

Accountability and co-production beyond courts: the role of the European Ombudsman

Maria Lee (UCL)

Introduction

A rich literature discusses variously the meaning, goals, components and frameworks of accountability, in all sorts of contexts. A comprehensive definition is elusive, but accountability can be simply described as a relationship between two parties in which one has an ‘obligation to explain and justify conduct’.¹ The actor being held to account is subject to some form of external scrutiny, as well as to the possibility of ‘facing consequences’.² Accountability is never straightforward: what we might mean by accountability is likely to depend on our (possibly unexamined) assumptions about what administrative (or executive) decision-making is and should be, so that when we disagree about whether a decision maker is properly accountable, we also disagree about deeper commitments.³

The ‘ombudsman institution’ is frequently understood as an institution of accountability.⁴ This paper attempts to explore some of the ways in which the European Ombudsman (EO) might contribute to accountability.⁵ The EO describes its ‘mission’ as ‘to serve democracy by working with the institutions of the European Union to create a more effective, accountable, transparent and ethical administration’.⁶ It is ‘empowered’ by Article 228 of the Treaty on the Functioning of the European Union (TFEU) ‘to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered

I am grateful to participants at *Regulating risks in the European Union: The co-production of expert and executive power* 21-22 May 2015, particularly to Maria Weimer for her detailed feedback, and to Steven Vaughan for comments on a draft of this paper, as well as to Amarvir Sidhu for his research assistance.

¹ M Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *ELJ* 447, p 450; J Black, ‘Calling Regulators to Account: Challenges, Capacities and Prospects’ *LSE: Law, Society and Economy Working Papers* 15/2012, p 4.

² Bovens, *ibid.*

³ Eg S Shapiro and E Fisher, ‘Chevron and the Legitimacy of “Expert” Public Administration’ (2013) 22 *Wm & Mary Bill Rts J* 465; R Mulgan, ‘“Accountability”: An Ever-Expanding Concept?’ (2000) 78 *Public Administration* 555; on judicial review, C Anderson, ‘Contrasting Models of EU Administration in Judicial Review of Risk Regulation’ (2014) 51 *CML Rev* 425

⁴ Eg T Buck, R Kirkham and B Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011) for whom ombudsmen promote integrity and accountability; P Magnette, ‘Between Parliamentary Control and the Rule of Law: the Political Role of the Ombudsman in the European Union’ (2003) *Journal of European Public Policy* 677 for whom the EO has ‘hybrid’ role, between political and legal accountability.

⁵ On the EO, see eg C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Hart Publishing, 2014), ch 3; Magnette, *ibid.*; A Tsadiras, ‘The Ombudsman’ in P Craig, *EU Administrative Law* (Oxford University Press, 2012).

⁶ EO, *Strategy of the European Ombudsman: Towards 2019* (2014), p 3. All EO documents discussed here can be found at <http://www.ombudsman.europa.eu/en/home.faces>.

office in a Member State concerning instances of maladministration ... He or she shall examine such complaints and report on them'.⁷

The particular context for this examination of the EO is the co-production of expert and executive authority. I am concerned to reflect upon the insight that not only are 'facts' *socially* constructed, but that 'society' does not exist independently of and prior to the facts; social and natural worlds are mutually constitutive. In respect of expertise and executives, neither form of authority is independent of the other, and each both shapes and rests upon the other; neither straightforwardly controls the other or has an autonomous definition of the purpose of their interactions.⁸ This perspective raises particular (if not unique) challenges for accountability: at its simplest, when power is co-produced, it is not easy to see where or by whom it is exercised, and accordingly how or with whom accountability relationships might most appropriately be constructed.

The next section introduces both the complexity of EU governance and the space occupied by co-produced authority in the EU. It also reflects upon the perennial scholarly concern around the accountability of the EU's dense processes of governance, especially the ways in which the most familiar and powerful legal and political / democratic routes to accountability are left wanting.⁹ There is relatively little detailed discussion of the EO in the literature on EU governance and accountability.¹⁰ Nor is co-production an explicit feature of this literature. Co-production is however deeply entwined in the existing focus on the complexity of EU governance, given shared interests in both the relationship between knowledge and authority, and the blurring of taken for granted lines between different stages and types of governance. After this discussion, I explore more specifically the EO's general promise as an institution of accountability. The following section then turns to a reading of EO decisions,¹¹ hoping to provide some modest insights into the ways in which the EO grapples with complexity and engages with co-production. It is perhaps not surprising that what we

⁷ Ombudsmen are often personalised, so that 'he' or 'she' reports. This reflects the importance of the personal qualities of the ombudsman, but to reflect the institutional status of the EO (and for simplicity), I de-personalise, other than when discussing speeches or publications in the EO's own name.

⁸ On co-production, see S Jasanoff (ed), *States of Knowledge: The Co-Production of Science and Social Order* (Routledge, 2004); Weimer and de Ruijter in this volume.

⁹ Although not powerless, eg C Harlow, 'Composite Decision-Making and Accountability Networks: Some Deductions from a Saga' (2013) 32 *YEL* 3.

¹⁰ Important exceptions (from different perspectives) include M Dawson, 'Transforming into What? New Governance in the EU and the "Managerial Sensibility" in Modern Law' [2010] *Wisconsin Law Review* 389 and C Harlow and R Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *ELJ* 542.

¹¹ I scanned all OILs, the opening sections of all Draft Recommendations between January 2010 and May 2015, and of all Decisions between July 2013 and May 2015, selecting the cases that seemed most relevant for closer examination. In particular, I dismissed the employment, contract and tender complaints, state aids and competition complaints, and cases about Commission enforcement decisions. One absence from the EO's 'docket' is striking: I have not encountered complaints about the ways in which the Commission (especially) uses, or does not use, scientific advice; by contrast, these are central to the most interesting litigation.

learn directly about co-production from the EO is rather thin. But the EO does take a keen interest in the generation both of knowledge, scrutinising the various groups providing scientific or technical advice and expertise in the EU, and (perhaps less keenly) of authority. This scrutiny of, and to some degree of the use of that advice and expertise, is a good place to start.

The intention here is not to propose the EO as a solution to our accountability challenges, or even to encourage the EO to engage differently with co-production. Indeed, a 'solution' to the EU's accountability challenges is probably impossible. The EO is an important institution, however, and its contribution to governance deserves critical attention.

Co-production and accountability in EU governance

The complexity of EU governance is the subject of large and powerful literatures in a range of disciplines and sub-disciplines.¹² At least four matters might be borne in mind. First, decision-making processes are obscure, and highly varied; the diversity of institutional structures for the delivery of expertise can be difficult to keep track of, and invisible without careful scrutiny of individual regimes. Secondly, the multiple (especially central and Member State) levels of governance involved in decisions are often impossible to disentangle, so that processes and decisions can no longer (if they ever could) be easily categorised as intergovernmental or supranational, 'national' or 'European'. Thirdly, public and private actors work together in ways that elide any public / private divide. And finally, the lines between institutionally separated areas of responsibility (including EU / national and public / private, but for current purposes, most importantly 'science' and 'politics') are difficult to maintain. Trying to isolate co-production from these broader features of EU governance, or to map features of co-production precisely upon them, would probably be unhelpful. The mutual shaping, influence and dependence of expert and executive resources and authority pervades EU governance. Exploring these four features is simply an effort to look more closely at EU governance.

A brief review of the arrangements for the delivery of expertise and scientific or technical advice in the EU brings out these four layers of complexity. On the obscurity and diversity of institutional structures, even at its simplest there are at least three broad approaches,¹³ within which lies considerable diversity, to knowledge generation. First, the Commission calls frequently on 'expert groups', defined as bodies 'set up by the Commission

¹² Selecting from the literature is daunting, but as well as work cited herein, see eg K Armstrong, 'The Character of EU Law and Governance: From "Community Method" to New Modes of Governance' (2011) 64 *Current Legal Problems* 179; CF Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010); G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006).

¹³ I am not suggesting that this exhausts the possibilities, consider also eg networks or epistemic communities, and even these three categories might be differently arranged.

or its departments to provide it with advice and expertise, comprising at least 6 public and/or private-sector members and meeting more than once.’¹⁴ Basic rules on appointment, operation and transparency apply,¹⁵ including mandatory registration on the Expert Group Register, although that is incomplete and sometimes inaccurate.¹⁶ Secondly, the EU agencies vary in their precise architecture and responsibilities, but in most cases they have an expert advisory or information generation role. They generally contain specialist scientific or technical committees, ‘the beating hearts of agencies’,¹⁷ and Management Boards composed of representatives of EU institutions, Member States and sometimes stakeholders. In some cases there is space for explicit political orientation, for example in the European Chemicals Agency (ECHA)’s Member State Committee, which has a consensus seeking role and, as its name suggests, represents national interests.¹⁸ In some cases there are standing stakeholder consultative groups.¹⁹ Thirdly, ad hoc approaches to expertise in particular pieces of legislation can be harder to pin down. The Industrial Emissions Directive,²⁰ for example, provides a bare framework for the ‘Seville Process’ (the European IPPC Bureau²¹ is based in Seville), in which Technical Working Groups, composed of a range of national and European, public and private, actors produce draft BAT reference documents (BREFs) to describe ‘best available techniques’ for different sectors.²²

Turning to the multi-level, public-private nature of these groups, again, variety in detail is the rule. ‘National’ experts are routinely, but with varying intimacy, involved in these ‘EU’ agencies, committees and groups, often alongside EU officials.²³ Although participants often have obligations of ‘independence’, concern with even-handedness of representation suggests that the potential for national affiliations to provide different perspectives on a problem is tacitly understood. Private actors, including public interest groups such as

¹⁴ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>.

¹⁵ European Commission, *Framework for Commission Expert Groups: Horizontal Rules and Public Register* C(2010) 7649 final. The rules also apply to ‘other similar entities’, which were not set up by the Commission, but play a similar role and are administered by the Commission.

¹⁶ *Decision in complaint 1682/2010 against the European Commission* (expert groups).

¹⁷ E Vos, ‘EU Agencies: Features, Framework and Future’ *Maastricht Faculty of Law Working Paper* 2013/3, p 15.

¹⁸ Reg 1907/2006/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency [2006] OJ L396/1, art 76.

¹⁹ Eg ECHA’s Directors Contact Group, <http://echa.europa.eu/web/guest/about-us/partners-and-networks/directors-contact-group>.

²⁰ Dir 2010/75/EU on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

²¹ Part of the Sustainable Production and Consumption Unit of the Institute for Prospective Technological Studies, in turn one of the Commission’s Joint Research Centre institutes.

²² M Lee, *EU Environmental Law, Governance and Decision-Making* (Hart Publishing, 2014), ch 5.

²³ Eg Member States are represented on Technical Working Groups in Seville. But whilst Member States nominate members to the ECHA committees, and the ECHA Management Board appoints at least one, and no more than two, members from each nominating Member State to each committee (REACH, above n 18, art 85), members of EFSA’s scientific panels are recruited by open calls for expression of interest.

environmental NGOs, but predominantly economic actors who are the subject of the regulation, are also ubiquitous, as experts, stakeholders and sometimes representatives of the Member State.²⁴

And finally, the purported divide between science or expertise and politics is firmly institutionalised, but difficult to maintain.²⁵ The groups and committees discussed so far are generally institutionally and rhetorically presented as providers of expertise or of scientific or technical opinions and advice. The more complex reality of their task flares into view during the occasional controversy, but their normative role is also routine in less high profile cases. The formally 'political' decision is generally taken by the Commission.²⁶ Even at this final stage, we have multi-level arrangements, since the Commission is supported or supervised by comitology, a set of processes for providing Member State oversight of Commission decision-making. The Member State representatives are generally civil servants, but sometimes industry representatives, and occasionally high level political representatives, including ministers of state. Since the Lisbon Treaty, comitology no longer applies to Commission 'delegated' acts;²⁷ but the intention seems to be to continue to consult Member State experts in committee.

The focus of this volume is co-production rather than the complexity of governance. The explicit language of co-production is rarely used by scholars of EU governance, but some of its features are clearly well understood. The blurred lines between European and national, public and private, for example, are often noted, as is the elusive line between politics and science, and the role of expertise as a legitimating mechanism. However, completing the circle of co-production, the Commission not only relies on 'the facts' as a source of its own political authority, but also (with others) participates in shaping the establishment of facts.²⁸ For example, the Commission is one of the political actors influencing the ways in which regulation

²⁴ C Abbot and M Lee, 'Economic Actors in EU Environmental Law' (2015) 34 *YEL* 1.

²⁵ By the Court from Case 9/56 *Meroni v High Authority* [1957/8] ECR 133 through to cases following Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305, emphasising the need for politically legitimate decisions; risk-regulating legislation (such as IED and REACH) tends to reinforce the distinction; in policy, eg European Commission, *Communication on the Precautionary Principle* COM (2000) 1 final. The distinction could plausibly be softened by any increased delegation of decision-making authority to agencies following Case C-270/12 *UK v European Parliament and Council (Short Selling)* nyr; however, this case does not revolutionise existing practice, and agencies already have their own internal institutional divides.

²⁶ In some cases final decisions, eg the grant of permits to operate, are taken by national authorities.

²⁷ Although the legislators continue to be involved. The new distinction between 'implementing' and 'delegated' acts (Arts 290, 291 TFEU) has not been much clarified by the Court, Case C-427/12 *Commission v Parliament and Council*, nyr.

²⁸ The focus here is largely on the facts as they emerge from risk assessment; a similar phenomenon is arguably emerging with respect to cost benefit analysis (CBA), which is increasingly called on in legislation and policy; there is arguably also an increasing reliance on the 'facts' of costs and benefits to legitimise a decision, eg Lee, above n 22, ch 2. Whilst political reliance on the facts of costs and benefits shape and enhance the authority of those producing CBAs, the production of CBAs shape decisions and *their* legitimacy.

is applied and interpreted by the technical bodies. Its demands for, approval of, or simple articulation of standards for technical / scientific decision-making, does some work 'enhancing scientific credibility in public contexts'.²⁹ The accumulation of detail on how the risk assessment of GMOs should be conducted, for example, may be seen as a conscious effort to enhance the status of the European Food Safety Authority (EFSA)'s facts, in the face of challenges to EU authority.³⁰ This idea that 'what one knows in science significantly depends on prior or concurrent choices about how one chooses to know it'³¹ has been implicitly raised before the EO. To extrapolate a little, a complainant alleged that the integrity of EFSA's whole approach to risk assessment (said to be the approach preferred by industry) was impugned by the private interests of the Chair of one of its science panels.³² The EO however did not address the significance of standard setting for the production of facts, focusing instead on EFSA's conflict of interest procedures.

It might even be fair to say that there is a self-conscious *effort* to co-produce authority in the EU, again fitting reasonably neatly into a discussion framed around the density of EU governance. So both the European 'scientific' bodies and the European 'political' bodies assert and enhance their own legitimacy and authority by reference to the institutional appropriateness of their own activity, and the 'scientific' or 'political' legitimacy of their interlocutor. Each contributes to the shaping of, and is shaped by, the other. Equally importantly, the insights of co-production may apply beyond natural and social life, scientific and political authority. 'Europe' calls on *European* science, knowledge and authority to present issues (sometimes contentiously) as of *European* importance.³³ We 'choose to know' in *Europe*, and the 'making' of 'knowledge' contributes to 'the making and constant re-ordering of Europe as an institutional and political entity'.³⁴ The inclusion and authority of *national* experts shore up the authority of collaboration at EU level. Similarly, 'private' knowledge is legitimised by its presentation and promulgation by an 'official' forum composed of a more mixed group; outputs may in turn be legitimised by the inclusion of private knowledge. In each case, calls on expertise and objectivity, or on the other hand on deliberation, consultation and representativeness, constitute an effort to render authority less problematic. The ways in which

²⁹ CA Miller, 'Climate Science and the Making of a Global Political Order' in Jasanoff, above n 8, p 56.

³⁰ See also the examples discussed by Fisher in this volume, and the more problematic cases discussed by A Stirling, 'Power, Truth and Progress: Towards Knowledge Democracies in Europe' in J Wilsdon and R Doubleday (eds), *Future Directions for Scientific Advice in Europe* (Centre for Science and Policy, 2015).

³¹ S Jasanoff, 'Making Order: Law and Science in Action' in E Hackett et al (eds), *The Handbook of Science and Technology Studies* (MIT Press, 2007), p 772.

³² *Decision in complaint 622/2012 against EFSA* (Test Biotech).

³³ Eg S Jasanoff, *Designs on Nature: Science and Democracy in Europe and the United States* (Princeton University Press, 2005).

³⁴ C Waterton and B Wynne, 'Knowledge and Political Power in the European Environment Agency' in Jasanoff, above n 8, p 88, specifically on environmental knowledge.

these legitimating strategies might fit together (or not) in the EU is unclear, and they may simply be uncoordinated efforts to appeal to different legitimacy communities.³⁵ Whilst some worry about ‘too much science’, others worry equally about ‘too much politics’, when actually the two categories mutually reinforce each other.³⁶

Accountability and legitimacy have been perennial concerns for those interested in the fragmentation and density of EU governance mechanisms. I hope that co-production does not add to ‘contestation over naming rights’,³⁷ but thinking explicitly about co-production could enhance our sense and understanding of authority building, the ways in which authority is divided up and patched back together, and sharpen our thinking on the elusiveness of hierarchy.³⁸ The institutionalisation of the (fictional³⁹) separation between scientific knowledge and politics could be interpreted as a particular way of thinking about accountability. It may reinforce the plausibility of peer review of technical decisions, rather than any broader approach, as a satisfactory form of accountability. The governance arrangements for the generation of knowledge discussed above tend to focus on peer accountability, meaning accountability towards others *within* the process, in an effort to fill the gaps left by the fragmentation of political and legal accountability. This is potentially rather powerful, and may provide the committed, resourced and informed account holder that we need.⁴⁰ It is however obviously limited, leaving unquestioned the identification of those peers, and the assumptions and approaches shared by ‘peers’.⁴¹ The rhetorical and institutional separation of science from politics may also attempt to provide one answer to ‘the enduring question of how experts, with their specialist knowledge, can be held accountable to public values’.⁴² The insistence that final decisions are the responsibility of politically legitimate institutions⁴³ reinforces a formal

³⁵ On which, see eg J Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation & Governance* 137, p 144. They are also part of the task of constructing objectivity, discussed below.

³⁶ M Weimer, ‘Risk Regulation, GMOs, and the Challenges to Deliberation in EU Governance – Politicization and Scientification as Co-Producing Trends’ in C Joerges and C Glinski (eds), *The European Crisis and the Transformation of Transnational Governance – Authoritarian Managerialism versus Democratic Governance* (Hart Publishing, 2014); M Lee, ‘Beyond Safety? The Broadening Scope of Risk Regulation’ (2009) 62 *Current Legal Problems* 242.

³⁷ B Karkkainen, ‘“New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping’ (2004-05) 89 *Minn L Rev* 471, p 478.

³⁸ M Lee, ‘The Ambiguity of Multi-Level Governance and (De)-harmonisation in EU Environmental Law’ (2014) 15 *Cambridge Yearbook of European Legal Studies* 357.

³⁹ S Jasanoff, ‘A Century of Reason: Experts and Citizens in the Administrative State’ in S Skowronek, S Engel and B Ackerman (eds), *The Progressives’ Century: Democratic Reform and Constitutional Government in the United States* (Yale University Press, 2014).

⁴⁰ Black, above n 1, on the challenges faced by the party doing the holding to account; CF Sabel and J Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the EU’ in Sabel and Zeitlin, above n 12 on the advantages of peer accountability.

⁴¹ Eg Harlow and Rawlings, above n 9.

⁴² Jasanoff, above n 39; although not to the other half of her question.

⁴³ Above n 25. The robustness of that claimed legitimacy is not explored in those sources.

delegation model, in which the accountability of the superior satisfies the accountability demands on the committee or working group.

This model of accountability is found seriously wanting in the EU's complex governance framework. The inadequacy of the delegation model is brought out by the fragile political legitimacy and weak political accountability of EU political authority, not least Commission plus comitology,⁴⁴ and in some cases, control of the 'lower' level actor will be resisted precisely because its independence is valued.⁴⁵ As suggested above, trying to attribute particular accountability challenges to co-production, rather than other ways of thinking about governance, is problematic. But to go back to the fundamental perspective of co-production, nature and society, facts and governance, mutually shape each other, and neither exists in the world independently of the other. Expertise and executive authority each depends on and is constituted by the other. So as with other complexity-embracing perspectives on EU governance, traditional (legal, political / democratic) mechanisms of accountability are not hopeless, but are lacking. No individual actor can be found fully responsible; but nor can any individual actor be entirely without responsibility.⁴⁶

The EO as a Forum for Accountability

The EO has a number of institutional advantages in terms of accountability.⁴⁷ First and perhaps most importantly, the EO is able to take a strategic approach to governance: 'firewatching' as well as 'firefighting'.⁴⁸ It has made a number of strategic contributions to the shaping of EU governance, perhaps most famously in respect of Commission infringement proceedings against Member States (particularly the treatment of complainants), and in respect of obligations of transparency.⁴⁹ The EO's power to undertake an own initiative inquiry (OI) allows for a more holistic view of administration than would be possible simply by

⁴⁴ D Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13 *ELJ* 523 on the weakness of links to political accountability; D Sarewitz, 'How Science Makes Environmental Controversy Worse' (2004) 7 *Environmental Science and Policy* 385 on the importance of political legitimacy.

⁴⁵ At issue in *Draft Recommendations in complaint 1151/2008 against the European Commission* (biofuels), [83].

⁴⁶ See also Sabel and Zeitlin, above n 40, on the difficulty of identifying 'principal' and 'agent' for the purposes of 'principal-agent' accountability, p 11; Harlow, above n 9 on the difficulty of holding the 'administrative' answerable to the 'executive', with the blurring of any line between administrative and executive roles, D Curtin, *Executive Power of the European Union* (OUP, 2009).

⁴⁷ For more detailed discussion of the EO's origins and role, see above n 5.

⁴⁸ Harlow and Rawlings, above n 5, p 65. The distinction is of course not clear cut, eg Magnette, above n 4.

⁴⁹ Eg R Rawlings, 'Engaged Elites, Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 *ELJ* 28; P Dyrberg, 'Accountability and Legitimacy: What Is the Contribution of Transparency?' in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP, 2002).

responding to complaints.⁵⁰ The ongoing OII into Commission Expert Groups is discussed further below.⁵¹ The EO visits agencies, proactively scrutinising such policies as language use, conflicts of interest, whistleblowing and transparency.⁵² And the EO can articulate standards of good administration, ‘a vital element in the process of securing accountability’:⁵³ as well as its guidelines and codes of practice, annual reviews of decisions may in part be an effort to rationalise its approach, and shape a body of something like precedent.⁵⁴

In addition to this strategic overview, the EO has a potentially important ‘dialogic and political role’,⁵⁵ emphasising the ‘relationship’ part of the ‘accountability relationship’. It has strong investigative powers, and ‘can conduct all the enquiries which [it] considers justified’.⁵⁶ It has access to files, can commission reports and consult the public, and hear from officials or ask questions of the challenged body. Submissions from respondents seem generally to provide substantial detail on the complaint, literally providing a public account, but this capacity to engage in ongoing dialogue with respondents,⁵⁷ and to require responses, enhances its capacity to demand an account.⁵⁸ The EO’s possible responses to maladministration also tend to emphasise ongoing reflection and dialogue, both in resolving the individual issue, and improving standards.⁵⁹ On a finding of maladministration, the EO initially tries to ensure a ‘friendly solution’ between the institution and the complainant.⁶⁰ The case is closed with a

⁵⁰ Art 228 TFEU; Decision of the European Ombudsman adopting implementing provisions (2002, as amended 2008), art 9. OIIs are reserved for ‘matters of significant public importance or principle’, EO Strategy, above n 6, p 3.

⁵¹ *Own-initiative inquiry OI/6/2014 concerning the composition of Commission expert groups*.

⁵² Through a series of OIIs, eg *OI/9/2011* (EMA), *OI/11/2011* (European Environment Agency), *OI/12/2012* (ECHA).

⁵³ C Harlow, *Accountability in the European Union* (OUP, 2002); E Fisher, ‘The European Union in the Age of Accountability’ (2004) 24 *OJLS* 495. There is some debate on the appropriateness of EO standard setting, see eg ME de Leeuw, ‘The European Ombudsman’s Role as a Developer of Norms of Good Administration’ (2011) 17 *EPL* 349. The line between setting and applying standards is not however easy to draw, and the EO is in part addressing the plethora of other standard setters in the EU.

⁵⁴ Certainly this is suggested by EO, *Good Administration in Practice: The European Ombudsman’s Decisions in 2013* (2014); earlier overviews are less substantive.

⁵⁵ Dawson, above n 9, p 432.

⁵⁶ Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman’s Duties OJ L 113/25 (1994) as amended in 2002 and 2008 (the ‘Statute’), art 3; see also Implementing Regulations, above n 50, art 5. See A Tsadiras, ‘Unravelling Ariadne’s Thread: The European Ombudsman’s Investigative Powers’ (2008) 45 *CML Rev* 757.

⁵⁷ And with others, eg consultees, complainants, the European Parliament. Harlow and Rawlings, above n 9, argue that the EO *network* (with national ombudsmen) is capable of seeing into multi-level governance, organised around networks of actors at all levels of governance.

⁵⁸ Black, above n 1.

⁵⁹ I am interested in a sub-set of cases, but for data on the processing of all complaints, see the EO’s Annual Reports.

⁶⁰ EO Statute, above n 56, art 3(5)-(7). The EO ‘finds it more constructive to avoid stating, even provisionally, that there could be maladministration’, instead identifying a ‘problem or shortcoming ... that could be put right’, EO, *Putting it Right? How the EU Institutions Responded to the Ombudsman in 2013* (2014), p 5. The EO resists being described as a mediation service, *Decision in OI/12/2011 concerning the European Monitoring Centre for Drugs and Drug Addiction*, [7].

reasoned decision if the friendly solution is effective. If a friendly solution is not possible, and the maladministration has no general implications, the EO closes the case with a critical remark. Otherwise, a report with 'draft recommendations' is issued.⁶¹ If the EO is not satisfied with the institution's response to its draft recommendations, it can provide a Special Report to the European Parliament. These are rare: there were none in 2014, and only one in both 2013 and 2012.⁶² The EO now reports systematically on responses to its inquiries, and concluded that in 2013 the institution responded 'constructively' to its intervention four out of five cases.⁶³ It promises to use its 'further remarks', which are intended to raise the quality of administration for the future and do not necessarily imply maladministration, to make 'concrete suggestions' for systemic improvements, or to invite the institution to make its own suggestions and report back. The EO says it will also systematically check that the institution does what it says it will do,⁶⁴ and it can revisit difficult or stubborn areas through OIIs.⁶⁵ Whilst many approaches to accountability demand the possibility of sanctions,⁶⁶ the EO, like most ombudsmen, has no formal coercive powers. The party being held to account does however 'face consequences':⁶⁷ informal and indirect sanctions abound, for example through publicity⁶⁸ and by reports to the European Parliament,⁶⁹ which in turn has formal sanctions at its disposal, including its role in the EU budget process.⁷⁰ The EP's representative democratic credentials are not straightforward, but nevertheless this speaks to a relatively familiar form of democratic accountability.

Thirdly, lawyers are often especially impressed by the EO's procedural openness, relative to the Court of Justice. Rules on standing are notoriously restrictive at the EU level, so that judicial review of EU acts by environmental or other public interest groups is rare, and

⁶¹ Followed by a reasoned decision.

⁶² *Special Report in OI/5/2012 concerning Frontex* (being considered by joint committee, 2014/2215(INI); *Special Report in 2591/2010 against the European Commission* (Vienna airport) (European Parliament resolution of 12 March 2013 on the Special Report of the European Ombudsman concerning his inquiry into complaint 2591/2010/GG against the European Commission).

⁶³ EO, above n 60. M Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001) 23 *Law & Policy* 47 suggests that ombudsmen have more policy impact than administrative courts, but the empirical evidence on both courts and ombudsmen is sparse.

⁶⁴ EO, *ibid*, p 3.

⁶⁵ *OI/6/2014* (Expert Groups), above n 51 follows up on the commitment to 'keep a watchful eye on the situation' in *1682/2010*, above n 16, [193].

⁶⁶ A Benz, C Harlow and Y Papadopoulos, 'Introduction' (2007) 13 *ELJ* 441.

⁶⁷ Bovens, above n 1.

⁶⁸ Harlow and Rawlings, above n 9, are concerned that including informal responses like publicity in notions of 'sanction' can collapse the criterion of 'sanctioning'.

⁶⁹ The EO describes its reports to Parliament in individual inquiries as 'the most powerful tool' at its disposal, EO, *Annual Report 2012*, p 35.

⁷⁰ The Parliament has twice (2012, 2014) voted to withhold part of the Commission's budget in a disagreement over expert groups; in 2012 it withheld the budget of agencies, including EFSA, referring to an EO decision, in part because of concerns over conflict of interests (A7-0106/2012), and citing an EO decision. A search of the European Parliament's Register of Documents suggests that EO reports frequently feature in written questions.

judicial review by economic interests more likely.⁷¹ The EO, by stark contrast, can receive complaints from ‘any citizen of the Union or any natural or legal person residing or having its registered office in a Member State’.⁷² This provides an additional route for the construction of an accountability relationship, with the complainant as well as the EO. Even if access is formally equal, we might expect powerful, well-resourced interests to make disproportionate use of any way of challenging unwelcome developments.⁷³ The relative speed and informality of the EO, as well as its independent investigative capacity, may contribute to evening out practical access.⁷⁴

As well as a particular approach to standing, the Court reviews only ‘acts’ that are ‘intended to produce legal effects’.⁷⁵ Whilst the Court in principle looks to form not substance,⁷⁶ this leaves an enormous amount of ‘non-binding’ guidance, opinions and advice in an uncertain position. This non-binding material addresses a range of questions, from the safety of a product, to the meaning of legislation, to acceptable methodologies for testing. Even if expressly not legally binding, these choices by powerful actors shape future findings of fact, including facts about the law, and the final, legally binding decision.⁷⁷ The EO is limited neither to reviewing ‘acts’ (it often addresses the general constitution and behaviour of groups within the governance system), nor to a consideration of legal effects. The limitations placed on Court and EO do overlap in one respect: Article 228 (like 263) applies to ‘the activities of the Union institutions, bodies, offices or agencies’.⁷⁸ Whilst this captures much of the EU governance landscape, there may be challenges if, for example, an ‘act’ is not formally authored at EU level.⁷⁹ Again, the fact that the EO is not constrained to particular ‘acts’ enlarges its scope of action.⁸⁰

⁷¹ M Lee, ‘Access to Justice at EU Level in Environmental Law’ (2012) papers.ssrn.com/sol3/papers.cfm?abstract_id=2062252.

⁷² Art 228 TFEU.

⁷³ The EO’s data on the source of complaints in 2013 simply tells us that 77.1% came from individual citizens, 22.9% from ‘companies, associations and other legal entities’, EO, *Annual Report 2013*; the Petitions Commission of the European Parliament has asked for better data on complaints, A8-0058/2014.

⁷⁴ S Gilad, ‘Why the Haves do not Necessarily Come out Ahead in Informal Dispute Resolution’ (2010) 32 *Law & Policy* 283 (although Gilad is especially concerned by the absence of precedent in cases where individuals challenge decisions made about them, whilst I am concerned with broader accountability of governance).

⁷⁵ Art 263 TFEU.

⁷⁶ See J Scott, ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48 *CML Rev* 329.

⁷⁷ E Korkea-aho, ‘Laws in Progress? Reconceptualizing Accountability Strategies in the Era of Framework Norms’ (2013) 2 *Transnational Environmental Law* 363; T Hervey, ‘“Adjudicating in the Shadow of the Informal Settlement?”: The Court of Justice of the European Union, “New Governance” and Social Welfare’ (2010) 63 *Current Legal Problems* 92.

⁷⁸ The EO cannot hear a complaint against Court acting in its judicial role, Art 228. The EO is subject to judicial review, C-234/02P *European Ombudsman v Lamberts* [2004] ECR I-2803.

⁷⁹ Scott, above n 76; *Decision in complaint 1581/2013 against the Commission* (passenger rights), discussed below.

⁸⁰ And note the European network of ombudsmen, above n 57.

The limits on the ability of the EO to hear a case are relatively light (although not non-existent⁸¹). Its procedural advantages can be seen in its handling of a complaint about the Air Passenger Rights Regulation.⁸² The Regulation provides a right to compensation if a flight is cancelled, unless the cancellation is caused by 'extraordinary circumstances'. The Commission put a list of 'extraordinary circumstances' (agreed by most National Enforcement Bodies) on its website. The publication of this list is suggestive of the ways in which authority and facts are casually co-produced between national bodies and the Commission, and between technical (legal) expertise and political judgment; and the EO in turn plays its own role in reinforcing the authority of these collaborations. The complainant alleged that the list was incompatible with the Regulation. In judicial review, the General Court would have first considered the standing of the complainant, a firm of solicitors, and rejected the challenge at that stage. In the unlikely event that another suitable litigant could be found, the ambiguous legal effects and authorship of the document would have been problematic. By contrast, the EO is not concerned with the formal status of the document. It acknowledges that publication on the Commission website 'added credibility and authority' to the list.⁸³ However, substantively, it seems to be satisfied that the document's status would be properly reflected by its description as a 'draft', and a disclaimer in terms of it being for information and guidance only, and not adopted by the Commission.⁸⁴ Such disclaimers are routine in the EU, and do not fully grapple with a document's authority.⁸⁵ The EO also however insists that 'good administrative practice requires the Commission to ensure that the ... list is compatible' with the Regulation, a question of legal interpretation to which we return below.⁸⁶

The concept of maladministration allows the EO to look beyond strict legality.⁸⁷ The current Ombudsman said in an early report that she had been 'struck by the extent to which EU institutions respond to complaints primarily in terms of the legality of their actions'. Whilst this is often reasonable, 'in some other cases, it is almost as if the law is being used to limit

⁸¹ EO Statute, above n 56. Eg *Decision in complaint 1892/2012 against the European Commission* (renewables) is indicative: some of the complaints missed the limitation period of two years; some were not first raised with the challenged body; and the EO cannot hear complaints against the 'merits of EU legislation'.

⁸² Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L 46/1.

⁸³ 1581/2013 (passenger rights), above n 79, [8].

⁸⁴ [9], [27]. Compare this with the EO's approach to a different sort of 'disclaimer', that a report was co-authored by the President of the European Central Bank (ECB) in 'his personal capacity': 'the ECB could not reasonably expect citizens and other stakeholders to regard such a statement as credible if the subject-matter of a report related to the areas of responsibility of the ECB ... **all** statements by members of the decision-making bodies of the ECB relating to the ECB's areas of responsibility, and **all** actions by members of the decision-making bodies of the ECB relating to the areas of responsibility of the ECB, will have an impact, in the eyes of EU citizens, and of other stakeholders, on how the ECB is perceived', *Decision in complaint 1339/2012 against the ECB*, [77].

⁸⁵ Korkea-aho, above n 77; Scott, above n 76.

⁸⁶ 1581/2013 (passenger rights), above n 79, [12].

⁸⁷ de Leeuw, above n 53.

the options', resonating with the possibility that legitimacy is sought in apparently 'technical' (legal) reasons for decisions. The EO by contrast 'will expect an institution to do whatever is possible within the law in order to achieve outcomes which are fair and reasonable in all the circumstances.'⁸⁸ The broad approach to 'maladministration', defined by the EO as something that 'occurs when a public body fails to act in accordance with a rule or principle which is binding upon it'⁸⁹ is developed in part through the cases, but also as suggested above, through the EO's *Code of Good Administrative Behaviour* (said to make 'the principle of good administration more concrete'),⁹⁰ and its summaries of decisions.

Sometimes, the language of the EO's self-denial is familiar to those of us more used to reading judicial decisions.⁹¹ Its approach to access to documents often looks a little legalistic (and it is bound by the access to documents regulation⁹²), but supplemented with broader advice on enhancing access, such as encouraging the development of improved archives or of mechanisms to help applicants identify the documents they need.⁹³ But in particular, the EO focuses primarily on procedure rather than substance, as will be seen in more detail in the discussion of the decisions below.⁹⁴ The EO does not 'reassess technical or scientific evaluations',⁹⁵ 'assess the outcome of the work of expert groups',⁹⁶ or '[settle] scientific disputes between EU agencies and complainants'.⁹⁷ Investigations turn easily into an examination of the way the Commission dealt with the initial complaint.⁹⁸ The procedural focus extends to the interpretation of legal requirements. The EO does not review the legality of legislation: a 'measure of general application ... must be presumed to be valid unless and until

⁸⁸ EO, above n 54, p 2.

⁸⁹ EO, *Annual Report 2012*, p 13.

⁹⁰ <http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1>; see also the Five Public Service Principles. The Code is rarely directly cited in the cases discussed here, although seems to be referred to more often in individual (eg employment / contract) complaints; for an argument that it has had limited impact, see P Leino, 'Efficiency, Citizens and Administrative Culture: The Politics of Good Administration in the EU' (2014) 20 *EPL* 681.

⁹¹ *Decision in complaint 364/2013 against the European Medical Agency (EMA)* (migraine medication) looked to 'whether a procedural error has occurred or whether there is a manifest error in the reasoning of the contested decision', [38].

⁹² Reg 1049/2001/EC regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43; see EO Statute, above n 56, art 4.

⁹³ *Decision in complaint 1877/2010 against the EMA*; *Decision in complaint 693/2011 against the EMA*, [34]. Note the 'serious concerns' about the EMA's inability to retrieve documents: 'The keeping of adequate records constitutes a principle of good administration which helps to ensure both effectiveness and accountability', [39].

⁹⁴ This observation may not apply in eg employment or contract cases.

⁹⁵ *Draft Recommendations in complaint 1171/2013 against the European Aviation Safety Agency (EASA)* (flight times), [25].

⁹⁶ EO, above n 54, p 15. See also eg *Decision in complaint 51/2011 against the EASA*, [40]. Nor does the EO substitute its own choice of members of committees, *Decision in complaints 1874/2011 and 1877/2011 against the European Insurance and Occupational Pensions Authority (EIOPA)*, [19].

⁹⁷ *Decision in complaint 1301/2013 against the ECHA*, [30].

⁹⁸ Eg *Decision in complaint 2202/2012 against the European Commission* (Ryanair).

annulled by the Court of Justice'.⁹⁹ Similarly, only the Court can provide a binding interpretation of legislation, but in the absence of such a binding interpretation, the EU institution is 'entitled to develop its own rules of interpretation', and the EO would consider 'whether the interpretation was *correct* and *reasonable*'.¹⁰⁰ In another case, the EO requires complainant to demonstrate that Commission's interpretation of legislation is 'manifestly unreasonable or incorrect'.¹⁰¹ But the EO focuses on the *reasonableness* of the interpretation, and on the process (including consultation) that it followed in reaching it.¹⁰² The elusiveness of any single 'correct' answer to legal interpretation is clearly recognised, if not explored; the EO's approval arguably contributes to the authority (perhaps the construction of objectivity) of the 'reasonable' interpretation, in practice and probably judicially. Avoiding contested substantive judgments in favour of process is a common tactic, and may contribute to the EO's own legitimacy in the eyes of those with whom it interacts.¹⁰³

Knowledge and Co-production in EO Decisions

We might hope that the EO would be able to look through the EU's complex governance arrangements to require an accounting from otherwise obscure parts of the picture, and beyond the 'science' of risk assessment and the 'politics' of the final outcome to take a more sophisticated and realistic picture of authority. Not surprisingly, the EO does not explicitly discuss 'co-production'. It does however scrutinise the various groups providing scientific or technical advice and expertise in the EU, and this is a good place to start. It is difficult to draw clear or consistent conclusions on the EO's approach to and understanding of co-produced authority, but this section tentatively organises the material along two dimensions, of objectivity and boundary drawing.

In thinking about objectivity, I rely on Jasanoff's description of objectivity as a 'highly sought-after and hard-won epistemic achievement'.¹⁰⁴ This does not require an unrealistic

⁹⁹ *Decision in complaint 1047/2013 against the European Commission*, [12]. T-294/03 *Gibault v Commission* [2005] ECR-SC II-635: 'the Ombudsman is empowered only to investigate and give his views in cases of maladministration, which cannot include infringement of a legal provision or of a general principle amenable to review by the Community judicature', [45].

¹⁰⁰ *Decision in complaint 1826/2010 against the ECHA*, [44].

¹⁰¹ 1892/2012 (renewables), above n 81, [34].

¹⁰² 1581/2013 (passenger rights), above n 79. The EO does seem to take a more substantive approach to interpretation of Reg 1901/2006 on medicinal products for pediatric use [2006] OJ L378/1 in *Decision in complaint 2575/2009 against the EMA*, see the discussion in the first half of the decision and the EMA response at [160] and following.

¹⁰³ Although accountability to parliaments may turn on the merits, Black above n 1. In 1892/2012 (renewables), above n 81, the EO suggested that the 'merits of EU legislation' are more suitable for the European Parliament's Petitions Committee.

¹⁰⁴ S Jasanoff, 'The Practices of Objectivity in Regulatory Science' in C Camic, N Gross, and M Lamont (eds), *Social Knowledge in the Making* (University of Chicago Press, 2011).

belief that neutral, universally applicable technical opinions are achievable, but engages with the idea that claims to objectivity are crucial in establishing the stability and authority of facts. In turn, this means that objectivity is crucial to the ways in which facts are used to claim a legitimate basis for the outputs of both knowledge generators and policy makers. The holding to account, and construction, of objectivity by the EU in the ways discussed below, speaks to co-production in a number of ways. Most importantly, it has the potential to recognise the constructed nature of facts, the role of political actors in constructing those facts, and then the dependence of political legitimacy on objectivity of the facts.

Turning to institutional boundary drawing, I am concerned with the ways in which EU governance arrangements attempt to maintain clear lines between both actors and concepts: science and politics, EU and national, private and public. These lines are not natural, but are rather effortfully drawn and maintained.¹⁰⁵ If it is blind to some of these boundaries, the EO will be able to forge accountability relationships with any part, or many parts, of a decision-making process, and in doing so to explore and challenge attempts to create space between them, in turn creating the potential to see into their mutual dependence.

The observations in this section reinforce both concerns about the difficulties of holding the EU's dense thicket of administration to account, and the potential of the EO in this respect.

The Construction of Objectivity in the EU

The 'objectivity' of expertise is directly or indirectly challenged in a number of the cases. The EO often requires an account to be provided of objectivity, and in some cases implicitly or explicitly rejects institutional claims of objectivity by a finding of maladministration. But importantly, the EO does not simply hold claims of objectivity to account. Objectivity is constructed and requires ongoing work, both by the generator of the facts, and the user of those facts.¹⁰⁶ Even in the cases where it rejects the institution's insistence that all is well, the EO reinforces the work being done to achieve objectivity, opening a route to authoritative fact-finding, in particular through better record-keeping or reason-giving, more inclusive or better rationalised procedures. For the avoidance of doubt, my argument is not that these processes always work in terms of either achieving neutrality, or achieving acceptance; contestation continues, as indeed it should. But we do see the EO both holding objectivity claims to account, and contributing to the achievement of objectivity.

In this latter respect, the EO's work on 'balance' is suggestive of the ways in which the EU may be constructing a peculiarly 'European' approach to the work of achieving objectivity

¹⁰⁵ A Irwin, 'STS Perspectives on Scientific Governance' in EJ Hackett et al (eds), *The Handbook of Science and Technology Studies* (MIT Press, 2008).

¹⁰⁶ Ibid.

and legitimacy,¹⁰⁷ particularly in its response to perennial concern that economic interests are disproportionately present or influential in EU governance, and to questions of geographical balance.

The challenge posed by the ubiquity of economic actors may not seem distinctively 'European', but it has been a dramatically visible 'EU' issue, including in the EO's 'docket', for example in numerous complaints about conflicts of interest.¹⁰⁸ Although the detailed legislative definition of the 'balance' provides the crucial context,¹⁰⁹ the EO's decisions in a number of cases about the stakeholder groups¹¹⁰ providing input into financial services regulation provide a sharp indication of the many ways in which economic actors might come to dominate in EU governance.¹¹¹ First, the EO holds that the mere fact that an individual is a consumer of financial services is not 'an adequate and valid justification' for appointment to the stakeholder group as a consumer (!); the question is whether the individual 'is able to act as an objective and dedicated consumer representative'.¹¹² Secondly, the EO has to clarify that it was 'not acceptable for profit-making suppliers of remunerated services' (lawyers, accountants, auditors, actuaries, analysts) to be included in the category of 'users' of financial services.¹¹³ And thirdly, an 'employers' representative' had been appointed; the EO pointed out that employers were already included in the 'industry' representation, and also found that there was nothing in the legislation to suggest that its list of interests was indicative only.

Similarly prompted (in part) by the place of economic interests in EU governance, the EO has begun an *OII Concerning the Composition of Commission Expert Groups*. In its letter to the Commission containing initial proposals, the EO proposes a 'legally binding' framework in which the 'balanced representation of all relevant interests' would be a 'mandatory requirement', rather than, as currently, required 'as far as possible'.¹¹⁴ Recognising the

¹⁰⁷ Of course, the EO, which is operating within a particular legislative and policy context, and may not be the most important place to look for this work on constructing EU objectivity. But some interesting issues are raised. Note that cases on 'balance' (or cases about the effectiveness of consultation more generally) do not often find their way before the Court.

¹⁰⁸ The EO emphasises the *potential* for influence, rather than requiring evidence that influence has actually been exercised, often relying on the OECD definition of 'conflict of interest', eg *Decision in complaint 297/2013 against the European Commission* (ad hoc ethical committee), [51]; EO, above n 54, p 20. The EO's responses in this area emphasise the importance of having proper procedures in place.

¹⁰⁹ Reg 1094/2010/EU establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L 331/48.

¹¹⁰ So not expert groups.

¹¹¹ *1874/2011* (EIOPA), above n 96, in which the EO refers to some similar cases about almost identical legislative provisions (the UNI I and UNI II decisions, [20]); *Decision in complaint 1966/2011 against the European Banking Authority* (EBA); *Decision in complaint 1875/2011 against the EBA*, and cases *1876/2011* and *1321/2011*.

¹¹² *1874/2011* (EIOPA), *ibid*, [39]. In this case, the 'consumer' was an academic, but as the EO points out, industry representatives also consume products, *ibid*.

¹¹³ *1874/2011* (EIOPA), *ibid*, [50].

¹¹⁴ *Letter to the European Commission* (27 January 2015), *OI/6/2014*. Commission, above n 15.

complexity of the notion of balance, the EO does not define or require a single approach.¹¹⁵ It proposes instead that ‘an individual definition of “balance”’, including the appropriate ratio of economic and non-economic interests, be published for each group. General criteria should be developed for working that out case by case. This may sound rather bland, but an obligation to articulate the meaning of ‘balance’ in any particular case could be a major step, providing criteria for assessing and challenging balance.¹¹⁶

In another case, it was alleged that the ‘European Biofuels Technology Platform’ was dominated by commercial interests, resulting in ‘one-sided advice’ to the Commission on biofuels.¹¹⁷ The EO confirmed the legitimacy of what the Commission called the ‘deliberate industrial focus of technology platforms’, and the possibility that an overall balance could be achieved by referring to other sources of advice. However, whilst the Commission enjoys ‘wide discretion in deciding how to achieve the necessary overall balance’,¹¹⁸ it cannot simply assert that ‘the sheer quantity of procedures, and the mass of input’ makes all well.¹¹⁹ Given the concern that the Platform was a ‘privileged interlocutor’, the Commission should ensure that others had a ‘genuine opportunity’ to express their views, with an ‘expectation that these views will be taken into account’.¹²⁰ The Commission should have been able to explain to the complainants the weight given to various inputs.¹²¹

So the EO seems to contribute a route to the construction of objectivity by making particular procedural demands in respect of the embedding of economic actors in the generation of EU knowledge. Equally pertinently, the issue of *geographical* balance points to a particular vision of European objectivity in the mutual shaping of science and Europe. The financial services legislation discussed above requires that ‘to the extent possible’ there should be ‘an appropriate geographical ... balance’.¹²² In response to a complaint about an alleged failure to include any industry representatives from a ‘new’ Member State in one group, the EO concludes that the Agency had not provided good reasons for limited geographical representation. In particular, there was nothing in the legislation to suggest that applicants should be discounted on the basis of ‘limited English language skills’ or ‘exclusive national professional focus’.¹²³ Of different possible ‘practices of knowledge making’, when policy or

¹¹⁵ The EO has agreed with the Commission that ‘general criteria’ are not helpful, *1682/2010*, above n 16, [113].

¹¹⁶ The Commission has rejected this proposal, *Opinion of the European Commission in OI/6/2014*. The EO will respond to this Opinion.

¹¹⁷ *1151/2008* (biofuels), above n 45, [6].

¹¹⁸ *Ibid*, [33]. See also *1682/2010* above n 16.

¹¹⁹ *Ibid*, [36].

¹²⁰ *Ibid*, [81], [91].

¹²¹ *Ibid*, [36].

¹²² *1874/2011* (EIOPA), above n 96, [6].

¹²³ *1874/2011* (EIOPA), *ibid*, [23].

legislation is concerned by geographical balance,¹²⁴ we see ‘common knowledge’ being created through ‘group reasoning explicitly based on principles of political representation’, with an emphasis on the representation of different types (new, old) of member state.¹²⁵ The approach to geographical balance might be contrasted with the EO’s discomfort at being asked to assess the balance between Christian and secular groups on the European Group on Ethics in Science (EGE).¹²⁶ The EO sidesteps the substance of the complaint about over representation of ‘the Christian world’, satisfied that members were required not to accept external instructions, for example from their church. The ‘pluralism’ of the EGE is judged in terms of ‘geographical origin, gender, age, as well as knowledge and expertise’; not in terms of religion. The EO agrees with the Commission that it would be legally ‘highly questionable’ to exclude anyone from the EGE simply because of allegiance to a religious group,¹²⁷ but seems unconcerned that ensuring geographical balance will lead to some being excluded simply for their (over-represented) nationality.¹²⁸

Whilst we generally see procedural routes to objectivity, the EO does not speak with a single voice. In the biofuels case, the EO takes what looks like a more substantive approach to ‘objectivity’:

Objectivity ... raises more concrete issues regarding the technical content and quality of the output, and the basis on which it is formulated. It raises specific questions as to whether the output is, or can reasonably be expected to be, factually well-founded and in line with informed and expert opinion.¹²⁹

The Commission needs to provide information on the ‘mechanisms ... to ensure the factual objectivity of the Platform’s input, namely, the objectivity of its advice/recommendations’.¹³⁰ Even here, however, with this ostensibly substantive approach, other than requiring arrangements that ensure that the Platform ‘[takes] into account all relevant considerations’ (a procedural requirement), the EO does not expand.¹³¹

Institutional Boundary Drawing

¹²⁴ Again, it should be noted that the EO is always working in a particular legislative and policy context. We are more accustomed to seeing explicit references to national / geographical representation in eg Agency and other committees.

¹²⁵ Jasanoff, above n 104.

¹²⁶ *Decision in complaint 203/2013 against the European Commission* (EGE), [19].

¹²⁷ *Ibid*, [32], [33].

¹²⁸ *1874/2011* (EIOPA), above n 96.

¹²⁹ *1151/2008* (biofuels), above n 45, [29].

¹³⁰ *Ibid*, [35].

¹³¹ *Ibid*, [77]. Consultation by the Platform, and the inclusion of one NGO in the Platform was not a sufficient response, [82].

In many cases, including for example the passenger rights case discussed above,¹³² the EO simply ignores the EU's tenacious institutional boundaries (such as politics / science, EU / national, public / private), in a way that enhances its capacity to hold muddled authority to account. Perhaps centrally for the purposes of co-production, the EO is generally emphatic that the 'technical' nature of an opinion or process in no way isolates that opinion or process from politics. For example, 'a choice in the field of research policy – however technical in nature or narrow in scope – cannot be dissociated from numerous other environmental, social and economic considerations'.¹³³ Similarly, whilst the EO does not engage directly with a Commission argument that a discussion 'limited to legal issues' could not amount to 'lobbying', its conclusion that 'private interests' were being represented in the relevant meeting seems to reject the proposition that legal argument is 'neutral'.¹³⁴ Nor is it acceptable simply to assume that particular actors, such as academics¹³⁵ or those in an Agency's secretariat,¹³⁶ raise no conflict of interest issues: 'an examination of the specific relevant facts'¹³⁷ or a 'thorough assessment' of tasks¹³⁸ is necessary in every case. More generally, although the required degree of 'representation' versus 'independence' varies according to the particular legislative or policy context, the EO's concern with the identification and 'balance' of participants implies a fundamental acceptance that science is not wholly autonomous of interests, or inevitable in the sense that anyone with access to the data would reach the same conclusion.

The EO's focus on economic interests, discussed above, could be bolder, but it at least implicitly recognises the role of interests, if not of power, in the production of knowledge and expertise, the impossibility of separating these categories.¹³⁹ The current Ombudsman, Emily O'Reilly, has indirectly acknowledged that the focus on 'lobbying' as an activity that can be isolated and so dealt with, may be unhelpful.¹⁴⁰ Private influence is a pervasive fact of EU governance, and she recognises that officials may not always be aware of being lobbied. She does not use the term epistemic communities, but she talks about elites shaping the debate in terms of knowledge, and about the role of industry in that process.¹⁴¹ Along similar lines, a decision on the Commission's ad hoc ethical committee did not engage with whether someone is employed as a 'lobbyist', but confirmed that the person involved 'represents private interests'

¹³² Above n 79.

¹³³ EO, above n 54, pp 15-16. See also *1151/2008* (biofuels), above n **Error! Bookmark not defined.**, [77].

¹³⁴ *297/2013* (ad hoc ethical committee), above n 108, [14].

¹³⁵ *Decision in complaint 346/2013 against EFSA* (conflict of interests).

¹³⁶ *Draft Recommendations in complaint 775/2010 against EFSA* (revolving doors).

¹³⁷ *346/2013* (conflict of interests), above n 135, [12].

¹³⁸ *775/2010* (revolving doors), above n 136, [65], [63].

¹³⁹ Stirling, above n 30.

¹⁴⁰ *Is Brussels the new Washington, D.C.? Lobbying transparency in the EU*, European Ombudsman Opening Address, 11 May 2015.

¹⁴¹ *297/2013* (ad hoc ethical committee), above n 108, [56].

when contacting EU institutions,¹⁴² looking to substance rather than form, enhancing the ability of the EO to scrutinise activities.

The ways in which the EO splits up and reassembles decision-making processes in its forging of accountability relationships, recognising expressly the mutual dependence of different parts of the process, is also relevant to the boundary between technical and political responsibilities. For example, the mere fact that advice is not binding does not allow the Commission to avoid accountability for that advice: 'the complainant's point was not that the Platform purports somehow to take over the Commission's decision-making ... but that its guidance **influenced** that decision-making'.¹⁴³ Similarly, the Commission 'is not exonerated from the obligation to ensure objectivity by the fact that it is not bound to follow the recommendations made by a particular committee or group'.¹⁴⁴ Being part of 'a wider rulemaking process' will not *necessarily* 'mitigate any potential conflict of interest in the rulemaking group', if a particular source of advice is central to the decision.¹⁴⁵ This wider process may however be important. A case about 'containing' conflicts of interest in a scheme to develop parts of the River Danube with EU funding, emphasises the totality of the process.¹⁴⁶ A study was steered by an engineering company with a financial interest in the outcome, leading to a potential conflict of interest. But the Commission had taken appropriate action: a Monitoring Group had not said anything to raise concerns; a 'regional conference' provided for the inclusion of 'a wider circle of interested parties ... reducing the likelihood of a single interest dominating the project'; and it was 'relevant' that 'the Commission closely followed the entire process'.¹⁴⁷

Notwithstanding its powerful potential to disrupt institutional boundary drawing, the EO is nevertheless often happy to reinforce lines between science and politics.¹⁴⁸ In a revealing response to a complaint, the ECHA argued that disclosing the positions of the Member States on animal testing proposals would mean a 'shift from decision-making based on the efficient provision of objective scientific and technical advice to decision-making based on policy considerations'. As well as the familiar and plausible concern that unanimous decision-making would be more difficult and the quality (perhaps read sincerity) of debate would be reduced,

¹⁴² Ibid, [54]. Elsewhere, the EO does define lobbying, EO, above n 54, p 21, citing 1339/2012, above n 84.

¹⁴³ 1151/2008 (biofuels), above n 45, [30]. Emphasis in original.

¹⁴⁴ EO, above n 54, 16; 1151/2008 (biofuels), *ibid*, [78], [30]. Also 775/2010 (revolving doors), above n 136.

¹⁴⁵ 1171/2013 (flight times), above n 95, [19], [22]; similar language is used in *Draft Recommendation of the EO in her Inquiry into Complaint 726/2012/FOR against the EASA*, [33].

¹⁴⁶ *Decision in complaint 2265/2011 against the European Commission*. Also 1151/2008 (biofuels), above n 45 and text at n 118, although the Commission had not explained adequately.

¹⁴⁷ 2265/2011 (Danube), *ibid*, [61], [62].

¹⁴⁸ Eg in its resistance to substantive judgments, above nn 95 - 97.

the ECHA was concerned that disclosure would 'lead to subjective decisions'.¹⁴⁹ The EO avoids commenting explicitly on the ECHA's line drawing between science and subjectivity,¹⁵⁰ but may be reflecting the ECHA dichotomy when noting that 'pressure' from third parties and registrants 'on science alone' is 'entirely legitimate and useful pressure'.¹⁵¹ Perhaps the most frustrating example of the EO uncritically adopting institutional boundaries is found in its OII into expert groups. The very framing of the inquiry is dependent on the institutional category of 'expert group', rather than on (for example) 'knowledge generating activities' or something similarly inclusive. Whilst we might expect some 'good practice' spillover into other areas, the EO's approach is obviously limited by prior and problematic categories drawn up by the very institutions being scrutinised.

Explaining the inconsistencies in the EO's approach is difficult, and we might more positively frame this as an observation that the EO does not insist on any single model of accountability. But the phenomena of objectivity and boundary drawing are not the conscious focus of the EO's attention, and although the EO is building a framework for good administration, the absence of any formal system of precedent, and an associated ability to respond to the fairness of any facts before it, is part of the power of ombudsmen institutions. Further, whilst we speak of 'the' ombudsman, and tend to personalise the decisions (although I have not here),¹⁵² the EO is an *institution*, with a multi-lingual staff, and four 'Complaints and inquiries units'.¹⁵³ This glancing interest in co-production, fact-specific decision-making, and institutional diversity means that differences in approach are to be expected. And importantly for current purposes, like the rest of us, the EO has to work with the institutions it finds. Sometimes it can be difficult to engage with, even criticise, risk regulation as it operates without somehow reinforcing its conceptual limitations.

Conclusions

The EO can hardly be called an unsophisticated observer of EU administration, or indeed of the co-production of science and (EU) society, and there are many cases in which it simply walks straight through the boundaries constructed for the convenience of governing, and engages quite directly (if implicitly) with the reality of co-produced authority, exposing the

¹⁴⁹ *Draft recommendation in complaint 2186/2012 against the ECHA* (animal testing), [24].

¹⁵⁰ Concluding, in words familiar from the Court, that the ECHA has not demonstrated that 'undue pressure on decision-makers is reasonably foreseeable, and not purely hypothetical', nor that this pressure 'would be of such a nature and intensity as to undermine seriously the decision-making process', *ibid*, [47].

¹⁵¹ [56], [58]. Although note the wording of REACH, above n 18, which provides that only 'scientifically valid information and studies', rather than ethical concerns, must be taken into account, art 40(2).

¹⁵² See above n 7.

¹⁵³ <http://www.ombudsman.europa.eu/en/atyourservice/team.faces>.

mutual dependence of different strands of the EU governance framework. This has the potential to provide a far reaching and distinctive sort of accountability. In other cases, however, it follows and reinforces, rather than challenging, the institutionalisation of boundaries. At best, this might strengthen more familiar (limited in this context, although not powerless) legal and political forms of accountability. Whilst this chapter provides a preliminary examination of the EO's role in co-production, and confident conclusions on what it offers to accountability would be premature, we can see that the EO does not insist on any single model of accountability.

The EO puts considerable faith in procedural mechanisms, taking a particularly striking approach to reason-giving, requiring not just reasons for an outcome, but also for the process that has been followed.¹⁵⁴ For example, whilst the institutions 'necessarily have a margin of discretion' in respect of 'the precise manner by which participatory democracy is made effective in any given circumstance', they should be able to 'justify objectively how they exercise that margin of discretion'.¹⁵⁵ The Commission cannot merely *assert* that subsequent broad consultation mitigates concerns about industry dominance in one particular part of the process, but must articulate how it does so.¹⁵⁶ Similarly, its initial proposals in the OII on expert groups the EO addresses an obligation of reason-giving to the way in which balance has been understood in any particular case.¹⁵⁷ These are potentially crucial contributions to accountability, since the obligation to explain¹⁵⁸ provides not only an accountability standard against which to assess individual cases, but may also allow for broader deliberation on the articulation of that very standard.

The EO is able to address the diversity of fora and processes for the construction of knowledge and executive authority in the EU, and to hold different combinations of actors to account. The information generated or revealed by the EO investigation can provide important resources for others seeking to hold public bodies to account, perhaps in other fora, including the European Parliament. Further, the EO's decisions and reports are public, providing 'avenues for political contestation and scrutiny of governance procedures'¹⁵⁹ even beyond parliament. The EO's structural role may also contribute to the development of governance

¹⁵⁴ This seems to be the sort of thing that the authors have in mind in J Scott and S Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 *Columbia Journal of European Law* 565, see also Vos in this volume. Also of course, the EO requires more routine processes of eg consultation and transparency.

¹⁵⁵ EO, above n 54, p 13.

¹⁵⁶ Eg discussion of 1151/2008 (biofuels) in text at n 118.

¹⁵⁷ EO, *ibid*, p 16. The Commission has rejected this proposal, above n 116. Also *Draft Recommendation in Complaint 2558/2009 against the European Commission* (non-human primates), [31]-[32]

¹⁵⁸ See more generally Sabel and Zeitlin, above n 40.

¹⁵⁹ Dawson, above n 10, p 393.

values, such as transparency and reason-giving, which shape the space for accountability more generally.

What a 'successful' accountability framework for the EU administration would look like is far from clear, not least because of the diversity of processes, but also because this question is fundamentally associated with the sort of governance and democracy to which we aspire.¹⁶⁰ The EO's openness has the capacity to recognise the challenges of EU democracy. But accountability is at least as complicated, and at least as contestable, as the thing(s) being held to account. If the EO provides only a partial and flawed response to the accountability of co-produced authority, it shares that characteristic with other accountability fora, political, judicial and peer. Exploring this particular forum, in respect of this particular accountability conundrum, is part of the continual revisiting and striving for accountability in the EU. Moreover, it is important that the EO receives the scrutiny of any institution that purports to speak with authority on administration in the EU.

¹⁶⁰ See above n 3.