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"QUERY PROCEDURES" IN THE EUROPEAN UNION: A CHALLENGE OR A GUARANTEE TO THE EUROPEAN RULE OF LAW?

OS PROCEDIMENTOS DE CONSULTA NA UNIÃO EUROPEIA: UM DESAFIO OU UMA GARANTIA DO PRINCÍPIO DA UNIÃO DE DIREITO?

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Summary: 1. Foreword; 2. The importance of national Ombudsmen in the guarantee of the rule of law; 3. The European Ombudsman; 4. Division of competences between the European Ombudsman and the national Ombudsmen; 5. The European Network of Ombudsmen Institutions (ENO); 6. The Query Procedure; 6.1. Queries on the development of EU's policies; 6.2. Requests for advice; 6.3. Queries on interpretation of the EU Law; 7. Similarities and Differences from the request for preliminary ruling; 8. Some critical remarks

Resumo: A existência de Provedores de Justiça independentes foi destacada por vários relatórios da UE como um aspeto central na garantia do Estado de Direito. Isso é aplicável aos Estados-Membros, mas também à própria UE, onde o Provedor de Justiça Europeu funciona não só como garante dos direitos dos cidadãos à "boa administração", mas também dos seus direitos fundamentais. A fim de desenvolver estes princípios em todos os Estados-Membros da UE, foi criado um mecanismo de diálogo entre as instituições "Ombudsman" nacionais e o Provedor Europeu. Um dos instrumentos mais importantes deste mecanismo é o "procedimento de consulta", através do qual a instituição nacional pode colocar uma questão ao Provedor de Justiça Europeu sobre a interpretação e aplicação de normas da UE. Se os objetivos deste procedimento são de aplaudir – pois destinam-se a garantir a aplicação uniforme do direito da UE – o seu desenvolvimento na prática suscita algumas reservas e preocupações, que podem representar, por sua vez, verdadeiros desafios ao Estado de Direito no da própria União Europeia.

Abstract: The existence of independent Ombudsmen has been highlighted by several EU reports as paramount for guaranteeing the Rule of Law. That is applicable to Member-States but also to the EU itself, where the European Ombudsman works not only as the guarantor of the citizens' rights to "good administration", but also of their fundamental rights. To

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develop these principles throughout all EU Member-States, a mechanism of dialogue between the national and the European Ombudsmen was developed. One of the most important features of this mechanism is the "query procedure", whereby the national institution may pose a question to the EU Ombudsman on interpretation and application of the EU Law. If this procedure's goal is to be applauded – the achievement of the uniform application of the EU Law – its development in practice raises several doubts and concerns, that may represent, on their turn, real challenges to the rule of law within the European Union.

Palavras-Chave: Procedimento de consulta, Estado de Direito, Provedor de Justiça Europeu, Instituições Ombudsman, Direito de Queixa

Keywords: Query procedure, Rule of Law, European Ombudsman, Ombudsman Institutions, Right to Complain

1. Foreword

The existence of an independent Ombudsman institution was highlighted in the European Union (EU) Rule of Law Report in Portugal as one feature that most contributes to a strong rule of law tradition in the country. That importance must be extended to all Member States where such institution exists, provided that its guarantees of independence are effective. Also, the creation of a European Ombudsman (EO) strongly promotes the respect for the Rule of Law's principles in the EU's Institutions, organisms, and bodies. Article 2 of the Treaty of the European Union benefits deeply of the existence of an Ombudsman at European level.

The present study focuses on a procedure, not foreseen in the Treaties, which was developed after the creation of the European Network of Ombudsmen (ENO). This Network functions at European level and gathers the Ombudsman institutions of Member-States, and similar institutions from other European States. One of the several objectives of the network was to ensure that the European Union Law would be uniformly applied by all the Member States' bodies – including their own Ombudsman institutions. In order to guarantee such goal, the EO developed a new procedure, known as "query procedure"[2]. According to the latter, a national Ombudsman may direct a question to the EO concerning EU Law – for example, when dealing with a case where a doubt arises on the interpretation or application of the EU law.

This procedure reminds the preliminary ruling procedure initiated by national courts before the Court of Justice of the European Union (ECJ), where national Courts may (or are obliged to) request the Court to clarify which would be the best interpretation of EU law while deciding a particular case. However, as we will see, these procedures – although promoting the same objectives – are very different as regards the intervening bodies and their consequences.

This study will begin by explaining the importance of the Ombudsman institutions at national level, in the context of the Rule of Law, and proceed to a brief mention to the EU Ombudsman and its specific functions and competences. Then, the analysis of the Network of Ombudsmen and the functioning of the "query procedure" will be dealt with, and some specific queries' cases will be mentioned, with a special focus on the Portuguese activity in this context. Finally, some critical analysis of the procedure will be carried out.

2. Besides some brief references in some studies on the European Ombudsman, this mechanism has been scarcely studied by legal scholars. The only known comprehensive analysis in this realm was developed by N. Athanasiadou & N. Vogiatis: "The EU Queries: A Form of Extrajudicial Preliminary reference in the Field of Maladministration?", *German Law Journal* (2021), 22, pp. 441-465.

2. The importance of national Ombudsmen in the guarantee of the rule of law

The Ombudsman institution has been generally understood as an institution that plays a decisive role in the checks and balances system of the State's powers. Its presence in legal systems – if it acts independently – is increasingly seen as a sign of strengthening the Rule of Law[3].

The general Ombudsman organisations in the EU Member States – irrespective of their specific institutional name – were inspired by the Nordic institutions responsible to receive complaints and to supervise the public administration's respect for the rule of law. In fact, these institutions have different names from Member State to Member State. In Portugal, it is designated as "Provedor de Justiça", whereas in Spain "Defensor del Pueblo", in Romania "People's Advocate". In France it is known as "Défensor des Droits". In several States, such Institutions coincide with Petition Committees established in the national Parliament, as it is the case of Germany. These bodies must be independent from the Executive and many of them (which is the case of the Portuguese Ombudsman) may promote investigations *ex officio*, independently of a specific complaint.

The Portuguese Ombudsman was created immediately after the establishment of the democracy in Portugal. It was, then, one of the first measures aimed at promoting the rule of law and democracy int the country. The first Ombudsman was appointed in 1975, which means that the Institution preceded the Constitution of the Portuguese Republic of 1976, being the oldest constitutional body (*"avant la lettre*) of the Third Republic. It was referred to in the *Portuguese Chapter* of the *EU's report on the Rule of Law* as one of the most important institutions for promoting the public powers' balance of in Portugal.

National Ombudsmen must respect several criteria to be considered Institutions that effectively promote the rule of law. First, they must be completely independent from the Government. Normally, they are elected by, and are responsible before the Parliament. Their main role is to defend and promote the rights, freedoms, guarantees and the citizens' legitimate interests, ensuring the justice and legality of the exercise of public powers. Their functions are, usually, developed upon the reception of citizens' complaints on matters on bad administration or on alleged disrespect of fundamental rights by the public powers. However, many Ombudsmen have *ex officio* powers, being competent to autonomously start an investigation on matters deemed relevant. Some European Ombudsmen may also intervene before the Courts (activating a judicial procedure or even as *amicus curiae*). However, they are not competent to deal with complaints regarding judicial decisions. To promote the effectiveness of their action,

3. For example, one of the aspects of a "Twinning Project" dedicated to the strengthening of the rule of law in Turkey, with a view to the accession to the European Union, was precisely the creation and development of an Ombudsman Institution in that country. The project was carried out through European funds, framed in the EU's neighbourhood external policy. The Portuguese Ombudsman was the EU Member-State partner in this project from 2018 to 2019.

the Ombudsman shall have the power to demand all information and documentation deemed necessary for the investigations. Normally, the Ombudsman's Statutes foresee that all entities have a duty of cooperation in this realm.

However, despite these characteristics – which are present in almost all national Ombudsman institutions – their action is usually not binding, and they lack enforcement powers. They do not have the power to annul, revoke or modify administrative acts or decisions. Normally, these institutions can only direct recommendations, among other non-binding actions, which they deem appropriate to prevent and repair injustices. In sum, the Ombudsman exercises a "magistrate of persuasion" or a "magisterium of influence". In this context, the prestige and recognition of the institution's holder can be pivotal for the effectiveness of the Ombudsman's role in defence of good administration, legality, fundamental rights and, thus, the rule of law.

3. The European Ombudsman[4]

During the negotiations of the Maastricht Treaty, the Member States decided to create an Ombudsman institution in the European Union, aimed at defending the principle of "good administration" in the European Institutions' activities[5]. This creation was in line with the new values affirmed by Article 2 of the Treaty on European Union (TEU): respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The Member States considered that the creation of an accessible and informal institution, inspired by the shape of the national Ombudsman, could contribute to the consolidation of these principles, as well as to the strengthening of the newly created citizenship of the European Union. This institution would be inspired by the Nordic model: its main activity would consist in dealing with complaints regarding the EU's administration, but it would not have biding and enforcement powers[6]. The Maastricht's

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4. On the European Ombudsman, in general, see A. Sequeira Ribeiro, "Do Provedor de Justiça Europeu: algumas considerações", in *AB VNO AD OMNES*, *75 Anos da Coimbra Editora*, Coimbra, Coimbra Editora, 1998, p. 1227, J.P. Giraud, *Lé Médiateur de l'Union Européenne*, Institut Européen de l' Ombudsman, Paris, 1995, AA.VV., *Le Médiateur Europén*: *bilan et perspectives*, S. Karagiannis & Y. Petit (ed.) Bruxelas, Bruylant, 2007, K. Heede, *European Ombudsman: Redress and Control at Union Level*, The Hague, Kluwer Law International, 2000, L.C. Reif, *The European Ombudsman: Good Governance, Human Rights and the European Union*, Springer, 2004, T. Erkkilä, *European Ombudsman as a Supranational Institution of Accountability*, Springer, 2020, I. Harden, *When Europeans Complain: the work of the European Ombudsman*, Cambridge University Press, 2017, K. Magliveras, "Best institutions but empty words: the European Ombusman", *European Law Review*, 1995, p. 401, J. González Moreiro, "El Defensor del Pueblo en el Tratado de la Unión Europea", *Gaceta jurídica de la CE y de la Competencia*, 1993, p. 167, A. Pliakos, "Le médiateur de l'Union Européenne", *Cahiers de Droit Européen*, 1994, n.º 5-6, p. 563, G. Tesauro, "Il médiatore europeo", *Rivista Internalionale dei Diritti dell'Uomo*, 1992, p. 891.

5. A first proposal to set up an Ombudsman had already been put forward by the European Parliament's Committee on Legal Affairs in 1979. However, it was opposed by the European Commission and the subsequent composition of the European Parliament.

6. Its origins date back to 1713, when the "High Representative of the King" was

drafters were also concerned with the legitimacy of this body. It would be paramount to provide it with guarantees of full independence towards other European Institutions. Currently, Article 228 of the TFEU sets forth that the Ombudsman will carry out his duties in complete independence, which presents a threefold dimension: in relation to (1) any Member State, (2) all EU institutions, bodies or agencies and (3) the prohibition of exercising any other professional activity, remunerated or not, during the term of office. As many other national Ombudsmen, the EO is elected by the Institution with democratic legitimacy – that is to say, the European Parliament (EP). A possible dismissal procedure, based on two moments, demonstrates the concern to maintain the independence of the body in relation to the EP itself. In fact, only the Court of Justice can dismiss the Ombudsman in cases where he or she no longer fulfils the necessary requirements for the performance of his or her duties or has committed serious misconduct. However, the Court of Justice will act at the request of the EP. The ECJ is also competent to judge actions against the EO. This fact deserves to be especially underlined, as it means that the Ombudsman is not immune to scrutiny and accountability – which, in turn, contributes to increasing confidence in the body.

Although the initial goal of the new body was to promote the principle of "good administration" among the EU Institution, its various holders have always given a wide interpretation of their mandate, by intervening in broader issues than the mere legality, such as the "integrity of the Union's action", the values of a "Union of Law" and the fundamental rights of all persons[7].

Currently, the EO's goals may be grouped into three main areas. First, the traditional role of guaranteeing the good administration within the European institutions. Article 228 of the TFEU provides, illustratively, that the European Ombudsman is competent to receive complaints concerning cases of maladministration in the activities of Union institutions, bodies, or agencies. Article 298 of the TFEU exemplifies the concept of "good administration" as an open, efficient, and independent administration.

Another of the primary purposes of the Ombudsman is to secure the fundamental rights guaranteed in the European Charter of Fundamental Rights, such as the right to a healthy environment, the right to health or the *non-refoulement*. At this point, it is important to emphasize that the Charter qualifies the access to the Ombudsman itself as an autonomous fundamental right, which belongs to all residents in the Member States of the European Union.

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created. The institution then underwent a remarkable development in 1809, through its transformation into a control body of the legislative and executive branch (the Parliamentary Ombudsman). This body could bring proceedings before the Courts on behalf of citizens against public authorities.

7. For an analysis, v. S. Kotanidis, *The European Ombudsman – Reflections on the role and its potential*, European Parliament Research Service, 2018, Tudor-Andrei Rautu, "How to Develop a True European Society: The Ombudsman Institution", *Acta Universitatis Sapientia, Legal Studies*, n.6, 1, 2017, pp. 155-168.

Finally, the EO is seen as a guarantor of the Rule of Law in the EU. For example, it has dealt with complaints against the Parliament itself, namely on the lack of transparency of its activity. The EO took the opportunity, in this context, to underline the special position of the Parliament in the context of other institutions, as the only one directly elected and the representative of all EU citizens - for which reason it was entrusted with more demanding duties of transparency in its activities[8]. The EO has also had some intervention in terms of guaranteeing the right of citizens' initiative[9]. Finally, it has also carried out public consultations in investigations of its own initiative[10]. Through this process, the EO gives a voice to the citizens and civil society organisations, which enhances the democratic basis of its actions[11].

4. Division of competences between the EO and national Ombudsmen

The European Ombudsman is competent to hear cases of maladministration concerning the activity of EU institutions, bodies, offices, and agencies (Article 228 TFEU). Its competence was extended with the Treaty of Lisbon, as previously it only covered "Community institutions and bodies" (ex-Article 195(1) of the Treaty of the European Community). Thus, the Ombudsman's competence covers the supervision and control of the activity of the Council, the Commission, the European Parliament, the European Council itself, the Court of Auditors, the administrative activity of Court of Justice, the Economic and Social Council, the Committee of the Regions, the European Central Bank, and the Investment Bank, as well as all the other bodies and the several agencies of the Union. The Ombudsman is not competent, however, to intervene as regards actions of the Court of Justice of the European Union in the exercise of its jurisdictional functions – in obedience, obviously, to the principle of the independence of the Courts and the prevalence of their decisions. However, it has competence over materially administrative issues of the ECJ's functioning, as for example the lack of transparency or ethical conduct of judicial actors[12].

The action of the Member States also falls outside the EO's "jurisdiction" - even when they apply European Union Law[13]. This problem was highly

8. Case 2393/2011/RA (some cases may be consulted in https://www.ombudsman.europa.eu/pt/home).

9. Case OI/9/2013/2013/TN.

10. Thus, the case SI/98/2018/DDJ, opened on 23/07/2018, in which the Ombudsman launched a "strategic initiative" on the use of official EU languages by EU institutions, bodies, offices and agencies, organising a public consultation on this point.

11. C. Neuhold & A. Năstase, "Transparency Watchdog: Guardian the Law and Independent from the Politics? – Relationship between the European Ombudsman and the European Parliament", *Politics and Governance*, 2017, vol. 5, issue 3, p. 9.

12. The case 1072/2021/NH, opened on 19/07/2021, is very interesting: the complainant, a civil society organisation, expressed concern about the public comments made by an Advocate General on the draft EU Digital Markets Act, while the legislative decision-making process was still ongoing. The complainant considered that the Court did not adequately address this potential breach of its Code of Conduct. The Ombudsman opened an inquiry and submitted several questions to the Court of Justice.

13. On this issue, N. Diamandouros, "The European Ombudsman and the application

discussed during the creation of the Institution. Some States, as Spain, claimed that the guarantee of the EU Law would be much more effective if citizens could address complaints to the EO in cases where Member States' administrative bodies would act irregularly while applying EU norms. This would also be justifiable under Article 51 of the European Charter of Fundamental Rights, which sets forth that Member States are bound to respect all rights enshrined therein, whenever they apply European Union Law. Therefore, it could make sense to control the Member States' administrative authority whenever it might fall under Article 51.

That was not the Member States' final choice. The EU did not adopt a division of competences between the EO and the national Ombudsmen on a *ratione materiae* basis. Instead, the main criterion corresponds to the *author* of the irregular action. Irrespective of the application of EU Law, if the author of maladministration is a national organ, then it is up for the national Ombudsman to analyse it. On the contrary, where it is a European body to incur in maladministration, the EO is the competent organ to analyse it. Thus, if an individual intends to make a complaint regarding a Member State's maladministration, even if such administration falls under Article 51 of the Charter or was due to the application of EU Law, the individual must address the complaint to the national Ombudsman.

This solution raises some critical considerations and difficulties[14]. Indeed, it implies that the European Ombudsman - an important guarantor of the EU's rule of law - does not have competence neither to fully address the respect of the Charter's fundamental rights nor to deal with all questions on administrative illegality under EU law. On the other hand, this division of competences causes some problems in practice, as it is might be ambiguous in some situations. Indeed, there are increasingly multilevel and integrated administrative actions, in which national and European administrations intertwine or collaborate closely[15]. While it may be possible to assign the final decision either to the European or to the national body, this criterion may prove to be limited in cases of complex or joint decision-making[16]. For example, in the case of the action by Frontex, a European agency that works with the collaboration of national entities, it may be difficult to establish, for example, whether a return operation of illegal immigrants was taken by the European administration or by the Member State's entities that have assisted in the operation.

of EU Law by the Member-States", *Review of European Administrative Law*, n. 5, 2008, pp. 5-38.

14. This was one of the main notes which was part of the Proposal for EO submitted by Denmark from the proposal put forward by Spain.

15. The doctrine on this point is very vast. V., in particular, M.L. Duarte, *Direito Administrativo da União Europeia*, Coimbra Editora, 2008, p. 66 e ss., Rui Lanceiro, *O Princípio da Cooperação Leal e a Administração- A Europeização do Procedimento de Acto Administrativo*, AAFDL, 2019, Lisboa, pp. 205-217; 268-360 e 365-386, J.J. Gomes Canotilho e Suzana Tavares da Silva, "Metódica Multinível: "Spill-over effects" e interpretação conforme o direito da União Europeia", *Revista de Legislação e Jurisprudência*, ano 138, n.º 3955, 2009, p. 182-199.

16. Drawing attention to this fact, H.C.H. Hoffman, "The Developing Role of the European Ombudsman", Herwig CH Hofmann & Jacques Ziller (eds), *Accountability in the EU: The Role of the European Ombudsman*, Edward Elgar 2017, p. 21.

5. The European Network of Ombudsmen Institutions (ENO)

In 1996, the first EO promoted the establishment of a "network" of national Ombudsmen and similar organs. It was designed as the "European Network of Ombudsmen Institutions" (hereinafter "ENO"), where both the EO, the Committee on Petitions of the European Parliament and all Member States' Ombudsmen would participate[17]. The membership was opened both to national Ombudsmen, regional Ombudsmen, where they existed, and similar institutions, such as Petition Committees. But it also includes similar bodies of candidate countries for EU membership, and other European Economic Area countries. The Network consists of over 95 offices in 36 European countries[18].

The main objective of this network was to develop cooperation between all Ombudsmen and the EO itself. The EO holder at the time considered that the European Ombudsman's collaboration with national institutions could bring added value to both sides, through mutual collaboration, information exchange, training, etc. The network would also be an important mechanism for coordinating joint or parallel investigations, regarding cases of maladministration developed at various levels – at the vertical level (Member States - EU) or at the horizontal level (between several Member States). And, indeed, the creation of the Network makes it possible, in a certain way, to prevent some of the inconveniences mentioned above, contributing to improve the application of the EU Law in the Member States, and to better respond to cases of multilevel administrative intervention.

The Network is also particularly important for organizing the transfer of complaints to the competent authorities, whether when a complaint is wrongly addressed to the European Ombudsman, or when it is addressed to a Member State that is not competent to deal with it. A case of this type occurs quite frequently in issues related to the free movement of workers (for example, cases of pensions' transfers, where there are doubts as to whether the maladministration occurred in the State of nationality or in the State of residence)[19].

It is important to emphasize, though, that the ENO is not based on a hierarchical structure, in which the European Ombudsman would be at the top and the national institutions at the bottom, subordinated to the first. On the contrary, the Network represents a "horizontal forum for cooperation"[20] between several homologous institutions, which are on an equal footing.

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17. On the preparatory works, see N. Diamandouros, *REAL*, p. 24.

18. The Network includes institutions of States that are candidates to EU membership (Albania, Northern Macedonia, Montenegro, Serbia, Turkey), and other States of the European Economic Area (Iceland, Norway), as well as the European Parliament's Committee on Petitions.

19. Case SI/3/2021/VS, opened on 06/18/2021.

20. T. Binder, M. Inglese & F. van Waarden, *The European Ombudsman: democratic empowerment or democratic deficit?, BEU Citizen*, 2017, p. 14.

6. The Query Procedure

The European Ombudsman's and the Network's role on providing support to national Ombudsmen are especially relevant in the context of the interpretation and application of EU law in specific cases. As previously said, the EO is not competent to deal with issues of maladministration incurred by the national authorities, even when related to bad interpretation or application of EU Law. Thus, national Ombudsmen may receive complaints where such problem of bad interpretation or application of EU Law is at stake. To contribute to the support in the interpretation and application of EU Law by national Ombudsmen, the EO has, then, developed a process through which national Ombudsmen may request written answers from the EO on questions about EU Law. This procedure is known as the "query procedure". It is not regulated in the EU Law itself. Neither the treaty text, nor the European Ombudsman's Statute and the Implementing Provisions provide any rules about the scheme. Actually, the procedure was decided in the first ENO's meeting, which took place in September 1996. It was then established that "[T]he cooperation among the bodies involved should be established on an informal and flexible basis and on equal terms. The cooperation would consist of exchanging information, views and advice on Community law matters."

When receiving a query from a national Ombudsmen, the EO may choose one of two ways to react: either responds directly to the question or, "if appropriate", directs it to the relevant EU Institution. As the ENO's official website shows, in most cases the EO opts to forward the query to the Commission. In other cases, the EO receives some type of input from the national bodies and decides, itself, to formulate a query to the Commission. When deciding to forward the query to another institution, in practice, there will be *two queries*: the first query is sent by the national body to the EO, and the second is directed by the EO to the Commission (or other relevant Institution).

The query does not need to be made in the context of a complaint. One should bear in mind that national Ombudsmen's competences differ from MS to MS, so the type of queries may differ substantially according to each Ombudsman. Therefore, at the end of the day, the queries' specific objects are ascertained by the national Ombudsmen's competence. National queries have been prepared in different ways: they may consist of requests for information on EU policies, of advice from the EO regarding a specific matter or – the most important type, - they may concern the interpretation of a particular source of EU law, or its application to specific cases. We will address and illustrate these three different types of "queries".

6.1. Queries on the development of EU's policies

The EO receives, quite frequently, requests for information on matters of European policy, both on existing policies and on planned policies. For instance, in 2017 the Estonian Chancellor of Justice submitted a query concerning the lack of EU-wide statistical data on access to ICT services

among citizens aged 75 and above. In this case, the national institution only shared with the EO the view that, while defining and implementing its policies and activities on fighting against discrimination based on age, the EU should develop guidelines on inclusive digital services. In this case, it was the EO that formulated specific questions to the European Commission, who provided information on the matter[21]. Another example of these type of cases was initiated by the Austrian Ombudsman, which asked the EO to intervene before the Commission due to numerous cases where the payment of family benefits was delayed because of the lack of cooperation by other Member States. In this case, the EO asked the Commission for solutions to facilitate the problem. The Commission, on its turn, considered that the problem could not be considered as "systemic" and mentioned several available mechanisms to facilitate the cross-country payment of benefits. The Austrian Ombudsman did not find the answer satisfactory and, to clarify the possibly systemic nature of the problem, the EO launched a consultation among all ENO's members, asking whether they had experienced similar situations to those described in the Austrian Ombudsman's query. Six members (the Belgian, Croatian, Finnish, Greek, Portuguese, and Slovak Ombudsman Institutions) confirmed to have experienced similar situations. The European Ombudsman shared the Austrian Ombudsman's comments and the replies with the Commission.

6.2. Requests for advice

In some cases, the national Ombudsman seeks the EO for advice on how to deal with a complaint. The interpretation or application of EU Law are not questioned, but the institution is more concerned on how to solve a particular case. This can be illustrated with a case submitted by the Tuscan Regional Ombudsman. This regional institution asked for the EO's intervention while dealing with complaints made by individuals vaccinated abroad with COVID-19 vaccines that had not been authorised by the European Medicines Agency (EMA). These individuals did not have the "EU digital COVID certificate" and had to be tested, at their own costs, to access the workplace. Based on this query, the EO asked the Commission on "any advice on how these issues could be addressed", and also to "provide an overview of the legal framework and of the possibilities available to the Member States under Regulation (EU) 2021/953 to address the issues"[22].

The Commission did not provide, strictly speaking, a "practical advice", but instead answered through a comprehensive interpretation of Regulation 2021/953 on the EU Digital COVID Certificate. It claimed that such certificate was aimed at facilitating the right to free movement within the

21. The queries were made as follows: "(i) what sort of statistical data does the Commission produce in relation to the use of ICT among citizens aged 75 and above in the EU? How are these data retrievable?" and "(ii) are there any further measures that the Commission could consider in order to make more statistical data about the use of ICT among elderly citizens available to the public?". See Case Q4/2017/EIS, opened on 25 August 2017; Decision on 17 October 2017.

22. Case Q4/2021/VB, opened on 07 December 2021; decision dated of 24 March 2022.

EU, and its uses for other purposes (such as access to workplaces) would not fall within the scope of the Regulation. It also mentioned that MS had an obligation under Regulation 2021/953 to issue an EU Digital COVID Certificate for every COVID-19 vaccine administered in that Member State, regardless of whether the vaccine has been authorised at EU level. States could also issue certificates to persons who had been vaccinated in non-EU countries, except when the vaccine concerned was not authorised for use in its territory. Furthermore, the Commission could adopt an "equivalence decision" to recognise, as equivalent, COVID-19 certificates issued by non-EU countries, where it deemed that they were reliable and interoperable with the EU Certificate.

6.3. Queries on interpretation of the EU Law

Finally, queries concerning the interpretation and application of EU law are the most common and the most important type of queries. They are also the procedures that may raise more questions as regards legitimacy under the rule of law principle.

In this procedure, the national Ombudsman is faced with a doubt concerning the interpretation and application of the EU law. It can direct its doubt to the EO, in two different ways: in some cases, the national institution opts to articulate, itself, a very clear and precise question on the interpretation or application of the specific EU norm. In many cases, these questions are very similar those made by national courts to the ECJ under the preliminary ruling procedure. In other cases, however, the national institution explains the doubt to the EO, not formulating a clear and objective question. The EO, then, usually opts to prepare a clear question to the Commission itself.

The Commission will then analyse the question, providing an interpretation of the relevant sources of EU Law: usually, the Regulation or the Directive that is being applied, but also Treaties' provisions, norms enshrined in the European Charter of Fundamental and even the European Court of Justice's case-law. After receiving the Commission's reply, the EO forwards it to the national Ombudsman for possible comments, usually without adding any remarks or an autonomous analysis. If the national Ombudsmen do not proceed with further replies or questions, the EO closes the procedure. Usually, it makes a brief comment on the content of the Commission's reply and concludes whether the issue raised in the query had been adequately addressed. That being the case, the EO's office decides that the query was successfully completed.

There are some interesting cases on EU's Law interpretation. For example, in 2017 the Austrian Ombudsman made a query concerning the impact of the new General Data Protection Regulation (GDPR)[23], asking whether

23. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

the Regulation was applicable to national Ombudsmen's activities[24]. The EO directed the question to the Commission, who answered that this legal instrument was applied to the processing of personal data by a private or public body when carrying out an activity within the scope of EU law, unless the processing was expressly exempted from the GDPR - which was not the case of the national Ombudsmen's activities. On the issue of whether national Ombudsmen were exempted from the data protection supervision requirement, the Commission recalled that each Member State was under the obligation to appoint one or more data protection supervisory authorities to monitor how *all private or public bodies* applied the Regulation. The only exception was foreseen in Article 55(3) of the GDPR, which only mentioned "courts acting in their judicial capacity". Therefore, the Commission concluded that national Ombudsmen were not exempt from the mentioned supervision.

Another important case study for an "interpretative" query can be found in a procedure started by the Portuguese Ombudsman. In 2019, the *Provedor de Justiça* received a complaint concerning two Afghan young citizens, who had applied for asylum in Portugal. These citizens had already benefitted from asylum in Sweden but had lost their protection status after completing 18 years old. The Swedish Courts had maintained the administrative decision, so the citizens decided to leave the country and to apply for asylum in Portugal. This matter is dealt with by EU Law, namely by the Dublin Regulation – an instrument that establishes rules on which Member State is responsible to examine an asylum application[25]. According to this Regulation, *only one* Members State can decide an application – and, in this case, the responsible Member Sate would be Sweden. Thus, the Portuguese Aliens and Borders' Service declared the application inadmissible and prepared to send the two citizens back to Sweden.

The Dublin Regulation is based on the principle of mutual trust between Member States. However, it foresees an exception: national authorities cannot send asylum seekers to the competent Member State if these citizens may face risk of *refoulement* therein. The issue at stake was precisely that risk: the asylum seekers claimed that, in the event of such transfer, they would be subjected to *refoulement*, since Sweden would send them back to Afghanistan. That being the case, the Dublin Regulation would forbid the Portuguese authorities to transfer the youngsters to Sweden. However, the Portuguese Aliens and Borders' Service did not uphold the applicants' allegations and maintained the transfer decision. That was when the citizens decided to make a complaint to the Portuguese Ombudsman. They alleged that the Portuguese authorities had not analysed the risk of *refoulement* that they could face if sent back to Sweden. According to their allegations, also the Swedish administrative and judicial decisions had not analysed whether they would face persecution in Afghanistan. Thus, the

24. Case Q5/2017/JN, opened on 26 September 2017; Decision dated of 26 April 2018.

25. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Portuguese Aliens' and Borders' Service should now analyse *the content of the Swedish decisions*, so they could evaluate whether they had indeed taken the risk of *refoulement* into consideration.

While deciding on the complaint, the Ombudsman had some doubts on the Dublin Regulation's interpretation. It was concerned on whether there was a risk of subjection to *refoulement* if the applicants would be transferred to Sweden, and whether the Portuguese Aliens' Service had acted wrongly by not analysing whether such risk was real, namely for not having studied the Swedish decisions. The main doubt was precisely whether the Portuguese Administration was under the obligation to analyse *the content of the Swedish decisions*. The Portuguese Ombudsman decided to submit a query to the EO on this matter[26]. It asked specifically whether the Dublin Regulation could be interpreted as giving the Portuguese authorities jurisdiction to examine how the Swedish administrative and judicial powers had evaluated the risk of breaching the *non refoulement* principle.

The European Ombudsman decided to submit the question to the European Commission, which shared its "view" on the matter. According to its understanding, the Dublin Regulation did not confer jurisdiction, nor any general obligation for the Member State that was dealing with an asylum application, previously rejected in another Member State, to examine that rejection, whether it was a decision of this latter's administrative authorities or of its courts. The Commission quoted the ECJ's case-law on the matter, which underlines the principle of mutual trust between the Member States, but also recognises some risks of the Dublin system. Indeed, the Court highlighted several times that no transfer could take place in cases where the transferring State *cannot be unaware that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment*[27].

In that regard, the Commission highlighted that, where the person has provided evidence on the existence of such a risk, the authority is indeed obliged to assess, based on objective, reliable, specific, and properly updated information, whether the risks exist. Having said that, the Commission stated that "nothing can be found in the Dublin Regulation, in other provisions of EU law or in the ECJ case law that would confer the administrative authorities' jurisdiction – or an obligation - to review administrative or court decisions in the field of asylum taken by other Member States, as the query from the Portuguese Ombudsman is suggesting". To take the decision to transfer the applicant to the responsible Member State or not to do so, the Portuguese authorities should take an "individual decision based on the elements given by the applicant, or which are otherwise available to them". Finally, the Commission stated that "the [Portuguese] authorities can request information from the other Member States concerning the applicant that is appropriate, relevant, and non-excessive, to determine the Member State responsible, examine the application for international protection or to implement any obligation arising from that Regulation".

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26. Case Q2/2020/JF, 16 September 2020.

27. See, for example the Ruling dated of 21/12/2011, N.S., proc. C-411/10 and C-493/10 and the Ruling dated of 16/02/2017, C.K., proc. C-578/16 PPU.

The EO did not provide further elements, and so the Portuguese Ombudsman's questions were only addressed by the European Commission. However, it is to believe that the Ombudsman's doubts were not fully understood – perhaps due to a bad choice of words. Indeed, the Ombudsman did not question whether the Portuguese administrative authorities could "*review*" the Swedish decisions, nor suggested such interpretation. Instead, it was only concerned to avoid a risk of "double" or "indirect" *refoulement*, in case of a return to Afghanistan. The Commission, on its turn, decided to provide general references to the ECJ's case-law and to repeat well-settled rules, as the need to consider the individual situation of the applicants, based on the available evidence. Moreover, the Commission put emphasis in the importance of intra-administration cooperation. The limited and vague answers might be due to a willingness of non-commitment from the part of the Commission, as the competent Institution interpret EU Law is the ECJ. This issue will be addressed below.

7. The "query procedure" and the request for preliminary ruling

Although it has some resemblances, the query procedure is not equivalent to the "request for preliminary ruling", through which the national courts, when faced with a doubt regarding the interpretation or legality of the European Union Law, refer the matter to the European Court of Justice. In both cases, the national body asks the European body/Institution for clarification on the EU Law. In both cases, the questions may concern different types of sources of Law: Treaties, the Charter, secondary law, general principles of law, etc. However, there are some very important differences.

First, the Ombudsmen are never obliged to direct a query to the EO, even when applying EU Law and even where an "insurmountable" doubt arises. On the contrary, according to Article 267 of the TFUE, where any such question is raised in a case pending before a court against whose decisions there is no judicial remedy under national law, that court is obliged to bring the matter before the ECJ. Secondly, once they submit a request for a preliminary ruling before the ECJ, national courts are obliged to wait for the Court's answer and to follow it in the final decision. On the contrary, the answers given by the European Ombudsman are not binding – even if they consist of the European Commission's point of view. So, after the EO's answer, the national Ombudsman is free to decide whether to follow the EU Institutions' answers or not.

8. Some critical remarks

The "query procedure" raises some challenging questions. Some of them concern not so much its theoretical understanding but rather some practices that are now generalised and systematically used. That is the case of when the EO chooses to return a question on EU Law's interpretation to one of the European Institutions, before responding to the national Ombudsman. As seen, the EO mostly reaches the European Commission for this purpose.

Additionally, it does not provide an answer to the query before hearing the Commission and also, usually does not add further considerations to the Commission's reply.

The original idea was to submit "some questions", when necessary, to the Institution "concerned". So, it would seem that the EO would remain the main source of cooperation, helping the national institution, although it could search for inputs from the "relevant Institution". However, the practice does not correspond to this idea. The EO seems to be reduced to a mere intermediary between the national Ombudsman and the EU Institution. It forwards, systematically, the questions to the latter, and returns its response to the national body. In the biggest part of the "query procedures" the EO does not add its own contribution or understanding. This practice also raises a conceptual doubt: who makes the query to whom? Who are the real intervenients in this procedure? Is it the national Ombudsman that makes a query to the EO? Or is it the EO that makes a query to the Commission? Or, perhaps, is it *the national body that makes a query to the Commission through the EO*?

Secondly, even the "original idea", according to which the EO would forward, when necessary, the query to the "competent Institution", poses some questions. When a certain policy is at stake, several Institutions may be concerned, as many of them have some sort of political competences. For example, when the national institution asks for information on the development of a certain policy, both the Council, the Commission, or even the European Council may have a word to say in that matter. This can be even more complex in cases where the EO is asked to give advice on the EU's law interpretation. Which is the "competent Institution" to deal with the matter? If it is true that, according to the ordinary legal procedure, the Commission has the initiative power, the legislators will be the European Parliament and the Council[28]. The EO and the Commission, however, developed a very well-established and uncontroversial procedure, according to which the "competent body" for helping national Ombudsmen to interpret EU Law is always the Commission[29].

This practice must be thoroughly debated before the "query procedure" becomes more widespread between all the 95 offices that are part of the ENO. Under the EU Law, the Institution that is entrusted to provide an authentic and final legal interpretation is the ECJ, not the Commission. That is so, that the ECJ may convict the Commission for breaching the EU Law, both for action or inaction (article 263 and 265 TFEU). Thus, the EU's rule of law principle would be more respected if the EO's had direct access to the ECJ and had the power to address questions on the best interpretation of Law[30].

28. Article 294 of TFUE.

29. There is, so far, one exception to this practice, where the EO directed the query to the FRONTEX agency. In that case, the query concerned the practice of that specific agency regarding the treatment of complaints by citizens.

30. The wording of the *"queries"* by the European Ombudsman to the Commission is very much similar to the wording of questions referred by the national courts to the ECJ. See the following example, where the EO questions the European Commission on the interpretation of Directive 2003/4/EC on public access to environmental infor-

Some cases are especially illustrative of how the Commission is acting like the ECJ would act in a preliminary ruling. One example of this situation can be found in a case initiated by the Belgian Federal Ombudsman in 2020[31], concerning the interpretation of Article 25 of the Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, etc[32]. Following the national institution's doubts, the EO asked the Commission to elaborate on whether Article 25 of Directive had a direct effect, to which the Commission answered affirmatively. The Commission proceeded to the provision's interpretation, considering that it was "sufficiently clear and precise, and unconditional". It added that: "if the conditions to stay for the purpose of job-searching or entrepreneurship are met, this Article requires the authorities to issue an authorisation for that purpose". It concluded that the provision "leaves no discretion to the Member State". However, the decisions on whether a certain provision from a Directive has direct effect or not would be the competence of the ECJ, not the Commission's.

There is another point that raises concerns: in practice, in these query procedures, the Commission acts as an ally, as a supporter to the EO's work on providing help to the national Ombudsmen. It is true that the Commission is the "guardian" of the Treaties, and one of the entities responsible for monitoring the Member States' compliance with EU law. However, the Commission is not acting as "guardian of the Treaties" while providing responses to the queries[33]. And, on the other hand, we must bear in mind that the Commission *can also be an object of complaint before the EO*. The EO's main role is, indeed, to deal with complaints made by citizens *against the Institutions*, and the query procedure is a mere cooperation mechanism created within the European Network of Ombudsmen.

However, the EO is acting in the two roles: dealing with complaints (that can be directed against the Commission) and cooperating with the national bodies (normally through the Commission's guidance). Thus, the interpretation of EU law under the query scheme is being entrusted to an entity that, in the future, may be, itself, *subjected to a complaint dealt by the EO*[34]. One can imagine a situation where the EO asks the Commission to provide help on legal interpretation in the context of a query procedure and, later, receives a citizen's complaint on maladministration related to

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mation: "*Is Directive 2003/4/EC on public access to environmental information to be interpreted in such a way that the breakdown of prices, contained in invoices from sub-contractors to an electricity company, must be considered to be covered by the definition of environmental information as set out in the Directive?*". The question at issue had originally been formulated by the Danish Ombudsman to the European.

31. Case Q1/2020/JAP, opened on 7 February 2020; Decision dated of 16 March 2020.

32. Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing

33. Even though, queries may provide an important information on how MS are implementing EU Law.

34. Some interesting considerations on the EO's role as "supervising the supervisor", N. Diamandouros, *REAL*, p. 10.

the same law provision. As it was the EO who asked, in the first place, for the Commission's interpretation in the query procedure - and then tacitly accepted the Commission's view -, will it not then be compelled, latter, to follow this interpretation? At the end, when deciding the complaint, won't the EO be bound to the interpretation that the Commission, itself, provided, at the very EO's request?[35]

Athanasiadou & Vogiatzis point out another important flaw on the query procedure: its lack of transparency. Not all procedures are published on the ENO's website, and there seems to be no reason for this lack of information, as other national Ombudsmen could benefit from the answers given in the queries made by other similar national bodies[36]. These authors fairly observe that the query system has operated for years under *rather opaque terms*. The way that queries are mentioned in the EO's annual reports vary enormously. In some cases, the report mentions only the number of queries that were received in a certain year. Other times, it describes some examples[37]. Queries were made public in the ENO's website only in 2017, and some of them are not published. The lack of transparency and publication may also justify why query procedures have not been used as frequently as it could be desirable. Its use started in 2015, and until May 2022, only 55 queries were made by the national Ombudsman institutions. These numbers are effectively low, especially considering the increasingly "Europeanisation" of the national administrations' activities, taken together with the complaints' growth in national Ombudsman institutions[38].

Now we should also consider the other side's arguments. Lately, the Commission has inserted a disclaimer, in its replies, stating that the document reflects a "preliminary outcome of informal discussions", and that "only the Court of Justice of the European Union can deliver legally binding interpretation of Union law". The Commission assumes that the reply on the EU Law's interpretation is neither formal nor final, and it is only directed to provide a swift guidance to the national institutions. Indeed, these institutions are precisely characterised by their informal way of functioning, and the ENO's goal is to provide a more flexible way of sharing information and developing cooperation, in an expeditious manner. It was decided, at the very beginning, that the query procedure would function as an informal mechanism of cooperation. If an access to the ECJ could be the perfect approach to fully respect the rule of law and to provide an "authentic guidance" on EU Law to the national bodies, on the other hand, the cooperation could become more burdensome, longer, and thus, less efficient[39]. The concern with efficiency has been one of the biggest

35. Taking a different perspective, Athanasiadou & Vogiatzis point out that the query procedure was decided in an ENO's meeting where the Commission, Parliament, and Council participated. For these authors, this participation was paramount because it gave further legitimacy to the EU queries scheme. However these authors are referring to the principle of sincere cooperation between Institutions, due to the fact that the EO could not oblige the Institutions to answer to its queries. See *GLJ*, p. 444.

36. Op. cit., p. 462.

37. Op. cit., p. 448.

38. For example, in Portugal, the number of complaints increased in 68% from 2016 to 2021. See Provedor de Justiça, *Relatório à Assembleia da República*, 2021, p. 19.

39. However, national Courts do not qualify under Article 267 TFEU, as they would

demands of the EO's holders. For example, the current EO, Emily O' Brian, decided to expedite the query procedure, stating a guiding timeline of twenty working days, unless the Commission needs more time to prepare its reply.

So, perhaps we need to reshape our hardness on judging which Institution is competent to have a final word on EU Law in this context, where the actors work in informal ways, where many problems can be dealt with through a phone call or an email and, at the end of the day, the Commission is only providing some guidance on how the national body (and the EO itself) can solve its national case. Moreover, as Athanasiadou & Vogiatzis point out, thanks to the flexibility of this instrument, interpretative guidance is provided at an early stage, in a case where problems in the application of EU law arises, and thus litigation may be avoided. Therefore, the query procedure may also function as a preventive mechanism of judicial litigation[40].

Moreover, some of the remarks made above are not valid in cases where the Commission is requested to interpret acts which were exclusively drafted by the Commission itself. That is the case of the interpretation of Communications, which have been increasingly adopted as acts aimed at providing guidance to application of other EU's Law sources[41]. For example, in 2017[42], after a consultation with the national institutions, the EO decided to submit a query to the Commission on the Commission's 2014 Communication providing guidelines to Member States on how to apply the Family Reunification Directive[43], given the aggravation of the refugee crisis since 2014. The Commission confirmed that its act was still valid, and that the Commission's position on the issues of family reunification of refugees had not changed because of the aggravation of the refugee crisis.

As a final word, we cannot conclude that the "query procedure" should be dismissed. It can be a very valuable procedure, as it favours the harmonization of the performance of the various European Ombudsmen in terms of the application of EU Law. What we need is to think about the practices that are already installed, as it seems that they were not preceded by a thorough and acute reflection on the procedure. We are witnessing to a generalisation of a routine that seems to have gained terrain without previous reflection. And this reflection is urgent and needs to take

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not meet the requirements as set out by the case-law of the Court on the definition of "courts or tribunals. See M. P. Broberg, "Preliminary References by Public Administrative Bodies: When are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?", *European Review of Public Law*, no. 207, 2009, p. 220–21.

40. *GLJ*, p. 441.

41. We will not address another very complex issue on the value of this type of Communications when they are aimed at facilitating the implementation of acts which were approved by other Institutions (the Council and the European Parliament, and also the European Council). Again, a doubt may raise on whether the Commission should have the power to interpret these acts.

42. CASE Q6/2017/MDC, opened on the 23rd, November 2017, decision of 26 March 2018.

43. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

place before a broader widespread of the procedure. Do we really want an EO that works as a mere intermediator between national bodies and the Commission? Shall the Commission take the role of the EO's *ally* in almost every cases? Was this the framework that the EO had in mind when the query procedure was created? A general practice cannot take over the design of such an important procedure. Maybe it is time to rethink the pros and cons of this scheme and decide consciously its design[44].

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44. Athanasiadou & Vogiatzis highlight, precisely, that one of the most controversial issues in the procedure is its lack of regulation. See *GLJ*, p. 445.