REVIEW OF EUROPEAN ADMINISTRATIVE LAW; VOL. 1, NR. 2, 5-37, EUROPA LAW PUBLISHING © 2008

The European Ombudsman and the Application of EU Law by the Member States

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Abstract

The mandate of the European Ombudsman (EO) to tackle maladministration is limited to the European Union institutions and bodies. However, the EO also promotes the correct application of EU law by the Member States, in two main ways. First, the EO deals with complaints against the European Commission in its role as 'guardian of the Treaty' and against the European Investment Bank, as regards its role in checking compliance with EU law in relation to the projects it funds. Second, the EO co-operates closely with national and regional ombudsmen and similar bodies, who have power to tackle problems of incorrect implementation of EU law by public authorities in the Member States. Some recent developments are creating links between these two aspects of the EO's work.

1 Introduction

Article 195 of the EC Treaty empowers the European Ombudsman (EO) to receive complaints concerning maladministration from any citizen of the Union and any natural or legal person residing or having its registered office in a Member State. Neither the Treaty nor the Statute of the Ombudsman[1] (hereafter 'the Statute') defines 'maladministration'. The EO has consistently taken the view that the concept of maladministration includes unlawful behaviour. The activity of the Ombudsman in tackling maladministration therefore contributes to the correct implementation of EU law, since an illegal act is, *ipso facto,* an instance of maladministration.[2] The EO's contribution is limited, however, both by the nature of the powers

* I would like to acknowledge the assistance of the European Ombudsman's Secretary General, Ian Harden, in the preparation of this article.

1 Decision of the European Parliament 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, 1994 OJ L 113 p. 15, as last amended by Decision of the European Parliament 2008/587/EC, Euratom of 18 June 2008, OJ 2008 L 189 p. 25.

2 The converse, however, is not true: maladministration does not necessarily imply illegality. See P. N. Diamandouros, 'The relationship between the principle of good administration and legal obligations', in Carl Baudenbacher, Claus Gulmann, Koen Lenaerts, Emmanuel Coulon and Eric Barbier de la Serre, eds., *Liber Amicorum en l'honneur de/in honour of Bo Vesterdorf* (Brussels: Bruylant, 2007), 315-341.

attached to the office and by the scope of the EO's mandate *ratione personae*. The fact that illegality is a form of maladministration does not imply that the EO is competent to inquire into every possible case of illegality.

The most important limitations on the powers of the EO, are that, unlike a court, he[3] cannot annul unlawful acts, nor are his views as to the correct interpretation and application of the law legally binding. In addition, the EO has consistently taken the view that the political work of the European Parliament does not raise issues of potential maladministration and is therefore outside the mandate. For these reasons, the EO does not, for example, deal with complaints against EU legislation.

On the other hand, the non-judicial remedy of complaint to the EO meets specific criteria and does not necessarily have the same objective as judicial proceedings.[4] Natural and legal persons may therefore complain to the EO in many cases where they could not bring the matter to court. For example, there is no requirement to demonstrate a specific interest in the case: even *actio popularis* complaints are possible.[5] Nor is the possibility to complain limited to acts that have legal effects. Furthermore, the work of the EO may serve not only to resolve differences between complainants and the institutions, but also to identify and eliminate instances of maladministration on behalf of the public interest.[6] Especially useful in this regard is the power to open own-initiative inquiries, which allows the EO to adopt a broader systemic perspective on the problems that may underlie specific complaints.

As regards the EO's mandate *ratione personae*, Article 195 of the EC Treaty limits it to the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. Moreover, according to the last sentence of Article 2 (1) of the Statute, '[n]o action by any other authority or person may be the subject of a complaint to the Ombudsman.' Naturally, the EO fully respects the limits on the mandate. However, citizens and residents of the Union have, in practice, complained to the EO in two ways that have led the EO also to acquire a role in promoting, indirectly, the correct application of EU law by the Member States.

First, citizens have complained against the European Commission and the European Investment Bank (EIB), both of which have responsibilities as regards the correct application of EU law at Member State level. In handling such complaints, the EO 'supervises the supervisor' (to use a phrase that is well-known in the ombudsman world). The next section of this article (section 2) explains the development of the EO's case law on supervising the

[3] 'Ombudsman' can refer to either a man or a woman. Since the present European Ombudsman is male, the masculine pronoun is used here.

[4] Case T-2009/00 *Lamberts* v. *European Ombudsman* [2002] ECR II-2203, paragraph 65.

[5] On this point, see the opinion of Advocate General Trstenjak in Case C 331/05 P *Internationaler Hilfsfonds* v. *Commission* [2007] ECR I-5475, paragraph 59.

[6] Case C-331/05 P *Internationaler Hilfsfonds* v. *Commission* [2007] ECR I-5475, paragraph 26.

supervisor and its impact on the way that the Commission and EIB carry out their supervisory tasks.

Second, although the EO has no mandate to deal with complaints against authorities in the Member States, it is understandable that many citizens whose rights under EU law are not respected by such authorities think that the EO should be able to help them. From the very beginning of the EO's operations in 1995, a high proportion of the complaints received have been against Member States. To try to help such complainants, the EO co-operates closely with national and regional ombudsmen and similar bodies in the Member States. Section 3 of the article explains the development of what is now known as the *European Network of Ombudsmen* and its impact, actual and potential, on the implementation of EU law by the Member States.

Section 4 of the Article examines recent developments that affect both aspects of the EO's work. Section 5 concludes.

2 Supervising the Supervisor

2.1 The European Commission as Guardian of the Treaty

One of the Commission's tasks under Article 211 of the EC Treaty is to ensure that Community law is applied. In this role, it is often called the 'guardian of the Treaty.' Other articles of the Treaty provide the Commission with powers of enforcement against Member States and, in the competition field, also against private actors. Complaints alleging maladministration by the Commission in this role are a significant (and sometimes controversial) part of the EO's workload. Such complaints concern the Commission's role *vis-à-vis* both Member States and private actors. The present article only concerns enforcement against Member States.

Article 226 of the EC Treaty provides the Commission with a general power to deal with infringements of Community law by Member States.[7] It reads as follows:

[7] See generally, Alberto J. Gil Ibáñez, 'A Deeper Insight Into Article 169', Jean Monnet Working Paper 11/98; *idem*, *The Administrative Supervision and Enforcement of EC Law, Powers, Procedures and Limits*, (Hart Publishing, Oxford: 1999); Richard Rawlings, 'Engaged elites, citizen action and institutional attitudes in Commission enforcement' (2000) 6 *European Law Journal* 4-28; I. Harden, 'What future for the centralized enforcement of Community law?', (2002) 55 *Current Legal Problems*, 495-516; Adam Tomkins, 'Of Institutions and Individuals: the Enforcement of EC Law', in P. Craig and R. Rawlings, (eds.) *Law and Administration in Europe, Essays in Honour of Carol Harlow*, (Oxford University Press, Oxford: 2003); Anne Bonnie, 'The Evolving Role of the European Commission in the Enforcement of Community Law: From Negotiating Compliance to Prosecuting Member States?' 1 *Journal of Contemporary European Research* (2005) 39-53; Carol Harlow and Richard Rawlings 'Accountability and Law Enforcement: The Centralised EU Infringement Procedure' (2006) 31 *European Law Review* 447-475. For specialised enforcement regimes see: Article 88 EC

> 'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned 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'.[8]

The procedure thus consists of an administrative stage, which is followed by a judicial stage if the Commission decides to bring the matter before the Court. The first formal step in the administrative stage is the sending of a 'letter of formal notice' (in French, 'lettre de mise en demeure'), specifying what the Member State is alleged to have done wrong and inviting its observations. Unless the case is closed at that stage, the next step is the reasoned opinion, which contains the Commission's analysis of the infringement and sets a time limit for compliance. If a reasoned opinion is sent and the Member State does not come into compliance before the expiry of the time limit, the Commission may initiate the judicial stage by referring the matter to the Court of Justice.

The text of Article 226 remains the same as in the original Treaty of Rome. However, the entry into force of the Maastricht Treaty provided the Commission with an additional instrument. If a Member State fails to comply with a judgement of the Court of Justice under Article 226, the Commission may bring the matter back to the Court under Article 228 of the EC Treaty, specifying a financial penalty which it considers appropriate in the circumstances. The procedure laid down in Article 228 is similar to that of Article 226. The Commission issues a reasoned opinion containing a deadline, after giving the Member State the opportunity to submit observations. If the Member State fails to take the necessary measures, the Commission may bring the case before the Court.

The Commission's annual reports on the monitoring of the application of Community law have often emphasised the importance of its role as guardian of the Treaty. The 2006 report, for example, stated that:

> 'The undertaking of monitoring the application of Community law is vital in terms of the rule of law generally, but it also helps to make the principle of a Community based on the rule of law a tangible reality for Europe's citizens and economic operators'.[9]

(state aids); Article 104 EC (excessive government deficits); Article 237 EC (enforcement by the European Investment Bank and European Central Bank) and Articles 95 and 298 EC (improper use of Member States' powers to take exceptional measures).

[8] Article 141 of the Euratom Treaty is identical.

[9] 23rd Annual Report on monitoring the application of Community law (COM(2006) 416 final), p. 3.

In similar vein, the Commission's Communication of 5 September 2007, *A Europe of Results – Applying Community Law* begins by declaring that:

> 'The European Union is founded in law, pursues many of its policies through legislation and is sustained by respect for the rule of law. Its success in achieving its many goals as set out in the Treaties and in legislation depends on the effective application of Community law in the Member States. Laws do not serve their full purpose unless they are properly applied and enforced. (....) Citizens' expectations of the benefits that the EU brings should be met. That is why ... it is necessary to attach high priority to the application of law...'.[10]

As the quotations above clearly recognise, natural and legal persons have a strong interest in the effective application and enforcement of EU law. That interest partly accounts for the development of a customary practice of petitioning the European Parliament; a practice that was later established as a right of European citizenship in the Maastricht Treaty and, subsequently, in the Charter of Fundamental Rights of the European Union.[11] In substance, many petitions are complaints that a Member State is infringing EU law. The Committee on Petitions of the European Parliament forwards such petitions to the Commission, which deals with them through the Article 226 procedure.

A similar customary practice has developed whereby citizens send complaints directly to the Commission. The Commission encouraged this practice in 1989 by publishing a standard complaint form, which it updated ten years later.[12] In 2005, complaints accounted for around 43.5% of total infringements detected by the Commission.[13] Unlike the right to petition, however, the practice of complaint to the Commission has not been formally recognised either in the Treaty, or by Community legislation. Furthermore, whilst the Community courts allow individuals to bring actions against decisions of the Commission rejecting complaints in certain competition matters,[14] the case law as regards Article 226 gives the Commission immunity from judicial proceedings[15] and denies Article 226 complainants the

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[10] COM(2007) 502.

[11] E. Marias, 'The Right to Petition the European Parliament after Maastricht,' (1994) 19 *European Law Review* 169-183. See Article 194 of the EC Treaty and Article 44 of the Charter.

[12] Failure by a Member State to comply with Community law: standard form for complaints to be submitted to the European Commission, 1999 OJ C 119 p. 5. Available online at: http://ec.europa.eu/community_law/your_rights/your_rights_forms_en.htm.

[13] 23rd Annual Report on monitoring the application of Community law (COM(2006) 416 final), p. 3.

[14] But not Article 90(3) of the Treaty: see Case C-141/02 P *Commission* v. *T-Mobile Austria GmbH* [2005] ECR I-1283, paragraph 70.

[15] As regards actions for failure to act and for annulment, see: Case 247/87 *Star Fruit* v. *Commission* [1989] ECR 291 paragraphs 11-13; Case C-29/92 *Asia Motor France and Others* v.

procedural rights enjoyed by complainants in competition proceedings.[16] The case-law also makes clear that if a Member State does not comply with a reasoned opinion in due time, the Commission has the right, but not the obligation, to refer the matter to the Court. In other words, the power to initiate the judicial stage is discretionary.[17]

The Commission relies on the above case law to support its view that the Article 226 procedure involves negotiation and compromise between itself and the Member State with a view to reaching a settlement and that secrecy is essential to promote an open and frank dialogue and mutual confidence between the parties.[18] Whilst giving more weight to compliance with the law as the purpose of the Article 226 procedure, the Courts have confirmed that it may be conducted largely in secret.[19]

Against this background, it is not surprising that disappointed Article 226 complainants began to turn to the EO even before the first Ombudsman was elected. As was pointed out above, the fact that he can only persuade, not compel, allows the EO to be more accessible than a court. The Commission's immunity from judicial proceedings brought by Article 226 complainants is not, therefore, an obstacle to investigations by the EO. On the contrary, the work of the EO complements that of the courts, by providing a means through which the Commission can be made answerable for how it chooses to exercise its discretion without limiting that discretion.[20]

However, the reaction of the Commission to the first inquiries by the EO was to insist on its discretion in such cases and to point out that complainants in (what was then) the Article 169 procedure do not possess any specific

Commission [1992] ECR I-3935, paragraph 21; Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v. *Commission* [1997] ECR I-947. As regards actions for damages, see Order of the Court of First Instance of 14 January 2004 in Case T-202/02 *Makedoniko Metro and Mikhaniki AE* v. *Commission* [2004] ECR II-181, paragraph 43.

[16] See the order of the Court of 17 July 1998 in Case C-422/97 P *Sateba* v. *Commission* [1998] ECR I-4913 and Case T-191/99 *Petrie and Others* v. *Commission* [2001] ECR II-3677, paragraph 70.

[17] Case C-87/89 *Sonito* v. *Commission* [1990] ECR-I 1981, paragraphs 6-7.

[18] See e.g. the Commission's position as explained in Case T-105/95 *WWF UK* v. *Commission* [1997] ECR II-313 and paragraph 45 and Case T-309/97 *Bavarian Lager* v. *Commission* [1999] ECR II-3217 paragraph 40.

[19] Case T-191/99 *Petrie and Others* v. *Commission* [2001] ECR II-3677, paragraph 68 and Case T-36/04 *API,* v. *Commission*, Judgment of the Court of First Instance of 12 September 2007 (nyr). In paragraph 121 of the *API* judgment, the CFI stated the purpose of the procedure is 'to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position', repeating language used by the Court in Case C-191/95 *Commission* v. *Germany* [1998] ECR I-5449, paragraph 44.

[20] It should also be noted in this regard that the Ombudsman's findings are not binding on the Court if they are invoked by a party in subsequent judicial proceedings: Case C-167/06 P *Komninou* v. *Commission* [2007] ECR I-141, paragraph 44.

procedural rights, in contrast to specific sectors like competition or anti-dumping.[21] The Commission also argued that it had proceeded in accordance with the principles of good administrative behaviour by registering the complaints and keeping the complainants informed of the treatment of the case. Subsequently, the procedural position of complainants became the main focus of the EO's activities in relation to Article 226 complaints, as section 2.2 below will explain. As will be made clear in section 2.3, procedure and substance are often closely intertwined in this field. Furthermore, the EO also engages in explicitly substantive review (see section 2.4).

2.2 The Procedural Position of Article 226 Complainants

One of the EO's earliest decisions on a complaint against the guardian of the Treaty criticised undue delay in informing the complainants of the outcome of their case and drew attention to the harmful consequences that had flowed from the Commission's failure to explain its reasons for concluding that there was no infringement. The general issues of avoiding delay and giving reasons were subsequently pursued through an own-initiative inquiry.[22] As regards undue delay, the Commission adopted an internal rule that, within a maximum period of one year from the date on which a complaint is registered, there must be a decision either to close the file, or to send a letter of formal notice. As regards reasoning, the Commission indicated its willingness to inform the complainant of its intention to close the file with the reasons why the Commission finds that there is no infringement of Community law, except where a complaint is manifestly unfounded or where the complainant appears to have lost interest in the complaint. In the decision closing the own-initiative inquiry, the EO understood this to mean that complainants could respond to the Commission's point of view before it commits itself to a final conclusion that there is no infringement.

More generally, the Commission acknowledged that complainants have a place in the infringement procedure and enjoy certain procedural safeguards. In particular, all complaints are registered and acknowledged. The complainant is then informed of the action taken in response to the complaint, including representations made to the national authorities, and of the outcome of the Commission's investigation of the complaint.

In January 2001, the Ombudsman proposed that the Commission should adopt a procedural code for the treatment of complainants, consistent with the right to good administration in Article 41 of the Charter of Fundamental

[21] See the *Newbury Bypass* and *M40* cases: http://www.ombudsman.europa.eu/decision/en/950206.htm and http://www.ombudsman.europa.eu/decision/en/950132.htm.

[22] The criticism was made in the M40 case (see previous note). The own-initiative inquiry had the reference 303/97/PD: http://www.ombudsman.europa.eu/decision/en/970303.htm.

Rights.[23] The following year, the Commission responded by publishing its *Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.*[24]

The Communication recognises the customary practice of complaints to the Commission as guardian of the Treaty by announcing, as general principles, that:

> 'Anyone may file a complaint with the Commission free of charge against a Member State about any measure (law, regulation or administrative action) or practice by a Member State which they consider incompatible with a provision or principle of Community law.

Complainants do not have to demonstrate a formal interest in bringing proceedings; neither do they have to prove that they are principally and directly concerned by the infringement complained of.'

It goes on to offer a series of important guarantees as regards the handling of complaints. The basic rule is that all complaints will be recorded in the central register of complaints kept by the Secretariat General. This ensures that the complaint is dealt with according to the Commission's internal administrative procedures for handling infringement cases. Exceptions to the basic rule are that correspondence is not to be investigated as a complaint and shall therefore not be recorded in the central registry of complaints, if:

'- it is anonymous, fails to show the address of the sender or shows an incomplete address;
- it fails to refer, explicitly or implicitly, to a Member State to which the measures or practice contrary to Community law may be attributed;
- it denounces the acts or omissions of a private person or body, unless the measure or complaint reveals the involvement of public authorities or alleges their failure to act in response to those acts or omissions. In all cases, the Commission shall verify whether the correspondence discloses behaviour that is contrary to the competition rules (Articles 81 and 82 of the EC Treaty);
- it fails to set out a grievance;
- it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant;
- it sets out a grievance which clearly falls outside the scope of Community law.'

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[23] Case 995/98 (*Thessaloniki metro*) http://www.ombudsman.europa.eu/decision/en/980995.htm.

[24] OJ 2002 C 244, p. 5.

The above list of exceptions is exhaustive. If correspondence is not registered as a complaint, it must be for one or more of the reasons above and the author must be informed of the reason or reasons.

Complainants will be contacted after each Commission decision (formal notice, reasoned opinion, referral to the Court or closure of the case) and will be informed in writing of the steps taken in response to their complaint. The Commission will, as a general rule, decide within one year either to issue a letter of formal notice or to close the case. Where a Commission department intends to propose that no further action be taken on a complaint, it will give the complainant prior notice in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within a period of four weeks.

In response to a suggestion from the EO, the Commission has accepted that the requirements of the Communication also apply in the period after it has sent a letter of formal notice to the Member State.[25]

2.3 The Link Between Procedure and Substance

The procedural safeguards contained in the 2002 Communication are entirely consistent with the Commission's discretionary power in the Article 226 procedure. One of the principles set out in the Communication itself is that '[t]he Commission may decide whether or not further action should be taken on a complaint.' Furthermore, the Communication provides that the Commission will decide whether to issue a letter of formal notice 'at its discretion' and that '[t]his discretion shall cover not only the desirability of opening or terminating an infringement procedure but also the choice of complaint.' However, the undertakings given by the Commission in the Communication as regards timing and reasons do have an important and beneficial effect on the way in which the Commission exercises its discretionary powers.

As regards timing, it is worth recalling the motto that 'justice delayed is justice denied'. Even if the purpose of the Article 226 procedure is not to provide justice to individuals but to put an end to infringements of Community law in the public interest, the underlying principle is similar: delays in enforcement can, in substance, render the law ineffective. As regards reasons, delays tend to occur not only when Member States drag their feet in providing information, but also when the Commission finds difficulty in formulating, or in explaining publicly, the reasons for its actions. Two cases illustrate these points and the approach that has been taken by the EO when complaint files appear to be blocked.

[25] The suggestion was made in a further remark in the decision closing case 3369/2004/JMA. See the Study of follow-up given by institutions to critical remarks and further remarks made by the Ombudsman in 2006, available online at http://www.ombudsman.europa.eu/followup/pdf/en/crfr2006.pdf pp. 23-44.

In the first case, a provider of sports betting services in Germany complained to the Commission that the German authorities had ordered him to stop offering these services, thus forcing him to close his business. When the Commission did not reply to an inquiry about the state of the investigation seven months after its registration, he turned to the EO. The Commission said that it had received several complaints relating to gambling services and had assessed the justification for and proportionality of a number of national bans on sports betting services based on public order considerations. It had sent a letter of formal notice to Denmark while its examination of infringement complaints against Germany, Italy and The Netherlands was ongoing. According to the Commission, it was still 'intensively' examining specific aspects of the complaint. The EO noted that the Commission had not had any contacts with the German authorities and found it implausible that the Commission could assess the justification and proportionality of the ban on sports betting services without such contacts. He therefore made a draft recommendation that the Commission should deal with the complaint diligently and without undue delay. In response, the Commission stated that infringement complaints relating to sports betting services were 'highly politically sensitive and controversial'. Although the issue had been raised in four internal meetings, a decision to open infringement proceedings required the support of the College of Commissioners, which had not yet been obtained. Whilst welcoming the frankness of this response, the EO considered that the Commission is not entitled indefinitely to delay its decision on an infringement complaint on the grounds that it is unable to reach a political consensus on how to proceed. Since an important issue of principle was at stake, the EO restated his recommendation in a special report to the European Parliament.[26] The Commission subsequently informed the Ombudsman that it had, in the meantime, decided to send a letter of formal notice to Germany.

The second case concerned an infringement complaint which alleged that Germany was failing to apply the Working Time Directive[27] as regards time spent on call by doctors in hospitals. The complainant turned to the EO in November 2005 alleging undue delay by the Commission. The Commission stated that it would deal with the complainant's infringement complaint once the Community legislator had considered the Commission's proposal, made in September 2004, for amendment of the Directive. The EO noted that if the Commission completed an investigation of the complaint and took the view that there was an infringement, it would clearly have discretion as to whether or not to refer the matter to the Court of Justice. However, the

[26] Case 289/2005/GG, http://www.ombudsman.europa.eu/special/pdf/en/050289.pdf

[27] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ 1993 L 307, p. 18. Directive 93/104/EC was replaced and repealed by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299, p. 9.

existence of that discretion could not entitle the Commission to postpone indefinitely reaching a conclusion on a complaint on the grounds that the applicable law may be amended at some time in the future. In response to a draft recommendation that it should deal with the complainant's infringement complaint as rapidly and as diligently as possible, the Commission said that, pending the outcome of the discussions on its legislative proposal, it had decided not to advance with infringement procedures, such as the present case, which concern those provisions of the Working Time Directive that the Commission has proposed to amend. The Commission also expressed regret that the Council had not yet reached a decision on its proposal to amend the Directive. The EO found the Commission's response unsatisfactory. According to the 2002 Communication, the Commission's investigation of an infringement complaint is intended to result in one of two possible decisions: either to issue a letter of formal notice, or to close the case. The Commission had done neither of those things. In effect, it appeared to have simply abstained from taking any further steps in its investigation since September 2004, when it submitted its proposal for amendment of the Working Time Directive. The EO therefore made a special report to the European Parliament, re-stating the draft recommendation as a recommendation. The European Parliament endorsed the recommendation in September 2008.[28]

It may be that the Commission's strategy with regard to the Working Time Directive was to try to use the possibility of enforcement of the existing law as a bargaining chip to obtain the agreement of the Member States to change the law. If so, not only would such a strategy be difficult to reconcile with the purpose of the administrative stage of the Article 266 procedure as recognised by the Community courts,[29] it would also seem to have been ineffective.

2.4 Reviewing the Substance of the Commission's Decisions

The scope of the Commission's discretion

As the above-mentioned case on the Working Time Directive makes clear, the EO recognises that the Commission enjoys discretion not only as regards whether or not to launch the judicial stage of the Article 226 procedure, but also as regards the investigation of possible infringements. The EO's criticism of the Commission in that case expressly acknowledged that the Commission could legitimately have decided to drop its investi-

[28] Case 3453/2005/GG http://www.ombudsman.europa.eu/special/pdf/en/053453.pdf. European Parliament resolution of 3 September 2008 on the Special Report from the European Ombudsman following the draft recommendation to the European Commission in complaint 3453/2005/GG (2007/2264(INI)), based on A6-0289/2008, *rapporteur* Proinsias De Rossa.

[29] See note 19 above.

gation of the complaint, rather than send a letter of formal notice to the Member State.

The Commission's discretion also extends to the initiation of investigations. In one case, the Commission registered, but declined to investigate, a complaint concerning infringement of the waste directive[30] as a result of disposal of waste in a wetland in Ireland. In its opinion on the complaint, the Commission explained that it had already brought an infringement case to the Court,[31] the object of which had been the need for improvement in Ireland's general administrative arrangements for responding to unauthorised waste disposal. The opinion also pointed out that one of the reforms that Ireland had put in place in order to meet the Commission's concerns was the creation in 2003 of an Office of Environmental Enforcement, which investigates complaints where there is evidence that a local authority has failed to implement properly its waste enforcement responsibilities. The Commission had suggested that the complainant make use of this office. The EO took the view that the Commission had given a satisfactory explanation for its omission to take action on the specific complaint and that the explanation could not be considered unreasonable. No maladministration was therefore found.[32]

The Commission's powers under Article 226 only arise, however, if it 'considers that a Member State has failed to fulfil an obligation under this Treaty'. When the Commission closes the file on a complaint because its investigation has revealed that no infringement exists, it is not exercising a discretion but drawing the necessary implication from its finding.[33] Furthermore, according to the Court's case law, the purpose of the pre-litigation procedure under Article 226 of the EC Treaty is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position.[34] Consequently, the Commission has no power to pursue an infringement that has come to an end, except where the Member State has delayed coming into compliance until after the time limit set down in the reasoned opinion.[35] In a case concerning the regulation of the Lloyd's insurance market in the UK, the EO found, therefore, that the

[30] Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39.

[31] Case C-494/01 *Commission* v. *Ireland* [2005] ECR I-3331.

[32] Case 3660/2004/PB http://www.ombudsman.europa.eu/decision/en/043660.htm.

[33] See the *Newbury Bypass* and *Thessaloniki metro* cases (notes 22 and 24 above) and, as regards Article 228 EC, Case 1037/2005/GG http://www.ombudsman.europa.eu/decision/en/051037.htm para. 2.15.

[34] Case C-191/95, *Commission* v. *Germany* [1998] ECR I-5449, paragraph 44.

[35] Case 7-61 *Commission* v. *Italy* [1961] ECR 317. Hence the established case law that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see e.g. See, e.g., Case C-209/02 *Commission* v. *Austria* [2004] ECR I-1211, paragraph 16.

Commission was entitled to focus its Article 226 investigation on alleged current breaches of the relevant directive, rather than also investigating alleged past irregularities.[36] Similarly, the EO found no maladministration in cases where the Commission closed complaints concerning tender procedures after the Member States concerned took measures to prevent similar cases arising again.[37]

The standard of review

As the previous sub-section made clear, the Commission exercises discretion when it decides

- not to investigate a possible infringement,
- to drop an investigation before it has been completed, *or*
- not to refer an infringement to the Court.

As a general matter, the EO has emphasised both that the discretionary nature of such decisions does not make them unreviewable and that there are always legal limits to discretion.[38] In practice, the criterion of review usually applied by the EO to the Commission's exercise of discretion is 'reasonableness'. It is difficult to avoid circularity when trying to analyse, in general terms, what constitutes 'reasonable' or 'unreasonable' behaviour. Furthermore, the case law does not provide enough points of reference to allow reasonableness to be identified as a distinct concept of Community law. The resulting imprecision of 'reasonableness' could give the impression of arbitrary review by the EO, if the latter could annul the Commission's decisions, or order it to act in a particular way. Since he does not have such powers, reasonableness as a review criterion in fact discourages arbitrariness by the Commission, since it is applied discursively, rather than intuitively: that is to say, the Commission must explain the reasons why it has exercised its discretion in a particular way, the complainant has the opportunity to put forward his or her point of view on those reasons and the EO evaluates the arguments *in concreto*.

As noted earlier, when the Commission decides that there is no infringement it is not exercising discretion, but reaching a conclusion based on applying the law to the facts of the case. In dealing with complaints against such decisions, the EO must maintain a clear distinction between reviewing how the Commission has discharged its functions (which is the EO's task) and reviewing whether the Member State has complied with Community law (which is the Commission's task as guardian of the Treaty and forms no part of the EO's mandate).

[36] Case 1437/2002/IJH http://www.ombudsman.europa.eu/decision/en/021437.htm.

[37] Cases 3570/2005/WP http://www.ombudsman.europa.eu/decision/en/053570.htm and 3391/2006/FOR http://www.ombudsman.europa.eu/decision/en/063391.htm.

[38] See, for example, the general report prepared by the EO for the 1998 FIDE Congress, 'The Citizen, the Administration and Community Law', http://www.ombudsman.europa.eu/fide/en/default.htm.

Where the complainant argues, essentially, that the Commission was wrong to reach the conclusion that there is no infringement, it is important for the EO to avoid stating his views in a way that implies that there is, or is not, an infringement. In the *Newbury Bypass* case, the Commission concluded that the relevant Community directive did not apply to a particular road project. The EO expressed regret that the Commission's opinion did not contain all the legal reasoning necessary to support the Commission's view. On the basis of his own analysis, however, the Ombudsman did not consider that the conclusion itself contained an error in the application of Community law to the facts and to the national legal context of the case. That came close to implying that the EO took the view that there was no infringement. In subsequent cases, the Commission has set out its reasoning more fully, which has made it easier for the EO to focus his review clearly on the Commission's role.

In cases involving complex issues of law and fact, the EO often frames his review in terms of 'reasonableness'. In this context, the concept of reasonableness allows the EO to exercise substantive review without substituting his judgment for that of the Commission as regards the question of whether there is an infringement or not. One complaint, for example, concerned the complainant farmer's rights under a regulation on milk quotas. Having analysed the case, the EO considered as reasonable both (i) the Commission's analysis of the complainant's situation under national law and practice at the time concerned and (ii) its finding, on the basis of a decision of the Court of Justice, that the regulation could not be interpreted as stipulating that a milk quota should remain with a milk-producing tenant when, at the end of a tenancy, the owner of the land to which the quota attaches does not intend to produce milk.[39]

Maintaining the distinction between review of how the Commission has discharged its functions and review of whether the Member State has complied with Community law is easier if the former issue is focused on a question of legal interpretation that can be framed in the abstract. For example, an infringement complaint concerned the conformity of a law enacted by the State of Hamburg with the Data Protection Directive.[40] The Commission based its view that there was no infringement on an interpretation of the scope of a particular article of the Directive. After analysing the provision in question, the EO considered that the Commission had failed to provide valid and convincing arguments for its interpretation. In its positive reply to a proposal for a friendly solution, the Commission set out a

[39] Case 1509/2004/TN, http://www.ombudsman.europa.eu/decision/en/041509.htm. See also for example, Cases 292/2004/TN http://www.ombudsman.europa.eu/decision/en/040292.htm and 3133/2004/JMA http://www.ombudsman.europa.eu/decision/en/043133.htm.

[40] Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, p. 31.

revised legal analysis in light of the arguments presented by the EO. The EO was therefore able to perform his role and achieve a friendly solution to the complaint without any need to enter into the details of the infringement complaint against the Member State.[41]

In this context, it is worth noting that the Commission has argued, in summary, that a divergence of views between the EO and the Commission as to the interpretation of the law cannot be considered as maladministration without putting in question the division of competences under the Treaty.[42] The Ombudsman's position is that, in a society governed by the rule of law, every public administration must follow the law. Errors of legal interpretation can, therefore, constitute maladministration and are a legitimate subject for inquiry. However, a difference of views on legal interpretation need not always give rise to criticism by the EO. Moreover, the division of competences foreseen by the Treaty is clear, since the Court of Justice is the highest authority on the interpretation of Community law.

2.5 Access to Documents Relating to Infringement Proceedings

As well as general principles and procedural guarantees, the Commission's 2002 Communication on relations with the complainant in respect of infringements of Community law[43] also contains a number of commitments as regards the transparency of the Article 226 procedure. Commission decisions on infringement cases are published on the Secretariat General's internet site[44] within one week of their adoption. Furthermore, decisions to deliver a reasoned opinion to a Member State or to refer a case to the Court of Justice will normally also be publicised by means of a press release.

Under the rules on public access to documents which were in force from 1994 to 2001, the Commission successfully defended its refusal to give access to letters of formal notice and reasoned opinions, on the ground of protection of the public interest relating to inspections, investigations and court proceedings.[45] The Commission's legislative proposal for what eventually became Regulation 1049/2001 on public access to European Parlia-

[41] Case 2467/2004/PB, http://www.ombudsman.europa.eu/decision/en/042467.htm.

[42] In response to the EO's critical remark in Case 1037/2005/GG: http://www.ombudsman.europa.eu/decision/en/051037.htm. See also the EO's study, dated 22 May 2008, of the follow-up given by institutions to critical remarks and further remarks made in 2006 (http://www.ombudsman.europa.eu/followup/pdf/en/crfr2006.pdf, pp. 32-34.

[43] Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law OJ 2002 C 244, p. 5.

[44] http://ec.europa.eu/community_law/infringements/infringements_decisions_en.htm.

[45] Case T-105/95 *WWF UK* v. *Commission* [1997] ECR II-313, paragraph 63; Case T-191/99, *Petrie and others* v. *Commission* [2001] ECR II-3677, paragraph 68.

ment, Council and Commission documents[46] contained a new category of exception specifically for infringement proceedings. This was rejected in the legislative procedure, but the Commission announced in the *Official Journal* that it would continue its practice of secrecy.[47]

It is understandable that the government of a Member State which is being investigated by the Commission in relation to an alleged infringement might sometimes want to keep the matter secret. The Commission, however, should promote the interests of the Community and it is less obvious how secrecy might serve those interests. It is often said that secrecy may promote voluntary compliance by the Member State through negotiations with the Commission. Interestingly, in the context of the European Union's complaint procedure against third countries under the Trade Barriers Regulation (TBR) publicity and active involvement of the complainant are regarded as helping to promote a negotiated settlement with the State concerned. The opening of an investigation into a complaint is announced in the *Official Journal*, with an invitation to submit information to the Commission. The complainant has access to the information obtained, subject to defined exceptions.[48]

Cases dealt with by the EO suggest that the Commission's wish for secrecy in the Article 226 procedure may have as much to do with its internal debates as with negotiations with Member States. One case has already been mentioned in which the Commission's handling of a complaint was delayed because it was unable to reach a political consensus on how to proceed.[49] In another case, a journalist asked the Commission for access to a document that its services had drawn up in 1995, in preparation for a decision on possible infringement proceedings against Greece in relation to the construction of a new airport in Spata. The Commission rejected the request, arguing that disclosure of the document would seriously undermine its decision-making process. It was only after the EO had made a draft recommendation that the Commission explained that its position was based solely on the sensitivity of the information contained in the document. On delicate issues such as the Spata airport case, it was essential for it to receive unfettered advice from its services and to keep the freedom of not following their recommendations. According to the Commission, disclosure of the document would reopen discussions and cast doubts as regards the legality

[46] OJ 2001 L 145 p. 43.

[47] See amended proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents OJ 2001 C 240E p. 165.

[48] Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation, OJ 1994 L 349 p. 71.

[49] The 'sports betting' case, 289/2005/GG. See note 26 above.

of its decision. After inspecting the document the EO was not convinced that disclosure of the document would have the negative consequences invoked by the Commission and closed the case with a critical remark.[50]

Furthermore, in two cases in which the Commission had refused to give the complainant access to a document from a Member State, the EO sought the views of the relevant national authorities, in accordance with Article 3 (3) of the Statute. One of the cases concerned the Article 226 procedure; the other concerned the 'excessive deficit procedure' under Article 104 of the EC Treaty.[51] In both cases, the result was that the Commission was able to release the document. Although not a large enough sample for scientific validity, this experience suggests that when Member States are called upon to take public responsibility for confidentiality in relation to specific infringement investigations, rather than relying on the Commission do it for them on a general basis, they may not be as resistant to transparency as is sometimes supposed.

2.6 The European Investment Bank

The European Investment Bank (EIB) is a Community body, established by the EC Treaty.[52] It raises substantial volumes of funds on the capital markets which it uses to lend on favourable terms to projects that further EU policy objectives and comply with EU law. The EO receives complaints alleging that the EIB has failed properly to discharge its responsibility to ensure that projects comply with EU law, though such complaints are less numerous than those against the Commission as guardian of the Treaty.

Two cases concerning projects financed by the EIB in Poland and Spain illustrate the EO's approach to supervising the EIB's discharge of its responsibilities. In both cases, the main issue concerned compliance with EU environmental law, in particular as regards Environmental Impact Assessments (EIAs).[53]

In the Polish case, two environmental NGOs alleged that the EIB had failed to (i) ensure that flood reconstruction and repair works complied with the EIA provisions of the Directive and (ii) exercise due diligence in its Octo-

[50] Case 1844/2005/GG, http://ombudsman.europa.eu/decision/en/051844.htm.

[51] Cases 3381/2004/TN http://ombudsman.europa.eu/decision/en/043381.htm and 116/2005/MHZ http://ombudsman.europa.eu/decision/en/050116.htm.

[52] Articles 9, 266-267 and Protocol 11 on the Statute of the Bank.

[53] See OJ 1985 L 175, p. 40, as amended by Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (OJ 1997 L 73, p. 5) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

ber 2004 monitoring mission to Poland. After making a detailed assessment of its actions, the EO found maladministration because the EIB had failed to react to official reports which appeared to suggest that the Polish authorities did not consider that an EIA was necessary. As regards the monitoring mission, the EO concluded that no further inquiries were justified, given that the EIB appeared to have given a reasonable follow-up to the complaints received from various NGOs during that mission.[54]

In the Spanish case, the complainant contested the EIB's financing of the high-speed railway project from Madrid to the French border, in particular the segment that will run through the centre of Barcelona, on the grounds that it had not been subject to an appropriate EIA. The EIB argued that the lending agreement for the project had been approved according to its standard appraisal process and that, following a thorough review, it had concluded that the EIA had been carried out correctly. The EO carried out an inspection of the EIB's file, which did not contain any document concerning the EIB's review of the EIA document. The EO therefore made a draft recommendation that, before disbursing any financial assistance for the high-speed railway segment going through Barcelona, the EIB should formally and adequately record in the relevant file its review of the EIA prepared by the Spanish authorities.[55] At the time of writing, the EIB's detailed opinion on the draft recommendation is still pending.

In both the above cases, part of the complainant's argument was that the actions of the national authorities were unlawful. As with 'Article 226' complaints against the Commission, the EO was careful to emphasise that his mandate is limited to the Community institutions and bodies and that that he does not examine the activities of national authorities. In the Spanish case, the EO pointed out that the complainant could address his allegations against the national authorities to the Spanish ombudsman.

In addition to reviewing directly how the EIB has discharged its responsibility to ensure that projects comply with EU law, the EO also works proactively to support the EIB in this regard. In the Polish case mentioned above,[56] the EO noted that the complainants had played a valuable role in bringing to the EIB's attention relevant information of which it was previously unaware and encouraged the EIB to continue to engage constructively with NGOs. In another Polish case, the EO suggested that the EIB consider establishing channels of communication with, and seeking information from, relevant national and regional control instances, such as ombudsmen, which could serve as additional sources of information concerning compliance of EIB-financed projects with national and European law.[57] Finally, with the encouragement of the European Parliament, the EO and the EIB

[54] 1807/2006/MHZ http://www.ombudsman.europa.eu/decision/en/061807.htm.

[55] 244/2006/(BM)JMA http://www.ombudsman.europa.eu/recommen/en/060244.htm.

[56] See note 54.

[57] 1779/2006/MHZ http://www.ombudsman.europa.eu/decision/en/061779.htm.

signed a Memorandum of Understanding (MoU) in July 2008. Key points of principle on which the MoU is based are that the EIB should inform the public about the policies, standards and procedures that apply to the environmental, social and developmental aspects of its activities and that complainants should have access to an effective internal EIB complaints procedure. The operation of the internal complaints procedure should result in a record that the EO can use as the starting point for his own review. The MoU also contains commitments by the EIB to ensure the adequate engagement of stakeholders, as well as internal procedures for that purpose, and to launch a public consultation on its internal complaints handling procedure early in 2009.[58]

3 The European Network of Ombudsmen

3.1 The Decentralised Enforcement of EU Law

One of the most distinctive features of the EU's legal architecture is that Community law confers rights on individuals, on which they can rely in the national legal order. Through its case law establishing the principles of primacy, direct effect, state liability and the obligation to interpret national law so as to be in conformity with Community law as far as possible, the Court of Justice has fostered the decentralised enforcement of Community law, alongside the centralised system of Article 226. This case law arose under the preliminary rulings procedure of Article 234 of the EC Treaty, through which the Court of Justice answers questions put by national courts and tribunals. It is therefore understandable that most of the cases, and most legal commentators, focus on the powers and responsibilities of national courts.

However, the duties of national courts to give effect to Community law and to protect Community law rights *vis-à-vis* other national authorities necessarily imply – indeed, they presuppose – that those authorities themselves have obligations to give effect to Community law. The Court of Justice has explicitly stated that it is for all the authorities of the Member State to ensure observance of the rules of Community law within the sphere of their competence and that the duty to disapply national legislation which contra-

[58] Another major element of the MoU, which is not relevant for purposes of the present article, is to extend protection to physical and legal persons who are not citizens or residents of one of the Member States of the EU, or who do not have a registered office in one of the EU Member States. The MoU will be published in the Official Journal. At the time of writing it is still in translation. The English version is available at http://www.ombudsman.europa.eu/cooperation/en/20080709-1.htm.

venes Community law applies not only to national courts but to all organs of the State, including administrative authorities.[59]

Moreover, the administrative implementation of Community law is largely the responsibility of the Member States, both in principle and practice.[60] As Alain Lamassoure MEP put it in a report to the French President in June 2008:

> ' there is not – and everyone wishes that there will not be – a European territorial administration. In essence, the administration of Community policies and the implementation of EU law are the responsibility of each Member State.'[61]

Most citizens who encounter problems that involve EU law are thus likely to do so when they are dealing with a national, regional or local authority in Member State. In consequence, the activities of authorities in the Member States are likely to generate many more complaints involving EU law than are the activities of Institutions and bodies at the EU level.

3.2 Origins of the Network

Understandably, many citizens wrongly assume that the EO can deal with all complaints about matters within the scope of EU law. Soon after the office became operational in September 1995, the proportion of total complaints outside the mandate stabilised at around 70%. The first European Ombudsman had to make a strategic choice as to how to deal with this situation. One possible solution could have been to seek an expansion of the mandate, in line with the expectations of complainants. This was rejected in favour of an approach based on the principle of subsidiarity, involving co-operation with ombudsmen and similar bodies at national and regional levels in the Member States.

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[59] See A. Rosas, 'Ensuring uniform application of EU law in a Union of 27: the role of national courts and authorities', in J-P. Delevoye and P. N. Diamandouros (eds.), *Rethinking good administration in the European Union*, Luxembourg: Office for Official Publications of the European Communities (forthcoming, 2008).

[60] Declaration relating to the Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Amsterdam (Declaration 43: OJ 1997 C 340, p. 140). The conclusions of the Essen European Council (December 1994) used slightly stronger words, stressing that '*administrative implementation of Community law must in principle remain the preserve of the Member States*'.

[61] '... il n'y a pas – et chacun souhaite qu'il n'y ait pas – d'administration territoriale européenne. Pour l'essentiel, la gestion des politiques communautaires et l'application du droit européen dépendent de chaque Etat membre'. Alain Lamassoure, 'Le citoyen et l'application du droit communautaire', rapport au Président de la République, 8 juin 2008 p. 5.

Beginning in 1996, the co-operation has developed to include three separate biennial series of meetings (of national ombudsmen, regional ombudsmen and liaison officers), as well as an electronic daily news service, a biannual newsletter and an internet forum. At the 4th Seminar of National Ombudsmen in 2003, the co-operation was expanded to include countries that are candidates for EU membership. In 2005, the Fifth Seminar approved measures to strengthen the co-operation and improve its visibility, including adoption of the name 'European Network of Ombudsmen' and the drafting of a Statement to make the EU dimension of ombudsmen's work better known and to clarify the service that they provide to people who complain about matters within the scope of EU law.

The Strasbourg Statement

The Statement was adopted at the Sixth Seminar in 2007.[62] It explains that the national and regional ombudsmen in the Network are independent and impartial persons, established by constitution or law, who deal with complaints against public authorities. They take into account the relevant provisions of EU law, including general principles of law such as respect for fundamental rights. Citizens and residents of the EU can turn to the appropriate national or regional ombudsman to complain against public authorities in the Member States about matters falling within the scope of EU law. The Statement also notes that, as well as responding to complaints, ombudsmen work proactively to raise the quality of public administration and public services.

3.3 The Scope and Impact of the Network

The European Network of Ombudsmen now embraces 31 countries: the 27 Member States, Iceland and Norway (which have been included from the very beginning as countries that belong to both the Schengen area and the European Economic Area) and two candidate countries, Croatia and the Former Yugoslav Republic of Macedonia.[63] Of the EU Member States, 25 have a national ombudsman and six have ombudsmen at the regional level. In Germany, the Committee on Petitions of the *Bundestag* fulfils a role similar to that of a national ombudsman at the federal level. There are also committees on petitions at the *Länder* level, as well as four ombudsmen. In Italy, there are ombudsmen in most of the regions, but there is no ombudsman or similar body at the national level.

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[62] The Statement is available in all 23 official languages on the EO's website: http://www.ombudsman.europa.eu/liaison/en/statement.htm.

[63] The Turkish Parliament adopted a law to establish an ombudsman in 2006, elements of which were struck down by the Turkish constitutional court. The creation of an ombudsman remains part of the Turkish government's legislative programme.

Transfers and advice

The Network makes it possible to transfer cases between its members, or to give rapid and accurate advice to complainants as to which member of the Network is competent to help them. In principle, there can be horizontal flows (of cases and of information on which to base advice) between different national and regional ombudsmen, as well as flows in both directions between the Member State and EU levels. In practice, the traffic is mostly from the EO to the Member States, for the reason already explained: the high number of complainants who address the EO when they have problems with public authorities in the Member States.

Exchange of information

As well as ensuring that complaints are steered to the right ombudsman, the Network also facilitates the exchange of information, including information about the implementation of Community law and the enforcement activities of the Commission. For example, the EO received a large number of complaints against the Commission concerning the supposed effects of its decision to start certain infringement proceedings against Spain. According to the complainants, the Commission had taken the view that the practice of Spanish public libraries to lend books to the public free of charge was contrary to a directive.[64] They alleged that the Commission's interpretation of the directive and its subsequent decision to pursue infringement proceedings against Spain undermined the existence of public libraries as a basic public service and went against the fundamental rights of citizens to have access to culture. As part of his inquiry into the case, the EO requested information from members of the Network as to how the directive had been implemented in the different Member States and whether any problems had arisen. The replies showed that most Member States had been able to implement the directive correctly, by means that did not involve charging individuals for borrowing books from public libraries. This analysis was confirmed by the Commission in its opinion on the complaints. The result of the case was that the EO, in co-operation with other members of the Network, helped clarify for the complainants and for the public generally the reasons for the Commission's actions and the possibilities for correct implementation of the directive.[65]

To take another example, the EO ensured that the Romanian Ombudsman was fully informed of the Commission's on-going infringement investigation into the car registration tax in Romania, which had generated complaints to the EO against both the Commission and the Romanian

[64] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, p. 61.

[65] Case 3452/2004/JMA, http://www.ombudsman.europa.eu/decision/en/043452.htm. The EO closed his inquiry when the Commission brought the matter before the Court of Justice in Case C-36/05 *Commission* v. *Spain* [2006] ECR I-10313.

authorities, the latter being within the mandate of the Romanian Ombudsman.[66]

Co-ordination of activities

The Network provides a mechanism for the EO and national offices to co-ordinate their activities and even to conduct parallel inquiries when complaints concern both the Member States and EU levels. For example, the EO is currently dealing with a complaint[67] against the Commission concerning the latter's alleged failure to ensure that Portugal applies Community law on the quality of shellfish waters. As well as opening an inquiry into the complaint against the Commission, the EO informed the Portuguese Ombudsman, who decided to open his own inquiry into the actions of the Portuguese authorities. At the time of writing, both inquiries are on-going and the EO and Portuguese Ombudsman are sharing the information that they obtain.

3.4 The Query Procedure

The Network enables ombudsmen in the Member States to obtain information about EU law, both generally, through the various communication instruments, and in relation to specific complaints. When transferring cases, the EO draws attention to the EU law dimension, if it seems useful to do so. Furthermore, a procedure was established at the First Seminar of National Ombudsmen in 1996 through which national or regional ombudsmen may ask for written answers to queries about EU law and its interpretation, including queries that arise in their handling of specific cases. The EO either provides the answer directly or, if more appropriate, channels the query to another EU institution or body (in most cases the Commission) for response. The query procedure has been used relatively sparingly: in total, 26 queries were received and dealt with in the 11 years up to October 2007. In the following 10 months, up to the date of writing (September 2008) a further eight queries were received. The most likely explanation for the increase is that the Statement adopted in October 2007 makes specific reference to the procedure.

In considering the significance of the query procedure, it is important to take into account that, although co-operation in the Network is entirely voluntary, ombudsmen in the Member States have legal obligations with regard to Community law. In particular, within their field of competence, ombudsmen in the Member States must apply Community law correctly and disregard any national rules which prevent them from protecting the rights that individuals derive from EU law.[68] To fulfil these responsibilities,

[66] Case 2543/2007/RT.

[67] Case 1618/2007/JF.

[68] See the contribution of Advocate General Maduro to the 5th Seminar of National Ombudsmen held in 2005: 'Ombudsmen and the constitution of the European Union' in A. Bren-

ombudsmen need appropriate legal information and, in some cases, support from the EU level in order to persuade the competent public authorities in the Member State to acknowledge the requirements of EU law. This point is of particular importance since national ombudsmen cannot use the preliminary ruling procedure of Article 234 of the EC Treaty.[69]

Naturally, the answers provided by the EO in response to queries are not legally binding, but their practical value and impact can be considerable and the procedure has great potential for future development, particularly as regards the right to good administration contained in Article 41 of the Charter of Fundamental Rights of the European Union.[70] It is true that the Charter is not legally binding as such and that the scope of Article 41 is limited to the EU Institutions and bodies. However, it is perhaps not yet sufficiently appreciated that the case law of the Court of Justice on which Article 41 is based concerns general principles of Community law. It is, therefore, also binding on the public authorities of the Member States, when they are acting within the scope of Community law. In that sense and to that extent, the citizens and residents of the Union are already entitled to the same right to good administration *vis-à-vis* administrative authorities in the Member States as *vis-à-vis* the EU institutions and bodies.

4 New Developments

4.1 The Revision of Article 5 of the Statute

The co-operation that has developed into the European Network of Ombudsmen is based on the provision, contained in Article 5 of the Statute, that the EO may co-operate with authorities of the same type in the Member States insofar as it may help to make his enquiries more efficient and better safeguard the rights and interests of persons who make complaints to him. The phrase 'authorities of the same type' is not defined. Arguably, it is broad enough to cover a wide range of independent complaint-handling bodies, not just the ombudsmen and similar bodies that form

ninkmeijer and P. N. Diamandouros (eds). *The role of Ombudsmen and similar bodies in the application of EU law, proceedings of the 5th seminar of national ombudsmen of the EU Member States and candidate countries* (The Hague: The National Ombudsman of the Netherlands: 2006) pp. 22-24.

[69] A point rightly emphasised by Carol Harlow and Richard Rawlings in 'Promoting accountability in multi-level governance: a network approach' (2007) 13 *European Law Journal* 542-562.

[70] The Charter of Fundamental Rights of the European Union was proclaimed again on 12 December 2007, prior to the signing of the Treaty of Lisbon on 13 December 2007 and published in the Official Journal (OJ 2007 C 303 p. 1), together with explanations of its provisions (OJ 2007 C 303 p. 17).

the European Network of Ombudsmen. The Network does not, therefore, exhaust the possibilities for the EO to co-operate with other bodies in the Member States to safeguard the rights and interests of complainants.

Furthermore, the revision of the Statute that took place in 2008 added a second paragraph to Article 5, making explicit provision for the EO also to cooperate with institutions and bodies of Member States in charge of the promotion and protection of fundamental rights.[71] The new provision could encompass a wide range of institutions, including, for example, those that have a role in applying the EU's equality directives[72] and those dealing with data protection and access to information, as well as national human rights institutions more generally.

Many such bodies already participate in one or more European networks of various kinds, such the European Network of Equality Bodies ('Equinet'), the 'Article 29' data protection working party and the co-operation system being developed by the Commissioner for Human Rights of the Council of Europe with national human rights structures.[73] Possible future initiatives based on the new provision will, therefore, need to be carefully planned so as to avoid duplication, although overlapping memberships are a normal feature of networks, particularly those involving institutions that have more than one task.[74]

The new Article 5 (2) is clearly intended as an encouragement to the EO to be even more active in the future in trying to ensure that complainants have access to fast and effective remedies at the Member State level in order to secure their rights, thereby also promoting the full and correct application of EU law by the Member States. The ready availability of such 'local' remedies reflects the principle of subsidiarity as set out in Article 1 of the Treaty on European Union that decisions in the Union are to be 'taken ... as closely as possible to the citizen'.

4.2 Solving Problems at the Member State Level

The development of 'local' remedies can also help to avoid overloading the centralised enforcement mechanism of Article 226 of

[71] Decision of the European Parliament 2008/587/EC, Euratom of 18 June 2008, OJ 2008 L 189 p. 25 amending Decision of the European Parliament 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 1994 L 113 p. 15.

[72] I.e., the Racial Equality Directive 2000/43/EC and the Employment Equality Directive 2000/78/EC.

[73] Equinet.: http://www.equineteurope.org/topics/2040.htmlArticle29 Working party: http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htmCommissioner for Human Rights: http://www.coe.int/t/commissioner/activities/themes/nhrs_en.asp.

[74] The Cypriot, Greek and Latvian Ombudsmen, for example, are the relevant national equality bodies and are members of Equinet as well as the European Network of Ombudsmen.

the Treaty. The enlargement of the Union to 27 Member States automatically entailed a significant increase in the workload of the Commission as guardian of the Treaty. If and when the Treaty of Lisbon comes into force, a further increase can be expected, since the Charter of Fundamental Rights will acquire the same legal value as the Treaties. Furthermore, the scope of Article 226 will be extended to cover provisions on police cooperation and judicial cooperation in criminal matters.[75]

Moreover, complaints differ in the extent to which they can be handled efficiently and effectively through centralised enforcement. Complaints about transposition of directives into national law mostly raise legal issues that can be dealt with through a written procedure. However, complaints about the poor application of Community law, or of national law implementing Community law, often raise complex factual, scientific and economic issues, as well as requiring knowledge of the details of administrative and/or financial procedures in potentially disparate parts of the public sector in the Member State concerned. This tends to be the case, for example, for complaints relating to Community law on the environment or public procurement. When faced with similar potential problems of efficiency and effectiveness, the usual response of ombudsmen is structural and proactive: they try to ensure that the public authority responsible for the activity puts in place an effective internal or 'front-line' complaint-handling system of its own. Not only does this result in fewer complaints reaching the ombudsman, it should also provide a structured record that facilitates review if the complaint is escalated to the level of the ombudsman. (As has been explained in section 2.5 above, the Memorandum of Understanding between the EO and the EIB embodies this logic, among other things).

The public response of the Commission to problems of potential overload in the Article 226 procedure has, until comparatively recently, focused mainly on prioritisation. In 1997, the Commission published a list of priorities in its 14th annual report on the monitoring of Community law. In 2001, the Commission's White Paper on Governance again insisted on the need for priorities and, a year later, a comprehensive list was set out in its communication on better monitoring of the application of Community law.[76] Most recently, the Commission repeated its commitment to prioritisation in its 2007 Communication *A Europe of Results – Applying Community Law*.[77] The latter document explains that all complaints and infringements will be dealt with and that '[p]rioritisation means that some cases will be dealt with by the Commission more immediately and more intensively than others' (page 9).

[75] As regards provisions that have already been adopted, the infringement procedure would normally only become applicable after five years: see article 10 of title VII of Protocol 36 of the Lisbon Treaty.

[76] *European Governance, a White Paper* (COM(2001) 428 final) p. 26; *Commission Communication: better monitoring of the application of Community law,* COM(2002)725 final/4.

[77] COM(2007) 502, 5 September 2007.

Whilst no-one can sensibly argue against the need for a public authority to establish, monitor and review priorities for its work, it needs to be pointed out that prioritisation, as such, is not an adequate response to the difficulties of centralised enforcement identified above, because it does nothing to strengthen local (i.e. decentralised) enforcement.

As already mentioned, the Commission recognised the advantages of effective decentralised remedies in its response to the EO following a complaint concerning disposal of waste in a wetland in Ireland (see note 31 above).

The SOLVIT network

More generally, the Commission promotes and co-ordinates the SOLVIT network of centres in each Member State's national administration. SOLVIT tries to solve cross-border problems for citizens and businesses, in cases where there is a possible misapplication of EU law by a public authority in a Member State.[78] Its remit includes, for example, recognition of professional qualifications and diplomas, access to education, voting rights, social security, driving licences, motor vehicle registration, border controls, market access for products and services, public procurement and taxation. The assessment of whether a case is appropriate to be dealt with through SOLVIT is normally carried out by the user's 'home' SOLVIT centre. Attempts to reach solutions are primarily the result of bilateral contacts between the home centre and the centre in the State where the problem has arisen. Major advantages of the system for citizens and businesses are its speed of operation (the deadline for solving cases is ten weeks), the fact that the service is free and the ability to submit a problem in the user's own language. When SOLVIT began operation in July 2002, cases arrived at an annual rate of fewer than 150. By 2007, this had risen to over 800 per year, with reported a success rate of about 80%.[79]

It is clear that, from the very beginning, the Commission was aware of the potential for SOLVIT to act as a kind of filter for infringement proceedings: either the problem would be solved by correct implementation of Community law, or the nature of the problem and the obstacles to a solution would be clarified, thus enabling the Commission to decide whether the case falls within its priorities as an infringement.[80] Moreover, at some point

[78] See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Effective Problem Solving in the Internal Market ("SOLVIT") COM/2001/0702 final; Commission Recommendation of 7 December 2001 on principles for using "SOLVIT" – the Internal Market Problem Solving Network (Text with EEA relevance) (notified under document number C(2001) 3901), 2001 OJ L 331 p. 79. SOLVIT also includes Iceland, Norway and Lichtenstein as EEA States.

[79] See SOLVIT's Annual Report for 2007: http://ec.europa.eu/solvit/site/docs/solvit2007_report_en.pdf.

[80] See the Commission Recommendation of 7 December 2001 (note 75 above) point G. 1.

in the second half of 2003 or the first half of 2004, the Commission services began to refer certain Article 226 complaints to SOLVIT.[81]

The 'EU Pilot' project

SOLVIT has also provided the inspiration for a more wide-ranging and ambitious attempt to solve problems quickly at the Member State level and thereby relieve the burden on the Commission as guardian of the Treaty. The 2007 Communication *A Europe of Results – Applying Community Law*[82] envisaged a pilot exercise involving some Member States in 2008 in which complaints to the Commission raising a question of the correct application of Community law would be transmitted to the Member State concerned. The Member State would be given a short deadline to provide the necessary clarifications, information and solutions directly to the citizens or business concerned and inform the Commission. In case of a breach of Community law, Member State would be expected to remedy, or offer a remedy, within set deadlines. If no solution were proposed, the Commission would follow up the matter, taking any further action, including through infringement proceedings, in accordance with existing practice.[83]

In practice, the 'EU Pilot', as it is currently called within the Commission, involves 15 of the 27 Member States.[84] Its operation resembles SOLVIT, in that it depends on contact points in the administration of each Member State. The responsible Commission service registers each complaint by creating a file in the EU Pilot IT application. The file includes a copy of the incoming letter and the initial reply from the Commission to the correspondent. The relevant Member State contact point is automatically alerted by e-mail that a new file has been created. The Member State should acknowledge receipt, investigate, and seek to resolve the issue within a ten week deadline, sending its answer directly to the correspondent. The relevant Commission service examines the answer of the Member State and assesses whether it solves the issue and is in conformity with Community law. The Commission then replies to the complainant indicating either that it is closing the file, or asking for additional information, or providing indications of intended further action. The correspondent has four weeks to provide new elements, after which the Commission services decide whether to close the file, resubmit it to the Member State, or prepare any other appro-

[81] This emerges from a comparison of the wording of the *Commission Communication: better monitoring of the application of Community law,* COM(2002)725 final/4, Point 3 (4) (a) (2) and the Commission staff working document setting out the approach for assessing the conformity of solutions proposed by the SOLVIT network with Community law, SEC(2004)1159, 17 September 2004, point 6 (b).

[82] COM(2007) 502, 5 September 2007.

[83] *Ibid.*, point III 2.2.

[84] Austria, Czech Republic, Denmark, Germany, Finland, Hungary, Ireland, Italy, Lithuania, The Netherlands, Portugal, Slovenia, Sweden, Spain and the United Kingdom.

priate further action, including the possibility of launching an infringement procedure.[85]

4.3 The Role of the EO and the European Network of Ombudsmen

The EO and the EU Pilot

The proposals contained in *A Europe of Results* for changing the administrative stage of the Article 226 procedure immediately aroused the interest of the EO, who identified their potential to empower citizens and businesses *vis-à-vis* the relevant Member State authorities and thus promote accountability at the right level. The Commission was invited to present its plans in more detail at the Sixth Seminar of National Ombudsman in October 2007 and the EO subsequently wrote to the Commission broadly welcoming the proposals. At the same time, two concerns about the EU Pilot were identified.[86]

First, some complainants may be confused if the Commission appears to refer the complainant back to the very authority against which he or she is complaining, rather than itself investigating the complaint. The EO therefore encouraged the Commission to include on its infringement website[87] information about the objectives and methods of the EU pilot, as well as identifying the 15 Member States to which it applies.

Second, complainants should be re-assured that they will continue to enjoy all the procedural guarantees contained in the Commission's 2002 *Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.*[88] In particular, it should be made clear that complaints will continue to be registered when they are received by the Commission, unless one or more of the six exceptions set out in point 3 of the 2002 Communication applies, and that the Commission will continue to decide either to issue a letter of formal notice, or to close the case, within not more than one year from the date of registration of the complaint.

The response from the Commission was largely reassuring and promised a full report and evaluation at the end of 2008. The EO remains watchful, however, to ensure that the undertakings in the 2002 Communication continue to be respected.

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[85] The information in this paragraph was kindly provided by the Secretariat-General of the Commission.

[86] The EO's letter to the Commission dated 6 February 2008 and the reply of 10 April 2008 are both available at http://www.ombudsman.europa.eu/letters/en/default.htm.

[87] http://ec.europa.eu/community_law/your_rights/your_rights_en.htm.

[88] Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, OJ 2002 C 244, p. 5.

The involvement of the European Network of Ombudsmen

The EO has tried to promote good communication between national ombudsmen and the SOLVIT centres and EU Pilot contact points, with a view to a mutually advantageous exchange of information and possible future co-operation. Such communication could be useful for two main reasons.

First, as mentioned above, many ombudsmen seek, for reasons of efficiency and effectiveness, to promote a situation in which public authorities have effective internal or front-line complaint-handling systems. The advantages are that fewer cases need to be escalated to the level of the ombudsman and that, where escalation occurs, the record of the internal complaint procedure facilitates the ombudsman's review. From the point of view of national ombudsmen, the SOLVIT centres could be seen as an internal complaints procedure of a special kind: internal because the centres are not independent supervisory bodies like ombudsmen, but part of the national administrations; special because of their links to the European Commission and because their role is horizontal, rather than being limited to a specific ministry or public agency. If SOLVIT is analysed in this way, complainants could be required, in appropriate cases, to use it before addressing the ombudsman.

Alternatively, national ombudsmen could regard SOLVIT as a handy first point of contact with the administration in their own handling of certain complaints. If the matter were resolved within the ten week deadline the case could be closed. If not, the ombudsman could decide whether to take further steps, taking into account, among other things, the possible role of the Commission in the case.

At present, only the Commission can activate the EU Pilot contact points, but the system could develop in ways that would also offer both the above possibilities as regards the handling of individual complaints.

The second reason it could be useful for national ombudsmen to have good communication with both SOLVIT centres and EU Pilot contact points also flows from the fact that the latter are part of the national administrations. On the basis of the available information, it appears that neither the SOLVIT centres nor the EU Pilot contact points have any formal powers, or even a formally defined role, within national administrative systems. Furthermore, their role is focused on individual cases rather than on systemic issues, such as administrative practices that wrongly apply, or fail to take adequate account of, Community law. In contrast, ombudsmen do have formal powers of investigation and competence to tackle systemic issues. Exchange of information and co-operation between SOLVIT and national ombudsmen could, therefore, lead to useful synergies.

Furthermore, since they are part of the national administrations, SOLVIT centres and EU Pilot contact points are likely themselves to fall within the competence of the relevant national ombudsman as possible objects of

inquiry or inspection. Good communication with the national ombudsman in each Member State could, therefore, also help to ensure that flows of information are sufficient to facilitate the ombudsman's supervisory role and to enable each centre and contact point to know what the ombudsman expects by way of good administrative behaviour in the context of its specific functions.

5 Conclusion

The preceding analysis shows that citizens' complaints have led the EO to become involved in seeking both to improve the centralised procedure for enforcement of Community law by the Commission and to promote 'local' ombudsman remedies in the Member States, thereby also strengthening decentralised enforcement.

As regards the improvement of centralised enforcement, there is nothing in the Treaties or in Community legislation that obliges the Commission to provide a general complaints mechanism against infringements by Member States. There was and is, however, a good reason for the Commission to establish and maintain such a mechanism. As with petitions to the European Parliament, the impetus for the Commission to receive and handle complaints came from citizens who were seeking to ensure that Member States comply with Community law, to protect both their individual rights and the public interest, especially as regards the environment. It would surely have been a major strategic error for the Commission to have missed the opportunity to engage with citizens who want to be involved actively in making European law work as it should.

In the absence of legislation governing complaints, the Community Courts have refused to allow complainants to invoke judicial remedies against the Commission as regards the Article 226 procedure. That does not imply that the Commission's undoubted discretion is absolute. Limits on its discretion are established by the Court's case law, arising from issues raised by Member States in defending themselves before the Court. The EO's case law is different and complementary, based on the principle that, if the Commission holds itself out as ready to deal with complaints, then it must treat complainants properly, in accordance with administrative arrangements which it has itself established for that purpose.

The main achievement of the EO's work in this field to date has been to persuade the Commission to commit itself to the procedural guarantees in its 2002 Communication on relations with the complainant[89] and to respect those guarantees in practice. Three aspects of the Communication are of particular importance for the transparency and openness of the process:

[89] *Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* OJ 2002 C 244, p. 5.

i) all complaints must be registered as such, unless one or more of six grounds for non-registration applies, in which case the complainant will be informed of the ground(s);
ii) if the Commission intends to close a case it will inform the complainant of the reasons and then listen to what the complainant has to say in response to those reasons before making a final decision;
iii) if the Commission takes longer than one year to decide whether or not to send a letter of formal notice to the Member State, it will explain the reason for the delay to the complainant.

These commitments do not narrow the Commission's discretion, but they do make a significant contribution to ensuring that the Commission is accountable for how it chooses to exercise that discretion.

As regards ombudsman remedies in the Member States and the strengthening of decentralised enforcement, the EO continues to invest significant resources in the European Network of Ombudsmen, in order to help national ombudsmen fulfil their responsibilities under Community law as effectively as possible and to promote the highest possible standard of service to citizens in the handling of complaints about matters within the scope of EU law.

The Commission is also seeking to encourage the development of remedies at national level through the SOLVIT network and, more recently, the EU Pilot project for handling infringement complaints submitted to the Commission. It is important to emphasise that the efforts of the EO and of the Commission in this regard are complementary, because the status and functions of national ombudsmen are quite different from those of the SOLVIT centres and EU Pilot contact points. The former are independent and impartial persons, established by constitution or law, who deal with complaints against public authorities. The latter are integral parts of the very administrations that the national ombudsmen supervise. The national ombudsmen could thus regard the centres and contact points either as internal complaints mechanisms, or as potential first points of contact in handling complaints.

From a theoretical standpoint, there is a certain degree of overlap between the roles of the Commission and of the national ombudsmen. Both are potential 'escalated complaints mechanisms' in cases where the national administration (which includes the SOLVIT centres and EU Pilot contact points) is unable to solve a problem satisfactorily by ensuring that EU law is fully and correctly implemented. This does not mean that there is any competition between them, still less any conflict. In practice, their roles are complementary, as are those of the Commission and national courts. Courts, however, operate through procedures that are necessarily quite rigid, because they are legally defined. Ombudsmen can be less formal and more flexible, as can the Commission in the preliminary stages of dealing with an

infringement complaint, before it invokes the formal procedure by sending a 'letter of formal notice' to the Member State. In these circumstances, the overall effectiveness of the contributions made by the various actors depends crucially on the existence of free-flowing channels of communication between them and their willingness to co-operate and share information. For this reason, the EO will continue to encourage and facilitate communication between national ombudsmen and the SOLVIT centres and EU Pilot contact points. For its part, the Commission needs to see national ombudsmen as key players in ensuring that national administrations understand and apply EU law correctly.

These developments tend to elide the clear legal distinction between two aspects of the EO's role: on the one hand, inquiring into complaints against the Commission and, on the other hand, co-operating with national ombudsmen to ensure that complaints outside the EO's mandate are also dealt with effectively. In practice, if the EO is to promote an effective relationship between national ombudsmen, the SOLVIT centres and the EU Pilot contact points, he must also co-operate with the Commission and promote good relations between the Commission and national ombudsmen. At the same time, the EO is responsible for supervising the Commission's handling of the infringement complaints submitted to it, including the use that it makes of SOLVIT and the EU Pilot for this purpose. Looked at another way, the same developments blur what might otherwise seem to be a clear distinction between remedies at the EU and Member State levels.

This elision and blurring of legal and conceptual distinctions should not be a cause for unease or alarm. It echoes, in the field of supervision and remedies, the multiple, overlapping and growing links that exist between national administrations and between the national and Community administrations. It is the EO's goal consistently and systematically to contribute to the dynamic generated by the broader process underpinning these developments and, in so doing, to help strengthen the rule of law and democracy in the European Union, to the benefit of its citizens and residents.