charter’s status as soft law.<sup>177</sup> This reasoning is supported by the fact that the fundamental

168. The Convention functioned from 17 Dec. 1999 to 2 Oct. 2000. See e.g. speech by the European Ombudsman on 2 Feb. 2000: Public Hearing on the draft Charter of Fundamental Rights of the European Union.

169. O.J. 2000, C 364/1.

170. The European Ombudsman, What can the Ombudsman do for you?, *supra* note 148 at p. 11.

171. See e.g. Decision on complaint 1532/202/GG against the Commission (age and sex discrimination), Annual Report 2003, at p. 190–196.

172. Art. 21 CFR; Art. II-81 CT. See OI/2/2001/(BB)OV, see Annual Report 2002, p. 207.

173. Art. 33(2) CFR; Art. II-93 CT. See OI/4/2001/ME, see Annual Report 2002, p. 201.

174. Art. 47 CFR; Art. II-197 CT. See OI/2/2002/IJH.

175. Art. 11 CFR; Art. II-71 CT. See OI/1/2001/GG, see Annual Report 2002, p. 196.

176. OI/3/2003/JMA. This inquiry was limited to the Commission, being the most important actor in the EU’s institutional framework, but may eventually to be expanded to other European institutions, [www.euro-ombudsman.eu.int/disabilities/en/default.htm](http://www.euro-ombudsman.eu.int/disabilities/en/default.htm), visited on 31 Aug. 2004. See summary in Annual Report 2003, at p. 35.

177. Speech by Söderman on 25 Feb. 2003, *supra* note 66; Diamandouros, *supra* note 5.



right to good administration (which is the other side of maladministration) comprises “fair” treatment (Art. 41 CFR; Art. II-101(1) CT).<sup>178</sup> And “fair” treatment, in turn, arguably includes respect for all fundamental rights.<sup>179</sup> In this perspective, the principle of “fairness” functions as a transmission belt which allows the Ombudsman to control the observance of all fundamental rights by the European administration (not by the legislative and judicial branch). The qualification of disregard for fundamental rights as maladministration does not turn on the formal legal status of the Charter of fundamental rights, because maladministration covers legal and non-legal errors. The Ombudsman’s reasoning therefore does not necessarily imply that he has treated the Charter of Fundamental Rights as binding law since its proclamation.<sup>180</sup>

In any case, one of the four main proposals of the Ombudsman in the Constitutional Convention was that the Charter should be legally binding.<sup>181</sup> This idea was realized by incorporating the Charter in Part II of the Constitutional Treaty. However, the Ombudsman’s interventions were not the principal driving force of this reform. As widely expected, the Convention’s Working Group on Fundamental Rights had come to the same conclusion.<sup>182</sup> In this context, it is crucial to realize that the Ombudsman’s power to enforce European fundamental rights finds its limits in his mandate (restricted to maladministration by Union bodies). Although in theory, both Union bodies and the Member States acting as agents must observe the European fundamental rights (Art. 51(1) CFR; Art. II-111(1) CT),<sup>183</sup> in practice Member

178. See for a discussion of the still unclear meaning of “fairness”, Lais, “Das Recht auf eine gute Verwaltung unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs”, 5 *Zeitschrift für Europäische Studien (ZEUS)* (2002), 447, at p. 462.

179. Guckelberger, op. cit. *supra* note 106, at p. 836; Guckelberger, op. cit. *supra* note 1, at p. 116

180. But see Craig and de Búrca, *supra* note 127, at pp. 362 and 390.

181. Ombudsman contribution CONV 221/02 CONTRIB 76, *supra* note 66; see also the speech by Söderman on 25 Feb. 2003, *supra* note 66. See also the Athens Resolution of national ombudsmen in Europe of 7–8 April 2003 (*supra* note 80), demanding to “facilitate the application of the Charter of Fundamental Rights”.

182. Final Report of the Working Group II on Fundamental Rights of 22 Oct. 2002, CONV 354/02.

183. Under Art. 51(1) CFR; Art. II-111(1) CT, “[t]he provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. ...” This provision is based on previous case law of ECJ; see Case C-292/97, *Kjell Karlsson*, [2000] ECR I-2737, para 37.

States implement Union law and consequently risk infringing Charter rights. It is widely agreed that Article 51(1) CFR covers every situation in which Member States' acts are occasioned by the Union, whether precisely determined by Union law or not. Charter rights must also be observed by the national authorities when the Member States enjoy discretion with regard to the means of implementation of European directives (*i.e.* framework laws in terms of Art. I-33 CT).<sup>184</sup> Most importantly, the "implementation" of Union law in terms of Article 51 CFR includes the application and interpretation of (formally) domestic law implementing European framework laws, because otherwise a coherent standard of European fundamental rights protection could not be achieved.<sup>185</sup> This very wide field of Member States' activity cannot be scrutinized by the European Ombudsman. His review of fundamental rights is limited to the far smaller field of direct Union administration. Here, the individual citizen's complaint to the European Ombudsman is a non-judicial alternative to the review of legality by the EJC under Article 230(4) EC (Art. III-365(4) CT), in which an individual can allege breaches of European fundamental rights by Union bodies under relatively restrictive conditions.<sup>186</sup>

In the more relevant case of non-observation of European fundamental rights by national authorities, it is primarily up to the Member States themselves to provide for effective remedies.<sup>187</sup> European fundamental rights are directly applicable by national courts, so that alleged violations can be dealt with there, eventually guided by an ECJ ruling in response to questions of interpretation via Article 234 EC (Art. III-369 CT). Moreover, almost all Member States offer non-judicial remedies (e.g. national ombudsmen, who may also deal with fundamental rights questions). A different option for an individual aggrieved by disregard of the European Charter is to address her-

184. A different and notoriously controversial question is the parallel or additional observation of "national" fundamental rights by the Member States' authorities (and access to national courts alleging a violation of a "national" fundamental right).

185. Meyer (Ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Baden-Baden, 2003), Art. 51 Charter, paras 25–28. Diamandouros, *supra* note 5.

186. The critical act must be addressed to that person or must be of direct and individual concern to him or her. Art. III-365 CT adds regulatory acts which do not entail implementing measures.

187. See Case C-50/00P, *Union de Pequeños Agricultores*, [2000] ECR I-6677, para 42: national courts are required to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act.

self not to national bodies, but to the Union, namely to the Commission in order to trigger an infringement procedure against her Member State under Article 226 EC (Art. III-360 CT). (See *supra*, 4.4.)

Finally, the Commission installed in 2002 a Network of independent experts to monitor respect for the European Charter of Fundamental Rights in the Member States.<sup>188</sup> The Network's main tasks are to draft annual reports on the state of fundamental rights practice in the EU based on national reports of the experts, to give opinions on specific questions (e.g. on unions between unmarried partners and same-sex marriages) on request of the Commission, and to assist the Commission and the Parliament to develop a European Union policy on fundamental rights. Moreover, the European Council decided in December 2003 to create a European Human Rights Agency and to that effect extend the mandate of the current European Monitoring Centre on Racism and Xenophobia in Vienna. The projected independent Agency is supposed to collect human rights data and analyse them with a view to defining Union policy in this field.<sup>189</sup> It is important that neither the Network nor the Agency provide for individual redress. However, their preventive functions indirectly serve this objective, too. Overall, the EU does not suffer from lacking remedies for fundamental rights violation, but offers a host of overlapping and probably even competing forums.

#### 5.2.2. *Accession of the EU to human rights instruments*

The European Ombudsman proposed in the Constitutional Convention that the Union should not only accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but also to further international agreements for the protection and promotion of human rights.<sup>190</sup> The Ombudsman welcomed the possibility for the Union to accede

188. [europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm](http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm), visited on 5 Jan. 2005.

189. Conclusions of the Representatives of the Member States, meeting at Head of Government level in Brussels on 13 Dec. 2003, [ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/misc/78398.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/78398.pdf), visited on 19 Oct. 2004. The plan is to amend Council Regulation (EC) 1035/97 of 2 June 1997, O.J. L 1997, 151/1, the legal basis of the current Monitoring Centre. See also the Communication from the Commission COM (2004) 693 final of 25 Oct. 2004, in which the Commission summarizes the state of affairs and announces a proposal for a regulation relating to the Agency in 2005.

190. Proposed by the Ombudsman at various occasions. See CONV 221/02 CONTRIB 76, *supra* note 66; Amendment Form: Suggestion for amendment of Art. 5(2) by Söderman; speech of 4 Oct. 2002 before Working Group II; speech by Söderman on 25 Feb. 2003, *supra* note 66; speech to the Convention on 27/28 Feb. 2003; already at an academic conference in 1998 (European Ombudsman, Press Release of 21 Oct. 1998).

to the ECHR, but feared that a constitutional provision on this issue would prevent the Union from other accessions.<sup>191</sup> The Convention did not take seriously the fears of the Ombudsman and chose not to mention any other human rights instrument besides the ECHR. Under Article I-9(2) CT, “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. ...”. In the Draft Constitution of 2003, this policy issue had only been formulated in a purely hortatory clause (“The Union shall seek accession”). It is laudable that the Constitution spells out a clear obligation to accede. This provision does not rule out future accessions to other human rights instruments.

### 5.3. *The Ombudsman and democracy*

The Ombudsman is intended to foster the principle of democracy in the Union,<sup>192</sup> including the institution of European citizenship. Historically, the ombudsman institution has always been conceived in the context of democracy. Consequently, the establishment of ombudsmen in the accession States formerly under communist rule was an important element of the transition to democracy.<sup>193</sup> The Ombudsman institution helps making the democratic idea a political reality, because it is a mechanism to secure the accountability of officials towards the citizens.<sup>194</sup> It can contribute to the individual’s feeling of security, which is a *conditio sine qua non* for a sound democracy.<sup>195</sup> Moreover, the Ombudsman entertains a dialogue with the citizens and thereby contributes to the openness of the Union and to closeness to the citizens.<sup>196</sup> His parliamentary appointment or election confers on him some degree of democratic legitimacy as well.

The establishment of the office of a European Ombudsman was linked to the creation of an European citizenship by the Treaty of Maastricht.<sup>197</sup> The

191. The Ombudsman argued that the question of whether the Union should accede to other human rights agreements is a matter of policy. The Constitution should leave that option open and not foreclose it. Explanation on Amendment Form: Suggestion for amendment of Art. 5(2) by Söderman.

192. See most explicitly Baviera, “Les pétitions au Parlement européen et le Médiateur européen”, 445 RMC (Feb. 2001), 129, at 135; Juvénal, *op. cit. supra* note 1, at p. 359.

193. Speech by Diamandouros to the European Convention on 24 April 2003.

194. Heede, *op. cit. supra* note 8, at p. 588.

195. Kirchheiner, “The ideological foundations of the ombudsman institution”, in Caiden vol. 1, *supra* note 60, 23, at p. 23.

196. Guckelberger, *op. cit. supra* note 106, at p. 838.

197. Marias, “The European Ombudsman: Competences and relations with the other com-

Ombudsman is a special body responsible for safeguarding citizens' rights. Most importantly, "[t]he right of citizens to have recourse to the Ombudsman is an integral part of citizenship of the Union",<sup>198</sup> alongside the right to petition the European Parliament (Art. 21 EC). As already mentioned, this right is even mentioned twice in the Constitutional treaty, first in the comprehensive article on citizenship (Art. I-10 CT), and second as a fundamental right in the European Charter as embodied in the Treaty (Art. II-103 CT).

#### 5.4. *The Ombudsman and transparency*

It is well known that European political and administrative action has been, despite the programmatic introductory clause of Article 1 TEU ("... decisions [in the Union] are taken as openly as possible"), notoriously opaque. However, transparency is an indispensable condition of a functioning democracy. Without transparency, citizens cannot give an informed consent to government action, cannot discuss or criticize it in a well-founded manner, and cannot intervene promptly in the political process.<sup>199</sup> Transparency is of course also linked to the rule of law, because that constitutional principle requires that citizens can easily obtain clear and precise information about their rights and duties. Conscious of this problem, the European governments promised in the Laeken Declaration of 2001 to increase the transparency of the institutions.<sup>200</sup> Since 2001, the Transparency Regulation regulates public access to documents of the Council, the Parliament, and the Commission.<sup>201</sup> Moreover, the Regulation establishes short time limits for the European Parliament, Council and Commission to react to applications for access to documents. Only recently, the institutions accepted the Ombudsman's suggestion that in the event of a citizen's complaint to the Ombudsman against the institution's refusal to grant access, the time-limit for the institution to give an opinion should be shortened from three to two months.<sup>202</sup> Both the Com-

munity institutions and bodies", in *id.* (Ed.), *op. cit. supra* note 1, at p. 71; Tierney, *op. cit. supra* note 12, at p. 528; see also Harden, *op. cit. supra* note 10, at 208.

198. *Lamberts, supra* note 85, para 50.

199. Lodge, "Transparency and democratic legitimacy", 32 *JCMS* (1994), 343–368.

200. Laeken Declaration on the Future of the European Union of 15 Dec. 2001, Part II: Challenges and Reforms in Renewed Union: "The Union needs to become more democratic, more transparent and more efficient." [gov.be/europ/en\\_decla\\_laken.htm](http://gov.be/europ/en_decla_laken.htm), visited on 5 Jan. 2005.

201. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (O.J. 2001, L 145/43).

202. See press release No. 21/2004 of 20 July 2004.

mission<sup>203</sup> and the Council<sup>204</sup> have adopted rules for the application of the Transparency Regulation. Under Article 8(3) of that Regulation, refusal of access or failure to reply entitles the applicant “to institute court proceedings and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.”

This entitlement is of high practical relevance. Year after year, the most frequent type of maladministration found in Ombudsman proceedings is lack of transparency (including refusal of access to documents).<sup>205</sup> Not surprisingly, of the eight Special Reports by the European Ombudsman to the European Parliament so far published, three Reports deal with public access to documents.<sup>206</sup> Moreover, the Ombudsman enshrined the duty to provide members of the public with the information that they request in Article 22 of the European Code of Good Administrative Behaviour.<sup>207</sup> Nevertheless, the European Ombudsman’s Annual Report 2003 is still full of cases dealing with denied access to documents of the Council, the Parliament, the Commission, the European Central Bank and even the Convention.

In the Constitutional Convention, the European Ombudsman submitted two pertinent proposals. The first was that the right of public access should apply to documents of all the Union institutions.<sup>208</sup> This proposal was fully adopted.<sup>209</sup> The second proposal was to include in Article 1 of the Constitu-

203. Commission Decision of 5 Dec. 2001 amending its rules of procedure, notified under document number C (2001) 3714, L 345/94, Annex: Detailed rules for the application of Regulation (EC) No. 1049/2001. Art. 1(3) of these rules precludes resort to the Ombudsman for citizens of third countries not residing in a Member State (in conformity with Art. 195 EC). [europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_345/l\\_34520011229en00940098.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_345/l_34520011229en00940098.pdf), visited on 24 Aug. 2004.

204. Council Decision of 22 March 2004 adopting the Council’s Rules of Procedure, O.J. L 106/22, Art. 10 and Annex II. [ue.eu.int/uedocs/cms\\_data/docs/2004/6/21/Councils%20rules%20of%20procedure.pdf](http://ue.eu.int/uedocs/cms_data/docs/2004/6/21/Councils%20rules%20of%20procedure.pdf), visited on 24 Aug. 2004.

205. In 2003, 28% of the complaints alleged lack of transparency, see Annual Report 2003, *supra* note 13, Annex 3.2. at p. 321.

206. Special Report of 15 Dec. 1997 (C4-0157/98, O.J. 1998 C 44/9) following the own initiative inquiry into public access to documents held by Community institutions (616/PUBAC//F/IJH, Annual Report 1996, 80), responding Resolution of the EP of 16 July 1998 in O.J. 1998 C 292/170; Special Report following complaint 917/2000/GG of 30 Nov. 2001 (access to Council documents concerning justice and home affairs); Special Report following complaint 1542/2000/(PB)SM of 12 Dec. 2002, see Annual Report 2002, p. 214 (access to Council documents).

207. *Supra* note 83.

208. CONV 505/03 CONTRIB 206 (by Söderman, “The functioning of the institutions”, 23 Jan. 2003).

209. Art. I-50(3) and Art. II-102 CT.

tional Treaty the principle that decisions are taken as openly as possible.<sup>210</sup> This would have given the principle of transparency a prominent place as a fundamental value of the Union. This idea was downgraded in the Constitutional Treaty somewhat. Nevertheless, the principle of transparency appears as a core constitutional principle of the Union. Transparency is mentioned in the non-operative preamble<sup>211</sup> and as an element of the principle of representative democracy in Title VI on the democratic life of the Union (Art. I-46(3) CT).<sup>212</sup> The central provision is Article I-50 CT “Transparency of the proceedings of the Union Institutions”.<sup>213</sup> Additionally, the institutional part contains common provisions on transparency and openness (Arts II-398 and 399 CT).<sup>214</sup> Finally, the Constitutional Treaty enshrines a right of access to Union documents on individual request. This right is a fundamental (“Charter”) right, and relates not only to one’s own files but to all documents.<sup>215</sup> Access to one’s own file is also part of the fundamental right to good administration (Art. II-101(2) lit. (b) CT). The purpose of these rights is to enable citizens to scrutinize the activities of those exercising public authority and to assess them. In this perspective, the right of access to documents is not only

210. CONV 505/03 CONTRIB 206, *supra* note 208; see also Amendment Form: Suggestion for amendment of Art. 1(1) by Söderman.

211. The preamble (para 2) of the Constitutional Treaty proclaims that Europe “wishes to deepen the democratic and transparent nature of its public life”.

212. According to Art. I-46(3) CT, “[d]ecisions shall be taken as openly and as closely to the citizens as possible”.

213. Art. I-50 CT: “(1) In order to promote good governance and ensure the participation of civil society the Union institutions, bodies and agencies shall conduct their work as openly as possible. (2) The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act. (3) Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have, under the conditions laid down in Part III, a right of access to all documents of Union institutions, bodies, offices and agencies, whatever their medium. European laws shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents.”

214. Art. III-398(1) CT: “In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.” Art. III-399 CT: “(1) The institutions, bodies, offices and agencies of the Union shall ensure transparency in their work and shall, pursuant to Article I-50, lay down in their rules of procedure the specific provisions for public access to documents. ... (2) The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the European law referred to in Article I-50(4).”

215. Art. II-102 CT “Right of access to documents”: “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has the right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.”

a fundamental right to be exercised according to one's personal needs but also an element of citizenship which may be exercised in the public interest.<sup>216</sup>

A different aspect of transparency is probably even more closely related to the democratic principle. It concerns the law-making procedures in which the Parliament, the Council, and the Commission participate. The pertinent sessions, debates and documents must be public. Public law-making means that every interested person can look into the process in its entirety, without having to request for a specific piece of information. It has been a long way towards complete transparency of the European legislative process, which is now laid down in Article I-50(2)CT: "The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act."

Recently, the European Ombudsman issued a decision on access to the Constitutional Convention's Praesidium documents. In the course of the Convention, summary notes of Praesidium's discussions and all documents resulting from them were published on the website. Agendas and minutes of the Praesidium's discussions, however, remained secret. The Praesidium's justification for this observance of secrecy was that otherwise the Praesidium's discussions could no longer fulfil their function as a stimulus to the constitutional debate. Instead, they would themselves become the object of controversy. Thereby the activity of the Convention's decision-making process would be undermined. This argument was accepted by the Ombudsman in a decision following a complaint of an NGO concerning the refusal of access to the agendas and minutes of the Praesidium.<sup>217</sup> The Ombudsman stated that the Transparency Regulation<sup>218</sup> does not as such apply to the documents held by the Convention. Nevertheless, he recommended that the Regulation's provisions on exceptions should be referred to by analogy.<sup>219</sup> Consequently, access to a document drawn up by the Praesidium for internal use can be refused only if disclosure of the document would seriously undermine the institution's decision-making process and if an overriding public interest in disclosure is lacking.<sup>220</sup> This condition is no longer present after

216. Harden, *op. cit. supra* note 10, at 232.

217. Decision of the European Ombudsman on complaint 1795/2002/IJH of 12 June 2003, opinion of the president of the European Convention and decision para 2.7. ([www.euro-ombudmsan.eu.int/decision/en/021795convention.htm](http://www.euro-ombudmsan.eu.int/decision/en/021795convention.htm), visited on 18 Aug. 2004).

218. *Supra* note 201.

219. Decision of 12 June 2003, *supra* note 217, paras 2.4. and 2.6.

220. Transparency Regulation 1049/2001, *supra* note 201, Art. 4(3)(1).



closure of the Convention. Consequently, the previously secret Presidium's documents must now be published.<sup>221</sup> The Ombudsman's decision may well have an impact on future procedures of constitution-making or amendment. Overall, the Ombudsman's "crusade for transparency"<sup>222</sup> has been an important factor of progress in this field.

### 5.5. *The Ombudsman and good administration*

As it is the Ombudsman's task to discover and criticize maladministration in the European Union, he is of course strongly interested in the other side of the coin that is good administration. In the course of European integration, a full-fledged set of European principles of good administrative behaviour has emerged.<sup>223</sup> This legal evolution could build on Member States' traditions. The idea of good administration has Scandinavian origins – in that tradition, the concept as such seems to enjoy a legal status.<sup>224</sup> In contrast, both in the Roman law tradition and in English law, good administrative behaviour is outside the realm of the law. Due to these diverging traditions, the legal quality of the notion of good administrative behaviour in EC law has been doubtful for some time.<sup>225</sup> Meanwhile, good administration is not only widely recognized as a legal concept, but even as a general principle of Community law.<sup>226</sup> However, not all the specific obligations of European officials flowing from this general principle are legal obligations, so legal rules and good

221. Decision of 12 June 2003, *supra* note 217, para 2.8.

222. Magnette, *op. cit. supra* note 4, at p. 945. See generally on transparency and the role of the Ombudsman in this context Söderman, "Transparency as a fundamental principle of the European Union", in Walter Hallstein-Institut für Europäisches Verfassungsrecht (Ed.), *Die Konsolidierung der europäischen Verfassung von Nizza bis 2004* (Baden-Baden, 2002), 53–70; Harden, "Citizenship and information", 7 EPL (2001), 165–193; Harden, "The European Ombudsman and the right of public access to documents", in Institut Suisse de droit comparé (Ed.), *L'intégration européenne: historique et perspectives* (Zürich, 2002), pp. 129–138; Harden, "The European Ombudsman's effort to increase openness in the Union", in Deckmyn (Ed.), *Increasing Transparency in the European Union?* (Maastricht, 2002), pp. 123–145.

223. See Usher, *supra* note 27, at pp. 100–120; Bauer, *Das Recht auf eine gute Verwaltung im Europäischen Gemeinschaftsrecht* (Frankfurt a. M., 2002); Lais, *op. cit. supra* note 178, 447–483.

224. See Martínez Soria, "Die Kodizes für gute Verwaltungspraxis: Ein Beitrag zur Kodifikation des Verwaltungsverfahrensrechts der EG", 37 EuR (2001), 682, at 684–688.

225. In the 1980s, it was still argued that good administration was not a general principle of Community law and not judicially enforceable. Case 64/82, *Tradax v. Commission*, [1984] ECR 1359, Opinion A.G. Slynn, 1381 at 1386.

226. Case T-54/99, *max.mobil v. Commission*, [2002] ECR II-313, para 48.

administration overlap.<sup>227</sup> Consequently, the Ombudsman's review is two-fold, examining legality and extra-legal factors.<sup>228</sup>

#### 5.5.1. *The codification of European administrative law*

Good administration requires clear legal standards. It is therefore not surprising that the European Ombudsman has been a partisan of the idea of a codification of European administrative law. He adopted the "European Code of Good Administrative Behaviour" of 28 July 1999,<sup>229</sup> which became his "principal battle horse".<sup>230</sup> It contains legal or even constitutional principles such as lawfulness, proportionality, absence of abuse of power, or the duty to state reasons, which are in part also codified in the Treaties. Furthermore, the model code embodies (traditional and new) fundamental rights of citizens, such as absence of discrimination, the right to be heard, or access to documents. Finally, the model code endorses extra-legal standards, such as courtesy, acknowledgment of receipt and the like. The Ombudsman urged the European institutions to adopt codes on the basis of this model.<sup>231</sup> But this plan did not fully work out. True, a number of Community institutions, bodies and agencies, notably the European Parliament, adopted the Ombudsman's model code. Most importantly, the Commission adopted a "Code of good administrative behaviour for staff of the European Commission in their relations with the public"<sup>232</sup> which includes most of the Ombudsman's proposals. However, that code forms part of the Commission's rules of procedure and thus does not confer any actionable rights on citizens. Nevertheless, complaints alleging disregard of the Commission code may be lodged with the European Ombudsman.<sup>233</sup> Other bodies, notably the Council, have so far

227. Usher, *supra* note 27, at p. 100.

228. Bonnor, *supra* note 88, at p. 43.

229. *Supra* note 83. See for a good analysis Martínez Soria, *supra* note 224, 682–705; overview in Guckelberger, *op. cit. supra* note 1, 107–113. See also Söderman, "What is good administration? The European Ombudsman's Code of Good Administrative Behaviour", speech given at the international seminar "The Ombudsmen and European Union Law", Bucharest 21–24 April 2001.

230. Magonette, *supra* note 4, at p. 942.

231. Identical Draft recommendations of the European Ombudsman (in the own initiative inquiry OI/1/98/OV) of 28 July 1999 and 13 Sept. 1999 (addressed to the Commission). The same draft recommendation was also addressed to the Parliament and the Council on 29 July 1999, [www.euro-ombudsman.eu.int/recommen/en/oi980001.htm](http://www.euro-ombudsman.eu.int/recommen/en/oi980001.htm), visited on 28 Oct. 2004.

232. Commission decision of 17 Oct. 2000 amending its Rules of Procedure, Annex (2000/633/EC, ECS, Euratom), O.J. 2000, L 267/63.

233. Commission Code, *supra* note 232, para 6 (at p. 66).

not adopted any code, and other institutions have codes which do not conform to the Ombudsman's model.<sup>234</sup>

Therefore, the Ombudsman began to consider a different strategy. He recommended the adoption of a European administrative law, applicable to all the Union institutions. Its legal basis would be – under the current Treaty law – the general clause of Article 308 EC.<sup>235</sup> In the Constitutional Convention, the Ombudsman proposed to create a clear constitutional basis for the adoption of an administrative law.<sup>236</sup> This proposal was not realized. Nevertheless, the Commission is currently considering submitting a draft proposal for an administrative law in the course of 2006.<sup>237</sup> Its legal foundation would be, after the entry into force of the Constitutional Treaty, the “flexibility” clause of Article I-18 CT.

#### 5.5.2. *The fundamental right to good administration*

The Ombudsman has consistently argued that good administration (as such) is not only a legal principle, but that there is even a fundamental right to good administration. It was the Ombudsman who first formally suggested that a right to good administration be included in the European Charter of Fundamental Rights.<sup>238</sup> However, it is not quite clear whether his intervention was decisive, or whether such a right would have been created anyway.<sup>239</sup> Be it as it may, the Charter is the first international human rights

234. Detailed references in Martínez Soria, *supra* note 224, at p. 681.

235. Recommendation in two Special Reports of April 2000: Special Report following the draft recommendation to the European Commission in complaint 713/98/IHJ, at p. 12 et seq. and Special Report following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/98/OV), at p. 12 et seq. All Special Reports can be found on the Ombudsman's website. [www.euro-ombudsman.eu.int/special/en/default.htm](http://www.euro-ombudsman.eu.int/special/en/default.htm), visited on 2 Sept. 2004.

236. CONV 221/02 CONTRIB 76, *supra* note 66. The proposed text was: “The Community institutions and bodies shall carry out their activities in accordance with the right to good administration. Principles of good administrative behaviour are to be observed by the Community institutions and bodies and their staff shall be laid down by the Council, acting in accordance with the procedure referred to in Article 251 within one year of the entry into force of the Treaty ...”

237. Statement of the Secretary General of the European Commission, mentioned in Diamandouros, *supra* note 5.

238. The right to good administration was not included in the list drawn up by the Praesidium of the Charter Convention as a basis for discussion (CHARTE 4112/00 of 27 Jan. 2000). See the proposal in the speech by the European Ombudsman in the Charter Convention on 2 Feb. 2000: Public Hearing on the draft Charter of Fundamental Rights of the European Union, Sec. 3 (CHARTE 4131/00 of 17 Feb. 2000), [www.euro-ombudsman.eu.int/speeches/en/Charter1.htm](http://www.euro-ombudsman.eu.int/speeches/en/Charter1.htm), visited on 1 Sept. 2004.

239. According to a commentary on the European Charter of Fundamental Rights, the right

instrument which explicitly enshrines the right to good administration.<sup>240</sup> Article 41 of the Charter of Fundamental Rights is now reproduced without any changes to Article II-101 CT.<sup>241</sup> It comprises, *inter alia*, a right to impartial, fair and timely handling of administrative affairs, the right to be heard, and the right to have access to one's file. Moreover, the administration's duty to give reasons for its decisions is made part of the new fundamental right. This well-known obligation is currently enshrined in Article 253 EC and in Article 18 of the above-mentioned Code of Good Administrative Behaviour.<sup>242</sup> It has been qualified by the Court as an "essential procedural requirement" in terms of the review of legality under Article 230 EC (Art. II-365 CT) and constitutes an actionable ground of illegality. In the Constitutional Treaty, the duty to give reasons figures as a principle common to the Union's legal acts (Art. I-38 CT). The fundamental right to good administration furthermore comprises the right to damages for institutional wrongs committed towards individuals. This provision relates to the Union's non-contractual liability under Article 288 EC (Art. III-431 CT). Finally, the right to good administration encompasses the right to communicate with the institutions in any official language.

Good administration is a fundamental part of citizenship. Therefore, the Ombudsman had in the Convention suggested including the citizens' right to good administration in the article outlining citizens' rights.<sup>243</sup> This proposal

to good administration was incited by the Ombudsman (Magiera in Meyer (Ed.), *supra* note 185, Art. 41 para 2. In contrast, Magnette, *supra* note 4, at p. 942 fn. 3 opines that the Ombudsman's influence in that regard was minor, because Charter Convention members had thought of including the new right even before the interventions of Söderman.

240. In the view of the Commission, the right to good administration is a "new" right which had been, until the adoption of the Charter, not explicitly acknowledged as a fundamental right (Commission Communication on the Charter of Fundamental Rights of the European Union, COM(2000)559 final, para 9).

241. Art. II-101 CT: "(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. (2) This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions. (3) Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the law of the Member States. (4) Every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language."

242. *Supra* note 83.

243. Ombudsman speech of 27/28 Feb. 2003 in the Convention's plenary meeting, pursu-

was realized only in part: the article on citizenship mentions only one particular aspect of good administration, namely the language right (Art. I-10(2)(d) CT).

Given its legal status as a fundamental right, the right to good administration could theoretically be enforced just as any other European fundamental right by judicial and non-judicial means. However, in practice the Ombudsman does have a greater role to play here than with other fundamental rights.

## 6. Conclusions

This study sought to assess the merits of the European Ombudsman within a highly dynamic constitutional system. The Ombudsman was established in order to improve the legitimacy of European governance. While the new institution was initially criticized as window-dressing by some observers,<sup>244</sup> this study has revealed that the European Ombudsman institution now forms one of the building blocks of good European governance, and strengthens both European rule of law and European democracy. Although these constitutional principles are to some extent intertwined and interdependent, I consider the Ombudsman's merits to lie primarily in the former field. However, the legitimacy problems of European governance relate predominantly to the functioning of democracy. Here the contributions of the European Ombudsman are more indirect, namely by strengthening the procedural side of citizenship, by realigning European identity,<sup>245</sup> and by improving transparency.

The Ombudsman's activities overlap with the functions of other European institutions: individual redress is offered not only by the Ombudsman, but also by the courts and the parliamentary petitions committee. Administrative and legal reforms are effected primarily by the Council, the Parliament, and the Commission, which the Ombudsman can approach in order to incite reform. Nevertheless, the Ombudsman institution does not needlessly duplicate the activities of existing grievance mechanisms. It occupies a "unique space"<sup>246</sup> between the other institutions.

Virtually all Member States of the Union have national ombuds-institutions or similar bodies. In comparison with some of them, the European

ant to the proposal of a Convention member. [www.euro-ombudsman.eu.int/speeches/en/2003-02-28.htm](http://www.euro-ombudsman.eu.int/speeches/en/2003-02-28.htm), visited on 5 Jan. 2005.

244. See e.g. Magliveras, "Best intentions but empty words: The European Ombudsman", 20 *EL Rev.* (1995), 401–408.

245. Tierney, *op. cit. supra* note 12, at p. 529.

246. Heede, *op. cit. supra* note 8, at p. 604.

Ombudsman's teeth are not very sharp.<sup>247</sup> He notably lacks two important powers: the power to formally trigger law reforms, and the power to refer suspected illegalities to Community courts.<sup>248</sup> Moreover, the European Ombudsman operates in a distinct, transnational context and therefore faces specific problems. The European Ombudsman must cope with a European administration which is influenced by different, in part hardly reconcilable national administrative traditions. Most importantly, the national ombudsmen can in many Member States operate forcefully because ultimately their actions are backed by a strong national parliament.<sup>249</sup> In contrast, the European Parliament is not strong. Consequently, the European Ombudsman must even more than his national counterparts rely on a cooperative style of control and of administrative reform.<sup>250</sup>

Since the European Ombudsman's inception, important elements of his working environment have changed. In order to operate successfully, the European Ombudsman must adapt to the changing context, and it currently looks as if the institution is capable of doing so. In all Member States, the administration is evolving towards lean administration and New Public Management (NPM), and this change of paradigm is not without effect on the European administration. Somewhat antagonistic to the NPM-euphoria, democracy and human rights protection are gaining importance. The new Member States of the Union, which have only recently created national ombuds-institutions for themselves, may be – due to their national history – even more sensitive in this regard than the old Member States. Last but not least, a written European Constitution has been adopted, which codifies various relevant constitutional principles and which slightly strengthens the European Ombudsman's institutional position, although the opportunity to codify systematically judicial and non-judicial remedies was missed. Not only on this point, but as a general matter, the Ombudsman's participation in the Constitutional Convention was a modest success. His substantial proposals only in part found their way into the Draft Constitution and later into the Constitutional Treaty.

Although the European Ombudsman can be characterized as “occupying the administrative hinterland of the formal law”,<sup>251</sup> his direct and more often

247. Hertogh, “The European Ombudsman: Different roles in a demanding context”, 3 *The European Yearbook of Comparative Government and Public Administration* (1996), 337–349, at 346.

248. Tierney, *op. cit. supra* note 12, at p. 528.

249. Hertogh, *op. cit. supra* note 247, at p. 346.

250. Cf. *id.*

251. Rawlings, *op. cit. supra* note 113, at p. 17.

indirect contributions to hard legal reform should not be underestimated. Rules on access to documents, procedural safeguards in the Commission's infringement proceedings, and the not yet completed codification of principles of good administrative behaviour are for the most part due to his persistent efforts.<sup>252</sup>

The average Ombudsman-institution lacks "hard powers", and so, generally speaking, is an institution which can only really be effective where habits of constitutionalism are well established and believed in. Its success "is likely to be the greatest in the sort of political and constitutional community which needs him least. ... It is more likely to make good government better than bad government good."<sup>253</sup> With this caveat, and far from falling prey to an irrational "Ombudsmania",<sup>254</sup> we can safely conclude that the European Ombudsman has matured to an indispensable factor of European constitutionalism, and that the network of ombudsmen in Europe may contribute to European constitutional convergence.

252. Guckelberger, *op. cit. supra* note 1, at p. 157.

253. Wheare, *Maladministration and its Remedies* (London, 1973) at pp. 165–166.

254. Caiden, *op. cit. supra* note 60, at p. 5