'Transparency, Accountability, and Democracy in the EU', Lecture by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the School of Advanced International Studies of the Johns Hopkins University, Bologna, Italy, 17 October 2006

Speech

1 Introduction

I am pleased to be back at JH Bologna Center, at the invitation of my old friend and colleague, Professor Pasquino. My initial visit was in the early 1980s, when Ronald Tiersky was the Director of the Center, and resulted in an occasional paper in the Center's series.

I want to thank the current Director, Professor Keller for making it possible to visit again an institution whose stature within the field of political science and democratization studies has grown impressively over time.

The title of my lecture is "Transparency, Accountability, and Democracy in the European Union". That is quite a lot of concepts to cover in 45 minutes or so, especially since I shall also mention legitimacy. My argument, however, is quite straightforward. Its main outline is as follows:

I shall begin with democracy and explain why the type of democracy that predominates in the Member States of the European Union involves both accountability at elections and accountability between elections.

A degree of transparency, I shall argue, is essential for both forms of accountability. However, an emphasis on accountability between elections leads to demands for more highly developed forms of transparency than when the focus is primarily on accountability at elections.

Next, I shall turn to democracy at the level of the European Union. Here, so I shall argue, accountability at elections is a relatively weak source of legitimacy. The EU institutions and bodies are therefore highly dependent on legitimacy derived from accountability between elections and so have a particular need for the highly developed forms of transparency associated with such accountability.

I shall then explain what the EU has done to promote the transparency of its functioning, including the mechanisms by which citizens can make the Union institutions and bodies accountable for failures of transparency.
Finally, I shall argue that the development of the European Union makes it important, from the standpoint of democratic theory, to promote a high level of transparency not only at the level of the Union, but also in the handling of European Union matters at the level of the Member States.

2 Democracy

Democracy as we know it today is a quite recent phenomenon. Its emergence was associated with the political and socio-economic upheavals that shook Europe and the American colonies during the "long century" that began in the last quarter of the 18th century and lasted well into the 20th.

Associated with the transformation of subjects into citizens and the progressive extension of the suffrage (that is, the right to vote in elections), democracy nowadays enjoys undisputed legitimacy, not only throughout Europe, but globally.

Definitions of democracy can be long and elaborate. For present purposes, I shall adopt a minimalist conceptualisation, identifying some basic attributes of democracy that serve as fundamental preconditions for its legitimacy and effectiveness. In my mind, these include:

- fair elections, including the classical political liberties, such as the freedoms of expression and association;
- flowing from these political liberties, the existence of more than one legal party having the right freely to contest elections; and
- the absence of "veto groups", capable of subverting the popular verdict of an election.

Traditional examples of such veto groups are the monarchy, the armed forces, or other parts of the state apparatus unwilling to accept the result of an election as legitimate and final.

An important implication of this analysis is that democracy cannot be simply equated with parliamentary institutions, or the mere holding of elections. Even a cursory look around the world provides ample evidence that, in many countries, the conditions under which elections are held do not meet the criteria of fairness, free contestation and absence of veto groups. Rather than democracies, these are better described, in the words of the Stanford political scientist, Terry Karl, as "electoral regimes".

At the level of the abstract principles informing democracy, I would argue that all modern democracies have been constructed on the foundation of liberty and equality, two of the most powerful intellectual legacies of the Enlightenment and of the political revolutions to which this momentous era gave rise.

The relative balance between these two principles allows us to distinguish between two, historically contingent, variants of modern democracy. I shall argue later that the constitutional formulae and institutional arrangements embodied in these variants have a particular bearing on debates concerning accountability and transparency.

The first variant derives its roots from the Jacobin legacy of the French Revolution and privileges equality as the fundamental organisational principle of democracy. Its attractiveness lies in the elegance issuing from its simplicity. According to the ideal type of
this conceptualisation of democracy, the sovereign people constitute the only source of power, whose sole institutional expression is (a mostly unicameral) parliament.

In this variant, the party that wins a parliamentary majority at an election constitutes the natural and logical expression of popular sovereignty and can legitimately claim a plenary right to exercise power on behalf of the sovereign people.

The major drawback of the egalitarian conceptualisation, deriving directly from its preoccupation with equality as its major, if not sole, organisational principle, is that it is driven by what I describe as a "unidimensional" logic, which is geared to privileging homogeneity over diversity. Pushed to its logical extremes, such an emphasis on homogeneity, so intimately linked to equality, risks generating a flattening dynamic and imparting a dimension of "levelling egalitarianism" that, in turn, raises serious concerns relating to the observance of the rule of law and to respect for individual rights.

The alternative conceptualisation of democracy, again in an ideal-typical form, is characterised by a pluralist logic, whose overriding preoccupation is the search for an optimal balance between institutions alternatively expressive of egalitarian and libertarian principles.

Such an overarching balance, which relies on the generation of a dense network of institutional checks and balances or counterweights, akin to Montesquieu's "corps intermédiaires", provides better conditions for the observance of the rule of law and for the quality of democracy.

Whilst predicated on the idea that legitimate authority to govern derives from a free and fair electoral process, a democracy that includes checks and balances excludes, by definition, the notion that electoral victory confers a plenary right to exercise power.

3 Accountability
At the level of constitutional and institutional arrangements, the difference between these two variants of democracy is associated with different forms and conceptions of accountability.

The English word “accountability” is often difficult to translate into other languages.

To be accountable means to have the duty to provide an account: that is, to explain and justify one's actions in terms of appropriate criteria and in sufficient detail. The criteria and level of detail that are required depend, of course, on the context.

Accountability is, therefore, not the same as, though it includes, answerability; that is to say, a duty – which may be legal, political, or moral – to respond to questions about a particular matter.

The concept of accountability also includes liability to some form of sanction if the performance revealed by the account is considered unsatisfactory. The sanction may be legal or, in a broad sense, political. As I will explain later, public criticism can be a significant form
of sanction in a democracy.

In the first variant of democracy, the natural concomitant of the idea that the winners of an election can legitimately claim a plenary right to exercise power on behalf of the sovereign people is that government is accountable only to the sovereign people at periodic elections. The sanction attached to such accountability is that, if electors deem a government’s performance unsatisfactory, they can vote it out of office.

Other forms of accountability are excluded as potentially limiting and constraining the sovereign people, as represented by those whom they have elected.

Naturally, democracies that more closely approximate the pluralist variant also provide for the accountability of governments to the people at elections. However, their constitutional arrangements provide, in addition, for continuous accountability between elections.

Both historically and in today’s world, the rule of law is the most developed and respected basis for such continuous accountability. As the traditional formulation of the separation of powers acknowledges, the judicial branch of government is the fountainhead of the rule of law.

Alongside the courts, there also exist other forms and institutions of continuous accountability within pluralist democracies. For example, although not enjoying as long a history as the rule of law, the idea of continuous parliamentary scrutiny of the Executive pre-dates modern democracy.

Modern democracies have also developed other institutions of continuous accountability to scrutinise the actions of public authorities, call them to account and provide information, analysis and redress. To give a few examples, there are: public auditors, information commissioners, ethics and standards committees, data protectors and, not least, ombudsmen.

The legitimacy of such institutions and hence their capacity to be net providers of legitimacy to the overall system of governance, depends on their fulfilling their functions in a way that is demonstrably impartial and non-partisan. This is the rationale for their independence, which, in constitutional systems where parliamentary scrutiny of the Executive is well-developed, is often secured by a privileged relationship with parliament.

Let me illustrate this with the example of my own institution, the European Ombudsman. The independence of my activity is mandated by the EC Treaty. The European Parliament elects the Ombudsman, no other institution having any role in the electoral process, but only the Court of Justice can dismiss me before the end of my term. I am accountable only to the European Parliament, and I render the account of my activities through annual reports and special reports.

Special reports are, in fact, a most valuable instrument for me because, as an ombudsman, I have no power to make legally-binding decisions, or to impose formal sanctions of any kind.
The authority of my office is moral and depends on two main elements.

The first is how convincing and persuasive I can be in identifying maladministration in the Union institutions and bodies and in proposing remedies to deal with it. Generally, the Union institutions and bodies are staffed by high-quality people, who want to serve Europe and European citizens. If I produce good arguments to show them that they could do better in a particular case, they normally accept what I say.

The second element is the right to criticise publicly an institution that fails to accept my findings and recommendations. That is why the right to make a special report is so valuable. Such reports are debated in the Committee on Petitions of the European Parliament and normally lead to a parliamentary Resolution, thus helping me reach public opinion.

Of course, the two elements are mutually reinforcing. The more convincingly I formulate my findings and recommendations, the more concerned the European institutions are likely to be at the prospect of adverse publicity if they fail to comply.

4 Transparency

The idea that publicity helps make the ombudsman effective as an institution of accountability brings me to the third concept in the title of my lecture: “transparency”, or as it is sometimes called “openness”.

Although there have been some attempts to argue that transparency and openness are different, I regard them as being essentially the same. (By the way, the best explanation I have heard as to why there are two terms instead of one, is that transparency was used to translate the French word “transparence”, because the translators were unfamiliar with English word “openness” in this context.)

“Transparency” seems currently to be the preferred term in European Union debates, as for example, in the Commission’s “Transparency Initiative”, which was launched earlier this year. I will therefore use that term.

The basic idea of transparency is that citizens should easily be able to obtain the information they need in order to call public authorities to account, whether at elections, or between elections.

At least until recently, many modern democracies have tended to assume that sufficient information would emerge as a by-product of the exercise of traditional political freedoms, in particular the freedom of expression.

This approach can be seen in the European Convention on Human Rights, which was adopted just over half a century ago. The Convention affords especially strong protection to the Press as regards freedom of expression, because of the role of the Press in imparting information and ideas to the public and the right of the public to receive them (1). However, freedom of expression does not require public authorities to impart information to citizens (2).
In contrast, transparency does indeed imply that public authorities should be proactive in publishing certain kinds of information, in ways that can be easily understood by the intended audience. In this sense, transparency overlaps with certain requirements of accountability such as, for example, publication of annual reports, or of a State budget showing plans and outcomes as regards spending, revenue and borrowing.

In addition, transparency requires public authorities to react promptly and positively to requests from members of the public for access to information and documents which have not been published.

This concept is known as “freedom of information”, or FoI, in the United States and in some other countries which have drawn on US experience since the introduction there in 1974 of the Freedom of Information Act, in the wake of the Watergate scandal.

As I shall explain in more detail later, the main legal framework for this aspect of transparency at the level of the EU is constructed around the concept of public access to documents. This orientation reflects Nordic influence, following the 1995 enlargement of the Union. However, despite the difference in legal technique, the objective of freedom of information and public access is the same.

In most European countries, Sweden being the most notable exception (3), legal rights to obtain access to information and documents have traditionally depended on having a special interest, greater than that of the public as a whole. For example, parties to administrative or judicial proceedings normally have a right to obtain documents and information needed to defend their interests.

Definitions of transparency may be formulated in a way that includes such special interests. However, the main idea of transparency is that everyone, or at least every citizen, has the right to obtain official information and documents, subject to legally defined exceptions for the protection of various public interests (such as security and prevention of crime) and private interests, (such as commercial secrets and private life).

Transparency, therefore, does not mean that all official information and documents must be public. What it does mean is that the burden of proof is on the public authority that refuses a request for public access, thus reversing the traditional presumption of confidentiality that existed in many countries.

Recommendations on public access by the Council of Europe, the Aarhus Convention on access to environmental information and the Advocate General in one of the first cases about public access to be brought before the Court of Justice, have all linked public access to democracy (4).

It is sometimes argued that public access cannot really be an aspect of democracy, because that would imply that many European countries that only recently adopted laws on public access, including, for example France, Ireland, the UK and most recently, Germany, were not previously democracies.
I think this criticism fails to take into account that the conceptual link between democracy and transparency passes through accountability and that mechanisms of accountability change and develop over time.

Logically, transparency is connected to both accountability at and accountability between elections, but I am persuaded that, historically, the development of public access to information and documents is associated with the growing importance attached to the latter form of accountability. It thus represents both an addition to the range of checks and balances in pluralist democracies and an instrument to promote the more effective operation of other types of checks and balances.

5 Democracy at the level of the European Union

I turn now to democracy at the level of the European Union.

It is almost conventional wisdom that the EU suffers from a “democratic deficit”, but there is less agreement about the remedy for the problem.

On one side, the idea of Europe as a federal State still has its advocates. To caricature, their argument is that such a State would be fully democratic and hence the democratic deficit would be overcome.

Some critics reject this idea on the grounds that democracy is impossible at the European level because there is no European *demos*, or people.

I believe that this argument is too simplistic, but that it, nevertheless, hints at a more complicated point, which has to do with the relationship between democracy and legitimacy. To put it simply, acceptance of the legitimacy of the state in the eyes of its citizens constitutes a prior condition for the smooth operation of a democracy. In fact, I would take this proposition one step further and, following Dahl, argue that if a state is not perceived as legitimate, then democratic elections cannot rectify this problem.

The European Union, of course, is not a state. It is perhaps best described as a multi-level system of governance. The Commission is sometimes referred to as the European “Executive”, but it is not a government. Although the Commission is, in many ways, a classical bureaucracy, much of its relationship with the external world is conducted through networks involving a variety of public and private organisations at different levels.

Moreover, administrations in the Member States, at national, regional and local level have the primary role in putting many aspects of EU law and policy into effect and, as successive waves of literature on implementation have emphasised, this is rarely a mechanical task.

For its part, the Council has not just one, but two, dual identities.

First, it is both supranational and intergovernmental. That is to say, it is an EU institution, but its structure makes it also a kind of standing process of diplomatic negotiation between governments of the Member States, involving a dense structure of committees.
Second, the Council is a legislative body, but it also has an executive role, especially in relation to police and judicial co-operation and the common foreign and security policy.

The Council has indirect democratic credentials, since it consists of representatives of the governments of the Member States, all of which have been democratically elected.

However, indirect democratic legitimacy derived from the national level has its limits. It is most convincing when used as a justification to block action at the Union level of governance. When used to justify positive action, even by unanimity, it is vulnerable to the accusation that governments in the Council are not subject to the checks and balances that exist in the domestic constitutional framework.

The European Parliament is directly elected and, contrary to popular myth, has quite extensive powers. However, in the absence of a well-developed European public sphere and a widely shared European identity, Parliament’s impact on public opinion is limited and participation rates at elections are low in many Member States.

Overall, therefore, the direct and indirect democratic credentials of the European Union, though real and important, do not achieve a very high degree of legitimacy.

On the contrary, the Union is widely perceived as technocratic, elitist, and unconnected to ordinary citizens.

The Constitution for Europe is an attempt to recognise and to rationalise, the multi-level system of governance that has been created in the European Union over the last fifty years. To simplify greatly, the Constitution represents not more Europe, or less Europe, but an explicit acknowledgement of the Europe that we now have.

The fact that it has not been possible to obtain agreement even on that is a demonstration of what I prefer to call the legitimacy deficit that the Union faces.

6 The development of transparency at the EU level

The problem of the legitimacy deficit was already visible when the Treaty of Maastricht was negotiated at the beginning of the 1990s.

Part of the response at that time was a commitment to transparency, to which the first Danish referendum rejecting the Maastricht Treaty gave added impetus.

Shortly after the Treaty finally entered into force in November 1993, the Council and Commission adopted a joint Code of conduct on public access to documents (5) . Although the Code was a major innovation, it had three limitations:
- First, it applied only to the Council and the Commission, not to the other EU institutions and bodies;
- Second, it applied only to documents of which the Commission or Council was the author. Documents received from outside -- from private parties, other institutions, or Member States, for example -- were excluded (6) ;
Finally, there was no requirement to make available any public registers of documents. This severely limited the usefulness of the Code, particularly in a system of governance marked by extensive reliance on networks and committees that are difficult to map from the outside – or even from the inside.

The European Ombudsman tackled the first of these limitations through two own-initiative inquiries in 1996 and 1999. These resulted in almost all the other EU institutions and bodies (including, for example, the Court of Auditors and the European Central Bank), also adopting rules on public access.

The second and third limitations were tackled in the Regulation on access to documents -- Regulation 1049/2001 (7) -- that superseded the Code in the year 2000.

Regulation 1049/2001 was adopted under Article 255 of the EC Treaty. That Article was introduced by the Treaty of Amsterdam, which was signed in 1997 and came into force in 1999. It provides for any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, to have a right of access to European Parliament, Council and Commission documents, subject to general principles to be laid down by legislation.

The Treaty of Amsterdam also amended Article 1 of the Treaty on European Union so as to provide that decisions in the Union should be taken not only as closely as possible to the citizen, but also “as openly as possible”.

The main features of the legal framework

Regulation 1049/2001 now constitutes the basic legal framework for public access to documents held by the EU institutions and bodies.

The Regulation applies directly to the Council, Commission and European Parliament and it has been extended ad hoc to cover certain EU agencies. Many of the other institutions and bodies that adopted rules on public access following the Ombudsman's own-initiative inquiries subsequently revised them in line with the principles in the Regulation.

Article 4 of the Regulation provides for exceptions to the right of access. If only parts of a document are covered by an exception, the institution must normally give partial access to the rest of it.

Most of the exceptions include a “harm test”: that is to say, the exception applies if disclosure would undermine the protection of the interest concerned.

Some exceptions are, in addition, subject to the possibility of an overriding public interest in disclosure. This is the case for the protection of: commercial interests; court proceedings and legal advice; and the purpose of inspections, investigations and audits. If an overriding public interest exists, then there is an “exception to the exception” and public access must be granted.

There is, however, no possibility of an overriding public interest in disclosure as regards the
exceptions for: public security; defence and military matters; international relations; financial, monetary or economic policy; and the protection of privacy and the integrity of the individual.

A stronger version of the harm test applies to the exception which is intended to allow the institutions a so-called “space to think”. The exception applies only if disclosure would seriously undermine the institution’s decision-making process. There is also the possibility of an overriding public interest in disclosure.

The Regulation makes a distinction between cases where the institution has not yet finished its thinking; that is to say, 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 decision has already been made.

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

If the decision has been made, the exception applies only to documents containing (quote) “opinions for internal use as part of deliberations and preliminary consultations within the institution.” (end quote) Incoming documents should thus, in principle, be accessible, unless a different exception applies.

Remedies
Each institution and body is responsible for applying the Regulation to the documents that it holds and dealing with requests for access. If an application for access is refused in whole or in part, the applicant has a choice of remedy. He or she may either seek judicial review of the decision, or complain to the European Ombudsman.

In practice, the Ombudsman and the Court receive roughly comparable numbers of cases. The latest comparative statistics available are from 2004, when nine cases were lodged with the Court, whilst the Ombudsman made decisions on 11 complaints.

In 2005, I made 14 decisions under Regulation 1049/2001, of which 11 concerned the Commission, two the Council and one the European Parliament. Two further cases concerned the application by the European Central Bank and the European Investment Bank of their own rules on access to documents.

As for who chooses to complain to the Ombudsman, putting the figures for 2004 and 2005 together, there were 14 complaints from NGOs, 10 from individuals, one from an industry association and two from companies.

The distinctive features of the Ombudsman remedy
The availability of both judicial and a non-judicial remedies, each with different characteristics, allows applicants to choose the more appropriate remedy for their case.

Two obvious advantages of choosing the Ombudsman are that the service is relatively quick and free to the complainant. The most obvious advantage of judicial review is that the Court's decisions are legally binding. The Court can therefore give authoritative rulings on
questions of legal interpretation, whereas the Ombudsman’s interpretation of the law is not binding.

For example, in dealing with a complaint, the Ombudsman took the view that the exception for “court proceedings and legal advice” should only apply to opinions given by the legal service of an institution in the context of possible future court proceedings.

In contrast, opinions from a legal service prepared during the process of drafting legislation should, according to the Ombudsman, be exempt from disclosure only if they fell within the exception protecting the institution’s “space to think”. This would have meant that, once the legislation was adopted, public access to legal service opinions would be subject to the “seriously undermine” version of the harm test, with the possibility of an overriding public interest in disclosure.

The Court of First Instance, however, gave a different interpretation in a judgement on another case, holding that the “court proceedings and legal advice” exception applies to all legal service opinions. The Ombudsman therefore had to abandon his earlier interpretation and apply the interpretation given by the Court.

There are, however, certain advantages for complainants flowing from the fact that my decisions are not legally binding. These advantages concern both the criteria of review and procedures. I shall develop both aspects in more detail, beginning with the criteria.

**Legality and maladministration**

The mandate of the European Ombudsman is to inquire into maladministration.

European institutions and bodies must respect the rule of law, so if they act unlawfully, that is maladministration. However, the converse is not necessarily true, because the principles of good administration require more of the institutions than merely avoiding unlawful behaviour. As I like to say, there is life beyond legality.

Let me give you an example that concerns access to information. Regulation 1049/2001 is about public access to existing documents. It does not require the institutions to create new documents containing information that someone would like to have. A few years ago, however, the Ombudsman drafted a Code of Good Administrative Behaviour, which contains, among other things, an obligation to provide members of the public with information on request.

Such an obligation cannot, of course, be absolute. As a principle of good administration, it amounts, essentially to the presumption that information should be provided unless the institution can offer a good reason not to do so.

Last year, I applied this principle in a case where the complainant had asked the European Central Bank whether it had intervened to soften the fall in the value of the US Dollar and the
rise in the value of the Euro. I took the view that, if the Bank was not prepared to release this information, it should explain to the citizen clearly and unequivocally its reasons for the refusal. The Bank did indeed provide such reasons and I therefore found no maladministration (10).

**Flexible procedures**

As regards procedures, I have already mentioned the Ombudsman’s power to conduct own-initiative inquiries, which led many EU institutions and bodies to adopt rules on access to documents. The procedural flexibility of the Ombudsman can also be valuable to individual complainants.

In one case, for example, an NGO made a rather generally phrased application to the Commission for access to documents concerning certain negotiations in the World Trade Organisation. The outcome of the complaint was a friendly solution in which the Commission supplied the complainant with a full list of the relevant documents, so facilitating a more precise application (11).

I would like to emphasise, however, that although I have focused on the Ombudsman in discussing remedies, the right to a judicial remedy is the fundamental guarantee that access to documents at the EU level is a legal right of citizens and residents, which the institutions and bodies are obliged to respect.

The Ombudsman’s role is complementary to that of the Court, providing an alternative remedy that applicants may choose if they consider it appropriate for their case.

Moreover, the freedom of not having the power to make legally-binding decisions also allows my office to play an active and sometimes innovative role in promoting transparency.

Let me illustrate this through an example which has a general importance for an overall assessment of transparency at the EU level of governance. It concerns the fact that the Council does not always meet in public when legislating.

In dealing with a complaint on this matter, I took the view that the principle in Article 1 (2) of the Treaty on European Union that decisions should be taken “as openly as possible” applies to the Council and that the Council’s own past actions made clear that steps to increase the transparency of its legislative activity had to be taken, and could be taken, under EU law as it stands at present. Since the Council gave no valid reasons why it should not meet in public whenever legislating, I found maladministration and made a Special Report to the European Parliament. Parliament then adopted a Resolution approving my recommendation that the Council should review its position (12).

The underlying arguments in favour of the Council legislating in public were not relevant to my finding of maladministration and so my Special Report does not deal with them. However, those arguments, which derive from the concept of accountability, are very
relevant to this lecture and I will explain them here. They reflect the Council’s dual identity as an intergovernmental and a supranational institution.

On the one hand, transparency of the legislative process in the Council reinforces accountability at the national level, by allowing citizens of each Member State to see what the governments they have elected are doing at the European level. Whilst there can be no guarantee that this will make it easier for the Council to reach agreement, such transparency is essential to counter the argument that the EU undermines accountability, and hence democracy, at the national level.

On the other hand, transparency of the Council’s legislative meetings also allows European citizens and residents, regardless of their nationality, to monitor the work of a European institution, thus helping to counter the perception that the Union is technocratic and elitist.

7 Transparency in the Member States’ handling of EU matters
The example of the Council’s legislative activity illustrates, I believe a more general point: that is, the artificiality of trying to maintain a clear separation between the Union and the Member State levels as regards accountability and transparency in EU-related matters.

Whilst the situation is by no means perfect, the Union institutions have, in the period since the adoption of the Maastricht Treaty, made very great progress towards ensuring the transparency of their functioning. This has involved a major cultural change, of a kind that can neither be effected overnight, nor by legal rules alone.

However, the more effective that mechanisms of accountability become at the Union level and the more demanding its requirements of transparency, the more obvious it becomes that constant interaction between the national and EU levels is the norm, whether the focus be policy-making, or the implementation of law and policy.

However, when we look at accountability and transparency, we find that they are confined quite rigidly to specific levels.

For example, although some commentators argue that the case law of the Court of Justice logically implies that public access is a fundamental right under EU law, the Court has not, or at least not yet, expressly defined it as such.

This is more than semantics. If public access were a fundamental right, it would be binding not only on the EU institutions, but also on the Member States when they are implementing EU law.

At present, however, EU law obligations on Member States to provide public access to information and documents are limited to specific fields, such as the environment (13).

Within the limits of my competence as European Ombudsman, I have tried to encourage greater transparency in the Member States’ handling of EU matters.

For example, I have given public support to the idea, put forward by the Commission in its
Transparency Initiative earlier this year, that Member States should be legally obliged to disclose the beneficiaries of certain EU funds.

I also adopted a new approach last year in dealing with two cases in which the Commission had refused to give the complainants access to documents from Member States. One of the documents was the response by the United Kingdom authorities to the Commission’s requests for information about a possible infringement of Community law. The other was a letter sent to the Commission by the Portuguese minister of finance in the framework of the excessive deficit procedure.

As well as asking the Commission to explain its refusal to give access, I also asked the authorities of the relevant Member States for their views, so as to clarify possible maladministration by the Commission. In both cases, the result of my approach to the national authorities was that the Commission changed its position and agreed to provide access to the documents concerned (14).

At present, however, Regulation 1049/2001 does not impose any legal obligations of transparency on the Member States. On the contrary, the Court of First Instance has held that the Regulation gives each Member State (i.e., its central government) the right to veto public access to any document of which it is the author, either at the time of sending the document to an EU institution, or subsequently, and without giving any reason (15).

This right of veto applies not only as regards contributions to policy-making, but also when the Commission is investigating a possible infringement of EU law.

I find it hard to explain and justify the lack of congruence between, on the one hand, quite flexible and unconstrained interaction between the national and European levels when it comes to exercising public authority and, on the other hand, the rigid segregation of those levels when it comes to transparency and accountability for the exercise of public authority.

8 Conclusion

In conclusion, I would like to emphasise that I do not believe that greater transparency offers a swift and sure route to greater legitimacy for the European Union. On the contrary, we face a long, hard slog to establish effective mechanisms of accountability, supported by appropriate forms of transparency, for the operation of the EU.

However, I am deeply sceptical about the adequacy of suggestions for a quick democratic fix, such as electing a President of Europe on a Europe-wide basis, or holding a Europe-wide constitutional referendum. Such ideas seem to me to put the cart before the horse, to use a colloquial expression. That is to say, they are based on the mistaken belief that democracy is a universal solvent for problems of legitimacy; a belief that, albeit in a wholly different context, has now surely been tested to destruction.

I am therefore persuaded that there is no alternative to the long hard slog. I find encouragement in the progress that has been made towards transparency at the level of the European Union institutions. I believe the next challenge is to create processes of transparency and accountability that match the realities of interaction between the national
and European levels in the exercise of public power.

Thank you for your attention.

(1) The Observer and the Guardian v United Kingdom 14 EHRR 153. See also Goodwin v United Kingdom 22 EHRR 123.

(2) Leander v Sweden 9 EHRR 433:

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 confirms 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.

(3) In Sweden, the right of public access to official documents has been linked to the freedom of the press since the 18th Century. Its stated rationale is promotion of “the free interchange of opinion and the enlightenment of the public.” (Freedom of the Press Act, chapter 2, Article 1).


(6) The validity of the authorship rule was upheld by the Court of First Instance in Case T-92/98, Interporc Im- und Export GmbH v Commission [1999] ECR II-3521.


(9) Article 22 of the European Code of Good Administrative Behaviour.


