European Ombudsman

Transparency in the Community Institutions -Speech delivered by the European Ombudsman, Mr Jacob Söderman, 10th Anniversary of the Court of First Instance, Luxembourg, 19 October 1999

Speech

Mr President!

I am honoured and delighted that you have invited me to this seminar to speak on transparency in the Community institutions.

The seminar celebrates the tenth anniversary of the Court of First Instance. It is tempting on such an occasion to compare the growth of an institution with that of a human being. I shall resist the temptation, not least because the office of European Ombudsman is only four years old.

At the beginning of my mandate as the first European Ombudsman, I gave a solemn undertaking before the Court of Justice. I said then that the essence of Community law concerning good or bad administration is to be found in the case-law of the Community courts and that this case-law would guide the work of the Ombudsman and constitute a veritable treasure trove of resources. That has proved to be an accurate prediction.

I also explained that the office of European Ombudsman is closely linked to the concept of citizenship of the Union, which was established by the Maastricht Treaty. The idea behind the office of European Ombudsman was to promote the concept of citizenship, so as to enhance relations between citizens and the European institutions by helping to promote open, accountable and service-minded administration.

Citizenship of the Union

Even now, six years after the Maastricht Treaty came into force, the significance of Union citizenship has not, I believe, been fully understood by everyone who works in the Community institutions. The creation of the Union citizenship was a further development of the principle, established by the case-law of the Court of Justice, that the subjects of the Community legal order comprise not only Member States but also their nationals. This principle is closely connected to the idea of the Community Treaties as the constitutional charter of a Community which is based on the rule of law (1) .

But the scope of Union citizenship is not limited to rights *vis-à-vis* the Member States. It also concerns the relationship between citizens and the Union institutions and includes rights which are intended to facilitate political participation by citizens. The establishment of citizenship thus recognises that the Union is a level of governance and 7 that, within their fields of competence, the Union institutions exercise judicial, legislative and administrative powers.

The Treaty of Amsterdam reinforces the idea of citizenship with an explicit statement of the constitutional principles on which the Union is founded: liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (Art. 6 TEU). Article 1 of the Treaty also mentions that decisions should be taken "as openly as possible."

Transparency

These principles make transparency a basic requirement for the relationship between individuals and the Union institutions, not an optional extra. By transparency, I mean that:
- the processes through which decisions are made should be understandable and open; - the decisions themselves should be reasoned; - as far as possible, the information on which the decisions are based should be available to the public.
Without transparency citizens cannot understand what public authorities are doing and why. Transparency is therefore fundamental to democracy; it is a necessary condition both for the accountability of public power to citizens and for the possibility of participation in public life (2) . As Declaration No 17, attached to the EC Treaty at Maastricht, puts it: transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The significance of Declaration No 17 was emphasised by the Court of Justice in the case of *Netherlands v Council* (3) . More recently, the judgement of the Court of First Instance in the case of *Heidi Hautala v Council* (4) refers to the opinion given by Advocate General Tesauro in the *Netherlands* case, who said that the basis for the individual right to information should be sought in the democratic principle, to which reference is made both in the preamble to the Maastricht Treaty and in Article 6 TEU (5) .

Complaints to the Ombudsman about lack of transparency

Many of the complaints made to the Ombudsman during the first mandate have alleged lack of transparency. Three main subjects have been raised: the Article 226 (formerly Article 169) procedure; recruitment competitions for Community officials; and access to documents.

The Article 226 procedure

A series of complaints to the Ombudsman concerns lack of transparency in the Commission's procedure for dealing with complaints about infringements of Community law by Member States. In a society governed by the rule of law no-one, however powerful, can break the law with impunity. Citizens of the Union are entitled to expect that all public authorities will obey Community law, whether at municipal, regional, national or Union level. Naturally, decentralised enforcement of Community law is both possible and desirable. Indeed, the Court of Justice was

the first Community institution to put subsidiarity into practice by establishing that courts in the Member States must protect individual rights under Community law. However, centralised enforcement by the Commission, in its role as "guardian of the Treaty" also remains important and necessary, as was emphasised by Declaration No 19 attached to the Final Act of the Maastricht Treaty (6) .

Many citizens who have accepted the Commission's invitation to complain about infringements of Community law by Member States (7) have subsequently complained to the Ombudsman about how the Commission has dealt with their complaint. The allegations included: excessive time taken to process complaints; lack of information about the on-going treatment of the complaint and its outcome; and not receiving any reasoning to support the conclusion that there is no infringement of Community law.

In response to an own-initiative inquiry by the Ombudsman (8) , the Commission acknowledged that complainants have a place in the infringement procedure. It also said that in the period before judicial proceedings may begin complainants enjoy procedural safeguards which the Commission has constantly developed and improved. In particular, it stated that all complaints are registered and acknowledged; under internal rules a decision either to close the file or to initiate official infringement proceedings must normally be taken within one year; and that the complainant is informed of the action taken in response to the complaint and the outcome. Furthermore, the Commission undertook to inform the complainant of its intention to close a case. This should provide an opportunity for the complainant to put forward views and criticisms concerning the Commission's point of view before the Commission commits itself to a final conclusion.

Despite these improvements, the administrative stage of the Article 226 procedure is still not a normal and transparent administrative process, in which the complainant is a party. Until it becomes such a process, there will remain a quite widespread belief amongst citizens that the rule of law at Union level is subject to arbitrary suspension by powerful political forces. This belief weakens citizens' confidence in the rule of law in the European Union.

Recruitment competitions

Secrecy in the procedures for recruitment to the Community institutions is another frequent source of complaints to the Ombudsman. One of the very first complaints was from a participant in a competition who wanted to see the reserve list of successful candidates. In its reply, the Commission accepted that reserve lists in future competitions should be published (9) .

Other complaints have come from candidates who wish to know the names of members of the selection board and to have access to their own marked examination scripts.

Following an own-initiative inquiry, the Ombudsman made draft recommendations to the Commission on both questions. In response, the Commission agreed to inform candidates of the names of members of the selection board but was unwilling to accept that a candidate should be able to see his or her own marked examination script.

In my view, it is important that citizens receive a positive first impression of the Community institutions. Citizens who wish to work for the Communities receive a bad impression if they are left in doubt as to whether their written examinations have been assessed fairly and correctly or, indeed, at all. To dispel such doubts, it is essential that each candidate should have the possibility to see his or her own marked examination script on request.

The own-initiative inquiry revealed nothing to prevent the Commission from taking the necessary action now, as a matter of good administration, to improve the transparency of its recruitment competitions. I have therefore prepared a special report to the European Parliament on the matter, under Article 3 (7) of the Statute of the Ombudsman.

Access to documents

Many complaints come from citizens who have been refused access to documents. The existing Council and Commission Decisions on access to documents (10) provide that a negative decision must indicate the possibility of redress through judicial proceedings and complaints to the Ombudsman.

In dealing with the complaints submitted to me as Ombudsman, I have the good fortune to be able to draw on the case-law of the Court of Justice and Court of First Instance. For example, in one case the Council relied on a provision concerning "repeat applications" and "very large documents" to justify not giving the applicant all the documents requested (11) . In fact, the applicant had applied for each document only once and none of the documents taken individually was very large.

There is established case-law that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule (12) . This case-law strongly suggested that the provision in question did not apply to the applicant's request. The Ombudsman made a critical remark to this effect, which the Council followed up by reconsidering the matter and giving access to all the documents concerned (13) .

In another case, the complainant claimed that the Commission Decision on public access also applies to comitology documents (14) . I was informed that this very issue was pending in a case before the Court of First Instance and I therefore suspended my inquiry into this aspect of the complaint until the Court had given judgement (15) . I was then able to inform the complainant that the point of principle for which he argued had now been clearly established by the Court of First Instance.

Mr President!

There is a common misconception that the Nordic view of transparency is that every document is public. This is not so.

In every democratic society, some information must remain confidential. Obvious examples are security and defence information, commercially sensitive information which it would be unfair to reveal to competitors and sensitive information about individuals. Furthermore, in order to function effectively, every administration needs the possibility to carry out internal preparatory work before putting its policy proposals into the public domain, together with the information and reasoning on which they are based.

Transparency does, however, require that the possible reasons for which access to documents may be refused should be announced to citizens in advance, through published rules. Amongst the Community institutions, the Commission and Council set the example of such "norm transparency" through adoption of their joint Code of Conduct. In the case of *Netherlands v Council* , the Court of Justice confirmed that, in the absence of general rules adopted by the Community legislature, rules on public access to documents could be based on the power of internal organisation, which authorises the institutions to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.

This part of the *Netherlands* judgement led me to launch an own-initiative inquiry into the possible adoption by other Community institutions and bodies of rules on public access to the documents they hold. The outcome was that almost all the institutions and bodies adopted rules on public access.

In a follow-up inquiry launched in April this year, the European Central Bank informed me that it has also adopted rules concerning access to its administrative documents. The European Police Office, Europol, informed me of the existing rules which govern access by individuals to the data which Europol holds on them. Europol also envisages the adoption of rules on public access to documents before the end of this year.

The Amsterdam Treaty

However, the most significant step in defining the limits of the right of access to documents should be the legislation foreseen by Article 255 EC establishing general principles and limits governing the right of access to documents of the European Parliament, Council and Commission.

The list of exceptions to the right of access should be shorter and more precise than in the existing Code of Conduct. In particular, the "authorship rule", unknown in the comparable legislation of the Member States, should be abandoned. It would also be important for the legislation to provide for registers of all documents to be maintained. The Council has already created a public register of its own documents and the Commission seems to have accepted the principle of a register in response to a draft recommendation from the Ombudsman (16) .

The Community institutions still occasionally give the impression that they start from the presumption that documents are secret, unless the citizen can prove the opposite in court. Taking citizenship seriously means exactly the opposite: access should be the rule and secrecy the exception which must be expressly justified. Properly-drafted legislation could help make

this point clear to everyone working in the Community institutions and bodies.

It should also be remembered that transparency is not just about access to documents. To give effect to the principles of openness and democracy enshrined in the Amsterdam Treaty, the Council in particular should consider opening its legislative meetings to the public, especially when it finally adopts Community legislation binding on European citizens.

Mr President!

In reading the case-law of the Court of First Instance relating to issues of transparency I have been reminded of the great work of the Supreme Court of the United States. In the 1950s and 1960s, that Court insisted on respect for human rights and fundamental liberties, to which other parts of the governmental system appeared indifferent or even hostile.

During its first ten years, your Court has, as I see it, played a similar role in the matter of transparency. I think that the European citizens have noted with due respect your role in upholding the law on transparency in the Community institutions.

The responsibility for creating a modern, accountable and service-minded administration lies, of course, with the Community legislator and the Community administration itself. More needs to be done, but the progress made in the period since the Maastricht Treaty shows that the legislator and the administration have the capacity to play their part. The implementation of Article 255 EC through properly-drafted and widely-debated legislation would mark a further big step towards making transparency a living reality in the office as well as in the courtroom and hence towards making a reality of European citizenship.

Mr President of the Court of First Instance!

I congratulate you and your colleagues, and all your staff and collaborators, for your excellent work during the Court's first ten years in improving the rights of the European citizens and upholding the rule of law in our European society.

Thank you for your attention.

(1) See e.g. Opinion 1/91 Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] ECR I-6079; Case 294/83 Parti écologiste Les Verts v Parliament [1986] ECR 1339.

(2) See generally on this theme, Council of Europe, *The Administration and You: a handbook* , 1996 p. 18.

(3) Case C-58/94 *Netherlands v Council* , [1996] ECR I-2169.

(4) Case T-14/98, judgement of 19 July 1999.

(5) [1996] ECR I-2171, point 19.

(6) Paragraph 2 of Declaration 19: *"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." Article 211 EC (formerly Art. 155) requires the Commission to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied".*

(7) An updated complaint form was published in the *Official Journal* of 30 April 1999: 1999 OJ C119/5.

(8) 303/97/PD, see the Ombudsman's Annual Report 1997, p. 270.

(9) Complaint 16/17.1.95/GS/IT, see the Ombudsman's Annual Report 1997, p. 191.

(10) Council and Commission joint Code of Conduct (OJ 1993 L 340/ 41), implemented through Council Decision of 20 December 1993 on public access to Council documents (OJ 1993 L 340/43) and Commission Decision of 8 February 1994 on public access to Commission documents (OJ 1994 L 46/58).

(11) Article 3 (2) of Decision 93/731: *"The relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents."*

(12) Cases T-194/94, *John Carvel and the Guardian Newspapers v Council* , [1995] ECR II-2765; T-105/95, *World Wide Fund for Nature (WWF) v Commission* , [1997] ECR II-313; Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289.

(13) Complaints 1053/96/IJH and 1087/96/IJH.

(14) Complaint 633/97/PD.

(15) Case T-188/97 *Rothmans International BV v Commission* , judgement of 19 July 1999.

(16) Made in relation to complaint 633/97/PD.