Speech of the European Ombudsman: The citizen, the rule of law and openness, Speech by Jacob Söderman, European Ombudsman, at the European Law Conference, Stockholm, Sweden, 12 June 2001, Session 8, 12 June 2001, 09.00-17.00, 'The need for clarity and public access: bridging the gap between the Union and its citizens.'

Speech

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. *(From the Preamble to the Charter of Fundamental Rights of the European Union)* .

1 Citizenship and the rule of law

When the Maastricht Treaty entered into force in November 1993, every national of a Member State became, in addition, a citizen of the European Union (1) . Before that, the European Communities operated more like an international organisation, co-operating only with the authorities of the Member States. The European Parliament has been directly elected since 1979, but the citizens had no direct involvement with any of the other institutions.

In the constitutional traditions common to the Member States, citizenship implies that the relationship between individuals and public authority is founded on the rule of law and the principle of democracy. The European Union is based on these principles, as is made clear by Article 6 of the Treaty on European Union and by the Charter of Fundamental Rights, which was proclaimed in Nice, on 7 December 2000, by the Presidents of the European Parliament, the Council and the Commission (2) .

The rule of law implies that no person or body, however powerful, can break the law with impunity. Every citizen is entitled to expect that not just other citizens, but also public bodies will obey the law. If a public body fails to act in accordance with a binding rule or principle, that is a threat both to individual rights and to the democratic principle that the holders of public office should be accountable to the citizens for their actions.

Redress in national courts

A fundamental achievement of European integration is that it creates legal rights for individuals, *vis-à-vis* both Community institutions and the Member States. Beginning with its decision in *van Gend en Loos* (3) , the Court of Justice has progressively developed the principle that national courts must uphold the rights that individuals enjoy under Community law. National courts should protect such rights against public authorities through the application of directly effective provisions of Community law, interpretation of national law and the award of damages (4) .

The Court of Justice has thereby promoted a decentralised procedure for the enforcement of Community law, in accordance with the principle of subsidiarity and the logic of the Treaty system. It is the national courts, not the Community courts, which directly enforce the rights of individuals against Member States. The role of the Court of Justice is to ensure, by making preliminary rulings under Art. 234 EC, that the national courts all apply the same law.

The Guardian of the Treaty

From the very beginning, the EC Treaty has also provided a centralised procedure for the enforcement of Community law. What is now Article 211 EC requires the Commission to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". In this role, the Commission is known informally as "the Guardian of the Treaty."

As regards the Member States, the main instrument of enforcement which the founders of the Community gave to the Commission is now Article 226 EC (ex Article 169):

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

The purpose of centralised enforcement

Why does the Union need centralised enforcement as well as a decentralised system? There are two reasons.

First, maintaining the rule of law is a public duty. It cannot be privatised without sacrificing the principle itself.

Second, citizens expect public bodies to obey the law, whether or not their private rights are affected by failure to do so.

Private parties have no obligation to invoke judicial protection of their rights. In many cases they find it too expensive to do so. Furthermore, if his or her private rights are not affected,

the citizen who wants to go to court must rely on public law remedies. These are not harmonised between the Member States. As the Commission has recognised, many complainants only have the Commission to rely on (5) .

Centralised and decentralised enforcement complement and reinforce each other. They are not alternatives. This is illustrated by the fact that the Commission relies to a great extent on complaints from citizens to inform it of failures by Member States to apply Community law correctly. In 1989, the Commission published a standard form in the *Official Journal* on which complaints could be made. The current version of the complaint form dates from 1999 (6) .

The importance of the Commission's role as Guardian of the Treaty was also emphasised by the Member States, in Declaration 19 attached to the Final Act of the Maastricht Treaty (7) . These words have been matched by concrete measures to strengthen centralised enforcement:
- The Maastricht Treaty recognised the right to petition the European Parliament as a right of European citizenship. The scope of the right to petition includes complaints about infringements of Community law by Member States. Via the Committee on Petitions of the European Parliament, such complaints are normally registered by the Commission as infringement cases (8) .
- The Treaty of Amsterdam introduced the possibility of an additional procedure if a Member State fails to comply with an Article 226 judgement of the Court of Justice. The Commission may bring the case back to the Court of Justice under Art 228 EC, specifying a financial penalty which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgement, it may impose a lump sum or periodic penalty (9) .
- In 1998, the Council adopted a Regulation laying down special measures in the case of serious obstacles to the free movement of goods requiring urgent action (10) .

The Commission has also taken steps to improve its working methods in relation to infringement proceedings (11) . It has emphasised both its unwavering commitment to its role as guardian of the Community legal order and the importance attributed by citizens to this task (12) .

However, it seems that the Commission has never accepted the obvious implications of citizenship and citizens' rights for the Article 226 procedure.

2 The Article 226 procedure (13)

The Article 226 procedure begins when the Commission is first alerted to a possible infringement. The Commission itself monitors the process of transposition of Directives into national law. As mentioned above, however, the Commission relies mainly on complaints from citizens to alert it to possible infringements in the application of Community law by public authorities in the Member States.

When the Commission learns of a possible infringement it registers the case and carries out a preliminary investigation. If there is a case to answer, the Commission then sends a letter of formal notice (*lettre de mise en demeure* in French) to the Member State. This specifies what the State is alleged to have done wrong and sets a time limit for the submission of its

observations.

After the time limit has expired, the next step is for the Commission to deliver a reasoned opinion. The opinion sets a time limit for compliance by the Member State.

If the Member State does not come into compliance before the expiry of the time limit in the reasoned opinion, the Commission may refer the matter to the Court of Justice. The word "may" is important, because it means that the Commission is not obliged to refer every infringement to the Court. The case law of the Court confirms that the decision to refer or not is discretionary. The Court has also said that individuals cannot oblige the Commission to adopt a particular position. Nor can they bring an action against the Commission if it refuses to refer an infringement to the Court (14) .

The role of the citizen in the Article 226 procedure

The above description makes clear that the Commission's possibility to refer an infringement to the Court of Justice arises only after an administrative procedure which involves several stages: registration, preliminary investigation, letter of formal notice and reasoned opinion.

The traditional view is that these procedures concern only the Commission and the Member States. According to this view, the citizen is not a party and has no rights in the administrative procedure. In fact, the citizen is considered as an informer. In its Fourteenth Annual Report on monitoring the application of Community law, the Commission expressed this traditional view as follows:

The citizen is not party to a procedure which cannot in any case change his personal situation, but he plays a valuable detection and information role (15) .

It is understandable that the infringement procedure was seen in this way when the Community was first established. At that time, it was not so different from other international organisations. There were no citizens. Natural persons have only gradually been recognised as subjects of the new Community legal order.

Since then, the Maastricht Treaty has established the citizenship of the Union and the right of citizens to petition the European Parliament, including about infringements of Community law by Member States. The Maastricht Treaty also established the office of European Ombudsman, to whom citizens may complain about maladministration in the activities of Community institutions and bodies. The Treaty of Amsterdam added that decisions in the Union should be taken as openly as possible and, most recently, the Charter of Fundamental rights has enshrines the right to good administration.

3 The European Ombudsman's attempts to improve the Art 226 procedure

Soon after the European Ombudsman began work, it became obvious that many citizens were dissatisfied with the Commission's handling of complaints about infringements of Community law by Member States. They gave as reasons: the secretive and time consuming nature of the Article 226 procedure; lack of information about developments; and failure to give reasons for closing cases. Citizens were left with the impression of high-handed and

arrogant behaviour by the Commission and that the procedure gives room for political fixing.

After dealing with a number of these complaints, the Ombudsman launched an own-initiative inquiry into the Commission's procedures in April 1997. The most important outcome of the own-initiative inquiry was that the Commission agreed to inform the complainant of its reasons before closing a case, thereby giving the complainant the opportunity to submit views before the final decision (16) . This gave the complainant some reasons for the Commission's actions and a limited possibility to be heard. In a critical remark made in the year 2000, the Ombudsman took the view that the Commission should have applied the same procedure when it decided to alter fundamentally the basis on which it was dealing with the complainant's case (17) .

Discretion

The Ombudsman has also received complaints alleging maladministration in the exercise of the Commission's discretion in the Article 226 procedure (18) . The Ombudsman has dealt with such cases according to three general principles of administrative law that apply whenever a public institution or body has legal authority to choose between two or more possible courses of action (19) .

First, the institution or body must observe the basic requirement of fair administrative procedure that a person should have the right to submit observations before a decision affecting his or her interests is taken. This right includes, amongst other things, the following elements:

(i) sufficient time in which to prepare and submit any observations

(ii) sufficient information as to the basis of the proposed decision, so that the complainant has a genuine opportunity to address all the relevant issues (20) .

Second, the institution or body must always have good reasons for choosing one course of action rather than another. The giving of reasons for a particular course of action is a normal part of the exercise of a discretionary power, both to inform the persons affected and to facilitate review of the decision.

Third, the institution or body exercising a discretionary power must remain within the limits of its legal authority . Discretionary power is not dictatorial power. Very broad discretionary powers may exist, but they are always subject to legal limits. General limits on such authority are established by the case law of the Court of Justice, which requires, for example, that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms.

The Ombudsman does not question the merits of a discretionary decision when the institution or body concerned has remained within the limits of its legal authority.
4 Strengthening citizenship and the rule of law

The complainant as a party in the Art. 226 procedure.

The Charter of Fundamental Rights of the European Union includes, as Article 41, the right to good administration. Here is part of the text:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

– the obligation of the administration to give reasons for its decisions.

(....)

In the Thessaloniki Metro (21) case the Ombudsman made a further remark suggesting that the Commission consider adopting a procedural code for the treatment of complainants in Article 226 cases, consistent with the Charter right to good administration. In response, the Commission has undertaken to consolidate the relevant parts of its manual of operational procedures and publish them on the Europa website (22) . This positive action will be a step forward for the citizens.

President Prodi and Commissioner Vitorino have recently said of the Charter:

There can be no doubt as to its fundamental nature. It has been devised and drafted with the utmost care.

The Commission, like the other institutions, must look to the practical implications of this historic event and make compliance with the rights contained in the Charter the touchstone for its action.

This must be an overriding requirement in the Commission's day-to-day business, both in relations with the general public and with those to whom our decisions are addressed and in our internal rules and procedures (23) .

In my mind, there is no doubt that the right to good administration in the Charter of fundamental Rights also applies to the administrative stages of the Article 226 procedure. This should be so whether the citizen,

(i) complains directly to the Commission in its role as Guardian of the Treaty, or

(ii) exercises the right under Articles 21 and 194 EC and Article 44 of the Charter to petition the European Parliament concerning an infringement of Community law by a Member State.

In other words, the citizen should be recognised as a party in the administrative stages of the procedure for dealing with his or her complaint. Nothing else is consistent with the principles of European administrative law. It is not possible to recognise citizens in the Treaty and then deprive of them of their basic rights in an administrative procedure so as to give the other party, the Member State, a privileged position.

As a party, the citizen must have access to the file on his or her complaint, in accordance with Article 41 of the Charter. Only full access to the file containing the facts in the case can ensure the right to a fair hearing . If the file includes information which is classified as confidential by law, the party should be obliged to respect that. Furthermore, the citizen must be given reasons for the position that the Commission adopts at the end of the administrative procedure.

Openness and effectiveness go together in the Art 226 procedure

The European Union's commitment to openness was re-affirmed in the Treaty of Amsterdam. The second paragraph of Article 1 TEU, as amended, reads as follows:

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

Some people argue that the nature of the infringement procedure means that it is not possible to conduct its administrative stages openly because there are legitimate interests of confidentiality which must be protected. In its proposal for a regulation on public access to documents, published in January 2001 the Commission even included a new exception specially for infringement proceedings. Fortunately, that idea was rejected: the Council and the European Parliament refused to accept the proposed new exception.

The traditional view is that confidentiality promotes a frank and unreserved dialogue between the Commission and the Member State and that this is necessary in order to persuade the Member State to comply with its obligations, which is the whole purpose of Article 226.

This argument does not seem very convincing. I fully accept that when an infringement by a Member State has been established, the Guardian of the Treaty has discretion to decide how best to act, including negotiation with the Member State to promote the correct implementation of the law. It cannot be an obligation in all cases to refer the matter to the Court of Justice. However, confidentiality in the administrative stages, before a possible reference to the Court, means an unbalanced procedure. One party, the complainant, is prevented from knowing how the other party, the Member State, responds to the Commission. This situation means that the Commission often gets the blame for delay or lack of co-operation which is the fault of the Member State. Moreover, in some cases the

citizen gets the impression that the procedure is dropped for the wrong reasons.

If the administrative stages of the infringement procedure were public, this would surely encourage the Member State to adjust its behaviour more rapidly to fulfil the requirements of the law. Openness would therefore strengthen the Commission in its vital task of ensuring the rule of law. Citizens could also follow the procedure and observe that justice is done.

A Chancellor of Justice?

In dealing with complaints, the Commission must introduce, as promised, a clear procedural code, based on the principle that the citizen who complains is a party in the administrative procedure and should enjoy all the procedural safeguards under Community law and the Charter of Fundamental Rights. Making the procedure as open and transparent as possible would promote more rapid handling of complaints and at the same time keep citizens informed of the Commission's activity to ensure respect for the rule of law in the European Union.

The rule of law requires that any undue influence on decision making, by lobbyists for example, should be avoided. In order to avoid bias and the appearance of bias, those who have an interest in a case, including a national interest, should not be involved. For both reasons, infringement cases should not be dealt with by political *cabinets* .

One way to achieve a proper and impartial treatment of case could be that decision making on the Art 226 procedure in the Commission should be in the hands of one Commissioner acting as a kind of Attorney-General. Alternatively, a Chancellor of Justice could be specially designated for this purpose.

The principle of subsidiarity suggests that the Commission should transfer the more straightforward cases to institutions in the Member States which already exist to supervise the administration and ensure that it acts according to law, such as national and regional ombudsmen and similar bodies. The European Ombudsman and his colleagues in the Member States have already established a network of national and regional ombudsmen and similar bodies in all Member States. We are ready to cooperate in this kind of activity to promote better application of Community law, for the benefit of the European citizens.

In other cases, complainants who have the possibility to initiate court proceedings in national courts could be advised to do so.

Such measures can help the Guardian of the Treaty to fulfil its obligation under Art 211 EC to ensure that Community law is correctly applied in all Member States. However, they do not allow it to escape that obligation.

Citizens cannot really trust the Union unless the Guardian of the Treaty acts fairly and properly. For the moment, the administrative stages of the Art. 226 procedure is secretive and obscure, so there is no basis for trust. It is time to reform this antiquated system and demonstrate to citizens that the Union is indeed based on the rule of law.

(1) On the importance and implications of citizenship of the Union, see the general report of the European Ombudsman, Jacob Söderman, to the 1998 FIDE Congress on *The citizen, the administration and Community law* . The report is available on the Ombudsman's website in English and French : http://www.ombudsman.europa.eu/FIDE/EN/Default.htm .

(2) OJ 2000 C 364/1.

(3) Case 26/62 *van Gend en Loos* [1963] ECR 1.

(4) Amongst the classic authorities are: Case 43/75 *Defrenne v Sabena* [1976] ECR 455 [1976]; Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case C 106/89 *Marleasing* [1990] ECR-I 4135; Cases C-6/90 and 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR-I 5357; Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany, R v Secretary of State ex parte Factortame* [1996] ECR-I 1029.

(5) Thirteenth Annual Report on monitoring the application of Community law, COM (96) 600 final, 1996 OJ 303/1, Introduction p 6.

(6) 1999 OJ C119/5.

(7) Paragraph 2 of Declaration 19:

The conference calls on the Commission to ensure, in exercising its powers under Article 155 of this Treaty, that Member States fulfil their obligations. It asks the Commission to publish periodically a full report for the Member States and the European Parliament.

(8) See the Committee on Petitions' Report on the institution of the petition at the dawn of the 21st century, March 2001 A5-0088/2001 (rapporteurs Margot Kessler and Roy Perry).

(9) See for example case C-387/97, *Commission v Greece* [2000] ECR I-5047, in which the Court imposed a fine of 20.000 Euros for each day of delay in implementing the measures necessary to comply with its earlier judgment.

(10) Council Regulation 2679/98, 1998 OJ L 337/8. See also Report from the Commission to the Council and the European Parliament on the application of Regulation (EC) No 2679/98, COM/2001/0160 final.

(11) SEC (1998) 1733 15.10.98.

(12) Seventeenth annual report on monitoring the application of Community law (1999) COM/2000/0092 final.

(13) See generally, A. Mattera, "La procédure en manquement et la protection des droits des citoyens et des opérateurs lésés", 1995/3 *Revue du Marché Unique* , 123-166, "Assurer une protection plus efficace des citoyens et des opérateurs économiques dans le cadre des voies

de recours prévues par le droit communautaire", in A. Mattera (sous la direction de) *La Conférence intergouvernementale sur l'union européenne: répondre aux défis du XXIe siècle* , Clément Juglar, 1996.

(14) Case C-191/95 Commission v Germany [1998] ECR I-5449, para 46; Case 247/87 Star Fruit v Commission [1989] ECR 291; Case 87/89 Sonito v Commission [1990] ECR-I 1981; Order of the Court of First Instance in Case T-182/97 Hubert Ségaud and Monique Ségaud v Commission [1998] ECR II-0271.

(15) COM (97) 299 final, 1997 OJ C 332/1, Introduction section II A. See also Jean-Louis Dewost, "le rôle de la Commission européenne", in European Ombudsman, *the Rights of Citizens of the European Union* , proceedings of the seminar held on 12-13 September 1996, Strasbourg.

(16) Own-initiative inquiry 303/97, 1997 EOAR 270.

(17) Case 161/99, decision of 13 September 2000.

(18) See Cases 175/97, 1998 EOAR 95; 176/97, 1998 EOAR 97; 995/98 decision of 30 January 2001 (*Thessaloniki Metro*).

(19) On these principles see e.g. the Council of Europe publication, *The Administration and You: a handbook* , 1996 p. 362.

(20) See the Ombudsman's decision in the *Thessaloniki Metro case* , Case 995/98, decision of 30 January 2001.

(21) Case 995/98, decision of 30 January 2001.

(22) Letter dated 15 May 2001 from Mr O'Sullivan, Secretary General of the Commission, to the Ombudsman.

(23) Extract from a Communication from the President and from Mr VITORINO, SEC(2001)380/3 13 March 2001.