

Dr. Marko Davinić

Assistant Professor

University of Belgrade Faculty of Law

markod@ius.bg.ac.rs

## THE EUROPEAN OMBUDSMAN – THE CHAMPION OF TRANSPARENCY WITHIN BRUSSELS BUREAUCRACY\*

*The European Ombudsman investigates complaints about maladministration in the activities of the EU institutions, bodies, offices or agencies, with the exception of the Court of Justice of the EU acting in its judicial role. Cases of maladministration related to the transparency issues are the most common in the European Ombudsman's practice. Therefore, the main goal of this paper is to analyze the role and contribution of Ombudsman in this area, as well as challenges and difficulties which lie ahead in his work. The analysis is largely based on case studies (cases brought by complaints, as well as the Ombudsman's own initiative inquiries), and on the interpretation of EU legal documents enacted in this area. The principle of transparency is violated when institutions unreasonably refuse to provide information or documents, when they provide misleading or wrong information, and further still when without reasonable explanations they exclude the public from their meetings or consultation process. These issues have been analyzed separately in the paper, due to the complexity of the principle of transparency and a better understanding of its various aspects. The main conclusion of this paper is that, despite numerous difficulties, the European Ombudsman has become a true champion of the principle of transparency within the EU, contributing to the reduction of its democratic deficit and strengthening the legitimacy of its institutions.*

Key words: *European Ombudsman. Transparency. Maladministration. Access to information and documents.*

---

\* This paper was presented at XVII IRSPM Conference in Prague on the panel Transparency and Open Government on 11th of April 2013.

## INTRODUCTION

The European Ombudsman (hereinafter: Ombudsman) was established by the Maastricht Treaty, and the first incumbent was elected in 1995. The Ombudsman investigates complaints about maladministration in the activities of EU institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. The Ombudsman defines that “maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it”.<sup>1</sup> This term obviously includes, but also extends beyond the concept of legality.

Cases of maladministration related to the transparency issues are the most common in the Ombudsman’s practice. They make up for more than one-third of all cases that he has investigated.<sup>2</sup> According to him, transparency is not an end in itself, but a means to an end, which is reflected in the strengthening of the rule of law and democratic principles within the EU.<sup>3</sup>

The importance the EU attaches to the principle of transparency has been demonstrated in introductory articles of the Treaty on European Union (hereinafter: TEU), which states that “decisions shall be taken as openly and as closely as possible to the citizen.”<sup>4</sup> Furthermore, the Treaty on the functioning of the EU (hereinafter: TFEU) underlines that “Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible.”<sup>5</sup>

Despite the importance the EU attaches to this issue, a large number of citizens are not satisfied with the transparency of its institutions.<sup>6</sup> The principle of transparency is violated when institutions unreasonably refuse to provide information or documents, when they provide wrong informa-

---

<sup>1</sup> European Ombudsman Annual Report (hereinafter: EOAR) 1997, 23.

<sup>2</sup> See speech of N. Diamandouros: *Keynote speech at the Conference on “The European Transparency Initiative and Ethics in Lobbying”*, Brussels, 5 November 2008, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/5434/html.bookmark>, last visited 30 August 2013.

<sup>3</sup> See speech of N. Diamandouros: *Building Trust in Times of Crisis*, Utrecht, 8 June 2012, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/11664/html.bookmark>, last visited 30 August 2013.

<sup>4</sup> Art. 10 par. 3 of the TEU.

<sup>5</sup> Art. 15 par. 1 of the TFEU.

<sup>6</sup> According to the Eurobarometer survey, which was conducted between February and March 2011 on a sample of 27 000 respondents in all EU member states, as many as 42% of them declared that they are not satisfied with the transparency of the EU institutions, while only 9% were satisfied. See: EOAR 2011, 5 6; <http://www.ombudsman.europa.eu/press/release.faces/en/10666/html.bookmark>; <http://www.ombudsman.europa.eu/en/press/statistics.faces>, last visited 30 August 2013.

tion, and further still when they without reasonable explanations exclude the public from their meetings or consultation process.

These issues will be analyzed separately in the paper, due to the complexity of the principle of transparency and a better understanding of its various aspects. We have to emphasize that this classification is not found in the Ombudsman's reports, papers or speeches, but was the result of our analysis and clustering of many cases that are related to the principle of transparency.

## 1. DIALOGUE WITH CITIZENS AND ORGANIZATIONS, THEIR PARTICIPATION IN THE CONSULTATION PROCESS AND THE TRANSPARENCY OF THE MEETINGS OF THE EU INSTITUTIONS

These aspects of the transparency principle enable the public to learn what institutions and bodies do, why they make certain decisions and what actions they intend to take in the future. The responsibility of institutions is provided on the basis of this information, while individuals and companies are enabled to exercise their rights more easily, and to take an active stance in the political debate on various issues. For these reasons, the principle of transparency is a necessary precondition for any democratic system.<sup>7</sup>

The Lisbon Treaty recognizes the importance of a permanent dialogue between the EU institutions and citizens and their organizations. In that sense, TEU emphasized that “institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”,<sup>8</sup> and the TFEU pointed out that the Union shall maintain an open, transparent and regular dialogue with churches, religious associations, philosophical and non-confessional organizations.<sup>9</sup>

The above provisions were the subject of the proceeding in the case 2097/2011/RA before Ombudsman, in which the European Humanist Federation addressed the Commission with a request for the organization of seminar on protection of the atheists' rights. The Commission rejected this request stating that the organization of seminars on the proposed topic is not in its jurisdiction. The European Humanist Federation

---

<sup>7</sup> See more: J. Söderman, *The Early Years of the European Ombudsman*, in *The European Ombudsman, Origins, Establishment, Evolution*, Office for Official Publications of the European Communities, Luxembourg, 2005, 95; *What can the European Ombudsman do for you?*, *The European Ombudsman, A guide for citizens*, European Communities, 2002, 15.

<sup>8</sup> Art. 11 par. 2 of the TEU.

<sup>9</sup> Art. 17 par. 3 of the TFEU.

subsequently contacted the Ombudsman. On the basis of his inquiry into complaint, the Ombudsman closed the case with the critical remark. He emphasized that the Commission failed properly to implement Article 17(3) TFEU by rejecting the complainant's proposal for a dialogue seminar, which constitutes an instance of maladministration. The Ombudsman added that the Commission should clarify its practices and rules in this area.<sup>10</sup>

The Treaty of Lisbon has given special importance to the citizens and their organizations in the process of the adoption of general and individual acts in the EU. As we already mentioned, the TEU states that "decisions shall be taken as openly and as closely as possible to the citizen."<sup>11</sup> This article has been concretized by provisions under which the "Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent".<sup>12</sup>

In relation to those provisions, a Spanish citizen addressed the Ombudsman in the case 640/2011/AN, noting that the Commission published a document intended for consultation process in relation to the tax legislation, only in English. The Ombudsman's investigation found that this example is not an isolated case, and that the Commission has very rarely published consultation papers in all official EU languages. The Commission agreed with the view that the language barrier may prevent a large number of citizens to participate in the consultation process, but pointed out that it is often forced to this solution due to limited time and resources. In his draft recommendation, the Ombudsman noted that the above procedure is a case of maladministration and called on the Commission to publish its consultation documents in all official EU languages, or to provide a translation at the request of interested parties. The Ombudsman added that "the Commission should draft clear, objective and reasonable guidelines concerning the use of the Treaty languages in its public consultations, bearing in mind that any restriction to the principles of democratic citizen participation in the decision-making process and of broad consultation by the Commission, enshrined in Articles 10(3) and 11(3) TEU, must be justified and proportionate. These guidelines should be public and easily accessible".<sup>13</sup>

The Commission has not acted on the recommendation of the Ombudsman, and he concluded the case with a critical remark. The sole reason that the Ombudsman did not submit a special report (which might

---

<sup>10</sup> More on this case: <http://www.ombudsman.europa.eu/cases/decision.faces/en/49026/html.bookmark>, last visited 30 August 2013.

<sup>11</sup> Art. 10 par. 3 of the TEU.

<sup>12</sup> Art. 11 par. 3 of the TEU.

<sup>13</sup> See the draft recommendation: <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/11043/html.bookmark>, last visited 30 August 2013.

have been expected given the importance of the issue), is the fact that the Parliament in June 2012 adopted a Resolution entitled “Public consultations and their availability in all EU languages”,<sup>14</sup> which confirmed the position of the Ombudsman.<sup>15</sup>

Finally, the transparency of the meetings of the EU institutions was the reason several complaints were filed to the Ombudsman. In case 2395/2003/GG complainant challenged the legislative procedure before the Council of EU, arguing that it is inconsistent with the TEU, which stipulates that decisions shall be taken as openly as possible. The Council, in its reply stated that the degree of openness within its meetings is a political choice of the institution itself. The Ombudsman did not agree with this opinion, due to the fact that the Council did not give valid reasons why the public should not have access to its meetings. In this regard, the Ombudsman made a draft recommendation, and subsequently submitted a special report to the Parliament in which he recommended to the Council to abstain from this practice.<sup>16</sup> The Parliament accepted the special report in its Resolution and endorsed the Ombudsman’s recommendations.<sup>17</sup> In order to prevent such situations in the future, the provision has been entered in the TFEU by which the Council is obliged to provide the openness of its meetings when considering and voting on a draft legislative act.<sup>18</sup>

In some cases, the failure of institutions is related to the nonexistence or improper conduct of the minutes of a meeting. In the most famous case of this kind, the microprocessor producer Intel filed a complaint against the Commission, due to its failure to make a minutes of a meeting held in August 2006, with the senior official from the computers manufacturing company – Dell. The meeting was organized under investigation of Intel operations, in connection with the possible abuse of its dominant position. The Ombudsman concluded that the Commission’s conduct constituted maladministration, and made the critical remark that by failing to make a proper written note of the meeting, the Commission infringed upon principles of good administration.<sup>19</sup>

Analyzed aspects of the principle of transparency are important for the trust of citizens and organizations in the EU institutions, especially in

---

<sup>14</sup> See the text of the Resolution: [http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7\\_2012\\_316&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7_2012_316&language=EN), last visited 30 August 2013.

<sup>15</sup> See the summary of the decision: <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/48744/html.bookmark>, last visited 30 August 2013; EOAR 2012, 33.

<sup>16</sup> See: EOAR 2005, 105.

<sup>17</sup> See the Resolution of 4<sup>th</sup> of April 2006: [http://www.europarl.europa.eu/sides/getDoc.do?pubRef //EP//TEXT+TA+P6\\_TA\\_2006\\_0121+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef //EP//TEXT+TA+P6_TA_2006_0121+0+DOC+XML+V0//EN), last visited 30 August 2013.

<sup>18</sup> See: Art. 15 par. 2 of the TFEU.

<sup>19</sup> See case: 1935/2008/FOR (Confidential), EOAR 2009, 46.

times of crisis and questioning of the basic values on which the Union is based.<sup>20</sup>

## 2. WITHHOLDING OR REFUSAL OF THE REQUESTED INFORMATION

Each institution publishes a range of information because it is obliged to do so or because it believes that it is necessary and useful. On the other hand, certain information must be kept out of reach of the public, for reasons of confidentiality and secrecy. However, most information does not fall into any of these categories and they are made available at the request of interested persons. It's understandable, given that institutions cannot, for practical reasons, publish all information in its possession, but it is important that information is made available to anyone who timely submits a request.<sup>21</sup> In this way, the public is able to monitor and evaluate the performance of institutions and bodies.<sup>22</sup>

Withholding or refusal of the information occurs when the EU institutions do not respond to a request for obtaining information, or when such a request is refused. In these situations, the call of the Ombudsman's office is often sufficient, for the institution concerned to quickly and accurately respond to the question at hand. This form of maladministration often occurs when the institution refuses to provide the requested information about the recruitment procedure.<sup>23</sup>

A large number of complaints related to the transparency of the Commission's recruitment procedure, resulted in the Ombudsman's inquiry opened on his own initiative in 1997. During the inquiry, the Commission accepted the Ombudsman's suggestions that after written exams allow candidates to take the questions with them, to indicate on the applicant's request the evaluation criteria, as well as the names of the mem-

---

<sup>20</sup> See speech of N. Diamandouros: *Open dialogue between institutions and citizens the way forward*, Brussels, 14 March 2012, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/11330/html.bookmark>, last visited 30 August 2013.

<sup>21</sup> See: I. Harden, *Citizenship and Information*, European Public Law, Vol. 7, Issue 2, June 2001, 174-175.

<sup>22</sup> European Code of Good Administrative Behavior also envisages the obligation of the institution to provide the requested information to the members of the public. See: Art. 22 of European Code of Good Administrative Behavior. See the whole text of the Code: <http://www.ombudsman.europa.eu/en/resources/code.faces>, last visited 30 August 2013.

<sup>23</sup> In interesting case 884/2010/VIK, at the request of an unsuccessful applicant for additional information about the criteria on which the selection had been made, the official of the Commission wrote: "See you in court." Following the intervention of the Ombudsman, the Commission apologized to the complainant for inappropriate behavior of its official and provided him with the requested information. EOAR 2011, 55.

bers of the Selection Board. However, the Commission continued to refuse to grant candidates access to their marked examinations papers (despite the Ombudsman's draft recommendation), claiming that its internal rules prevent such practice. In this regard, the Ombudsman submitted a special report to the European Parliament in October 1999, in which he recommended to the Commission to make available evaluated works, on the request of the candidates. After a few months, the former President of the European Commission Romano Prodi informed the Ombudsman that this institution accepted his recommendations and proposed the necessary legal and organizational arrangements to give candidates access to their own marked examination papers, upon request. The Committee on Petitions endorsed the Ombudsman's special report and drafted a resolution, which was adopted at the plenary session of the European Parliament in November 2000. The Resolution supported the Ombudsman's recommendation, and invited all other EU institutions and bodies to follow the example of the European Commission. The Ombudsman pointed out that the outcome of this inquiry was a critical step in the improvement of transparency in the EU's recruitment procedures. He also praised the cooperative behavior of the European Commission and the support he has received from the European Parliament.<sup>24</sup>

With the aim to enable the standardization of activities in the field of EU recruitment procedures, the European Personnel Selection Office (hereinafter: EPSO) was established in 2002. As a result, most of the complaints about the recruitment procedures and open competitions have been related to the activities of EPSO. The Ombudsman opened an own-initiative inquiry into the work of the Office in 2005. In 2008, he made a draft recommendation, calling on EPSO to disclose to candidates, at their request, the evaluation criteria, as well as the detailed breakdown of their marks. The Office accepted this recommendation and was praised by the Ombudsman for its positive response.<sup>25</sup>

Two years later, the Ombudsman launched a new inquiry into the work of the EPSO, this time on the possibility of unsuccessful candidates to have access to the questions and answers they gave in computer based tests. EPSO refused to provide the requested information, explaining its position with administrative and financial constraints, emphasizing the fact that such practices would prevent it to use the same questions in fu-

---

<sup>24</sup> See: 1004/97/(PD)/GG, EOAR 1999, 26; EOAR 2000, 206 207; See also case 25/2000/IP, in which the European Parliament allowed the candidates to have access to their marked examination papers. EOAR 2001, 191 193; The Council adopted the same practice in connection with cases 2097/2002/GG and 2059/2002/IP, EOAR 2003, 176 181.

<sup>25</sup> OI/5/2005/PB, EOAR 2008, 51, 63; EPSO allowed all applicants (not just unsuccessful) to have access to their marks on tests. This was a result of complaint that successful candidates cannot find out the marks they received on the test. See case: 2346/2007/JMA, EOAR 2009, 48.

ture tests. On the other hand, the Ombudsman pointed out that the principle of transparency must hold precedence over the reasons given by the Office. Taking into account that a large number of individuals challenged this practice before the Court of Justice of the EU, the Ombudsman closed the case with a critical remark.<sup>26</sup>

Withholding or refusal of the requested information is also common in areas of tender or grant award procedures, organized and implemented by the EU institutions.<sup>27</sup>

Sometimes the reason for the refusal of information cannot be found in the secrecy, negligence or inefficiency of the EU institution, but in the inadequacy of its organization and lack of communication between different units. In cases 69/16.08.95/WDR/PD/D-de and 70/16.08.95/SF/PD-D-de two German journalists contacted the Ombudsman, claiming that the Commission's official did not want to give them a statement regarding the topic on which they were making a TV report. The Commission asserted in its reply that the official was not authorized to give any answers to journalists, since it was the responsibility of the special services for public relations. However, the Commission recognized that the journalists had to be referred to the appropriate units and services, and also had taken measures in order to avoid such misunderstandings in the future. The Ombudsman found the Commission's actions satisfactory, and closed the case.<sup>28</sup>

Finally, in 2011 the Ombudsman made procedural improvements in cases related to this aspect of the transparency principle. In the previous period, he considered the case to be concluded after the institution sent the requested information to the complainant. However, in order to prevent any additional complaints if citizens are not satisfied with the substance of the reply, the Ombudsman now invites them to make further observations. Only in the case of a positive response of complainants, the Ombudsman will close the case.<sup>29</sup>

### 3. PROVIDING MISLEADING OR FALSE INFORMATION

Cases of maladministration may be related to misleading or wrong information, found mostly on the institutions' websites, which may mislead and confuse citizens and companies.

---

<sup>26</sup> See: OI/4/2007/(ID)MHZ, EOAR 2008, 64; EOAR 2009, 63.

<sup>27</sup> See, for instance, cases: 3346/2005/MHZ, EOAR 2008, 58; 1683/2011/TN, EOAR 2012, 46.

<sup>28</sup> EOAR 1996, 27 28; See, also: 1128/31.12.96/MH/L/(VK)OV, EOAR 1998, 140 142.

<sup>29</sup> See: EOAR 2011, 8.



In the most famous case of this kind, the Commission published on different websites a variety of information related to flights that were canceled or delayed due to the large volcanic eruption in Iceland in April 2010. The European Regions Airline Association contacted the Commission and pointed out that documents wrongly implied that passengers had an automatic right to compensation in all cases involving delayed luggage. The Commission needed two weeks to admit that relevant information in the document was really misleading, and more than a month to remove it from the website. The Ombudsman criticized the Commission due to inaccurate information that was published, and because of the time it needed to correct such information.<sup>30</sup>

In addition, claims of misleading information can be the consequence of different questions posed to EU institutions, and of requests for information in various fields. Thus, in 1996 a Belgian citizen complained to the Ombudsman, claiming that the Commission had given him incorrect information about the competition for a development project in Latin America. The Commission, in its reply, stated that the same information had been transmitted to the other candidates, so any possible mistake would therefore prejudice all the candidates. Considering that in this way the Commission had recognized its mistake, the applicant was not insisting on further investigation, and the Ombudsman closed the case.<sup>31</sup>

Finally, false and misleading information was given in various documents of the EU institutions, such as procurement procedures documentation,<sup>32</sup> the guidelines for a scholarship program,<sup>33</sup> the guidelines on the Union Citizenship Directive,<sup>34</sup> as well as in other materials and brochures.<sup>35</sup>

---

<sup>30</sup> In this case, as in many other situations, there were also present some other forms of maladministration, such as negligence or avoidable delay besides the main issue (transparency). See: 1301/2010/GG, EOAR 2011, 32; See also cases: 2403/2006/(WP) BEH (confusing information on the website of the Commission's Directorate General for Enterprise and Industry), EOAR 2007, 56 57; 1220/2010/BEH (incorrect information on the EPSO's online application form), EOAR 2011, 53 54.

<sup>31</sup> EOAR 1997, 168 169; See also case 1694/2007/(WP)BEH, which concerned allegation that the Commission had given insufficient and incorrect replies to a request for information regarding a certain legislative procedure. EOAR 2009, 52.

<sup>32</sup> 920/2010/VIK, EOAR 2011, 47.

<sup>33</sup> 1574/2010/MMN, EOAR 2011, 47; 3031/2007/VL, EOAR 2011, 55 56.

<sup>34</sup> 1451/2011/BEH, EOAR 2012, 42.

<sup>35</sup> 1475/2005/(IP)GG and 1476/2005/(BB)GG (inaccurate and misleading information contained in Commission's leaflets, posters, fact sheets, and a video presentation on air passenger rights), EOAR, 2007, 21 22, 82.

#### 4. PUBLIC ACCESS TO DOCUMENTS HELD BY THE EU INSTITUTIONS

The Ombudsman has made a significant impact in terms of access to documents in the possession of the EU institutions, as one of the most important elements of transparency principle. At the inter-governmental conference that led to the signing of the Treaty of Maastricht in 1992, efforts to enter into the Treaty provisions on the access to documents were unsuccessful. Instead, the Treaty was amended in the Annex by the Declaration 17 where it was emphasized that “the transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in administration.”<sup>36</sup> Such a declaration had motivated the Commission and the Council of EU to adopt a common Code of Conduct<sup>37</sup> in 1993, which served as a basis for each of these institutions to adopt a separate decision on the availability of documents in their possession.<sup>38</sup> These acts, among other things, provide the right of the person who is not being allowed access to requested documents, to refer his/her case to the EU courts and the Ombudsman.

In June 1996, the Ombudsman initiated an inquiry on his own initiative (the first of this kind), in order to determine whether the other institutions and bodies (in total 15) have adopted the rules on the access to documents in their possession. The reason for investigation was a large number of complaints received by the Ombudsman, which related to the issue of transparency in the work of the EU institutions and bodies. The starting point in the inquiry was the position of the Court of Justice, formulated in its judgment in *Netherlands v Council*, in which it emphasized the following: “So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization (...).”<sup>39</sup> In other words, in the absence of general rules, the Court identified the obligation of institutions to adopt internal rules on access to documents.

From responses received during an investigation, the Ombudsman found that most of the institutions and bodies failed to adopt such rules, but that they had an intention of doing so. In this regard, the Ombudsman made a draft recommendation, followed by a special report (also, the first

---

<sup>36</sup> Declaration on the Right of Access to Information, annexed to the Final Act of the Maastricht Treaty.

<sup>37</sup> Code of Conduct concerning public access to Council and Commission documents, Official Journal 1993 L340, 41.

<sup>38</sup> Council Decision 93/731 of 20 December 1993 on public access to Council documents, Official Journal 1993 L340, 43; Commission Decision 94/90 of 8 February 1994 on public access to Commission documents, Official Journal 1994 L 46, 58.

<sup>39</sup> C 58/94, *Netherlands v Council*, European Court Reports 1996, par. 37.

of its kind), in which it was stated that most of the EU institutions and bodies, subsequently adopted the said rules.<sup>40</sup> This report was accepted by the resolution of the European Parliament in July 1998, on the basis of the report that was previously submitted by the Committee on petitions.<sup>41</sup>

In April 1999, the Ombudsman has initiated a new inquiry, which included four bodies, established after the completion of the previous investigation.<sup>42</sup> Three of them adopted the rules on access to documents after the intervention of the Ombudsman, whilst he made a draft recommendation with regard to Europol, leaving this body three months to make a statement on this issue.<sup>43</sup> The director of Europol soon informed the Ombudsman that he fully accepts the draft recommendation, and that he will take appropriate measures for its implementation.<sup>44</sup> That means that most of the EU institutions and bodies adopted and published rules on access to documents in its possession, as a result of the inquiries of the Ombudsman.

Finally, the European Parliament and the Council of EU adopted Regulation no. 1049/2001 on the access to documents in 2001, which relates to the two mentioned institutions and the European Commission.<sup>45</sup> Regarding other EU institutions and bodies, the internal rules on the access of documents, adopted on the recommendation of the Ombudsman, remained in force, but they were also complemented by the principles contained in the said Regulation.<sup>46</sup>

This arrangement is also envisaged in the European Code of Good Administrative Behavior, adopted by the Parliament on the initiative of the Ombudsman, in which it was emphasized that “the official shall deal with requests for access to documents in accordance with the rules adopted by the Institution and in accordance with the general principles and limits laid down in Regulation (EC) No 1049/2001.”<sup>47</sup> In this way, the

---

<sup>40</sup> Compare: 616/PUBAC/F/IJH, EOAR 1996, 81 87; EOAR 1997, 276 277.

<sup>41</sup> Report on the Special Report by the European Ombudsman to the European Parliament following his own initiative inquiry into public access to documents (A4 0265/1998); Committee on Petitions; Rapporteur: Mrs Astrid Thors; Compare: EOAR 1998, 28, 278.

<sup>42</sup> This inquiry included, among other bodies, the Europol and the European Central Bank. See: EOAR 1999, 246.

<sup>43</sup> See in detail: OI/1/99/IJH, EOAR 1999, 245 259.

<sup>44</sup> See: EOAR 2000, 194 195.

<sup>45</sup> See: Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal 2001 L 145, 43.

<sup>46</sup> Compare: J. Söderman, 97 98.

<sup>47</sup> Art. 23 par. 1 of the European Code of Good Administrative Behavior; The right of access to documents of any EU institution is also guaranteed by Article 42 of the Char

Regulation exceeded the framework of the three institutions concerned and has become the most important document in the area of access to documents in the EU.<sup>48</sup> As it was emphasized by the Ombudsman, the adoption of the Regulation was a turning point in the transparency of the EU institutions, since its application led to a situation where transparency has become the rule, and secrecy and confidentiality exceptions (as opposed to the previous period).<sup>49</sup> However, the way of thinking and a common practice within institutions change slower and harder than regulations.<sup>50</sup>

EU citizens, whose request for access to documents is rejected, have a possibility to bring an action before the General Court or to address the Ombudsman.<sup>51</sup> The advantage of the first option is reflected in the fact that the Court will mostly set aside the decision of the EU institution on rejection (because it is not sufficiently reasoned), but it will not prevent the institution to issue a new decision with the same content (this time with detailed reasoning). On the other hand, complaint to the Ombudsman (due to his specific competencies) provides change in the conduct of the institution.<sup>52</sup> The Ombudsman will seek to determine whether the refusal represents a case of maladministration, which is a broader notion than the concept of illegality. This will undoubtedly be the case if the institution did not act in accordance with the internal rules on the access

---

ter of Fundamental Rights of the EU, which reads: “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.”

<sup>48</sup> On 30 April 2008 the Commission made available the Proposal to amend Regulation no. 1049/2001, which provoked a vivid debate amongst the institutions and public. See the text of the Proposal: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0229:FIN:EN:PDF>; The Commission adopted another proposal to amend Regulation 1049/2001 in March 2011, with the only aim to adapt the Regulation to the requirements of the new Article 15 TFEU, leaving the 2008 proposal unchanged. More on this process: M. Augustyn, C. Monda, *Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001*, EIPA Maastricht, 2011; See the text of the new proposal: <http://www.statewatch.org/news/2011/mar/eu-com-access-reg-1049-proposal.pdf>, last visited 30 August 2013.

<sup>49</sup> See the speech of N. Diamandouros: *Experiences of investigating complaints about maladministration in the EU institutions, especially regarding access to documents*, Stockholm, 8 September 2009, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/4256/html.bookmark>, last visited 30 August 2013.

<sup>50</sup> See the speech of N. Diamandouros: *Making the EU accountable to its citizens*, Dublin, 24 February 2011, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/10188/html.bookmark>, last visited 30 August 2013.

<sup>51</sup> See the complete text of the Regulation: [www.europarl.europa.eu/register/pdf/r1049\\_en.pdf](http://www.europarl.europa.eu/register/pdf/r1049_en.pdf), last visited 30 August 2013.

<sup>52</sup> See: K. Heede, *European Ombudsman, redress and control at Union level*, Kluwer Law International, The Hague, London, Boston, 2000, 232.

of documents, as well as with the principles contained in the Regulation no. 1049/2001.<sup>53</sup>

It is understood that the access of documents is limited and excluded in certain situations (e.g. concerning public security, military affairs, international relations, financial, monetary and economic policies of the EU and the member states, the right to privacy, commercial interests, threat to judicial, investigative and audit procedures, as well as decision-making procedures within the institution itself), but it is important that these exceptions are interpreted restrictively.<sup>54</sup>

A large number of cases which concerns access of documents is quickly resolved after the intervention of the Ombudsman. However, often delays of the Commission and other EU institutions regarding requests for access to documents eventually became a systemic problem, whose solution requires an adequate and innovative approach. In this regard, the Ombudsman called for a pro-active method, which implies taking into account issues of access to documents even in the early stage of its drafting and preparation. Concretely, if a document has to contain confidential information, it should be designed in a way that would allow its partial access. Thus, confidential information should be concentrated in a separate section, which would be followed by an explanation of why that part cannot be made public.<sup>55</sup>

Transparency of the EU institutions has been reinforced after the Ombudsman's investigative powers have been strengthened and specified, as a consequence of the amendments of his Statute and Implementing provisions in 2008. The Ombudsman now has full access during his inquiries to documents held by the EU institutions and bodies, and they can no longer refuse to disclose them on "duly substantiated grounds of

---

<sup>53</sup> Compare: EOAR 1998, 30.

<sup>54</sup> See: Art. 4. of Regulation no. 1049/2001; EOAR 2006, 83; In the case 2560/2007/BEH the European Medicines Agency refused access to clinical study reports on the grounds that disclosure would undermine commercial interests of a drug producer. EOAR 2010, 41; See also the case 3106/2007/FOR in which the same agency initially refused to make available the report on the adverse effects of a drug (because of the protection of personal data). EOAR 2011, 42; See also cases: 1039/2008/FOR (protection of the purpose of investigation), EOAR 2010, 39; 355/2007/FOR and 1195/2010/OV (threat to decision making process), EOAR 2010, 40 41; 2219/2008/MHZ (protection of commercial interests and economic policy), EOAR 2010, 40; 523/2009/TS and 944/2008/OV (protection of public interest with regards to international relations), EOAR 2010, 41; 2016/2011/AN (protection of monetary and economic policies of the EU), EOAR 2012, 36; 3136/2008/EIS and 682/2010/TN (protection of personal data), EOAR 2012, 41.

<sup>55</sup> See the speeches given by N. Diamandouros: *Remarks of the European Ombudsman on Reform of Regulation 1049/2001 Access to EU Documents after the Lisbon Treaty*, Brussels, 29 September 2010, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/5360/html.bookmark>; *A more pro active approach towards transparency for the EU*, Brussels, 28 September 2011, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/10959/html.bookmark>, last visited 30 August 2013.

secrecy". In addition, EU officials who give evidence to the Ombudsman are no longer required to speak "on behalf of and in accordance with instructions from their administrations".<sup>56</sup> Of course, there is a provision of the Statute that imposing special conditions on the Ombudsman when he uses the information and documents protected as classified (secret, confidential, sensitive).<sup>57</sup> All those changes provided the following: the complainant can be sure that the Ombudsman will have access to all documents and information related to the inquiry, while the institution can be assured that any information or document presented to the Ombudsman, and which is protected as classified, will not be made available to the complainant, or the general public.<sup>58</sup> However, some of these powers are not frequently used by the Ombudsman, and there is space for improvement in this area.<sup>59</sup>

Furthermore, the Ombudsman has made a significant contribution in the conduct of official records of documents held by the EU institutions. If such records do not exist, citizens will not be aware of the existence of particular document. These records are a prerequisite of efficiency of each institution, because they allow a rapid and accurate finding of relevant documents.<sup>60</sup> Thus, in the case 633/97/PD complainant contacted the Ombudsman stressing that the lack of registers on documents in the possession of the Commission, significantly restricts the right of citizens to have access to its acts. The Ombudsman found that this failure of the Commission constitutes maladministration and in his draft recommendation urged this institution to establish a record of documents which are in its possession. In its opinion, the Commission has fully accepted the Ombudsman's recommendation, but also pointed to the existence of practical problems that must be resolved before the establishment of such registers. Although the complainant was not satisfied with the position of the Com-

<sup>56</sup> See: EOAR 2008, 34.

<sup>57</sup> Art. 3. par. 2. of the Statute of the European Ombudsman.

<sup>58</sup> See: EOAR 2008, 25–26; A good illustration of the relationships that were created after the amendment of the Statute and Implementing provisions is case 523/2009/TS, in which the complainant asked the Council to disclose the document on allegations that the U.S. Central Intelligence Agency (CIA) used territory and objects of European countries to transport and illegally detain prisoners. The Council refused this request, arguing that the disclosure of the document would jeopardize diplomatic relations between the EU and the U.S. Furthermore, the Council noted that in this case it was not possible to allow partial access to the document, because the information contained therein constitute an inseparable whole. After inspecting the document, the Ombudsman concluded that the Council acted correctly and that there was no case of maladministration in its work. See: EOAR 2010, 29.

<sup>59</sup> Ending with 2012, the Ombudsman has used his power to hear witnesses only in 8 cases, while he inspected institution's files in 221 cases. See: EOAR 2006, 43; EOAR 2007, 39; EOAR 2008, 34; EOAR 2009, 30; EOAR 2010, 18; EOAR 2011, 18; EOAR 2012, 17.

<sup>60</sup> I. Harden, 176.

mission, the Ombudsman concluded that this institution needs some time in order to fulfill this task, and closed the case.<sup>61</sup>

The efforts of the Ombudsman in this area are crowned with the adoption of the already mentioned Regulation no. 1049/2001 on access to documents, which provides an obligation for all EU institutions to keep records of official documents in their possession.<sup>62</sup>

The Ombudsman also emphasized that even in areas where there are still no complete and systematized records, the EU institutions are required to provide, at the request of citizens, a rough list of documents that are in their possession, regardless of difficulties and expenses that such preparation implies.<sup>63</sup>

Finally, the Ombudsman has advocated the establishment of electronic registers, wherever possible, through which citizens could directly come into the possession of the relevant documents. This approach would make application for access to documents unnecessary, which would significantly reduce the obligations of the EU institutions, and relieve the Ombudsman due to a smaller number of complaints.<sup>64</sup> In this situation, all three parties in this process would be better off.

## CONCLUSION

Cases of maladministration related to the transparency issues are the most common in the European Ombudsman's practice. Violation of the principle of transparency occurs when the institution unreasonably refuses to provide information or documents, when they provide misleading or wrong information, and when no good reasons are given for exclusion of the public from its meetings or consultation process.

---

<sup>61</sup> EOAR 1999, 234 238; See also the cases: 1055/25.11.96/STATEWATCH/UK/IJH, EOAR 1998, 256 259 and EOAR 1999, 232 233; 917/2000/GG, EOAR 2001, 225; 1764/2003/ELB, EOAR 2006, 79 80; 3072/2009/MHZ, EOAR 2011, 36.

<sup>62</sup> See the speech of N. Diamandouros: *Freedom of Information: a European Perspective*, Manchester, 23 May 2006, <http://www.ombudsman.europa.eu/speeches/en/2006/05/23.htm>, last visited 30 August 2013; The obligation of institutions to maintain official records is confirmed by Art. 24 of the European Code of Good Administrative Behavior. However, some institutions still haven't established registers of documents in their possession. Thus, in the case 3208/2006/GG Ombudsman ordered Commission to establish such register, and views of the Ombudsman are confirmed by the Parliament's resolution. See: EOAR 2008, 54.

<sup>63</sup> See the case: 2350/2005/GG, EOAR 2007, 81.

<sup>64</sup> See the speeches given by N. Diamandouros: *Remarks of the European Ombudsman on Reform of Regulation 1049/2001 Access to EU Documents after the Lisbon Treaty*, Brussels, 29 September 2010, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/5360/html.bookmark>; *EU rules on access to documents: The European Ombudsman's perspective*, León, Spain, 27 April 2011, <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/10310/html.bookmark>, last visited 30 August 2013.

Transparency enables the public to monitor and evaluate the performance of authorities, to learn the motives and reasons behind their decisions and to predict their actions in the future. The information provided ensures the responsibility of the institutions, but also allows citizens and companies to exercise their rights and take an active stance in the political debate on various issues. For these reasons, the principle of transparency is a necessary precondition for any democratic system.

Lack of transparency frequently occurs when institutions do not answer a question or provide a person with the wrong information, especially in the area of recruitment, or tender procedures organized by the EU institutions.

Furthermore, the Ombudsman has made a significant impact in terms of availability of documents in the possession of the institutions and bodies of the EU. As a result of the inquiries conducted by the Ombudsman (in 1996 and 1999) almost all EU institutions and bodies adopted and published rules on public access to documents in their possession. In addition, the Ombudsman actively participated in the debate leading to the adoption of Regulation 1049/2001, regarding the public access to documents in the possession of European Parliament, Council and Commission. This Regulation was a milestone in the development of transparency at the EU level, since it established openness as a rule, and secrecy and confidentiality as the exception. It exceeded the framework of the three institutions concerned and has become the most important document in the area of access to documents in the EU.

In addition, the Ombudsman has advocated a proactive approach regarding access to documents. This implies that EU institutions should proactively identify what information the public needs and then disseminate that information, as well as to take into account issues of access to documents even in the early stage of its drafting and preparation. Such an approach would also prevent many cases of maladministration in the practice of EU institutions.

The analysis indicates that the Ombudsman undoubtedly made a significant contribution to the transparency of the EU institutions. In accomplishing this task, he mostly did not seek to form his own soft law (non-binding rules), but has motivated institutions to adopt their regulations that will be followed in daily contact with citizens and companies. This approach has proved to be successful in this field. Despite numerous difficulties, the Ombudsman has become a true champion of the principle of transparency within the EU, contributing to the reduction of its democratic deficit and strengthening the legitimacy of its institutions. This role further gains in importance, especially in times of social and economic crisis and questioning the basic values on which the EU is based.