

*Guarding the money guardian: how the European Ombudsman is enhancing the framework for the European Central Bank transparency*

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**Abstract**

In the 2008 aftermath, the European Central Bank (ECB) acquired new mandates and policy instruments to assure financial stability. With growing powers, there is a correspondent demand for transparency. This research presents an account on how and in which conditions the European Ombudsman has been contributing to improve the ECB governance, particularly to the transparency of its decisions. The Ombudsman is an entity responsible for investigating complaints about poor administration by institutions and bodies in Europe. This paper argues that the Ombudsman has managed to achieve hard effects, despite its ‘soft’ legal structure. Even though Ombudsman’s pronouncements are non-binding (a very different feature if one compares to Courts), through fifteen inquiries involving the Central Bank, this institution promoted identifiable impacts on expanding the transparency of monetary and financial governance in the eurozone. The Ombudsman tends to adopt distinctive legal reasoning to claim for either a ‘maximum’ or an ‘optimum’ levels of Central Bank transparency. It seems that the recourse to principle-based arguments, opposed to a more formal rule-based reasoning, was the way found by the Ombudsman to push for more transparent governance of the European monetary affairs. Therefore, legal principles have been a driving force to operationalize transparency, creating space to move from optimum to maximum degrees in the transparency spectrum. Nevertheless, in cases dealing mainly with policies designed to respond to financial crises, a formalistic legal argument combined with an approach of optimum transparency tend to predominate.

**Keywords:** European Central Bank, European Ombudsman, governance, transparency, monetary policy, financial regulation.

## 1) Introduction

Looking at the history of central banking, it is particularly remarkable how changed the way central banks regulate money in the economy: the disclosure of methods and goals replaced the secrecy of monetary policy.<sup>1</sup> In fact, since the 1990s, central banks in advanced economies have invested in operational transparency for monetary policy. Transparency mechanisms<sup>2</sup> were also designed by law to assure that parliaments and heads of government could evaluate the management of monetary affairs by independent central banks.

Since the beginning of its operations in 1998, the ECB has followed this trend, even though the confidentiality of its deliberations is guaranteed by treaty. Article 132(2) of the Treaty on the Functioning of the European Union (TFEU) states that the ECB ‘*may* decide to publish its decisions, recommendations, and opinions.’ Protocol 4 of the TFEU (Article 10.4) reinforces this particular power of the European authority: the proceedings of the Governing Council’s meetings are confidential. Thus, by means of hard law, ‘the power to decide the degree of transparency and the level of social accountability concerning monetary decisions is granted to the ECB.’<sup>3</sup>

The ECB was designed as a politically independent institution. Yet, monetary decisions have broad social impacts and distributive consequences. The ECB allocates resources among different social groups, i.e., creditors and debtors. Thus, despite the complexity of central bank decisions, ‘technical’ issues on money are political in nature and define winners and losers in the European society. In democratic contexts, there is a demand for legal and political mechanisms that could maintain this significant monetary power in check.

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<sup>1</sup> See A. Blinder, *The quiet revolution: central banking goes modern* (Yale University Press, 2004); M. Goodfriend, ‘How the world achieved consensus on monetary policy’, (2007) 21 (4) *Journal of Economic Perspectives*; C. Kaufmann, Cristine and R. H. Weber, ‘Transparency and monetary affairs’, in T. Cottier, R. Lastra and C. Tietje (eds), *The rule of law in monetary affairs* (Cambridge, 2014), 487.

<sup>2</sup> Transparency is a different concept of accountability. From the point of a political and legal view, “transparency is a precondition (i) to legitimate monetary policy implemented by [...] independent CBs [central banks] and (ii) for the accountability of these institutions – it enables social forums and political institutions to monitor and evaluate their operation”, in C. V. Duran, ‘The Framework for the Social Accountability of Central Banks: The Growing Relevance of the Soft Law in Central banking’, (2015) 8 *European Journal of Legal Studies*, 121. Kaufmann and Weber (2014: 487) argue that “[...] *ex ante* mechanisms [transparent data regime] help to prevent the abuse of power, *ex post* accountability applies instruments such as judicial review or non-traditional remedies to assess monetary activities”, in C. Kaufmann, Cristine and R. H. Weber, ‘Transparency and monetary affairs’, in T. Cottier, R. Lastra and C. Tietje (eds), *The rule of law in monetary affairs* (Cambridge, 2014), 487.

<sup>3</sup> C. V. Duran, ‘The Framework for the Social Accountability of Central Banks: The Growing Relevance of the Soft Law in Central banking’, (2015) 8 *European Journal of Legal Studies*, 114-115.

Interestingly, by its initiative, the ECB specified and communicated a quantitative aim of price stability (a precise inflation target) in 1998 and decided to publish its meeting minutes after 2015.<sup>4</sup> This trend can be explained by an economic consensus that has been pervasive: price stability is the primary goal for monetary authorities and market communication is an instrument to manage inflation expectations. Political autonomy came along with operational transparency. This EU modality of rulemaking - the use of communications, notices, and codes (a ‘soft post-legislative rulemaking’) - has become an integral part of the EU law implementation.<sup>5</sup> That is also the case for the European Central Bank.

One could argue that this movement towards more transparency in the governance of money, initiated by the central bank with an *economic* aim, could have a collateral result: to reduce the scope of supervision by political actors. The ECB itself - not a political authority - chose the precise measure to be evaluated by political actors and European citizens, i.e., a quantified inflation target. Furthermore, this type of transparency mechanism has emerged as *soft law*, i.e., outside of the battles of the political powers’ arena (as in the making process of treaties, for instance), through the issuance of mere regulations by the central bank and supposed ‘technical’ decisions.

This precise type of decision, although soft, has a clear legal nature: it creates an *obligation* for the ECB in achieving the communicated goal (the inflation target) and to continue to publish its decisions (meetings’ minutes). Political actors and European citizens can continuously evaluate the institution, although by the ECB own measures. These ‘soft’ legal instruments tend to complement the framework for monetary policy transparency constructed by parliamentary initiatives.<sup>6</sup>

Nonetheless, there is a lack of ‘teeth’ in this soft legal structure. Who is supposed to guard the money guardian based on self-imposed rules? Parliaments are usually the main body. However, could citizens contribute to expanding the central bank transparency and better governance of monetary affairs in the EU?

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<sup>4</sup> The ECB adopted a quantitative definition of price stability in 1998: ‘Price stability is defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%’. In 2003, it clarified to “inflation rates below, but close to, 2% over the medium term”. In February 2015, the ECB decided to publish its minutes. The *Financial Times* attributed this decision to “public pressure for more accountability after the global financial crisis [which] has forced traditionally secretive rate setters to open up” (‘European Central Bank opens up with release of minutes’ – *Financial Times*, 19 February 2015).

<sup>5</sup> L. Senden, ‘Soft post-legislative rulemaking: a time for more stringent control’, (2013) 19 (1) *European Law Journal*, 57.

<sup>6</sup> C. V. Duran, 2015.

Here, a non-judicial institution in Europe can particularly support this aim: the Ombudsman. The European Ombudsman has a hybrid nature: it is formally a parliamentary body but operates as a *quasi*-judicial forum by the initiative of individual complaints, the European citizens. It also has the power to initiate its own inquiries. It is designed to assure the respect of the rule of law by the European institutions by investigating denunciations of ‘acts of maladministration.’ The Ombudsman is empowered by Article 228 of the TFEU. Its mission is to ‘serve democracy by working with the Institutions of the European Union to create a more effective, accountable, transparent and ethical administration.’

This paper assesses how and in which conditions the practices of the European Ombudsman are contributing to enhancing the framework for the ECB transparency, thus broadening citizens oversight over central bank actions. We present an analysis of all the Ombudsman’s cases involving the Central Bank and how they are contributing to increasing the general public’s assessment over monetary and financial regulation. This research identifies at least one factor, which tends to define the Ombudsman contribution towards more transparency: the *legal reasoning* adopted for each case. We identified that the Ombudsman is more effective when s/he uses law – both rules and principles - as a positive instrument to implement more transparency and governance reforms.

Transparency rules have attracted growing attention in the last years, notably in periods after crises. However, it is not easy to define the scope of its application. In short, transparency rules may ensure: (1) a broad access to documents, which means all documents, at any time, by any feasible means, with exception rules interpreted very restrictively (“maximum” approach); or (2) a limited access to documents, which are to be available by the government after a specific decision-making process, based on a broad spectrum of exceptions to the principle (“optimum” perspective). In a more ‘pro-transparency’ approach (1), transparency is understood as a general right to access documents with a focus on the citizen guarantees. It also has a broad application: it requires organizational changes to make transparency work effectively. In the second model (2), transparency has a narrower scope and application (‘transparency-sceptic’ view): it is understood as a targeted government communication and should not endanger the institution. In this “sceptic view,” it

needs to consider the potentially perverse effects of transparency on the policies conducted by the institution.<sup>7</sup>

Our main aim is to contribute to the literature on how law and legal mechanisms can assure transparency of central banks and better governance of monetary affairs. The transparency framework for monetary policy is particularly relevant in the context of the growing complexity of the ECB's mandates and responsibilities. The financial crisis challenged the central bank's institutional framework. The quantitative easing policies (QEs), known as 'unconventional' monetary policy, became a relevant tool for central banks (including, the ECB), since interest rate decisions exhausted their effects.<sup>8</sup> The intellectual consensus on the neutrality of money was contested, and central banks gained more power and complex responsibilities related to financial stability as well.<sup>9</sup>

The ECB currently oversees banking supervision in the legal framework of the Single Supervisory Mechanism (SSM). Financial instability pushed EU authorities to assume new mandates at the European level, as well as to concentrate the decision-making power on financial matters on the ECB. Measures to avoid deflation or the default of European countries in the after crisis pushed the boundaries of the Central Bank policies. The Asset Purchasing Programme<sup>10</sup> and the integration of the SSM into the structure of the ECB are the main examples. Consequently, the aftermath of the economic crisis raised questions on central bank legitimacy, particularly regarding transparency.<sup>11</sup>

New regulatory tools and different mandates created legal realities, which raised questions on how to keep the ECB (new and old) powers in check. Having a sole aim, such as monetary stability, was supposed to make straightforward the assessment of central bank performance by political powers and society. However, it was already complex for citizens and political actors to assess central bank decisions

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<sup>7</sup> M. Hillebrandt, D. Curtin, and A. Meijer, 2014, 5.

<sup>8</sup> M. Joyce, D. Miles, A. Scott, D. Vayanos, "Quantitative easing and unconventional monetary policy – an introduction", (2012) 122 *The Economic Journal*, 271-288.

<sup>9</sup> C. A. Goodhart, 'The changing role of central Banks', (2010) 326 *BIS Working Papers*; M. Aglietta, 'Complément A: La rénovation des politiques monétaires', in *Le "central banking" après la crise: deux lectures d'une enquête internationale auprès d'économistes et de banquiers centraux*, (2011) 1 Rapport Conseil D'analyse Économique (CAE); C. Borio, 'Central banking post-crisis: what compass for uncharted waters?', (2011) 353 *BIS Working Papers*.

<sup>10</sup> The Asset Purchase Programme (APP) consists of purchases of both private and public sectors' securities by the central bank to influence interest rates in the European market.

<sup>11</sup> For a democratic legitimacy approach see V. A. Schmidt, 'The Forgotten Problem of Democratic Legitimacy', in Matthias Matthijs and Mark Blyth (eds.), *The Future of the Euro* (Oxford: Oxford University Press, 2015), 90-114.

through legal instruments related to operational transparency in the traditional monetary policy framework, either soft or hard law in nature. What could be said about the QE policies and new financial functions acquired after the 2008 crisis? In democratic and global integrated societies, how to assure supervision of complex public actions taken by monetary authorities?

The Ombudsman is particularly concerned with this issue and has been challenged to give answers to European citizens. The global financial distress called for the re-imagination of transparency mechanisms in monetary policy and banking supervision. This new attitude towards transparency is a way to re-legitimate central bank actions. Along with the European Council, the Parliament and the Court of Justice, we hypothesise that the Ombudsman has been able to adopt, interpret and, especially, enforce transparency rules. We believe the Ombudsman “out-of-the-box” approach has added an important chapter in the transparency of the eurozone.

This paper is divided into four sections. Besides this introduction, in the next section, we identify the literature gap on central bank transparency, as well as on the relationship between non-judicial bodies and monetary authorities. In the third section, we present our assessment of the Ombudsman’s fifteen cases involving the ECB (all cases related to central bank transparency and governance of monetary affairs, since the foundation of the ECB). Even though Ombudsman’s pronouncements are non-binding (a very different feature if one compares to Courts), this European institution has been promoting identifiable impacts on central bank institutional framework. Its soft-law nature is contrasted with hard effects generated by cases involving the ECB since 1999, as we will explore below. In the fourth section, we explore the conditions under which the Ombudsman tends to play a more strategic and activist role in promoting transparency in monetary and financial affairs. We argue that it depends on the type of decisions and legal reasoning adopted to interpret each case. The Ombudsman sustained principle-based arguments when conducting complaints, in which it tried to reinforce the idea of maximum transparency for the ECB policies. The recourse to the notion of optimum transparency, on the other hand, was verified when the Ombudsman accepted formalistic rule-based arguments sustained by the Central Bank, without making further clarifications or questioning the monetary authority. Usually, this approach was adopted in cases dealing with policies designed to fight financial crisis in the eurozone. A brief conclusion follows.



## 2) The literature gap on the ECB transparency: soft-law instruments have been neglected

Since the 1990s, the literature on central bank transparency and accountability is very proficient.<sup>12</sup> Yet, as Duran argued,<sup>13</sup> this literature (1) with few exceptions,<sup>14</sup> analysed transparency from essentially an economic perspective (i.e. focused on efficiency of monetary policy and central bank communication towards market agents), and (2) accountability instruments were fused with transparency tools and the main literature did not sufficiently pay attention to the differentiation between *ex ante* and *ex post* institutional mechanisms to keep monetary power in check. Although “transparency” and “accountability” generally come together, transparency is a requirement to ensure accountable public institutions. In fact, the growing relevance of *soft-law* in monetary policy transparency was not identified by this intellectual field.

Yet, these legal mechanisms were the main institutional innovation of central banks in the last decades. The political choice of operational transparency created a set of tools (such as inflation targets, or interest rate goals), which are not only policy

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<sup>12</sup> R. Lastra and H. Shams, ‘Public accountability in the financial sector’, in E. Ferran and C. Goodhart (eds), *Regulating financial services and markets in the twenty first century* (Hart Publishing, 2001), at 165; De Haan, F. Amtenbrink and S. Eijffinger, ‘Accountability of central Banks: aspects and quantification’, (1998), 9854 *CentER Discussion Paper Series*; F. Amtenbrink, *The democratic accountability of central Banks: a comparative study of the European central bank* (Oxford, 1999); L. Bini-Smaghi, D. Gros, ‘Is the ECB accountable and transparent?’, (2001) *European Institute of Public Administration*; C. Van der Berg, *The making of the Statute of the European System of Central Banks: an application of checks and balance* (Dutch University Press, 2005); A. Blinder, *The quiet revolution: central banking goes modern* (Yale University Press, 2004); T. Lybek, ‘Central Bank Autonomy, Accountability, and Governance: Conceptual Framework’, (2005) 4 *Current Developments in Monetary and Financial Law*; J. De Haan, S. Osterloo, ‘Transparency and accountability of central banks in their role of financial stability supervisor in OECD countries’, (2006) 22 *European Journal of Law and Economics*; N. Dincer, B. Eichengreen, ‘Central bank transparency: where, why, and with what effects?’, (2007) 13003 *National Bureau of Economic Research*; M. Goodfriend, ‘How the world achieved consensus on monetary policy’, (2007) 21 (4) *Journal of Economic Perspectives*; B. J. Laurens, M. Arnone and J. Segalotto, *Central bank independence, accountability and transparency: a global perspective* (Palgrave Macmillan; International Monetary Fund, 2009); C. Van der Cruysen, S. Eijffinger and L. Hoogsuin, ‘Optimal central bank transparency’, (2010) 29 (8) *Journal of International Money and Finance*; C. Van der Cruysen, D. Jansen and J. De Hann, ‘How much does the public know about the ECB’s monetary policy? Evidence from a survey of Dutch households’, (2010) 1265 *European Central Banks Working Paper Series*.

<sup>13</sup> C. V. Duran, 2015.

<sup>14</sup> J. Fox, ‘The Uncertain Relationship between Transparency and Accountability’, (2007) 17 *Development in Practice*, 669; R. Lastra and H. Shams, ‘Public accountability in the financial sector’, in E. Ferran and C. Goodhart (eds), *Regulating financial services and markets in the twenty first century* (Hart Publishing, 2001), at 165. See also O. Issing, V. Gaspar, I. Angeloni and O. Tristani, *Monetary policy in the Euro Area: strategy and decision-making at the Central European Bank* (Cambridge, 2001) and N. Vardi, *The integration of European financial markets: the regulation of monetary obligations* (Routledge-Cavendish, 2011).



instruments to manage inflation expectations. They are ‘binding’ with a particular legal nature - even though they were not created by parliaments or head of governments through laws.

Another literature gap is the relative absence of detailed empirical analysis on the role of judicial and non-judicial bodies on the review of monetary and financial policies. In Europe, few studies have focused on the relation between the ECB and the Court of Justice of the European Union (CJEU) or the European Ombudsman. One may mention the collection of articles on the CJEU’s decision related to the implementation of the Outright Monetary Transactions (OMT)<sup>15</sup> by the central bank (the ‘Gauweiler case’) published a special section at the German Law Journal (2015). However, these articles do not focus on how the CJEU is contributing (or not) to enhance the public oversight of monetary decisions, but rather on how this decision impacts the constitutional design of the EU and its relationship with national courts.<sup>16</sup>

In what concerns studies on the European Ombudsman practices, there is important literature stating its prominence in the general EU accountability framework. On the analysis of the Ombudsman’s particular proceedings, Cadeddu<sup>17</sup> argues that the protection of the citizen’s fundamental rights and the establishment of procedural rules to foster democratic participation are within the scope of this entity. In this regard, the author sustains the Ombudsman has successfully promoted “good administration” among the EU institutions by means of reports, speeches, letters, notes, and press releases. For instance, in the context of United States-EU negotiations for the Transatlantic Trade and Investment Partnership (TTIP), the European Ombudsman interventions were central to foster transparency. The Ombudsman was even considered “a dog that can bite” during the TTIP negotiations.<sup>18</sup>

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<sup>15</sup> The OMT was announced by the ECB in August 2012. The main goal of this policy was to purchase sovereign bonds issued by the Eurozone member-states in the secondary markets.

<sup>16</sup> For a contribution related to the CJEU review of the European Council decisions, see V. Abazi, M. Hillebrandt. ‘The legal limits to confidential negotiations: Recent case law developments in Council transparency: Access Info Europe and In ’t Veld’, (2015) 52 (3) *Common Market Law Review*.

<sup>17</sup> S. Cadeddu, ‘The proceedings of the European Ombudsman’, (2004) 68 (1) *Law & Contemporary Problems*.

<sup>18</sup> C. Harlow, ‘Editorial: transparency, accountability and the privileges of power’, (2016) 22 (3) *European Law Journal*, 277.

Kirkham and Thompson<sup>19</sup> highlighted that this institution promoted integrity, transparency, and accountability, providing a valuable independent review of the political actors for citizens. Fundamentally, the investigative role and the strategic approach ('fire-watching' and 'fire-fighting') has been recognized. Researchers have stressed the Ombudsman's active role towards democratic improvements of the EU institutions.<sup>20</sup> For instance, the Ombudsman has produced guidance on the content of good administration,<sup>21</sup> impacting local ombudsmen in different European countries.<sup>22</sup>

Notwithstanding this proficient literature, a study focused specifically on the relationship between the European Ombudsman and the ECB is still absent. Both Magnette<sup>23</sup> and Cadeddu<sup>24</sup> refer to few Ombudsman's cases related to the ECB.<sup>25</sup> However, they did not emphasise the possible institutional effects produced *by* the Ombudsman's decisions *on* the transparency framework of the ECB.

Using its powers to check governance procedures, the European Ombudsman can indirectly reach the *content* of monetary decisions by giving voice to stakeholders outside parliaments, or markets. The institution deals with individual and collective complaints which enables citizens to address monetary and financial questions related to the ECB governance.

The Ombudsman methods shift the idea of EU institutions' legitimacy from being exclusively substantive, "placing emphasis on effective policy outcomes,"<sup>26</sup> to procedural legitimacy, in which those affected by a rule have somehow been included in the process of public policies' debates. This framework is essentially *ex post*, but with *ex ante* effects. This model has been managed to allocate voice to European stakeholders, enabling them to scrutinize the ECB's decisions.

The soft post-legislative rulemaking of the EU institutions, based on communications, notices, and codes, became an integral part of the EU law

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<sup>19</sup> T. Buck, R. Kirkham and B. Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011).

<sup>20</sup> M. Smith, 'Developing administrative principles in the EU: A foundational model of legitimacy', (2012) 18 (2) *European Law Journal*, 285. See also, C. Harlow and R. Rawlings, 'Promoting accountability in multilevel governance: a network approach', (2007) 13 (4), *European Law Journal*, 556.

<sup>21</sup> E. Ombudsman, *The European code of good administrative behavior* (2001).

<sup>22</sup> T. Buck, R. Kirkham and B. Thompson, 2001.

<sup>23</sup> P. Magnette, 2003.

<sup>24</sup> S. Cadeddu, 2004.

<sup>25</sup> C. Harlow, 2016; P. Magnette, 2003, 699-689.

<sup>26</sup> L. Senden, 2013, 58.

implementation.<sup>27</sup> As a result, the European Ombudsman soft powers have grown in importance and have the potential to enhance the ECB transparency, notably in the context of accentuated complexity of central bank mandates and responsibilities.<sup>28</sup>

From a legal perspective, the Ombudsman can be compared to an alternative dispute resolution mechanism (ADR), engaging in account giving and questioning, even though it has no proper legal sanctions. The institution tends to positively benefit both complainants and public authorities, characterizing a ‘positive-sum’ situation.<sup>29</sup>

Even though Article 288 of the TFEU acknowledges that “recommendations and opinions shall have no binding force,” soft-law mechanisms such as communications, notices, codes, and similar instruments have been essential legal tools to implement policies in the EU. Legal effects can be produced from several legal actors and institutions’ decisions, such as judicial interpretation (Grimaldi Case).<sup>30</sup> Both the TFEU (article 7) and the Treaty of European Union (TEU), article 13(1), recommends consistency among EU authorities, which certainly apply to the Ombudsman activities.

In fact, this flexible legal nature highlights a retrospective element (*ex post*) of the Ombudsman’s decision as a tool for transparency (*ex ante* effect).<sup>31</sup> Even if the Ombudsman is a type of ‘constraint institution,’<sup>32</sup> it is not tied to formal structures and chains of delegation. Sieberer, for instance, argues that the Ombudsman can be classified as a ‘powerful player,’ mainly because it ‘can influence the payoffs and thus indirectly the behaviour of other actors, for example by making influential public statements or providing new information.’<sup>33</sup> Hard effects are not related to the classical analysis of law (the presence or not of sanctions), but the effectiveness of different legal tools to achieve their goals using other types of behavior incentives.

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<sup>27</sup> L. Senden, 2013.

<sup>28</sup> For Harlow and Rawlings (2007, 545-546), ‘We do not see this difficulty [to define accountability without the possibility of sanction] as overcome by stretching the term (as Bovens does) to embrace informal “sanctions” of publicity or apology and negative consequences such as “disintegration of reputation or career”. More positively, we see reparation and effective redress as key factors in legitimation through accountability’.

<sup>29</sup> C. Harlow, R. Rawlings, 2007, 555.

<sup>30</sup> L. Senden, 2013, 62, selected this case: ‘national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.’

<sup>31</sup> C. Harlow, R. Rawlings, 2007, 545.

<sup>32</sup> U. Sieberer, ‘Checks or toothless tigers? Powers and incentives of external officeholders to constrain the cabinet in 25 European democracies’, (2012) 47 (4) *Government and Opposition*.

<sup>33</sup> U. Sieberer, 2012, 519.

Concisely, the fundamental elements of the Ombudsman's attributes, which may impact the framework for monetary governance, are: (1) its investigative power, (2) its openness to complaints by any European citizen or resident without formalities, and (3) its 'contradictory' procedures, where complainant and administration can dialogue and reach an agreement. Its technical specialization on governance issues and good administrative practices reshapes citizen's arguments and can put them in a similar level of knowledge as European economic bureaucracies. Also, it works through repressive measures that may generate effects on European institution's reputation and prestige - a sort of sanction feared notably by central banks.

Being a relevant 'source of diffuse power', the Ombudsman exercises political pressure on institutions in Europe. It is also a form of ensuring indirect procedural legitimacy.<sup>34</sup> The Ombudsman has been a relevant actor to enhance EU governance, with its independent, dialogic and political role.<sup>35</sup> It seems that the Ombudsman is also playing a relevant role for the ECB transparency, which can be further expanded.

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<sup>34</sup> L. Senden, 2013.

<sup>35</sup> M. Lee, 'Accountability and co-production beyond courts: the role of the European Ombudsman', (2005) Workshop *Regulating Risks in the European Union: The co-production of Expert and Executive Power*, 8.

### 3) Soft-law mechanisms, hard institutional impacts: how is the European Ombudsman improving the ECB transparency?

The Ombudsman has a critical ‘dialogic and political role.’<sup>36</sup> It tends to emphasize reflection and dialogue among European institutions and stakeholders. Pragmatically, the Ombudsman may first try to ensure a ‘friendly solution’ (which might not be effective). When the Ombudsman is not satisfied with the European institution’s justifications, it can draft a special report to the Parliament. While it has no *formal* coercive powers, the Ombudsman proceeds, through flexible interventions, can produce political pressure.<sup>37</sup> Consequently, the Ombudsman has been able to create a procedural legitimacy by manipulating its soft powers<sup>38</sup>, even impacting one of the most independent institutions in Europe: the ECB.

Up to the present, the Ombudsman decided a total of 15 (fifteen) cases concerning the ECB governance and transparency, which involved complaints related to the management of monetary policy, financial regulation as well as broader institutional matters.<sup>39</sup> Those cases are sufficient for the empirical analysis due to the (i) varieties of issues related to the ECB governance in monetary affairs; and (ii) the possibility to analyze the work of three different Ombudsman’s since the ECB foundation. Most of the cases (eleven) were initiated by European citizens or residents, which reveals the high degree of the Ombudsman’s facilitated access (Table 1, below). Other cases comprised complaints by a member of the European Parliament (one case) and a non-governmental organization - NGO (two cases), as well as a procedure initiated by the Ombudsman’s own initiative.

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<sup>36</sup> M. Dawson, ‘Transforming into What? New Governance in the EU and the “Managerial Sensibility” in Modern Law’ (2010) 389 *Wisconsin Law Review*.

<sup>37</sup> M. Lee, 2017.

<sup>38</sup> Busuoiu argues “through a unique combination of mediation, (political) pressure, arbitration, its role as a quasi-judicial body and parliamentary body, it has demonstrated itself to be veritable ‘magistrate of influence’”. In M. BUSUIOC, *European agencies: law and practices of accountability* (Oxford University Press, 2013), 244.

<sup>39</sup> We do not include in our empirical research cases related to the ECB legal regime for employees and other service contracts. These rules are not aimed at the management of the European currency, or financial stability, which are the focus of this paper.

**Table 1. European Ombudsman cases concerning the transparency and governance of monetary and financial affairs in the eurozone**

Case denomination and official number		Opened on	Ombudsman	Complainant
<b>1. Group of 30 – case II</b>	1697	2016	Emily O'Reilly	NGO
<b>2. ECB duty of compensation in case of policy failure</b>	1836	2016	Emily O'Reilly	Irish resident
<b>3. Quantitative easing policies</b>	1276	2016	Emily O'Reilly	European resident
<b>4. ECB powers on prudential supervision and consumer protection</b>	18	2016	Emily O'Reilly	Irish resident
<b>5. Asset Purchase Programmes</b>	1742	2015	Emily O'Reilly	British resident
<b>6. AnaCredit</b>	1693	2015	Emily O'Reilly	Member of the European Parliament <sup>40</sup>
<b>7. Eurozone convergence criteria</b>	356	2014	Emily O'Reilly	German resident
<b>8. Irish ECB letter</b>	1703	2012	P. Nikiforos Diamandouros and Emily O'Reilly	Irish resident <sup>41</sup>
<b>9. Group of Thirty – case I</b>	1339	2012	P. Nikiforos Diamandouros	NGO <sup>42</sup>
<b>10. Spanish ECB letter</b>	2016	2011	P. Nikiforos Diamandouros	Spanish resident
<b>11. Language for ECB communication - case II</b>	1008	2006	P. Nikiforos Diamandouros	French resident

<sup>40</sup> The MEP is Sven Giegold, a German politician (Group of the Greens/European Free Alliance).

<sup>41</sup> The complainant was an Irish journalist, Gavin Sheridan.

<sup>42</sup> The organization was the Corporate Europe Observatory (CEO), an NGO based in Brussels, which works on exposing the power of lobbying groups in Europe.

Case denomination and official number		Opened on	Ombudsman	Complainant
<b>12.</b> <b>European Exchange rate policy</b>	3054	2004	P. Nikiforos Diamandouros	European resident
<b>13.</b> <b>Euro banknotes</b>	1939	2002	P. Nikiforos Diamandouros	European resident
<b>14.</b> <b>Language for ECB communication - case I</b>	281	1999	Jacob Söderman	European resident
<b>15.</b> <b>Rules governing public access to documents</b>	1	1999	Jacob Söderman	Ombudsman (own initiative)

In all of these cases, except for the Case 1, the Ombudsman declared there was *no maladministration* on the part of the ECB. Nine cases revealed a clear and identifiable contribution to the ECB transparency (Section *a*, below). Therefore, the Ombudsman's particular influence was not in the inquiry result *per se* (the identification of an act of maladministration or not), but elsewhere: in the manipulation of its independent and soft powers and the establishment of an institutional forum to build dialogue among the complainants and the ECB. Also, the Ombudsman vocalized issues related to institutional governance. Particularly, in cases 1, 2, 6, 8, 9,<sup>43</sup> 10 and 15, the ECB seems to change its behaviour to respond to the Ombudsman's demands for transparency. All three Ombudsmen contributed to this movement: Emily O'Reilly, P. Nikiforos Diamandouros and Jacob Söderman. Particularly, O'Reilly dealt with the most challenging cases related to financial crisis policies in the eurozone and issued relevant decisions impacting the ECB transparency.

#### **a) Cases with relevant impact on the ECB governance**

<sup>43</sup> Both Cases 1 and 9 are related to the same issue: the relation between the ECB and the 'Group of 30'.

The AnaCredit case (Case 6, Table 1, above) was the most remarkable one. By means of a complaint, a member of the European Parliament (MEP) manifested his concerns on the AnaCredit regulation to be issued by the ECB. The AnaCredit is ‘a project to set up a dataset containing detailed information on individual bank loans in the euro area, harmonized across all member states.’<sup>44</sup> The Central Bank aim was to create an analytical credit dataset. The MEP was concerned that this regulation might be a breach of higher-ranking EU law, particularly rules and principles concerning data protection. Furthermore, according to him, the ECB should carry out public consultation before issuing this type of regulation, since it concerns millions of people in Europe.

In her decision, O’Reilly noted that the ECB was - at that time - examining the MEP substantive concerns and it was consulting the Data Protection Supervisor in Europe. Her first assessment was that, as *prima facie*, the legal basis for the AnaCredit did not seem to be ‘wrong’. However, concerning the public consultation, she provoked the ECB to take action. The Central Bank consulted the banking industry, but no assured the participation of citizens in Europe. In her words,

I note from material published by the ECB on 11 November 2015 that the Bank ran a 'merits and costs' procedure, in which '*representatives of the banking industry were directly involved*' [...]. It is further stated that the industry was informed on many occasions and extensively in writing. [...] The regulation to be adopted will affect millions of individuals; **adopting it without ensuring the most appropriate consultation of stakeholders and the wider public may undermine the public trust of AnaCredit, irrespective of its merits.**<sup>45</sup>

The Ombudsman’s decision was issued on 20 November 2015. On 4 December, the ECB published a draft regulation for the AnaCredit and opened a period of more than 50 days for public consultation. The ECB also clarified that it would “provide feedback on how the observations received were assessed and taken into account in the Regulation.”<sup>46</sup> This was accomplished in May 2016.<sup>47</sup> The Central

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<sup>44</sup> ECB website.

<sup>45</sup> Fragments of the Ombudsman’s decision on the Case, 1693/2015/PD *AnaCredit*, European Ombudsman, emphasis added.

<sup>46</sup> See the ECB announcement at: <https://www.ecb.europa.eu/stats/money/aggregates/anacredit/html/index.en.html>

<sup>47</sup> See the ECB feedback statement at: [https://www.ecb.europa.eu/stats/money/aggregates/anacredit/shared/pdf/feedback\\_statement\\_201605.en.pdf](https://www.ecb.europa.eu/stats/money/aggregates/anacredit/shared/pdf/feedback_statement_201605.en.pdf)



Bank also explained the confidential rules of the project: '[d]ata will be treated according to strict confidentiality rules as set out under existing European law, and will only be accessible to the [aforementioned] users and for the foreseen uses.'<sup>48</sup>

Therefore, the ECB reacted positively to the Ombudsman's decision promoting, in a very short period, a public consultation for the AnaCredit regulation and, by its website, tried to address the initial concerns on data protection. Also, it is important to remark the Ombudsman's sentences: she clearly vocalized the interests of other stakeholders, besides the financial industry.<sup>49</sup>

Another case, which had a relative impact on the ECB, was the contestation made by an NGO on the Central Bank President's membership of the Group of Thirty - G30 (Cases 1 and 9, Table 1, above). The NGO stressed that this membership could jeopardize the ECB independence since private market agents were also members of this Group. The G30 was considered, by the complainant, as a 'lobbying vehicle'. In 2013, in his final decision (Case 9), the Ombudsman P. Nikiforos Diamandouros analysed in detail the Group's membership and financial support. It found a great variety of interests inside the institution and did not characterize it as a private market's lobbying group. In fact, he understood that this Group is a diversified forum, in which ideas on monetary regulation could be exchanged in an open dialogue. He emphasizes that the ECB should dialogue in other forums as well, not only at the G30.<sup>50</sup>

In 2017, it was possible to identify a change in the Ombudsman's views concerning the G30. An NGO made a new complaint (Case 1) related to the Central Bank independence in the light of its involvement in the Group. The Ombudsman has

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<sup>48</sup> See the ECB announcement at: <https://www.ecb.europa.eu/stats/money/aggregates/anacredit/html/index.en.html>.

<sup>49</sup> Possibly, this case had another effect: the announcement of a research fellowship on ECB transparency on 9 December 2015. The second edition of the 'ECB Legal Research Programme' called for papers on a 'comprehensive analysis of the principle of transparency, including in view of the case law of the relevant courts and the practice of non-judicial subjects (e.g. the European Ombudsman) [which] would be relevant to determine whether transparency demands prevail over other competing requirements (related to central bank activities), favouring a more limited scrutiny'. See the announcement at: [https://www.ecb.europa.eu/pub/conferences/html/20151209\\_lrp.en.html](https://www.ecb.europa.eu/pub/conferences/html/20151209_lrp.en.html).

<sup>50</sup> In his words, "[...] the obligation to maintain an "open" dialogue with civil society also implies that the dialogue should be balanced, affording diverse interlocutors an appropriate opportunity to debate issues of relevance to the work of the ECB. This observation does not imply that members of the decision-making bodies of the ECB should seek only to engage with those civil society groups that encompass, internally, the entire diversity of views on issues of relevance to the work of the ECB. Indeed, it is unlikely that such all-encompassing groups exist. Rather, it means that efforts **should be made to discuss the work of the ECB in diverse fora**, in addition to discussing the work of the ECB in the context of entities such as the Group of Thirty." (Fragments of the Ombudsman's decision on the Case 1339/2012/FOR, European Ombudsman, [our] emphasis).

taken a highly active position, addressing sixteen questions to Mr. Mario Draghi. In accordance with Article 3(6) of the Statute of the European Ombudsman, on January 15 of 2018, the Ombudsman recommended that the ‘ECB should, therefore, ensure that the President of the ECB suspends his membership [of the G30] for the remaining duration of his term’<sup>51</sup> and that the G30 non-member events should be subject to the same transparency measures applied to other ECB meetings. On July of 2018, O’Reilly declared that the Central Bank had failed to ensure its President suspends his membership of the G30. According to her decision, this confirmed her original finding of maladministration in this case, since “it gives rise to a public perception that the independence of the ECB could be compromised.”<sup>52</sup>

In Case 2 (‘ECB duty of compensation in case of policy failure’), the Ombudsman’s assessment might be considered a *symbolic* improvement on the ECB’s transparency. The complainant wrote to the ECB asking for compensation for its failure since 1999 to regulate financial issues in the Eurozone, particularly related to Irish banks. This case is rather relevant due to the procedure adopted by the Ombudsman, highlighting the communication gap between a European citizen (an Irish citizen) and the ECB.

Four cases with significant impacts (Cases 10, 12, 13 and 15, Table 1, above) concerned European citizens’ demands to access ECB documents or information. Regarding the *qualitative arguments* brought forth by the Ombudsman, the most valuable case was Case 10 (‘ECB communication with Spanish authorities’). In this matter, a Spanish lawyer asked to access a document sent by the ECB to political authorities in Spain. The Central Bank refused, basing its decision on the exception concerning the protection of economic and monetary policy interests (Article 4(1) (a), second indent of Decision ECB/2004/3). However, in the European citizen’s view, the ECB decision was not issued with an appropriate ‘statement of reasons.’

In this case, the Ombudsman mentioned cases-law at the CJEU to identify the European legal regime on the statement of reasons. In his words, the Court of Justice has clearly held that, when processing an application for access to documents, the institutions must carry out a specific examination of each document concerned. The mere fact that a

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<sup>51</sup> Fragments of the recommendations of the European Ombudsman on the involvement of the President of the European Central Bank and members of its decision-making bodies in the ‘Group of Thirty’ (1697/2016/ANA)

<sup>52</sup> Fragments of the decision of the European Ombudsman on the involvement of the President of the European Central Bank and members of its decision-making bodies in the ‘Group of Thirty’ (1697/2016/ANA).

document concerns an interest protected by an exception is not, in itself, sufficient to justify the application of that exception. On the contrary, the institution in question must, in principle, explain **how disclosure of the document could specifically and effectively undermine the interest protected by the exception invoked**. In addition to that, the risk of protected interests being undermined must be reasonably foreseeable and **not purely hypothetical**.<sup>53</sup>

Case 8 ('Irish ECB Letter') is also a relevant case, which had a significant impact on the ECB transparency decisions. The complainant aimed to grant public access to a letter sent by the ECB President, Jean-Claude Trichet, to the Irish Finance Minister on 19 November 2010. The complaint was originated with the ECB refusal to disclose the Letter to an Irish journalist (Gavin Sheridan), based on the need to protect the integrity of Ireland's monetary policy and the stability of the Irish financial system. The refusal was also based on the significant market pressure and extreme uncertainty of the Irish economy after the 2008 financial crisis.

The European Ombudsman opened an inquiry in 2012, which increased the pressure on the ECB to grant access to the Letter. Subsequently, the document was only submitted to the Ombudsman, who considered that 'at the time of the request, the ECB was entitled to refuse access based on the exceptions laid down in Article 4(1) of the ECB Decision on public access to documents'.<sup>54</sup> However, although the Ombudsman declared there was no *maladministration*, O'Reilly invited the ECB to reconsider its decision, since the initial request was made two years earlier and the refusal of the ECB seemed to be no longer applicable. The Governing Council, however, maintained its position. On 07 March 2014, Emily O'Reilly stated that it was a missed opportunity for the ECB to foster transparency; according to her,

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<sup>53</sup> Fragments of the Ombudsman's decision on the Case 2016/2011/ER, European Ombudsman, [our] emphasis. The cases-law were: Case C-506/08 P *Sweden v MyTravel and Commission*, judgment of 21 July 2011, not yet published in the ECR, paragraph 76; Case T-250/08 *Bachelor v Commission*, judgment of 24 May 2011, not yet published in the ECR, paragraph 78; Case T-166/05 *Borax Europe v Commission*, judgment of 11 March 2009, not yet published in the ECR, paragraph 88; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission*, judgment of 21 September 2010, not yet published in the ECR, paragraph 72; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-1429, paragraph 43; Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; *Sison v Council*, cited in footnote 5, paragraph 75."

<sup>54</sup> See the decision of the European Ombudsman closing the inquiry into complaint 1703/2012/(VIK)CK against the European Central Bank(CEB) at: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54178/html.bookmark> at: <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54178/html.bookmark>.

*I regret that the Governing Council of the ECB has wasted an opportunity to apply the principle that, in a democracy, transparency should be the rule and secrecy the exception. At a time when so many people have been, and are, suffering as a result of austerity arising from the economic crisis, the very least a citizen can expect is openness and transparency from those who make decisions that directly impact on their lives and on the lives of their families. Following an inspection of the letter, I am unconvinced by the Governing Council's explanation for continuing to keep it secret.*<sup>55</sup>

In order to attenuate O'Reilly criticism towards the ECB, the Central Bank committed itself to re-evaluate the possibility of disclosing the Letter. This approach was considered a "friendly solution" by the ECB. On November 2014, Mr. Mario Draghi informed the Ombudsman that the Governing Council decided to disclose the Letter.<sup>56</sup> As a 'symbolic act,' in the same document, the ECB President announced the disclosure of three other letters exchanged between the Central Bank and the Irish financial authorities.

Case 13 ('Euro banknotes') discussed an important issue: the ECB did not explain sufficiently its reasons for not providing information related to the statistics on stock and flows of euro banknotes. In this case, Diamandouros warned the ECB he could not accept that Central Bank 'is entitled' to rely on a purely 'intellectual' argument related to 'irrational behaviour' from the public, such as the idea of a run on banknotes in countries where there is less stock. The ECB did not offer 'evidence to substantiate this argument which, moreover, does not appear to relate to any of the exceptions' contained in the ECB regulation regarding the publication of documents (Article 4, Decision ECB/2004/3).<sup>57</sup> Therefore, the Ombudsman stressed that economic ideas are not acceptable as reasons for reducing Central Bank transparency.

Case 15 ('Rules governing public access of documents') also produced an important impact. It was the first case involving the ECB. It was an inquiry on the J. Söderman's initiative concerning different European institutions, and their rules governing public access to documents. The first ECB regulation regarding this issue was the Decision 1998/12 and the Ombudsman identified problems on it. The most

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<sup>55</sup> Fragments of the Ombudsman's decision on the Case 1703/2012/(VIK)CK *Irish ECB Letter*, European Ombudsman, [our] emphasis.

<sup>56</sup> Mario Draghi attributed his decision to the 'developments in the Irish economy and funding markets and in particular, considering the conclusion of the comprehensive assessment for the Irish financial sector.' See the Follow-up by the European Central Bank at: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58280/html.bookmark>.

<sup>57</sup> Fragments of Fragments of the Ombudsman's decision on the Case 1939/2002/IJH, European Ombudsman.

relevant was: the ECB only regulated the access of so-called ‘administrative documents’ and did not mention the procedures to have access to Governing Council decisions on monetary policy, such as the meetings’ minutes. The dialogue with the ECB, during the inquiry, seemed to be tensioned. The ECB ‘remembered’ the Ombudsman that, according to the TFEU, it was *not obliged* to disclose its decisions. The Ombudsman replied saying the Central Bank may reveal if it decides to, and the regulation should govern this procedure. He referred to different cases-law of the CJEU.

This inquiry was the first to establish an institutional dialogue between these two European institutions and, after this first one, the ECB seems to be more cordial and attentive to the Ombudsman’s demands and remarks. Also, the Ombudsman clearly vocalized a particular concern with the Governing Council’s minutes, which contain the most relevant decisions of the European monetary policy. We cannot identify a causal relationship between this particular Ombudsman’s decision, issued on 24 September 1999, and the ECB political choice to publish regularly its minutes in 2015.<sup>58</sup> Besides, the ECB issued a better regulation concerning access to documents in 2004 (ECB Decision 2004/3), in which there were no more distinctions between ‘administrative’ and other policy decisions. The regulation applies for any document formalized by the ECB.

#### **b) Cases without particular contribution, or with negative impact on the ECB governance**

In all the cases without contribution, or with a negative impact on the ECB transparency, the questionable outcome was not related to the absence of legal enforcement of the inquiries. The Ombudsman decision impacted negatively due to his/her approach on the matter, and the ‘automatic’ acceptance of a specific ECB’s argument without asking for a more developed reasoning on the part of the Central Bank. The Ombudsman could have acted in a more strategic way or, at least, s/he could provide different approaches to achieve harder effects. It is interesting to note that no particular contribution in enhancing transparency was pronounced in cases related to financial stability policies and unconventional monetary measures destined to deal with crises in the eurozone (e.g., QE, SSM and the Asset Purchase Programs).

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<sup>58</sup> However, since its creation, the ECB established an institutional practice of organizing press conferences after the Governing Council’s meetings.

Case 3 ('Quantitative easing policies', Table 1, above) is related to unconventional monetary policies implemented by the ECB after the financial crisis. The complainant asked, 'how can quantitative ease help increase the inflation rate?.' The Ombudsman understood that ECB provided a comprehensive answer to the complaint, without asking for more information, or for an improvement regarding the communication of the ECB monetary choices in the future. In the enquiry, we could identify the difficulties of the complainant to understand the policy aims.

The ECB powers on prudential supervision and consumer protection (Case 4, Table 1, above) were questioned in another case with no particular contribution to the ECB transparency. The Ombudsman asked the Central Bank to provide the complainant with a detailed answer concerning its supervisory role in relation to national central banks, and the its mission in the Single Supervisory Mechanism (SSM), notably in supervising private entities. After the ECB's clarifications, claiming that the supervisory decisions do not include compliance with financial regulation in general, or consumer protection laws, the Ombudsman concluded that the ECB answer was comprehensive and based on relevant legislation (i.e., the Council Regulation 1024/2013).

The fifth case (Case 5, 'Asset Purchase Programmes', Table 1, above), even though did not affect the ECB transparency framework, the Ombudsman developed arguments based on case-laws to justify his decision. The complainant, a London based-financial journalist, requested public access to documents containing detailed information on the ECB Asset Purchase Programmes, which aimed to bring inflation rates to levels close to 2%. The ECB replied that access could not be granted because it was covered by exceptions regarding the financial, monetary and economic policies of the EU.

The Ombudsman requested additional clarifications to the ECB, and after analysing all documents provided by the Central Bank, it concluded that the refusal to grant access was in accordance with relevant case-law and, thus, legally justified.<sup>59</sup> For the Ombudsman, the ECB refusal to grant access was convincing. Additionally, as stated in a case-law, 'releasing this kind of data would most likely undermine the

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<sup>59</sup> Case T-376/13 *Versorgungswerk v ECB*.

Eurosystem's efforts to restore confidence in financial markets and to enhance the transmission of monetary policy impulses.'<sup>60</sup>

In case 7 ('Eurozone convergence criteria'), O'Reilley received a complaint by a European citizen, in which s/he argues the ECB was not publishing statistics on convergence criteria in 'user-friendly' form, like a checkbox. The ECB replied that it publishes the relevant data on annual reports and by other means. The Central Bank stressed that member states are called upon to steer their fiscal and other policies in compliance with other criteria in addition to the convergence one.

The Ombudsman did not identify a duty on the part of the ECB to publish the information *in the way* the complainant asked for and did not develop further remarks. However, in this case, we believe the Ombudsman could contribute more to the ECB transparency encouraging the Central Bank to invest in a less complicated form to communicate with the European community. The United States Federal Reserve (Fed), for instance, has been investing in a website for financial education, which contains clear explanations about the Federal Reserve system and its functioning.<sup>61</sup> The Ombudsman could have used this kind of complaint to remember the ECB that there are alternatives to create a friendly environment for understanding complex matters related to European monetary and economic policies.

As regards to the case 12 ('Exchange rate policy'), the Ombudsman accepted ECB allegations to deny the disclosure of the information requested. According to the Ombudsman assessment, the ECB was able to present its reasons for not providing information related to the exchange rate policy.<sup>62</sup> In this case, Diamandouros stated that Regulation 1049/2001 provides for refusal of access to documents where disclosure would undermine the protection of 'public interest as regards: (...) the financial, monetary or economic policy of the Community.'<sup>63</sup>

In cases 11 and 14, we believe the main negative contribution was the acceptance by the Ombudsman (both Diamandouros and Söderman, respectively) of a precise ECB argument, i.e. that there are two different documents on monetary decisions: one to be addressed to 'experts' and financial markets, concerning

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<sup>60</sup> Fragments of the Ombudsman assessment in Case 1742/2015/OV.

<sup>61</sup> The website is: <https://www.federalreserveeducation.org>

<sup>62</sup> The complaint was formulated in these terms: "has the ECB intervened to soften the fall in the dollar and the rise in the value of the Euro?"

<sup>63</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L145: 43) Article 4 (1) (a) fourth indent.

‘technical issues’ in monetary policy and published in English; others to be shared with the European community and written in all languages.

This ‘differentiated language regime’ drew a rigid line between monetary decisions (technical issues) and ‘general information’. Yet, the so-called ‘technical’ decisions have relevant effects on resources allocation among social groups. In both cases, the Ombudsman did not explore the ECB argument and allowed the Central Bank to be less transparent for the general public. Of course, there is a concern on cost-efficiency to publish ECB documents in all community languages. However, a moderate approach could have been explored by the Central Bank to assure its legitimacy.



#### **4) Analysing the dimensions of transparency: in which conditions the Ombudsman is enhancing the ECB transparency framework?**

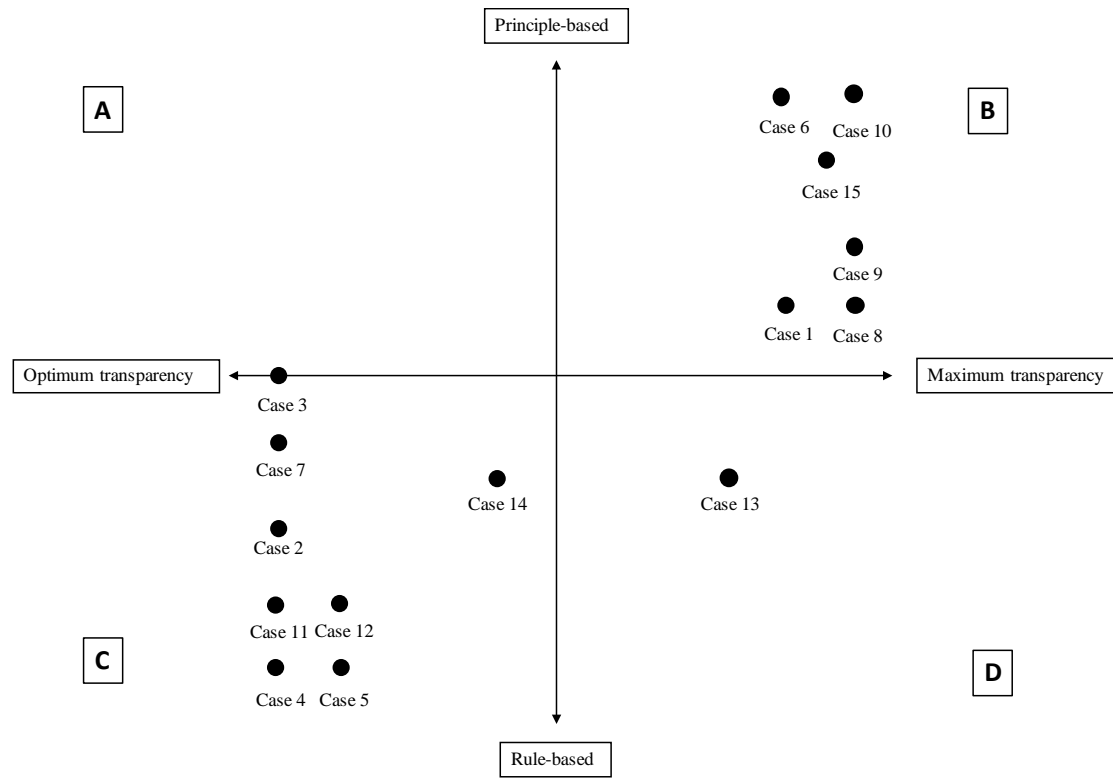
In the previous section, we focused on how the Ombudsman is enhancing the transparency framework of the ECB. A closer look at this empirical data may also glimpse some light in which conditions (explanatory factors) the Ombudsman is doing this work. Are there favourable conditions for the Ombudsman to scrutinize financial and monetary issues more closely, contributing more effectively to enhance transparency?

Based on the empirical analysis, it seems that no condition, in particular, tends to favour (or disfavour) a more ‘activism’ on the part of the European Ombudsman in what concerns monetary and financial policies. However, one could remark that the aim of the policy (to deal with a financial crisis or not) was an essential condition determining the actual influence of the Ombudsman. For instance, cases dealing with new mandates and unconventional monetary actions in the eurozone did not receive more scrutiny on the part of the Ombudsman (e.g., QE, SSM and Asset Purchase Programmes). The ECB arguments were accepted without further Ombudsman’s comments or questions.

Furthermore, the cases reveal that the Ombudsman seems to adopt two types of legal reasoning: (1) rule-based, but *mostly* principle-based, arguments as a positive instrument to push for more transparency at a maximum level; and (2) formal interpretations of rules and case-laws to limit his/her analysis to an optimum level of transparency in policies designed to deal with financial crises in the eurozone. Principles and rules are integral part of legal orders. Rules define specific behaviour prescriptions. Principles defines more vague standards, or values, for conduct. They give to the interpreter more space to define its legal content in each case.

Figure 1, below, and Table 2, in the Annex 1, highlight this approach for the fifteen inquiries and identify the dimensions of transparency adopted by the Ombudsman in each case.

**Figure 1. European Ombudsman legal reasoning (principle or rule-based arguments) and the approach adopted in monetary and financial affairs (dimensions of transparency)**



Two conclusions can be drawn from Figure 1, and Table 2: (1) principle-based arguments were the main legal reasoning used by the Ombudsman to achieve more transparency; and (2) rules were also important to push for more transparency, but in a less extent compared to principles. In fact, rule-based arguments were mainly used by the ECB and confirmed by the Ombudsman in cases identified as adopting an ‘optimum’ transparency approach and in cases dealing with crises’ measures.

Figure 1 is divided into four areas: A, B, C and D. Area ‘A’ creates an unusual combination: principle-based reasoning with optimum transparency. None of the cases met this criterion. It seems coherent since European rules grant to the ECB the decision to reveal or not the justification of monetary policy actions. Therefore, there is no need to explore principle-based arguments to sustain a reduced degree of transparency.

Area ‘B’ identifies the cases in which the Ombudsman managed to push further its soft powers for more transparency. S/he clearly vocalized a pro-transparency view, focusing on the citizens’ rights to have access to public documents and the right to participate in the deliberative process on financial matters (voice).<sup>64</sup> Also, area ‘B’ shows cases not only based on principles but in a combination of both principles and rules (1, 8 and 9).

Cases in area ‘C’ tend to reveal the acceptance of a more formal argument based on *legal rules*.<sup>65</sup> In those cases, prevailed a dimension that transparency should not endanger the institution (efficiency of monetary and financial policies) and less transparency could be necessary to avoid perverse economic effects.<sup>66</sup> The majority of these cases are related to policies destined to deal with financial crises.<sup>67</sup>

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<sup>64</sup> Case 2 is an outlier (see Figure 1). The arguments used by the Ombudsman to accept the complaint laid down on general principles of transparency: she wanted to give “voice” for the complainant.

<sup>65</sup> Cases 13 is an outlier. However, it is an important case from the argumentative and rhetorical point of view, making clear that the ECB should present evidence to substantiate arguments to deny access. Nevertheless, this reasoning did not change the Ombudsman’s decision, which could be classified as ‘optimum’ from the transparency perspective.

<sup>66</sup> Cases 3 is an outlier: is neither based on principles nor on rules.

<sup>67</sup> Case 14, however, is on the border between ‘optimum’ and ‘maximum’. Despite the Ombudsman’s argument that he was ‘not aware that the provisions of Community law concerning use of languages (Articles 21 of EC Treaty; Regulation 1/58)’, he also vocalized a principle-based reasoning: ‘effective communication requires that, as far as possible, the Community institutions and bodies should provide information to citizens in their own language’.

Area ‘D’ shows case 13 as an outlier. The Ombudsman interpreted restrictively the exceptions laid down by an ECB regulation, defining the reasons to restrain the publication of certain decisions.

Clearly, the Ombudsman used a specific legal strategy to push for more transparency in the ECB’s activities: legal principles as arguments. All cases with no particular contribution on the part of the Ombudsman, s/he accepted formal rule-based reasoning (mainly, based on the Regulation 1024/2013, EC Treaty, TFEU, or specific case-laws).

Law can be a persuasive tool for an institutional shift towards more transparency in Central Bank governance. According to our findings, legal principles has been a driving force to operationalize transparency, creating space to move from “optimum” to “maximum” in the transparency spectrum. This strategy is illustrated by cases located in ‘B’ area of Figure 1. It seems that the flexible nature of legal principles created more room for the Ombudsman to accomplish his/her aim. Legal principles tend to emphasize the importance of transparency to implement concrete values, such as democratic governance.<sup>68</sup> In complex domains, such as European governance of monetary affairs, principles can be an effective tool to implement transparency.

The Ombudsman institutional design contributed to change the European framework for transparency from a passive role to strategic and more active tactics. This shift enabled the Ombudsman to select sensitive demands with positive impacts on EU social legitimacy and on the standard monetary policy to push his/her soft powers.<sup>69</sup> As demonstrated by the majority of the cases scrutinized, although the European Ombudsman declared there was *no maladministration* on the part of the ECB (except for Case 1), the Ombudsman’s procedures were effective to promote changes on the way the Central Bank handled its policy and governance issues.

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<sup>68</sup> According to Hillebrandt, Curtin and Meijer, the ethical dimension of transparency deals with the question why we should (not) have transparency. In M. Hillebrandt, D. Curtin, and A. Meijer, 2014, 4.

<sup>69</sup> Curtin and Meijer defined ‘social legitimacy’ as the affective loyalty of those who are bound by it, on the basis of deep common interest and/or strong sense of shared identity. A sense of ‘social legitimacy’ will usually have to be constructed by symbol-building campaigns and communications strategies, not rule-making, in D. Curtin and E. J. Meijer, ‘Does transparency strengthen legitimacy’, (2006) 11 *Information Polity*, 122. For a critical analysis of the relation between “maximum” transparency and legitimacy, see J. Lodge, ‘Transparency and Democratic Legitimacy’, (1994) *Journal of Common Market Studies* 32 (3).

## **5) Conclusion**

This paper presents an analysis of the European Ombudsman decisions involving the ECB governance of monetary and financial affairs. We believe that this institution is contributing to expanding Central Bank transparency. It was evident in eight of the fifteen inquiries involving the ECB decisions.

Despite its soft-law powers, the Ombudsman is promoting hard effects on the ECB framework. However, there is more room to improve it. At least in seven cases, the Ombudsman did not contribute, or impacted negatively Central Bank transparency. The questionable outcome, however, was not attributed to the absence of legal enforcement. In fact, in these seven cases, the Ombudsman could act in a more strategic way or, at least, s/he could provide different approaches to achieve harder effects. For instance, it could further confront the ECB arguments with the complainant's, asking for more detailed reflection on policy issues.

From the legal point of view, the Ombudsman used principle-based arguments to push for more ECB transparency. The Ombudsman practices proved to be an efficient mechanism of alternative dispute resolution. Empirically, its powers were strategically exercised by allocating voice to stakeholders outside the traditional political arena. By including the view of other participants besides parliaments and markets, the Ombudsman positively increased the ECB transparency and improved its governance.

This contribution is even more critical in the context of the post-2008 crisis and the expansion of the ECB powers. It is not irrelevant that most of the cases regarding the ECB occurred in this period and were related to new policies and novel mandates to deal with financial crisis. The Ombudsman's work to enhance legitimacy and transparency across European institutions is an example that the EU legal framework might not require more hard law, but more soft institutions imposing hard effects. More than an alternative to judicial intervention, the soft institutional design of the Ombudsman seems to be a genuine political force to improve transparency among the EU institutions, notably on the ECB.

## Annex 1

**Table 2. Summary and extracts of the European Ombudsman justifications**

Types of legal reasoning	Optimum transparency	Maximum transparency
<p><b>Rule-based arguments</b></p>	<p>‘As to the complainant’s concern that the ECB had failed to rescue the Irish banks, the ECB was correct in its reply that bailing out banks would not be compatible with its tasks under the Treaty on the Functioning of the European Union’ (Case 2).</p> <p>‘The ECB’s reply appears to be comprehensive and <i>based on the relevant legislation</i>’.<sup>70</sup> (Case 4)</p> <p>‘On the basis of the information in the file and the additional information obtained during the meeting of 25 January 2016, the Ombudsman considers the <i>ECB’s decision to refuse to grant access to the requested documents to be correct and in accordance with the relevant case-law on public access to documents held by the ECB</i>’.<sup>71</sup> (Case 5).</p> <p>‘The Ombudsman points out therefore that <i>Articles 21, 314 and 290 of the EC Treaty and Regulation 1/58</i> set out the legal basis for multilingualism in the EU [...] In this regard, the Ombudsman notes that the practice of providing technical information only in English appears reasonable since English tends to be the language most used in international finance (...)’.<sup>72</sup> (Case 11)</p> <p>‘The Ombudsman also points out in this regard that <i>Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents provides for refusal of access to a document where disclosure would undermine the protection of “the public interest as regards: (...) the financial, monetary or economic policy of the Community”</i> and that the ECB’s decision concerning public access provides for an exception to protect the public interest as regards <i>“monetary and exchange rate stability”</i>’. (Case 12)</p> <p>‘The Ombudsman is not aware that the</p>	<p>‘The Ombudsman points out that the ECB offers no evidence to substantiate this argument which, moreover, does not appear to relate to any of the exceptions contained in <i>Article 4 of Decision ECB/1998/12.</i>’ (Case 13).<sup>74</sup></p>

<sup>70</sup> <https://www.ombudsman.europa.eu/pt/decision/en/71604>.

<sup>71</sup> <https://www.ombudsman.europa.eu/en/decision/en/69379>.

<sup>72</sup> <https://www.ombudsman.europa.eu/pt/decision/en/3135>.

<sup>74</sup> <https://www.ombudsman.europa.eu/en/decision/en/1820>.

	<p>provisions of Community law concerning use of languages (<i>Articles 21 of EC Treaty; Regulation 1/58</i>) could prevent a Community body publishing on a Website, as a public service, documents in the language in which they are drafted' (...) effective communication requires that, as far as possible, the Community institutions and bodies should provide information to citizens in their own language. From its opinion, it appears that the ECB envisages a progressive development of the provision of information on its Website in the other Community languages'.<sup>73</sup> (Case 14)</p>	
<p><b>Principle-based arguments</b></p>		<p>'The requirement to conduct an "open, transparent and regular dialogue" with representative associations and civil society is set out in the EU Treaties (Article 11(2) TEU). This means that the <i>highest standards of transparency must always be met in all ECB meetings</i> with financial institutions and related bodies.'<sup>75</sup> (Case 1)</p> <p>'I understand there is no legal impediment to the ECB giving all stakeholders including <i>the wider public an opportunity to voice their views.</i>'<sup>76</sup> (Case 6)</p> <p>'Thus, in line with the Ombudsman's mission to seek <i>fair outcomes</i> to complaints that satisfy both the complainant and the institution concerned, she made the following proposal for a friendly solution, which aimed to give the ECB an opportunity to demonstrate further its commitment to the <i>principles of transparency and accountability</i>' [...] she [Ombudsman] trusts that, should a citizen make a new request for public access to the Letter (Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents 2004/258/EC, OJ 2004 L 80), the ECB will take into account her views and give greater weight to the public interest in transparency and accountability, as well as to the need further to enhance its legitimacy in the eyes of the EU citizens.'<sup>77</sup> (Case 8)</p> <p>'In the Ombudsman's view, <i>the obligation to maintain an "open" dialogue with civil society</i> also implies that the dialogue should be balanced, affording diverse interlocutors an appropriate opportunity to debate issues of relevance to the work of the ECB [...].'<sup>78</sup> (Case 9)</p> <p>'The Ombudsman encourages the European Central Bank to continue to regard the</p>

<sup>73</sup> <https://www.ombudsman.europa.eu/pt/decision/en/1173>.

<sup>75</sup> <https://www.ombudsman.europa.eu/en/opening-summary/en/75199>.

<sup>76</sup> <https://www.ombudsman.europa.eu/pt/decision/en/62903>.

<sup>77</sup> <https://www.ombudsman.europa.eu/en/decision/en/54178>.

<sup>78</sup> <https://www.ombudsman.europa.eu/en/decision/en/49139>.

		<p>disclosure of documents to the public, and the reasoning of decisions refusing disclosure, not only as legal obligations, but also as an <i>opportunity to demonstrate its commitment to the principle of transparency</i> and thereby to enhance its legitimacy in the eyes of citizens.’<sup>79</sup> (Case 10)</p> <p>‘The Ombudsman informed the European Central Bank of his draft recommendations, made in a <i>previous own-initiative inquiry, that Community institutions and bodies should adopt rules concerning public access to documents</i>. In reply, the ECB informed the Ombudsman of its decision ECB/1998/12 of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank.’<sup>80</sup> (Case 15)</p>
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<sup>79</sup> <https://www.ombudsman.europa.eu/en/decision/en/11770>.

<sup>80</sup> <https://www.ombudsman.europa.eu/en/decision/en/2391>.