



The European Ombudsman

Reflections on the role and its potential



IN-DEPTH ANALYSIS

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This paper aims to provide an overview of the Ombudsman's activity from 2009 until 2017 inclusive. It gives an account of the main functions of the Ombudsman and the main areas of work of the body. Through an analysis of the Ombudsman's annual reports, this paper attempts to identify trends in the activity of the Ombudsman and to highlight how the activity has evolved since its creation. An overview is also given of those topics on which the strategic efforts of the Ombudsman have been most concentrated. This paper also makes some proposals for modification of the Ombudsman's Statute, in the event that reform of the body were sought.

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EXECUTIVE SUMMARY

Over more than 20 years, the European Ombudsman's office has established a reputation and working methods that reflect the work of the three different office-holders to date. Without real power of enforcement, the Ombudsman's strength lies in the exercise of 'soft power', an approach based on the idea that change within an administration comes from understanding where shortcomings occur and an openness to remedying them.

The Ombudsman's mission pivots around the notion of 'maladministration', an open-ended concept that encompasses, but goes beyond, legality. Borrowing an expression from a previous Ombudsman, referring to maladministration as a 'life beyond legality', maladministration can be identified with those aspects of administrative behaviour which it is not necessarily possible to subject to judicial review, such as lack of transparency, negligence, delays, service-mindedness, and impartiality.

The Ombudsman can act in both a reactive and a proactive role. On the reactive side, the Ombudsman analyses complaints from citizens, companies or associations and endeavours to reach a 'friendly solution'. If this is not possible, and maladministration is uncovered, the Ombudsman issues recommendations to address the issue, to which the European Union institutions must react within three months. If, after that, the recommendation is not accepted, the Ombudsman issues a 'finding of maladministration'. The Ombudsman may also, however, issue recommendations where there is no clear finding of maladministration but nevertheless identifies improvements to the system to propose. In this proactive role, the Ombudsman may begin investigation on the office's own initiative if, as the result of a complaint or from another source, occurrence of maladministration is suspected in a specific field.

The activity of the Ombudsman can be assessed based on the Ombudsman's annual reports from 2009 to 2017, which show that the Ombudsman is most engaged regarding matters of transparency, including access to documents (20-30 %). The second area where the Ombudsman is concerned (9-21 %) appears to be the Commission's role as 'guardian of the Treaties', where the reasonableness of the exercise of that role comes into play. A further 15-20 % of the Ombudsman's activities concern a heterogeneous area encompassing broader administrative behaviour, while 13-19 % concerns financial or contractual issues, such as delays in payments to suppliers. The Commission's proactive role is also to be highlighted, as a way in which the Ombudsman can exercise a certain influential 'political' leverage, by highlighting a specific topic. In recent years, increased strategic use of own-initiative inquiries for issues connected with democratic enhancement and EU institutional ethics, such as accountability, integrity and transparency, can also be observed.

This paper explores possible modifications to the Ombudsman's Statute that could range from minimal to more substantial ones. While the former could amount to consolidating some established practices, e.g. that of informing the committee responsible for an issue instead of submitting a special report to Parliament, or formalising the existence of the European Network of Ombudsmen, more substantial changes could give the Ombudsman power to refer matters to the Court of Justice of the European Union (CJEU), or to intervene in cases pending before the Court. Both these latter proposals, explored in the literature, however confront counter-arguments that depend highly on the type of Ombudsman that is ultimately desired, as attention must be paid to avoid denaturing the role of the European Ombudsman as it currently stands.

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1. Establishment of the European Ombudsman

The European Ombudsman (EO) was established by the Treaty of Maastricht in 1992. The first European Ombudsman, Jacob Söderman, took office on 1 September 1995, following two decades of debate over the creation of such an EU body. The notion of an Ombudsman as a public representative with oversight of an administration was first developed in Scandinavian countries, particularly Sweden, where it possessed the function to provide redress against acts of the Crown. Ombudsman offices developed further in other European countries with different features. Academics have attempted to classify ombudsman models depending on their function, whether the redress or the control function is predominant, or depending on whether their mandate overlaps with other mechanisms of control and redress.

Historically, the creation of the EO was strongly influenced by the Danish model. At the time of discussions predating the creation of the EO, two models were advanced: the Spanish model, with a focus on shortening the distance between the complex EU administration and citizens, and with a broad mandate to review the implementation of EU law by all institutions and Member States; and the Danish model, focused on a more restricted mandate involving the capacity to settle administrative disputes on behalf of citizens where the EU administration is a party. To understand the competence and nature of today's European Ombudsman, it is important to bear in mind that the EO was inspired by the Danish model.¹

The establishment of the EO by the Maastricht Treaty was also linked to a new status attributed to citizens of EU Member States, that of EU citizenship, which is considered to be a further step towards deeper European integration. The link created between citizens of a Member State, from which EU citizenship is derived, and the EU, is reflected in a number of rights, among which feature the right to petition the European Parliament (EP), and the right to apply to the EO (Article 20 TFEU). The latter right is further confirmed in Article 24(3) TFEU by empowering every citizen to apply to the EO for redress.

The specific powers of the EO are laid out in Article 228 TFEU, which at the same time, gives the EO both a reactive and proactive role. On the one hand, it empowers the EO to investigate cases of maladministration, acting upon information gathered from complaints or submitted through a member of the EP, by any citizen of the EU, or by natural and legal persons residing or with a registered office in the EU. On the other hand, it gives the EO the task ('**shall**') of investigating wherever the Ombudsman finds grounds for doing so, thereby acting beyond the stimulus of a complaint ('own-initiative inquiries'). The EO's activities can be directed towards any EU actor, since its field of competence comprises EU institutions, bodies, offices and agencies,² with the exception of the Court of Justice of the European Union (CJEU) acting in its jurisdictional role. The EO may not, similarly, extend its pursuits to scrutiny of the activity of national bodies, even though such bodies may be called upon to implement EU law.

¹ H. C.H. Hofmann, 'The developing role of the European ombudsman', in *Accountability in the EU*, edited by H. C.H. Hofmann and J. Ziller, Edward Elgar Publishing; 2017, p. 2.

² For the purpose of this paper, a reference to the term 'institutions' as addressees of the Ombudsman inquiries also includes EU bodies, offices and agencies, as stated in Article 228 TFEU.

1.1. European Ombudsman's powers

The main functions of the European Ombudsman can be described as, on the one hand, to settle disputes between the administration and a complainant (individual citizens, companies or associations), and on the other, to 'educate' or demonstrate to the EU institutions the best ways to respect the principle of good administration enshrined in the Treaties and Article 41 of the Charter of Fundamental Rights, which provides specifically for the right to good administration. In this sense, the Ombudsman acts in the complainant's interest by seeking to eliminate maladministration and by finding a solution to individual cases that are acceptable to both the EU administration and the complainant. At the same time, however, the EO also acts in the interest of the EU as a whole, because it strives, through investigations, recommendations or other initiatives, to raise the quality of the administration, to strengthen the trust of the wider public, to oversee that fundamental rights and fundamental principles of administrative law are respected, and to improve the accountability and transparency of the EU administrative apparatus. These two functions are also reflected in the type of remedies that the Ombudsman can provide, acting in dispute-resolution, or adjudicatory mode. To fulfil both missions, the Ombudsman is empowered by Article 228 and the Statute³ to put a number of initiatives in place. The practical exercise of the Ombudsman's powers is then contained in the implementing provisions.⁴

As a first step, the Ombudsman may try to seek redress for the complainant by proposing an **amicable or 'friendly' solution**. In this situation, a win-win approach prevails and the focus is on seeking a solution that accommodates both parties, the complainant and the institution. The Ombudsman in these situations is less keen on pointing out the existence of maladministration, but prefers to refer to shortcomings in less reproachful terms. Such a 'friendly solution' is obviously the best outcome, whereby the Ombudsman may propose that the institution apologises, discloses documents, or even pays compensation, which does not however imply as such the admission of negligence justifying legal liability.

If, however, such a friendly solution cannot be achieved, the Ombudsman may issue a **draft recommendation**. Sometimes, the EO may decide not to seek a friendly solution but instead to issue a recommendation directly if the EO believes that the institution is unlikely to accept a friendly solution or if such a solution is no longer viable. A draft recommendation presupposes a finding of maladministration, and includes remedial measures. In response to the Ombudsman's recommendation, the EU institution may send a draft opinion taking a position on the Ombudsman's findings within three months, which is also forwarded to the complainant. A draft recommendation is however more visible, since it is published on the Ombudsman's website, and/or may be the subject of a press release, which may affect the institution's reputation (the 'blame and shame' approach). At this point, if the EU institution's opinion is satisfactory, i.e. if the institution has been sufficiently cooperative and constructive, the Ombudsman may close the case with a **decision**. A fundamental aspect of the Ombudsman's decisions is that they are not binding, may not produce a legal effect vis-à-vis third parties, and may not be enforced by a court.

From 1 September 2016,⁵ a change in the implementing provisions renamed, for clarification purposes, certain measures already in existence. The Ombudsman may issue a **'finding of**

³ [Decision of the European Parliament of 9 March 1994](#) on the regulations and general conditions governing the performance of the Ombudsman's duties, as amended most recently in 2008.

⁴ [Decision of the European Ombudsman](#) adopting Implementing Provisions, 20 July 2016.

⁵ See 'Putting it Right' report, December 2017, p. 4.

maladministration' (previously 'critical remarks') and **'suggestions for improvement'** (previously 'further remarks'). 'Findings of maladministration' may be issued when an Ombudsman's recommendation is not accepted by the institution(s). In this case, the Ombudsman exercises a clear 'educative' role by informing the institution of where it has erred and which principle has been overlooked or violated and, where necessary, explains what the institution should have done instead. Suggestions for improvement are, to the contrary, not premised on a finding of maladministration, but attempt to assist the institution in identifying better ways to raise the quality of the administration's behaviour.

An important tool in the Ombudsman's hands is the possibility to initiate **own-initiative inquiries**. In this respect, Article 8 of the implementing provisions allows a certain degree of discretion, as they may be opened 'where the Ombudsman finds grounds' to do so. These inquiries have more recently been referred to as 'strategic initiatives'. Rules applicable to complaints may be applied by analogy in this case. Beyond the obligation to report regularly to Parliament on the inquiries (Article 3(6) of the Statute), something which has been implemented with less rigidity than the wording would require, the Ombudsman has, importantly, the **power to submit a special report** to the European Parliament on an inquiry leading to a finding of maladministration which the Ombudsman considers of particular relevance or impact. This demonstrates the political pressure that the Ombudsman is able to exercise, notwithstanding the lack of a binding effect of its decisions, and in line with the 'soft power' of the office.

1.2. Maladministration

The concept of maladministration is crucial for understanding the reach of the mission of the European Ombudsman. Although Article 228 TFEU refers to 'instances of maladministration', and the Statute also to the same concept (e.g. Articles 2 and 3), this fundamental notion is not defined by EU law. Interestingly, a first definition was given by the first Ombudsman in [1995](#), when it was said to occur 'if a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance'. A number of non-exhaustive examples of maladministration were added to that broad definition, such as administrative irregularities, administrative omissions, abuse of power, and negligence. The Ombudsman's decision to enquire regarding certain complaints against the Commission, for not taking the United Kingdom to Court over the [Newbury Bypass](#) road project sparked some debate on the limits of the Ombudsman's remit with respect to the Commission, as well as to the Committee on Petitions. At the invitation of the European Parliament, the European Ombudsman developed a further definition of maladministration in its [1997 Annual report](#), as occurring when 'a public body fails to act in accordance with a rule or principle which is binding upon it.' This rather broader definition is widely accepted today as indicating behaviour of an administration that goes against legally and non-legally binding rules or principles. In this light, the sphere of maladministration encompasses, but is not limited to, scrutiny of the legality of the administrative action. To use the words of the second European Ombudsman, 'illegality necessarily implies maladministration, maladministration does not automatically entail illegality'. Maladministration therefore encompasses situations where the lack of transparency, negligence, and even the impoliteness of administrators, may have an adverse effect on citizens. In this respect, the rights and obligations contained in the Code of Good Administrative Behaviour constitute an indication of the standards against which the 'Ombudsreview' is performed, albeit a non-exhaustive one. In other words, the mandate of the European Ombudsman goes beyond legality, which is that which can be sanctioned by judicial review. It is, however, necessary to draw the boundaries of the 'Ombudsreview', i.e. the material

scope of Ombudsman inquiries, as the Ombudsman may not intervene or scrutinise the exercise of judicial, legislative and political power on the merits. Maladministration does not extend to the merits of a Court decision, nor to a decision by the legislator, or to the discretionary power enjoyed by the Commission, as the executive institution. Maladministration is therefore a wide concept – in fact an open-ended one – which may be said to encompass the sphere of the integrity and accountability of the European institutions.

2. European Ombudsman's performance

Maladministration may also vary, depending on the focus that the holder of the office bestows on a specific subject, or depending on the maturity of the office itself. This to say that, while the lack of an EU definition of maladministration may seem *prima facie* to be an obstacle for a straightforward understanding of the EO's office, this *lacuna* allows a certain leeway that contributes to shaping the office, depending on the perception of what should constitute maladministration at different moments in time.

2.1. Evolution of the Ombudsman's role

With this in mind, it is possible to observe how the EO's performance has evolved over the decades. The three Ombudsmen that have held the office in over 20 years have tackled different situations, expectations and aspects of the multi-faceted notion of maladministration. In other words, they adapted the mandate of their office in different ways. Giving an overview from the beginnings of the body's creation to today, it can be observed that from the first holder, Jacob Söderman (1995-2003), to the second, Nikiforos Diamandouros (2003-2013), up to the present incumbent, Emily O'Reilly (2013-today), each Ombudsman has interpreted their role in different ways.

The first European Ombudsman looked closely at the relationship between citizens and the Commission in its role as 'guardian of the Treaties' and as the institution responsible for monitoring the correct application of EU law by Member States. Söderman promoted a broad notion of the addressee of Ombudsman's enquiries, by enlarging the range of entities that may be subject to scrutiny and including EU agencies and bodies, which at the time were not expressly included in the wording of the applicable provision. Söderman also established the practice of anchoring the scrutiny of complaints on the basis of solid legal arguments. The first EO also achieved the introduction of the European Code of Good Administrative Behaviour which, although [adopted](#) by the European Parliament in 2001, could not be followed by the adoption of a binding source of EU law, thereby remaining a 'soft law' instrument. He also created the [European Network of Ombudsmen](#), a network meant to establish cooperation between different Ombudsmen throughout the Member States and the European Ombudsman, with the aim of guaranteeing citizens the most appropriate protection of their rights.

The second European Ombudsman (2003-2013), who inherited a body with an already established authority and working methods, was confronted with the challenge of the enlargement of the EU to central and eastern European countries. Diamandouros consolidated the authority of the body by emphasising the broad concept of maladministration, meant to capture not only areas of illegality but also grey areas where the behaviour of the administration in the wider sense does not live up to the standards of a modern administration, identified in concepts of transparency,

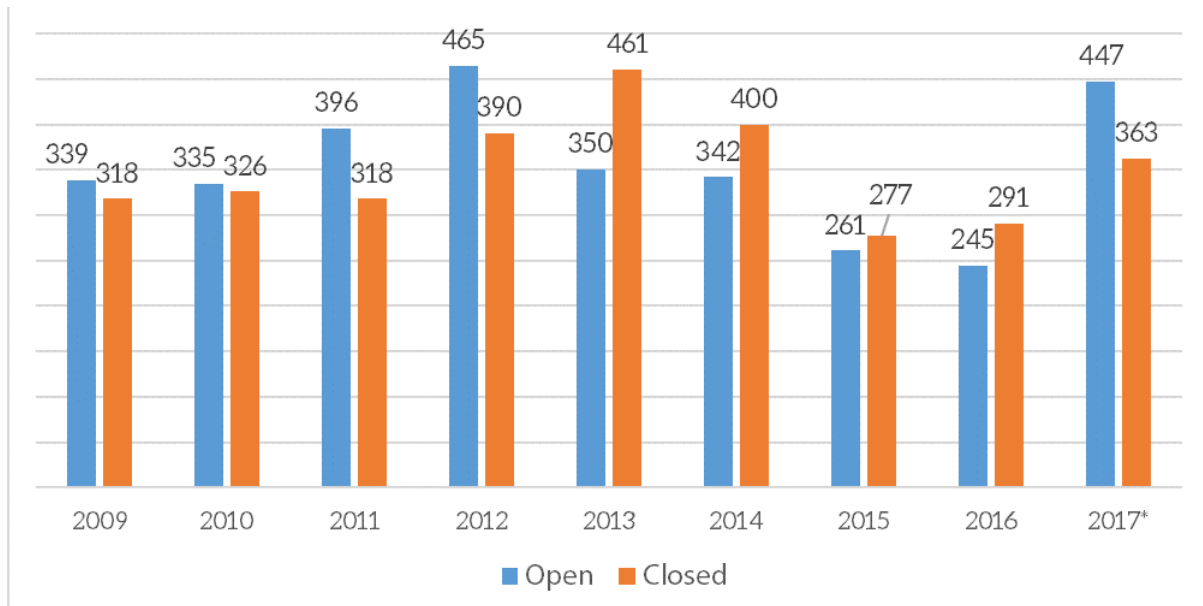
openness, service-mindedness, and fairness. Academics have also viewed Diamandouros' role as that of an enhancer of the Union's integrity.⁶

The third and incumbent European Ombudsman, O'Reilly (2013-to date), gave what has been described as more 'political' connotations to her role by emphasising the accountability and transparency of the EU decision-making process, the ethical dimension of the administration, the protection of fundamental rights, and enhancing the [quality](#) of the democratic life of the state within the EU. In this sense, the office also obtained greater visibility.

2.2. A closer look at the European Ombudsman's performance

This paper looks at the development of the Ombudsman's performance between 2009 and 2017, the year of the latest available Ombudsman's annual report. The Ombudsman saw a steady engagement in terms of workload on inquiries on maladministration raised by citizens and companies or associations. As Figure 1 shows, after an increase from 2009 to 2012, where the number of open EO inquiries reached its highest level (465), the number of inquiries have decreased to a low (245) in 2016, but increased again in 2017 (447). The figures have, however, to take into account that what is represented does not give the full dimension of the EO's workload since, from the vast majority of complaints received, the Ombudsman opens an inquiry in only 10-15 % of cases. This bears witness to the EO's workload, and the body has consequently also strived to serve citizens by redirecting them to other problem-solving networks that are more competent for solving their individual case. The Ombudsman has also made efforts in [communicating](#) to citizens, when issues fall under the EO's sphere of competence and when they may not.

Figure 1: Number of inquiries handled by the European Ombudsman, 2009-2017



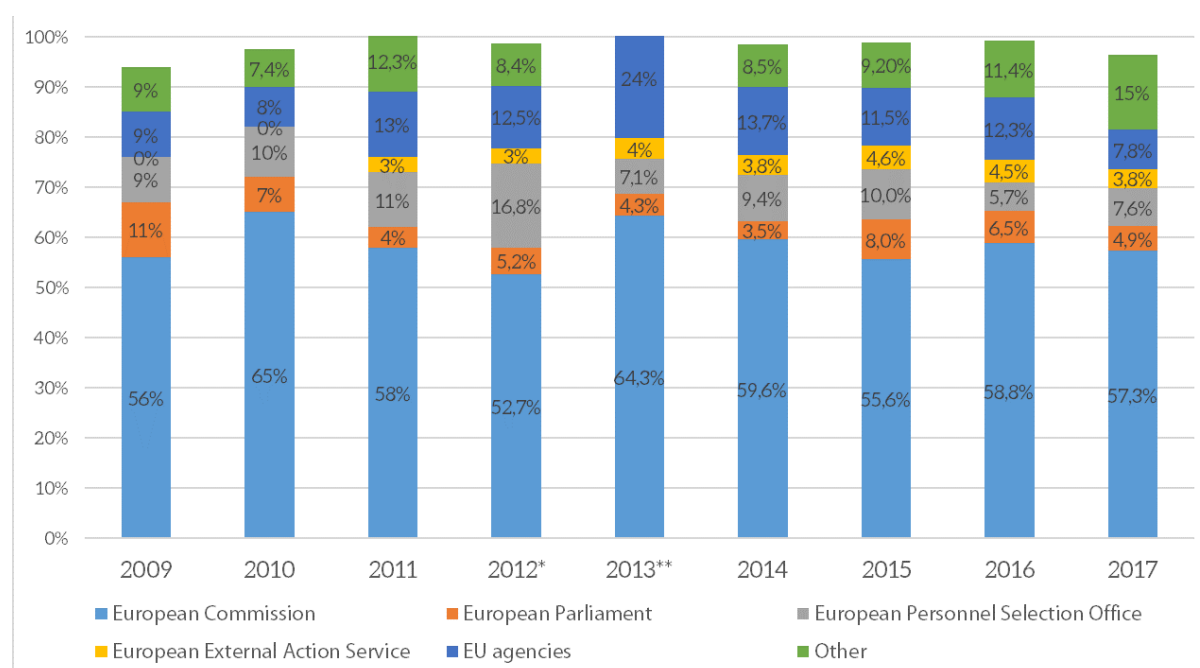
Source: European Ombudsman's annual reports, 2009-2017.

Since the Commission represents the biggest part of the EU executive, it is unsurprising (Figure 2), that it is also the main addressee of the Ombudsman's inquiries. More than half of the inquiries initiated are in fact directed towards this institution. This is indeed to be expected if one considers

⁶ H. C. H. Hofmann, 'The developing role of the European Ombudsman' in *Accountability in the EU*, edited by H. C. H. Hofmann and J. Ziller, Edward Elgar Publishing; 2017, p. 1.

the size of the institution, the reach of its competences and the nature of its work that has a direct impact on EU citizens in several fields. This is visible, for example, with infringement procedures, which is a horizontal competence of the Commission across almost all policy areas. Another subject of the Ombudsman's inquiries is the European Personnel Selection Office (EPSO), as disputes concerning selection procedures are quite frequent. In the last decade a more prominent part of the Ombudsman's work has been directed towards EU agencies and bodies. While the insertion of EU agencies and bodies in Article 228 TFEU came with the Lisbon Treaty, previous European Ombudsmen had taken an extensive interpretation of Treaty provisions, including them as part of the EU administration. Interestingly, in the last decade the number of EO inquiries into EU agencies has surpassed those into other institutions, with the exception of the Commission, which remains stable in its primacy. The EU agencies accepted the application of the European Code of Good Administrative behaviour to their activities in 2008 ([annual report 2008](#)).

Figure 2: Main addressees of the Ombudsman's inquiries between 2009 and 2017 (%)



Source: European Ombudsman's annual reports, 2009-2017.

The issues tackled by the Ombudsman cover the broad range of areas where maladministration may be found. Until 2015, the Annual reports of the EO clustered the various areas of activity into the categories of transparency, the Commission as guardian of the Treaties, matters related to the treatment of staff or competition and selection procedures, as well as tenders and the execution of contracts. In 2016 and 2017, this classification changed, which makes it more difficult to assess the engagement of the EO's work with continuity. However, based on Figure 3, some observations can be made.

A large part of the Ombudsman's activity is devoted to the area of transparency. This subject consistently occupies between one quarter and one third of the Ombudsman's work. Transparency involves maintaining a high level of openness in the EU institutions. This involves not only the way in which Union institutions take decisions (Article 10 TEU), but also the way in which EU institutions, bodies, agencies and other EU entities work. More directly connected to citizens, is the possibility to access EU institutions, bodies and agencies' documents, under certain conditions – a right guaranteed in the Treaty (Article 15(3) TFEU), and, subject to certain exceptions, by secondary EU legislation (Regulation 1049/2001). The frequent controversies regarding the correct interpretation or fair behaviour of the EU administration in refusing access to documents in specific cases also falls under the notion of transparency. Here, the respect of statutory [deadlines](#) in providing a reply to a citizen's request for access to a document often come into play (Case 1972/2009/ANA). Another aspect of this work concerns the assessment of the reasonable or sufficient motivation invoked by the administration for the application of [exceptions](#) to the right of access (Case 1051/2010/BEH). In these cases, the EO also assesses, from the point of view of proportionality, whether the exception has been reasonably invoked, and account taken of the circumstances.

The second main area of the Ombudsman's work concerns the scrutiny of the Commission's activities, with particular regard to the latter's role as 'guardian of the Treaties'. This mainly involves scrutinising the way in which the Commission carries out infringement procedures against Member States. In this respect, the Ombudsman recognises the discretionary power that the CJEU has consistently attributed to the Commission. However, the role of the Ombudsman is to check and monitor the boundaries of the exercise of such discretionary power in the light of maladministration, for instance, the sufficient and coherent statement of the grounds for not initiating an infringement procedure, the delay in carrying out such procedures, and the respect of procedural obligations towards the complainant. It is therefore the reasonableness of the exercise of the discretionary power that is subject to scrutiny, and not the substantive assessment of whether or not a Member

Figure 3: Subject matter of Ombudsman inquiries between 2009 and 2017 (%)



Source: European Ombudsman's annual reports, 2009-2017.

State has violated EU law. Although the dividing line might not always be clear, especially in cases where the Ombudsman invites the Commission to reconsider the matter, it can be said that the Ombudsman's assessment does not trespass on the limits of its mandate, which is to ensure that the Commission acts impartially and coherently by respecting procedural rules and guarantees of the rights of complainants.

Under the broad cluster of institutional and policy matters, which cover around 15-20 % of the Ombudsman's activity, fall all those disputes that concern the institutions in their policy-making activities or their general functioning. Under this label, the EO scrutinises the behaviour of the EU administration in the light of fairness, administrative errors, abuse of powers and failure to fulfil obligations. The type of scrutiny in this field is very heterogeneous, which makes it difficult to detail specific types of disputes, however it comprises situations where the safeguards of impartiality or efficiency have not been observed, such as the [Commission](#) failing to ask for an external audit of the European Schools (Case 814/2010/JF), or situations where the professional attitude of the Commission as an administration comes into [question](#) (Case 884/2010/VIK). Here also, the scrutiny of the Ombudsman does not extend to the substance of the matter. For example, in [Case 107/2009/\(JD\)OV](#), where the Council of the EU was reproached for having adopted too short a transitional period for Switzerland's integration into the Schengen area, the Ombudsman did not question this choice, as this pertained to the political choice of the Council. Disputes on the linguistic regime of certain EU institutions' activities also fall under this category, e.g. the use of the [Irish language](#) on Parliament's website (Case 861/2012/FOR), or by the Office of the Harmonisation of the Internal Market ([OHIM](#)) (Case 2413/2010/MHZ).

Between 13 % and 19 % of the Ombudsman's activity is directed towards solving issues where the overall financial or contractual behaviour of the EU administration is involved. Traditionally, the distinction between awarding tenders or grants and the execution of contracts lies in the moment when the disputed behaviour occurs, either before or after the award stage. In this type of dispute, the Ombudsman emphasises its dispute-settlement function, as it often tries to settle controversies concerning the [eligibility](#) of costs incurred by the contractor (Case 901/2011/OV), [late payments](#) made by the Commission (Case OI/2/2010/GG). In these cases, the Ombudsman does not seek to replace judicial scrutiny, but offers an alternative avenue for reaching a settlement. For example, the Ombudsman may limit its scrutiny to the classic indicators of maladministration, such as the lack of sufficient justification for the reasons to make a decision to disregard certain costs, lack of respect of a reasonable delay in performing payments, or insufficient respect of the right to be heard.

In 2016 and 2017, the way in which the Ombudsman reported its own activity in its annual reports changed. While on the one hand, this appears to provide a more detailed account of the subjects the EO has dealt with, on the other hand, a new system of categorisation makes it more difficult – at this point in time – to compare the evolution of the EO's activities with respect to previous years. It can however be observed that, in 2016 and 2017, complaints concerning transparency account for between 30 % and 21% respectively of the Ombudsman's activity. Scrutiny of the use of discretion together with respect for procedural rights accounted together for around 24 % of the Ombudsman's activity in 2016, and around 30 % in 2017. New categories are identified under which to cluster the Ombudsman's performance, such as ethics or public participation in EU decision-making. This bears witness to an increased emphasis on these topics, which deserves to be captured autonomously.

2.3. Proactive role of the Ombudsman

When the Ombudsman acts on complaints received, the EO role is a reactive one. The Ombudsman may, however, upon his/her own initiative and discretion, decide to open inquiries on individual cases or matters that seem to have a systemic, broad or widespread implication. This may occur in two situations.

One such situation occurs when the complaint would not be admissible because the complainant does not fulfil one of the requirements provided by Article 228 TFEU or Article 2 of the Statute, for example if the complainant is a third-country citizen or a company not resident in the EU. In these situations, the Ombudsman has always interpreted⁷ the eligibility requirement quite broadly, so as to allow the EO to exercise its own scrutiny as often as possible. Despite this, situations may arise where such a broad interpretation would not suffice. In these circumstances, the Ombudsman may decide, if the matter is found to be of particular interest or seems to indicate inappropriate administrative behaviour, to initiate an own initiative inquiry. The practice of the Ombudsman, in these cases, has been to consider the non-entitled complainant as an ordinary complainant as to the right to be informed and to interact with the Ombudsman.

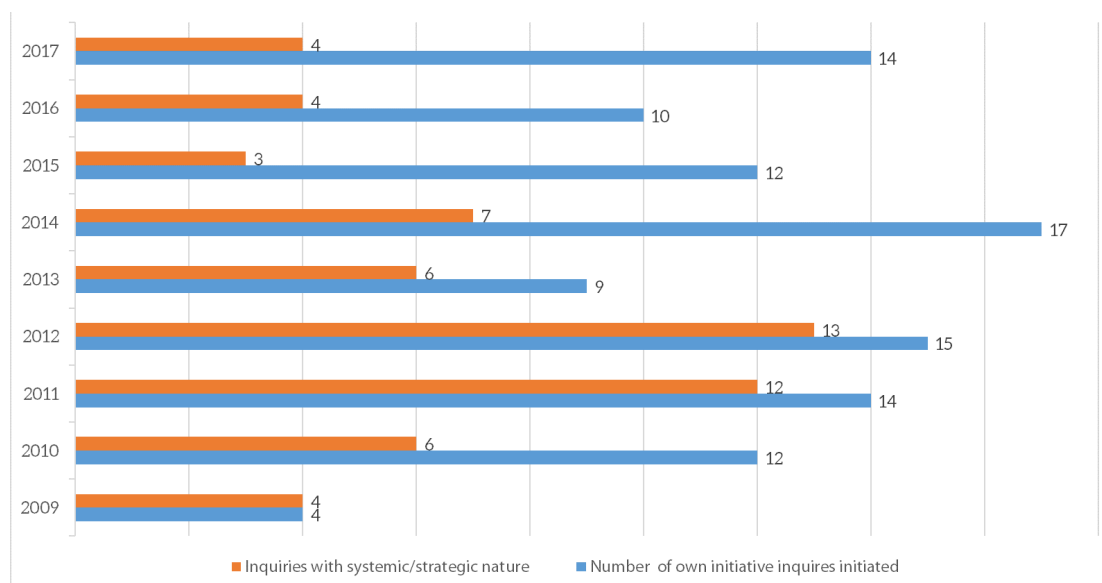
A second situation where the Ombudsman may initiate an own-initiative inquiry occurs when the Ombudsman decides, using its discretion, to monitor or scrutinise a specific aspect of administrative life. In this case, however, the choice of the topic depends on the particular attention that the Ombudsman decides to give to a specific topic. This second type of own-initiative inquiry is obviously quite indicative of the proactivity of the office as an actor meant also to **promote** good administration, in addition to monitoring its observance. It may also be added that the choice of subject areas may vary and evolve with time. An inquiry that would appear unsurprising today, considering the overall political and institutional environment, might perhaps have been difficult to envisage ten years ago.

While Figure 4 shows the quantitative evolution of own initiative inquiries, it also singles out – as far as the annual reports allow – the **systemic or strategic⁸ initiatives**, i.e. those based on the proactive role of the Ombudsman as previously described. It can be observed that the number ranges between 3 and 7 per year; with a peak in 2011 and 2012, when respectively 12 and 13 inquiries were initiated. In those years, however, the higher number is due to a specific action where a large number of own-initiative inquiries were launched against EU agencies with the intention of 'exporting' principles and practices on good administration to the agencies, which had acquired increased importance and competences in the EU architecture over the previous decade.

⁷ See annual report of 2012, p. 15.

⁸ The term 'strategic' initiative is used more recently in the Ombudsman's annual reports.

Figure 4: Number of own initiative inquiries initiated by the European Ombudsman 2009-2017



Source: European Ombudsman's annual reports, 2009-2017.

Disregarding the peaks in 2011 and 2012, it could be argued from a quantitative perspective that the proactive output of the Ombudsman follows a declining trend, as the Ombudsman in recent years has made less use of its power to detect systemic shortcomings or hints of maladministration. A closer look at Table 1 indicates that it is also possible to argue that the topics of own initiative inquiries have shifted from areas linked to the administrative dimension and therefore more 'traditional' subjects for an ombudsman review, e.g. the application of staff regulations, infringement procedures, access to documents, EPSO activity, delays in payments to contractors, the linguistic regime of administrative activities – to more 'modern' concepts of ombudsman review, such as fundamental rights, accountability, ethics, transparency of negotiations, or the 'revolving doors' issue.

Table 1: Subject matter of systemic/strategic own-initiative inquiries

Year	Number	Subject Areas
2009	4	Citizens request for access to documents Right to be heard when Commission recovers overpaid amounts from staff Infringement procedures Payments to contractors
2010	6	EPSO (3) Rights and duties of Staff regulations to replace administrative acts in light of evolving case law Accountability in EU common security and defence policy missions
2011	12	Radioactive contamination of food after Fukushima Unconsumed food in EU canteens EU Pilot Infringement procedures Respect of deadlines for access to document for the Council Time barred of a complaint to a selection panel Inquiries against EU agencies (6)
2012	13	Verification of supporting documents in EPSO competitions Remedies available to candidates in selection procedures Selection procedure of the European Network and Information Security Publication of Commission's Communication in all EU languages Frontex and protection of fundamental rights Inquiries against EU agencies (8)
2013	6	Establishment of a redress procedure in EACI Functioning of the European Citizens Initiative Difficulties in respecting deadlines on access to documents of Regulation 1049/2001 Availability of information by EMA only in English Disclosure of members of selection board in ACEA selection procedures Timeliness and delays in payments to contractors and beneficiaries
2014	7	Respect by Frontex of fundamental rights in Joint Return Operations Transparency on TTIP negotiations (2) Respect of fundamental rights and EU cohesion funds Protection of whistleblowing, improving composition of expert groups EMA's decision to release redacted versions of certain clinical studies reports
2015	3	Transparency of trilogues Request of review in EPSO competitions Timeliness of payments of the Commission
2016	4	Conflict of interest of special advisers EU pilot procedures, delays in chemical testing Compliance with UN Convention of the treatment of persons with disabilities under the EU Institution's Joint Sickness Insurance Scheme (JSIS)
2017	4	Council transparency Revolving doors of a former Commissioner Accessibility of websites for persons with disabilities Pre-submission activity linked to medicine assessment by EMA

Source: European Ombudsman's annual reports, 2009-2017.

2.4. Implementation of the Statute

The legal framework in which the Ombudsman operates is set by the Treaty provisions. Article 228 TFEU empowers the Parliament to lay down, on its own initiative and according to a special legislative procedure, the regulations and general conditions governing the performance of the Ombudsman. A prior opinion from the Commission is needed, as well as the consent of the Council. Although Article 228 TFEU establishes such fundamental pillars, more detailed rules governing the matter are provided by the [Statute](#) of the Ombudsman, or more precisely, the Decision of the European Parliament of 9 March 1994. This Statute was modified in 2002 and 2008, on the latter occasion to strengthen the Ombudsman's right to have access to files or relevant information and the power to hear witnesses.

The Statute details the course of action of the Ombudsman, for instance on the redirection of complaints to the relevant problem-solving authority, the effect of an ongoing judicial procedure on the admissibility of the complaint, or the effects of a complaint on time limits for exercising judicial redress. The Statute in particular details the different initiatives that the Ombudsman can carry out, such as own-initiative inquiries (Article 3(1)), the power to inform Parliament if an institution is not giving the Ombudsman proper assistance in information-gathering (Article 3(3)), the power to seek a 'friendly solution' (Article 3(5)), to address recommendations to institutions where maladministration is found (Article 3(6)), and to send a report to the Parliament and the institution concerned if the institution does not reply satisfactorily to a recommendation (Article 3(7)).

The Ombudsman's specific powers are even more detailed in the [Implementing Provisions](#), a set of rules issued by the Ombudsman that are meant to guide his/her action, for example on the processing of complaints or the assessment of their admissibility. Implementing Provisions serve also the function to set out complainant's rights with respect to, for instance, legal certainty, reasonable expectations, and request for review. In general, it can be said that in the daily handling of complaints, the Ombudsman seeks to set a good example with respect to their swift handling. Although the length of an inquiry may range between 9 and 11 months (13 months in 2013), the Ombudsman has made regular efforts to simplify the internal process by favouring quick handling of the matter (telephone calls or quick inspection of the file), and introducing a [fast-track procedure](#) for complaints concerning access to documents.

In general, it can be said that the Ombudsman has in many respects made extensive use of the powers endowed by the Statute. As the annual reports from 2009 onwards demonstrate, the Ombudsman has made use of all its powers as enshrined in the Statute, although with variable intensity. On the one hand, amicable settlement has been the preferred solution in around half of the open cases, despite the percentage being around 21 %-26 % in 2011, 2012 and 2013. The Ombudsman has also issued recommendations and critical remarks, depending on the need, on a regular basis, as confirmed by the annual reports and the 'Putting it right?' reports. On the other hand, what has been termed the Ombudsman's 'ultimate weapon', the issue of [special reports](#) to the Parliament, has seldom been used: once or twice per year, sometimes with no issue at all in certain years. The reason is to be found in the particular nature of the special reports that have a 'political' connotation, as they intend to signal publicly to Parliament a systemic problem inherent in the EU administration over which Parliament itself has the power of oversight. In this respect, European Ombudsmen have made sparing recourse to this tool, to avoid its inflationary use.

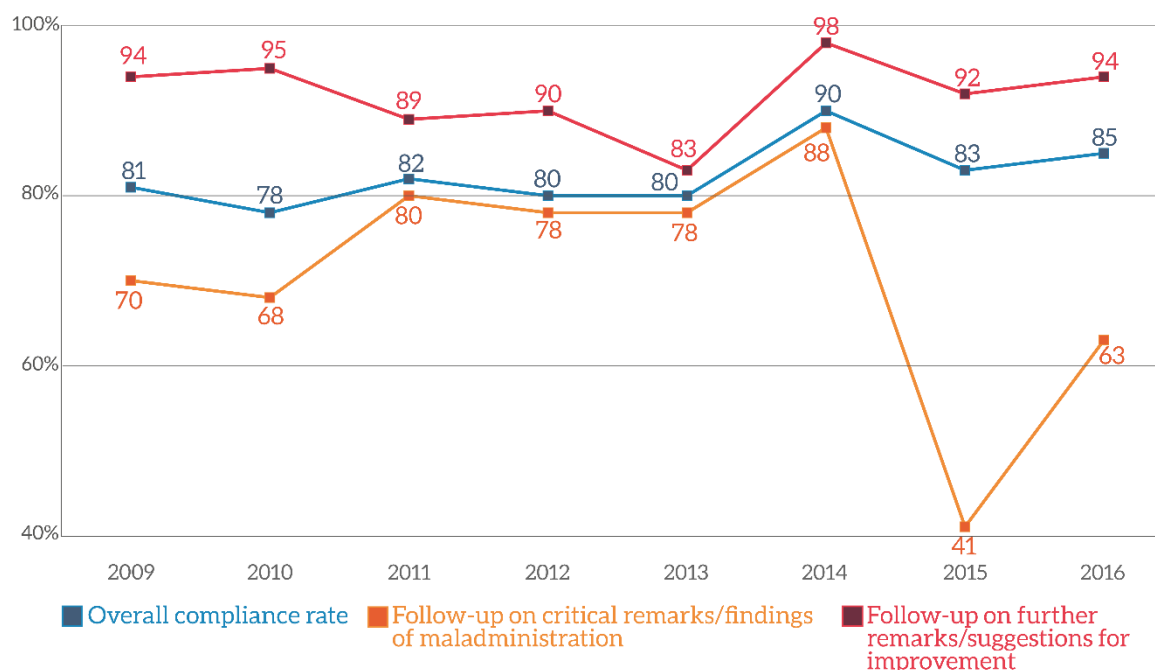
3. Implementation rate of EO recommendations

The Ombudsman has acquired an established and respected role within the EU architecture. The figures extrapolated from the Ombudsman's annual reports show a very high degree of overall compliance with Ombudsman recommendations. The overall compliance rate includes proposals for a friendly solution, recommendations, follow-up on critical remarks (i.e. findings of maladministration), and on suggestions/further remarks.

As Figure 5 demonstrates, the rate of compliance between 2009 and 2016 is above 80 % on average, with a peak of 90 % in 2014. On closer inspection, however, different patterns are observed as regards the reaction of the EU administration when critical remarks are issued, i.e. where maladministration is found. Here it can be observed that, where the educative role of the Ombudsman is clearly exercised, which presupposes that a friendly solution was not achieved, no longer viable, or that a recommendation was not satisfactorily answered, the willingness of institutions to comply is clearly reduced. Rates of compliance in these cases are lower than previously reported, ranging between 41 % and 88 %.

Conversely, institutions show a higher compliance rate towards recommendations where no maladministration is found, but where the Ombudsman seeks instead to give suggestions to improve the quality of the institution's administrative behaviour. In these cases, the follow-up to suggestions or further remarks is consistently the highest of all compliance rates, ranging between 83 % and 95 %.

Figure 5: Compliance rate with Ombudsman proposals since 2009 (%)



Source: 'Putting it right?'; annual reports, 2009-2016.

The Ombudsman's annual reports⁹ allow a quantitative analysis of the compliance rate with respect to the different tools used, however a qualitative analysis, for example of the trends in situations

⁹ Reports that follow up on institutions' responses to the Ombudsman recommendations are called 'Follow-up to critical and further remarks' and, as of 2012 'Putting it right?'.

where recommendations are not complied with, is less simple. Some sporadic considerations are however contained in the 2012 report '[Putting it right?](#)' where the Ombudsman finds that institutions tend to be more cooperative in cases concerning access to documents or tender procedures than in other areas.

4. Potential of the European Ombudsman office

The broad yet still sufficiently specific, wording of the Statute's provisions has so far allowed a flexible, yet seemingly shrewd, exercise of the Ombudsman's prerogatives. The possibility to decide whether a complaint displays sufficient grounds for intervention or whether to tackle a suspected shortcoming via a 'reactive' or an own-initiative inquiry gives the Ombudsman the necessary flexibility to adapt to different situations and times. Possibilities to broaden the range of the Ombudsman's powers have not been lacking in the past. Notably, the need to increase certain aspects of the Ombudsman's attribution were highlighted by the office-holder in 2005,¹⁰ such as the desire to increase the Ombudsman's access to documents or the rules on the hearing of witnesses. Amendments to the Statute materialised a few years later, in 2008, with enhanced powers in this respect.

It is difficult to predict whether further enhanced powers or a change in the Statute are effectively desired or needed today. After all, the Ombudsmen have been able to interpret their role so far to suit their mission and agenda satisfactorily. Nevertheless, some consideration of the potential of the role can be undertaken, were modifications to the Statute indeed to be sought.

On the one hand, it could be possible to incorporate practices which are already in use in the Statute. On the other hand, some more far-reaching modifications could be envisaged. Of course, the Ombudsman should be heard and able to steer any change to the Statute impacting the working methods as defined in the implementing provisions.

As a less extensive change to the Statute, the inclusion of a practice connected with the topic of special reports to Parliament could be considered. These are the Ombudsman's tools of last resort. In the absence of any binding effect to Ombudsman recommendations, the EO may issue a special report to Parliament, if the institution concerned does not wish to comply and remedy maladministration. In practice, special reports are sent to the Committee on Petitions which deals with relations with the European Ombudsman and which is entitled to a limited number of own initiative reports per year, among which those derived from matters received from the European Ombudsman are included. The effect of such a special report could be that an issue is highlighted and could eventually become the object of a Parliament resolution. The Ombudsman has not frequently adopted the approach of using this power, but has instead [informed](#) the competent committee. This step does not seem to be explicitly provided for in the Statute, but neither is it forbidden. To the contrary, it could derive from the general duty of interinstitutional cooperation and the fact that the Ombudsman's action is directed towards the general EU interest. A modification of the Statute incorporating this established practice by empowering the Ombudsman to either submit a report to Parliament or to inform the competent committee could offer a

¹⁰ See, N. Diamandouros, 'Reflections on the Future Role of the Ombudsman in a Changing Europe', in *The European Ombudsman, origins, establishment, evolution*, Office for the official publications of the European Communities Luxembourg, 2005, p. 225.

guarantee of the establishment of a solid future communication channel to the benefit of the overall 'educative' mission of the Ombudsman.

Another aspect that could be considered is the formalisation of the European Network of Ombudsmen (ENO) in the Statute.¹¹ This network was created by the first Ombudsman in 1996, and was originally conceived as a remedy to the limited geographical competence of the European Ombudsman, which is confined to dealing with maladministration perpetrated by EU institutions, bodies and agencies, to the exclusion of national authorities. The possible need to monitor national authorities' activities when they implement EU principles cannot therefore be satisfied, as the European Ombudsman has a restricted sphere of intervention. With this in mind, the ENO was created, to help connect the EU and the national (or regional) levels of Ombudsmen – without any hierarchical structure – through exchanging information and coordinating work, with a common purpose to serve the citizens. Activities within ENO often comprise the redirection of complaints from the national to the EU level and vice versa. This network is however little recognised in the Statute, which more broadly refers in Article 5 to the possibility for the Ombudsman ('may') to cooperate with Ombudsman-like institutions in Member States for more efficient safeguarding of complainants' rights. This provision does not refer, for example, to the possibility to launch common initiatives such as joint inquiries, although this has not hampered the practice of carrying out [parallel inquiries](#).

A further (non-extensive) modification of the Statute could be to introduce an obligation to include qualitative elements of evaluation in the Ombudsman's annual reports that, according to Article 3 of the Statute, must be submitted at the end of each annual session. This obligation could be supported by a disclaimer indicating that the qualitative assessment is carried out 'to the extent possible'. Such qualitative assessment could add value to the analysis of the impact of the Ombudsman's action and could be conducive to finding remedies where the Ombudsman encounters resistance from the institutions. Also, it could be formalised in the Statute that the Ombudsman should appear, upon Parliament's invitation, in plenary session, more than once per year.

Regarding more substantial modifications of the Ombudsman Statute it cannot be overlooked that academics¹² have advanced ideas to enhance the Ombudsman's role. One of these concerns the possibility to grant the Ombudsman the power to refer matters to the Court, in the absence of an institution's voluntary compliance with a recommendation. This proposal takes account of the fact that this idea was originally proposed, but ultimately rejected, with respect to cases involving fundamental rights, and that some national Ombudsmen indeed enjoy such power. The drawbacks attached to this option is seemingly a 'judicialisation' of the Ombudsman function, which is instead perceived as an appealing alternative to litigation. Granting the power to refer to the Court may risk blurring the current dividing line with the judiciary, and turn the Ombudsman into a *de facto* small claims court. From a more philosophical perspective, it may also be argued that the strength of the Ombudsman's office resides precisely in its power of 'non-aggressive' persuasion through the exercise of soft power, and that the attachment of a degree of enforceability to its decisions may contaminate this character, changing its role to a judicial one. Counter-arguments however, point to the possibility that empowering a referral to the CJEU could be a deterrent for non-compliance.

¹¹ N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, Series: European Administrative Governance, 2524-7263; 2018; Palgrave Macmillan UK; 2018.

¹² N. Vogiatzis, *The European Ombudsman and Good Administration in the European Union*, Series: European Administrative Governance, 2524-7263; 2018; Palgrave Macmillan UK; 2018.

However, an increased link between the Ombudsman and the judiciary may imply a rise in confrontation, and ultimately in litigation.

Another point of reflection highlighted by the same academic, is the Ombudsman's right to intervene in cases pending before the CJEU. It is reported that such a right has been invoked, arguing that the European Data Protection Supervisor also enjoys such an entitlement. It is, however, also noted that maladministration is a broader concept than illegality, where 'extra-legal' maladministration is at stake, the power to intervene in cases referred to the CJEU 'would not serve any meaningful purpose'.

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The European Ombudsman is a body established to ensure that maladministration in the EU institutions is addressed and where possible remedied. From the establishment of the European Ombudsman, personalities and the open-ended character of the notion of maladministration have been relevant in shaping the activity of the office. Maladministration is widely accepted to be a sphere of inappropriate behaviour of the administration that goes beyond simple illegality. The particularity of the Ombudsman lies therefore on the fact that it is able, through the exercise of 'soft power', to tackle issues that would escape the scrutiny of the Court of Justice of the EU.

This paper provides an overview of the activity of the Ombudsman, and attempts to identify the main areas of activity in quantitative terms, the main institutions to which the Ombudsman addresses inquiries and recommendations and highlights the proactive role exercised by this body so far. The compliance rate with the recommendations of the Ombudsman is rather high, although it would seem to decrease where the Ombudsman, by issuing critical remarks, exercises an 'educational' function. This paper also sets out some proposals to modify the Statute, with some less-extensive proposals, that would take into account already established practices, and other more far-reaching proposals, that would need however to be carefully considered so as not to distort the nature of the body.

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