European Ombudsman

Speech of the European Ombudsman: Transparency as a Fundamental Principle, by Jacob Söderman, European Ombudsman, at the Walter Hallstein Institute, Humboldt University, Berlin, Germany, 19 June 2001

Speech

"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." (*Treaty on European Union, Article 1*).

"…the transparency called for by European Councils, in order to allow the public 'the widest possible access to documents' as stated in the Code of Conduct, is essential in order to enable citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions..." (*Judgement of the Court of First Instance in Case T-92/98, Interporc Im- und Export GmbH v Commission ("Interporc II"), [1999] ECR II-3521, paragraph 39*).

1 The meaning of transparency

Transparency, or as it is sometimes called in English, openness, is not a legally defined term. I should therefore explain what in my view it means.

To me, transparency involves three elements:

- the processes through which public bodies make decisions 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.

2 The link to democracy and citizenship

Why is transparency important? According to Declaration 17, attached to the Maastricht Treaty, *"transparency of the decision-making process strengthens the democratic nature of the*

institutions and the public's confidence in the administration."

I would go further and say that transparency is an essential part of democracy. It is obvious that the debate and adoption of laws should be carried out in public. I know of no legislative body that claims to be democratic and which adopts legislation behind closed doors – except the Council of the European Union.

Citizens also need information about public activities other than legislation. They need such information in order to evaluate the performance of their political representatives; to ensure the accountability of public authorities; and to participate effectively in the on-going public debate which is part of a healthy democracy.

According to Article 6 Treaty on European Union, democracy is one of the founding principles of the Union. Democracy is also mentioned as one of the founding principles of the Union in the Charter of Fundamental Rights of the European Union, which was proclaimed in Nice, on 7 December 2000, by the Presidents of the European Parliament, the Council and the Commission (1) .

Furthermore, 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 (2) .

The Union's commitment to democracy and its recognition of citizenship mean that the principle of transparency is also a binding obligation for the Union institutions. That is why the second paragraph of Article 1 of the Treaty on European Union, as amended by the Amsterdam Treaty, mentions that decisions in the Union should be taken *"as openly as possible"* .

3 The European Ombudsman and transparency

The EC Treaty contains a number of Articles which define certain special rights of citizenship of the Union. On of them is Article 21, which provides for the right to petition the European Parliament and the right to complain to the European Ombudsman.

After my election by the European Parliament in July 1995, I began work as the first European Ombudsman in September 1995. In October 1999, the European Parliament re-elected me for a second mandate.

In accordance with Article 195 EC, any citizen of the Union, or any natural or legal person residing or having its registered office in a Member State, may complain to the Ombudsman about maladministration in the activities of a Community institution or body.

The term *maladministration* is not defined by the Treaty or by the Statute of the Ombudsman (3) . However, following a request from the European Parliament, the European Ombudsman himself proposed a definition, after consulting the national ombudsmen and similar bodies in the Member States, including the Committee on Petitions of the German *Bundestag* . The definition

is:

Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.

The concept of maladministration therefore includes failure to respect legal rules and principles, or the fundamental rights to which the Union has committed itself, including the right to good administration which is guaranteed by the Charter of Fundamental Rights of the European Union.

The European Parliament welcomed this definition (4) and it now seems to be generally accepted.

As I have already explained, one of the principles binding on the Community institutions and bodies is transparency. Many of the complaints that I have received as European Ombudsman have alleged a lack of transparency. Three main subjects have been raised: access to documents; recruitment competitions for Community officials; and the Commission's fulfilment of its role as "Guardian of the Treaty".

4 Public access to documents

(5)
The right of public access to documents held by public bodies is the item that has been most debated in the European Union in recent times. For brevity, I shall refer to this right as "public access".

4.1 Public access as a fundamental right

Public access is not dependent on any special interest that distinguishes the person requesting access from other citizens. It is therefore separate from legal rules and principles, such as the rights of the defence, which require documents to be supplied to persons who have such a special interest.

It is also separate from the right of the individual to have access to personal data concerning him or herself, which is an aspect of the right of privacy guaranteed by Article 8 of the European Convention on Human Rights (6) .

In Sweden, public access has been a Constitutional right since 1766. There it is linked to the freedom of the press. The idea is to promote "the free interchange of opinion and the enlightenment of the public." (7) However, public access is not a special privilege of journalists, but a right enjoyed by all citizens.

In the case-law of the European Court of Human Rights, the protection afforded to the press under Article 10 of the European Convention on Human Rights is especially strong, because of its role in imparting information and ideas to the public and the right of the public to receive them (8) . However, the Strasbourg case law does not interpret Article 10 so as to require public authorities to impart information to citizens (9) . The Strasbourg case law is therefore silent as

regards public access to documents. There are, however, Council of Europe recommendations on the subject (10) and a working group of specialists on access to official information is currently drafting a further instrument. I should also mention the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (11) .

The Court of Justice has noted that the "domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle." (12) Member States which have recently adopted national legislation on public access are Ireland (1997) and the United Kingdom (2000).

In my view, public access is an essential aspect of transparency which, as I have explained earlier, is itself an essential part of democracy. Citizens, including journalists, should not have to rely only on information which public authorities choose to provide. Public access enables citizens to scrutinise the activities of those exercising public authority and to make an independent evaluation of them.

As the Court of First Instance put it in its *Interporc II* judgement:

"…the transparency called for by European Councils, in order to allow the public 'the widest possible access to documents' as stated in the Code of Conduct, is essential in order to enable citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions..." (13)

Like most rights, the right of public access to official documents is not absolute. It is subject to limits and exceptions that are prescribed by law and that are necessary to protect other rights and interests.

4.2 Community law concerning the right of public access

The first step towards recognition of public access as a right in Community law came with Declaration 17 attached to the Maastricht Treaty. It recommended that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

The Commission carried out a survey of national laws and practices (14) and in 1993, the Council and the Commission jointly adopted a Code of Conduct on public access to documents. The Code was implemented through decisions made separately by the two institutions (15) .

The Code of Conduct provides for a two-stage procedure of initial application, followed by a confirmatory application in case of a refusal to grant access. If a confirmatory application is rejected, the applicant must be informed of the possibility of redress through judicial proceedings under Article 230 EC and through complaint to the European Ombudsman under Article 195 EC.

4.3 The case law of the courts and the Ombudsman

The case law of the Community courts establishes that the Council and Commission Decisions contain enforceable rights for individuals (16) . Furthermore, exceptions to the general rule of

public access should be construed and applied strictly, in a manner which does not defeat the application of the general rule (17) .

Furthermore, in dealing with an application for access to a document which contains information covered by one or more exceptions, the institutions must examine whether partial access should be granted to information which is not so covered (18) . The Court of First Instance also rejected the idea that documents linked to infringement procedures are automatically covered by the exception relating to protection of the public interest and has held that the exception for court proceedings applies only to documents specifically drawn up for the purposes of the proceedings (19) .

As regards reasoning for the application of the exceptions, the institution must consider in respect of each requested document whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the protected facets of public interest (20) .

In my view the case law of the Courts implies, although it does not unambiguously state, that public access is a fundamental right. When the validity of the Council's decision on public access was challenged in the *Netherlands* case, the Court of Justice said this:

So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration (21) .

To me, it is difficult to understand why it should be mandatory ("must") to adopt measures to deal with requests for access to documents unless there is an underlying right of the citizen at stake. Subsequent case law of the Court of First Instance also points in this direction. In the *Bavarian Lager* case, the Court of First Instance referred to the *"principle of the widest possible access for citizens to information."* (22) In the *Rothmans* case (23) , it referred in quite general terms to the right of access to documents, restrictions on which must be construed narrowly in holding that access to "comitology" documents must be provided under Commission Decision 94/90. This reasoning depends on public access to documents being a general right, which exists independently of the rules which the Council and Commission adopted concerning access to their own documents. Otherwise, there would be no reason to consider the possible exclusion of comitology documents as a restriction, since such documents are not Council or Commission documents.

In my view, therefore, the case law does reveal an emerging fundamental right of public access as a general principle of Community law.

The Ombudsman has dealt with roughly the same number of cases on refusal of access to documents as the Courts. In one case, the Council contested the Ombudsman's competence to deal with a series of complaints concerning documents relating to co-operation in justice and home affairs (the "third pillar"). The Ombudsman considered that the correct interpretation and

application of the Council Decision is a matter of Community law and not a third pillar matter, even if the documents in question concern actions under the third pillar (24) .

The Ombudsman did not consider a mere reference to "the fight against organised crime" to be an adequate reason for applying a mandatory exception. Nor was it sufficient merely to state that a document contains "detailed national positions" when applying the exception for maintaining the confidentiality of the institution's deliberations (25) .

Earlier this year, the Ombudsman made draft recommendations to the Commission that it should release to the no-governmental organisation Friends of the Earth two reports on the implementation of environmental directives by the UK. The Commission had originally wanted to black out parts of the document on the grounds that they could relate to future Art. 226 infringement proceedings. the Commission has now accepted these draft recommendations.

The Ombudsman's own-initiative inquiry into the adoption of rules on public access by other institutions and bodies

The Council and Commission Decisions adopting the joint Code of Conduct apply only to requests for documents addressed to those two institutions.

In 1996, the European Ombudsman began an own-initiative inquiry into the possible adoption by other Community institutions and bodies of rules on public access to documents. The inquiry was mainly based on the fact that, as I mentioned earlier, the Court of Justice in the *Netherlands* case said that institutions must adopt measures to deal with requests for public access (26) .

A follow-up inquiry was launched in 1999, addressed to bodies which had been established, or become operational, after the closure of the original inquiry.

The outcome of these is that almost all the Community institutions and bodies, including the European Parliament, the Court of Auditors, the European Investment Bank and the European Central Bank have adopted and published their own rules on public access to documents, as a matter of good administration. Europol agreed to apply the Council's rules.

5 Article 255 EC and its implementation

Limits of the existing rules

The Council and Commission Decisions, as well as the rules adopted by other Community institutions and bodies, have two main limitations.

First, they provide for access only to documents which the institution or body has itself drawn up. Incoming documents are excluded, a restriction which is usually referred to as the "authorship rule".

The second limitation is that there is no obligation to maintain a register of documents. The Council, however, established a public register of its documents following a draft recommendation from the European Ombudsman (27) . The Commission has agreed to

examine the possibility of a public register of Commission documents as part of its implementation of Article 255 EC, added by the Treaty of Amsterdam (28) .

The Treaty of Amsterdam and Article 255 EC

In order to recognise public access as a right and to remedy the weaknesses of the existing rules, proposals were made to amend the EC Treaty by a new provision in the Treaty of Amsterdam. The outcome was new Article 255 EC Treaty, expressed as a right of access to documents of the European Parliament, Council and Commission (29) .

Art 255 (2) EC foresees that the Council and European Parliament shall lay down general principles and limits on grounds of public or private interest governing the right of access to documents within two years of the entry into force of the Treaty of Amsterdam, that is by 1 May 2001. The procedure for this purpose began rather badly with a poor proposal from the Commission, made without any prior public consultation (30) .

Whilst the Council and Parliament were examining the Commission's proposal, the Council unilaterally amended its existing rules on public access through the so-called Solana decision (31) . The change which attracted most attention was the addition of two new categories of exception covering the security and defence of the Union or one of its Member States and military or non-military crisis management.

However, the Solana Decision also excludes from the scope of public access any document which has been classified in one of the top three categories of an amended system of security classification. This deprives the citizen of the right to receive a reasoned decision, since no reasons are given when a document is classified. Furthermore, the citizen is also effectively deprived of the possibility of redress against a refusal of access to such a document (32) .

In November 2000, the European Parliament adopted amendments to the Commission's draft Regulation and referred the issue back to the Committee on Citizen's Rights to try to achieve a compromise with the Council and Commission (33) . As a result of these so-called "trilogue" negotiations, Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents was finally on 30 May 2001 (34) .

The public access Regulation

I shall call Regulation 1049/2001 the "public access Regulation." Overall, I believe that it represents real progress towards full recognition of public access as a fundamental right of citizenship. The main weakness is that it is legally binding directly only on the European Parliament, Council and Commission. That, however, was the inevitable result of the limited scope of Article 255 EC.

The provisions of the new Regulation are applicable from 3 December 2001 and each institution must adapt its rules of procedure by that date.

The Regulation preserves the two-stage administrative procedure for application, followed by the possibility to contest a refusal through court proceedings or complaint to the Ombudsman. Initial applications must be acknowledged and both initial and confirmatory applications must be

answered within 15 working days from registration (Arts. 7 and 8). The institutions must provide information and assistance to citizens on how and where applications for access to documents can be made.

The term document continues to be defined broadly so as to include any content, whatever its storage medium, concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility (Art. 3).

5.1 Incoming documents and registers

The Regulation deals with the two main weaknesses of the present Council and Commission rules: the exclusion of incoming documents and the lack of registers.

According to Article 2 (3), public access applies to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession. Incoming documents are therefore included. It is also worth noting that the Regulation applies expressly in the second and third pillars, in accordance with Articles 28 (1)and 41 (1) of the Treaty on European Union.

Article 11 requires each institution to maintain a public register of documents, which must be operational by no later than 3 June 2002. The register must be updated without delay and should be accessible in electronic form.

5.2 The exceptions

Article 4 contains nine categories of exception to public access. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

All nine categories of exception are subject to a harm test. and some are also subject to a balancing test of overriding public interest in disclosure.

For five of the categories, the harm test is whether public access would *undermine* the protection of

(a) the public interest as regards:

— public security,

— defence and military matters,

— international relations,

— the financial, monetary or economic policy of the Community or a Member State.

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

For the next three categories the test is also is whether public access would *undermine* the protection of:

—commercial interests of a natural or legal person, including intellectual property,

—court proceedings and legal advice,

—the purpose of inspections, investigations and audits

In these three cases, however, public access must still be granted if there is an *overriding public interest in disclosure* .

The final category of exception is intended to protect the so-called "space to think". The Regulation makes a distinction between cases where the institution has not yet finished its thinking; that is, where it has not yet made a decision on the matter to which the document relates and those where the thinking period is over because the institution has made the decision.

If the decision has not yet been made, the exception applies to both documents drawn up by the institution for internal use and to incoming documents.

If the decision has been made, the exception applies only to documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned.

In both cases, the harm test is that public access would *seriously undermine* the institution's decision-making process and public access must still be granted if there is an *overriding public interest* in disclosure.

As regards third-party documents, the institution shall consult the third party with a view to assessing whether one of the first eight exceptions is applicable ,unless it is clear that the document shall or shall not be disclosed.

A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

5.3 Sensitive documents

Article 9 of the Regulation contains certain special provisions as regards sensitive documents. These are documents which are classified as TOP SECRET, SECRET or CONFIDENTIEL in accordance with the security rules of the institution concerned and which protect essential interests of the European Union or of one or more of its Member States in the areas covered by the first four exceptions to the right of public access, notably public security, defence and military matters.

Applications for access to sensitive documents are dealt with under basically the same conditions as for non-sensitive documents in relation to exceptions and procedures, including the possibility of recourse to the Court or the Ombudsman if an application is refused. The differences of treatment are as follows:

- if access to a document is refused, reasons must be given in a manner which does not harm the interests protected by the exceptions.
- initial and confirmatory applications are to be handled within the institutions only by persons with the necessary security clearance to enable them to have knowledge of the documents.
- the originator of the document, not the institution which holds it, makes the final decision on whether one or more of the exceptions applies (Art 9 (3)).

"Sensitivity" is not therefore a separate category of exception and public access cannot be refused merely on the grounds that a document is sensitive: one or more of the exceptions must be invoked and the applicant has the right to challenge refusal of access to a sensitive document before the Court or the Ombudsman.

The damage done by the Solana decision has therefore mostly been corrected.

5.4 Documents originating from an institution and held by a Member State

One of the most controversial questions in the debate over the public access Regulation concerned cases where a Member State holds a document originating from an institution. How should the Member State deal with a request for access to the document? Article 5 of the Regulation provides that, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of the Regulation. Alternatively, the Member State may refer the request to the institution.

These provisions mean that the Member State is entitled to apply its own national law on public access after consulting the institution concerned, in cases of doubt.

6 Recruitment competitions

Secrecy in the procedures for recruitment to the Community institutions has been 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 (35) .

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 by the Ombudsman, 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. The Ombudsman therefore submitted a Special Report to the European Parliament on 18 October 1999. In this special report, the Ombudsman recommended that the Commission should give candidates access to their own marked examination scripts upon request in its future recruitment procedures, and at the latest from 1 July 2000 onwards. This recommendation was made, in accordance with Article 3 (7) of the Statute of the Ombudsman, in order to remedy the instance

of maladministration which the Ombudsman had detected.

On 7 December 1999, the President of the Commission wrote to the Ombudsman in order to inform him that the Commission welcomed his recommendation and would take the necessary measures in order to comply with it.

Following a report by the European Parliament's Committee on Petitions, drafted by Herbert Bösch MEP, the European Parliament adopted a resolution on the Ombudsman's Special Report. In its resolution of 17 November 2000, the European Parliament called on all the institutions and bodies of the EU to follow the example set by the European Commission and provide candidates with access to their marked examination scripts.

The outcome of this case was therefore a decisive step towards ensuring transparency in the EU's recruitment procedures.

7 The Guardian of the Treaty and the rule of law

Article 211 EC requires the European Commission to *"ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied"* . In other words, the Commission must ensure respect for the law.

Like democracy, the rule of law is mentioned in both Article 6 of the Treaty on European Union and the Preamble to the Charter of Fundamental Rights as a fundamental principle on which the Union is based.

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. In the context of the Union, this includes the public authorities of the Member States. A public body which fails to act in accordance with a binding rule or principle is a threat both to individual rights and to transparency. When public bodies are governed by law their actions can be predicted and understood. When they fail to respect the law they normally try to keep their actions hidden from the citizens and from democratic debate.

In carrying out its task of ensuring the rule of law, the Commission is known informally as "the Guardian of the Treaty."

As regards the Member States, its main instrument of enforcement is Article 226 EC:

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.

7.1 The Article 226 procedure (36)
When the Commission learns of a possible infringement by a Member State it registers the case and begins an administrative procedure, which has a number of different stages. First the Commission carries out a preliminary investigation. If there is a case to answer, the Commission sends a letter of formal notice to the Member State. It specifies what the State is alleged to have done wrong and sets a time limit for submission of observations.

Once 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, the Commission may refer the matter to the Court of Justice. The decision to refer or not is discretionary. 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 (37) .

7.2 The role of the citizen
The Commission relies predominantly on complaints from citizens to identify cases in which a Member State fails to apply Community law correctly. There is even a special form published in the *Official Journal* on which complaints can be made (38) .

If a provision of Community law has direct effect, citizens also have the possibility to bring proceedings in a national court to defend their rights. However, as the Commission has recognised, in practice many complainants only have the Commission to rely on (39) .

The Commission has recently emphasised both its unwavering commitment to its role as guardian of the Community legal order and the importance attributed by citizens to this task (40) . However, it seems that the Commission has never accepted the implications of citizenship and of the principle of transparency for the Article 226 procedure.

The traditional view is that Article 226 procedure concerns only the Commission and the Member State which is accused of an infringement. 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 (41) .

7.3 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 traditional Article 226 procedure. They complained to the Ombudsman about its secretive and time consuming nature; the lack of information about developments; and the Commission's 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 inquiry was that the Commission agreed to inform the complainant of its intention to close a case and the reason before making a final decision (42) . 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 (43) .

In a case decided this year the Ombudsman made a further remark suggesting that the Commission consider adopting a procedural code for the treatment of complainants in Article 226 cases (44) . The Code should be consistent with Article 41 of the Charter of Fundamental Rights, which guarantees the 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 (45) . This positive action will be a step forward for the citizens.

In my mind, there is no doubt that the right to good administration in the Charter of Fundamental Rights means that 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.

7.4 Transparency and effectiveness go together in the Art 226 procedure

Recognising the complainant as a party in the procedure should be accompanied by a general improvement in the transparency of the Article 226 procedure. The traditional view is that the procedure should be conducted in secret; that secrecy 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 purpose of Article 226.

This argument does not seem very convincing. Confidentiality in the administrative stages of the Article 226 procedure means that the Commission often gets the blame for delay or lack of co-operation by 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.

8 A new threat to transparency

The text of the public access Regulation represents real progress towards greater transparency in the European Union Its success in practice will depend on how it is implemented.

The European Community adopted a Directive on data protection in 1995 (46) . The Directive also applies to the Community institutions and bodies by virtue of Article 286 EC (47) .

These rules are extremely complex. They are also drafted in an unusual style. In a democracy governed by the rule of law, the law normally defines what is forbidden. Unless something is forbidden, it is permitted. The data protection laws seem to be drafted the other way round: all processing of personal data is forbidden unless it is allowed.

The style of drafting of the data protection laws could be described as almost totalitarian, but I am reluctant to use that word for two reasons.

First, the drafters had the very best intentions. The style of drafting goes back to the first legal instruments on this subject, at a time when computers were seen as a new and inhuman threat and not, as now, a normal part of everyday life, enhancing the possibilities of communication for ordinary citizens.

Second, despite their obscurity, the data protection rules can be interpreted and applied in a way that does not threaten transparency, provided that their purpose is kept in mind. That purpose, as the new regulation on public access puts it, is protection of the privacy and integrity of the individual.

A recent decision of the Supreme Court of Sweden illustrates the right approach to the interpretation of data protection rules. The case involved a Swedish citizen who wanted to criticise banks and finance companies. He created a website for this purpose in which he criticised certain named individuals working in these sectors.

For doing this, he was prosecuted and convicted under the Swedish law implementing the Data Protection Directive. In dealing with his appeal, the Swedish Supreme Court referred to the European Convention on Human Rights, which is mentioned in the Treaty on European Union. The Court noted that Article 9 of the Data Protection Directive refers to Article 8 of the Convention on the right to respect for private and family life and to Article 10 on freedom of expression. The Court stated that when interpreting Article 9 of the Directive, these rights under the Convention must be taken into account.

The Court then explained that Article 8 of the Convention concerns the sphere of private life. Even if it can be difficult to define what comes within this sphere, data relating to a person's public life falls in principle outside the scope of protection.

Next, the Court noted that Article 9 of the Directive permits exemptions or derogations from

restrictions on processing of personal data "carried out solely for journalistic purposes, if they are necessary to reconcile the right to privacy with the rules governing freedom of expression." The Court considered that the exception for journalistic purposes is an attempt to express a general balance between privacy and freedom of expression. The idea is not to confer a special privilege on newspapers, but to emphasise the importance of the free flow of information to the public.

The Court concluded that the aim of the defendant's website must lie within the framework of what is meant by journalistic purposes. The processing of data on the website was therefore carried out solely for journalistic purposes and the citizen was therefore acquitted (48) .

The question of the purpose and scope of data protection rules has also arisen in the European Ombudsman's handling of a complaint about access to information. Briefly, the complainant had previously complained to the Commission in its role as Guardian of the Treaty about a British law which prevented him from importing German beer into the UK. The Commission investigated and closed the case after the UK authorities amended their law. The complainant then wanted to know who had made submissions to the Commission about the matter and who had attended a meeting organised by the Commission to discuss the case; a meeting which he had not been allowed to attend.

The Commission claimed that the Data Protection Directive requires it to keep the names secret unless the persons concerned agree to their identities being revealed. The Ombudsman rejected this argument for two main reasons: firstly, the Directive should be interpreted so as to support the openness of EU decision-making. Secondly, the Directive is designed to protect fundamental rights. Providing information to an administrative body in secret is not a fundamental right. Since the Commission maintained its refusal, the Ombudsman submitted a special report on the matter to the European Parliament (49) . The Committee on Petitions of the European Parliament is currently dealing with the matter.

9 Conclusion

In conclusion, I would like to emphasise again that transparency or openness is fundamental to democratic accountability. The citizens of the Union need information about what their institutions have done, what they are doing and what they plan to do. The institutions should provide that information through an effective communications strategy and through prompt and effective dealing with requests for public access. This is essential if citizens are to have the confidence in the Union which it so badly needs.

(1) OJ 2000 C 364/1.

(2) 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 [Link].

(3) European Parliament decision 94/262 of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 1994, L 113/15.

(4) OJ 1998 C 292/168.

(5) See generally Hans Ragnemalm, "The Community Courts and Openness Within the European Union", *Cambridge Yearbook of European Legal Studies* , Vol. 2. (1999) 19: Ian Harden "Citizenship and information", forthcoming in *European Public Law* , Vol 7, (2).

(6) *Gaskin v United Kingdom* .

(7) Freedom of the Press Act, chapter 2, Article 1:

In order to encourage the free interchange of opinion and the enlightenment of the public, every Swedish subject shall have free access to official documents.

(8) *The Observer and the Guardian v United Kingdom. See also Goodwin v United Kingdom.*

(9) *Leander v Sweden:*

The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.

This confirmed the approach taken by the Commission of Human Rights in Z v. Austria, Application no. 10392/83, 56 DR 13, admissibility decision of 13 April 1988.

(10) Recommendation No 854 (1979) of the Assembly of 1 February 1979; Recommendation No. R (81) 19 of the Committee of Ministers of 25 November 1981 on access to information held by public authorities.

(11) The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

(12) *Netherlands v Council* [1996] ECR I-2169.

(13) Case T-92/98, *Interporc Im- und Export GmbH v Commission* ("Interporc II"), [1999] ECR II-3521, paragraph 39.

(14) Commission Communication on public access to the institutions' documents OJ 1993 C 156/5; Commission Communication 93/C 166/04 of 2 June 1993 on openness in the Community, OJ 1993 C 166/4.

(15) Council and Commission Code of Conduct concerning public access, OJ 1993 L340/41;

Council Decision 93/731 of 20 December 1993 on public access to Council documents OJ 1993 L 340/43; Commission Decision 94/90 of 8 February 1994 on public access to Commission documents OJ 1994 L 46/58.

(16) Case T-194/94, *John Carvel and Guardian Newspapers v Council* , [1995] ECR II- 2765.

(17) Case T-105/95, *WWF v Commission* , [1997] ECR II-313; Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289.

(18) Case T-14/98, *Heidi Hautala v Council* , [1999] ECR-II 2489.

(19) Case T-309/97, *The Bavarian Lager Company Ltd v Commission* , [1999] ECR-II-3217; Case T-92/98 *Interporc II* [1999] ECR II-3521.

(20) Case T-124/96 *Interporc v Commission* [1998] ECR II-231 paragraph 52; Case T-83/96 *van der Wal v Commission* [1998] ECR II-545, paragraph 43.

(21) Case C-58/94, *Netherlands v Council* , [1996] ECR I-2169, paragraph 37.

(22) Note 31 above.

(23) Case T-188/97, *Rothmans International BV v Commission* , [1999] ECR-II 2463.

(24) Case 1087/96, [1998] EOAR 41. The Court of First Instance subsequently used the same analysis in a case in which its own jurisdiction was contested on the same ground; Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraphs 85-86.

(25) Case 1057/96, [1998] EOAR 178.

(26) Case C-58/94, *Netherlands v Council* , [1996] ECR I-2169, paragraph 37.

(27) Council Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council documents OJ 2000 L9/22.

(28) The Ombudsman's draft recommendation to the Commission was made in case 633/97, [1999] EOAR 234.

(29) 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of

Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

(30) COM(2000) 30 final/2.

(31) Council Decision 2000/527 of 14 August 2000, OJ 2000 L 212/09.

(32) Decision of the Secretary-General of the Council/High Representative for the Common Foreign and Security Policy of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council, OJ 2000 C 239/01.

(33) EP vote of 16 November 2000. The hearing was on 18 September 2000. Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs A5-0318/2000, rapporteur Michael Cashman (PSE). Rapporteurs for the Constitutional Affairs Committee and Legal Affairs Committee were Hanja Maij-Weggen and Heidi Hautala respectively.

(34) 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, 2001 OJ L 145/43.

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

(36) 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.

(37) 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.

(38) 1999 OJ C119/5.

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

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

(41) 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.

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

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

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

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

(46) Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

(47) See also Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L8/1.

(48) Judgement of the Swedish Supreme Court of 12 June 2001 in case B 293-00.

(49) Case 713/98/IJH, special report of 23 11 2000.