European Ombudsman

Keynote speech at the Fourth Dataharvest Conference

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Good morning everyone and thank you for the invitation to address this fourth Dataharvest event. As you may have read in my biographical notes, I am a former journalist and while the core purpose of journalism has not fundamentally changed, to find out what's going on and to tell people about it, the landscape on which the 'what' is found out, and the way in which people are told about it has been changed in previously unimagined and unimaginable ways.

Thirty years ago, I performed what you do now but on a manual typewriter without mobile phones, fax machines, emails, or internet, in a political climate in which Government secrecy and Government ownership of data were accepted norms, but also in a media climate where only professional journalists and media owners determined what was mediated. The possibility of others joining in, giving their views, proposing different realities were limited to well edited letters pages. Both government and media were, ironically, united in their closed shop approach to what they did and how they did it.

There is no need to tell this audience how the IT revolution has changed all of that. The lines between the former professionals and the non -professional citizens have not just been blurred but virtually eradicated. And allied to that, or even cued by that, is increased pressure on governments to open up their files, their archives, their data, to the people so that they can use their wisdom, their intelligence and their fundamental right actively to participate in the democratic process, to play their role in creating the laws and the structures of the kind of society that they wish to live in.

Just yesterday I took part in the first European seminar of the Open Government Partnership, a global initiative, started in the US, but now spreading worldwide, whose aims are precisely what I have just described, to bring the citizen inside the Government tent, to make citizen participation a living, breathing, transformative reality.

Countries seeking to join have to produce National Action Plans detailing concrete actions they propose to take in areas of transparency, accountability, anti corruption measures and, critically, open data initiatives. At yesterday's seminar, I described the potential of the OGP as 'revolutionary' and I reference it now because so much of what you will be talking about at this conference dovetails with the ideals of those who are promoting Open Government Partnership.

Two days ago, I met with the head of the European Central Bank, Mario Draghi, to discuss his organisation's plans to become more transparent and accountable as the reach and influence of the bank becomes greater in light of the new measures that have been introduced to attempt to avoid the repetition of the economic and banking collapse of recent years. In passing, we discussed the latest book on economics currently attracting a lot of attention by French economist Thomas Pikkety. And it's interesting to note, for this audience, that Mr Pikkety's earlier research in the area of capital and income inequality and its effect, came essentially from dataharvesting. He used hundreds if not thousands of the archived tax returns of the wealthy to draw the conclusions that he did.

I have been asked today to address the 'Hot topics in the EU now and in the coming months'. As a former political editor, there is nothing I would like better than to talk about the imminent elections for the European Parliament, the election of a new Commission President and College, and the host of other high profile positions that will need to be filled in the months ahead. However, given the time available, I will instead highlight a range of Ombudsman topics and cases that I hope will be of interest and may inform some of your discussions later today.

But I also want to salute the efforts that you are making to dig deep into EU data to report on what is happening on many critical issues for the EU. I was particularly struck by a project called 'The Migrants Files', which seeks to determine precisely how many people have died since the year 2000 trying to reach the EU and I have already referenced that in recent public talks.

One media outlet rightly described the assessment as "shocking", More than 23,000 people have died or disappeared since the start of this very young century attempting to enter Europe and the figures that you have produced did not appear to have been collected by any responsible agency. We should not also forget, the tragedy of the families left behind. The Sunday Times recently published a most poignant photograph of a mother looking out to sea from the coast of North Africa, grieving the loss of her child who attempted to reach a better life and was never seen again.

I recently conducted an investigation into Frontex, the EU Agency that co-ordinates the co-operation between Member States in the field of border security and illegal immigration. The investigation led me to recommend that Frontex establish a mechanism for dealing with complaints about fundamental right infringements arising from its work. Frontex was unwilling to do so, arguing that individual incidents that occur are the responsibility of the respective Member State. Against the backdrop of the Lampedusa tragedy and other recent humanitarian catastrophes at EU borders, I felt that it was vital that Frontex deal directly with complaints from immigrants, other affected persons and concerned groups.

I therefore submitted a Special Report to the European Parliament, asking for its support in making sure Frontex reviews its approach. I have already addressed two Parliamentary committees and one sub-committee who have held hearings on the matter. Parliament's involvement has already helped clarify the issues and I am optimistic that Frontex may significantly change its position before the new Parliament has occasion to return to the matter

in the Autumn.

And let me say, that no one person or institution can always effect change, but projects such as the Migrant Files do add to the collective pressure and that is their great worth and value.

It is of course relatively rare for the European Ombudsman to deal with issues touching on life and death. And yet, a further example that I want to share with you relates to access to clinical trials data - in other words the data generated as a result of trials aimed at determining the safety and efficacy of drugs used to treat humans.

Over the last five years, my office has dealt with several complaints from citizens who were refused access to documents containing clinical trials data. Those opposing disclosure argued that the data is of a commercially confidential nature. After the European Ombudsman became involved, the public authority in question, the European Medicines Agency, declared that it would make clinical trials data publicly available proactively. The Agency suspended the implementation of that policy when it was taken to court by an American pharmaceutical company over its decision to release a specific clinical trial report. My office intervened in support of the Agency's position to release the report. Just to put this case in context, the drug in question generated $11 billion worth of sales last year.

The pharmaceutical company has now dropped the court case, as the Agency has agreed to further redactions before the report is released. I then decided to open an inquiry into the Agency's the decision to make these redactions. That inquiry was launched last month and hopefully will confirm that the redactions were appropriate as it is hard to identify an issue where full transparency is more important and more pressing than in the protection of public health.

I was therefore very pleased that the European Parliament, also last month, voted for specific legislation to make clinical trials information public. Thanks to the new rules, details of all clinical trials in Europe will be publicly accessible online, making it possible to verify whether medicines are as effective as they are claimed to be and whether they have potentially dangerous side effects. This will provide better protection for patients and could save countless lives across Europe. However, the new rules will apply only in the case of new clinical trials: they will not have retrospective application. This means that, in the case of drugs already in widespread use across the EU, access to the clinical trials data in relation to them will not be available – unless the drugs companies themselves choose to make them available or the regulator does so under public access rules. And we know from the work of investigative journalism, both print and television, that there are several examples of high profile drugs whose safety and/or efficacy remains in doubt – to put it mildly – but where the full range of clinical trial data has never been made available publicly.

The Ombudsman's involvement in this debate came about as a result of my role in ensuring that the EU institutions comply with freedom of information rights. Regulation 1049/2001, which provides for public access to documents, gives applicants the choice of complaining to the Ombudsman or going to court in the event that they are refused access to a document by an EU institution. I played a similar role in Ireland, where I was Information Commissioner from

2003 to 2013. During those ten years, the landscape changed dramatically and we now inhabit a reality unimaginable only a decade ago. With the information technology capacity at our disposal and the apps and downloads freely available on the internet, the genie really is out of the bottle. And yet, with all the information that is out there, do citizens always know what their public authorities are doing in their name?

Let me give you another example of a case, this time one in which the Ombudsman did not oppose the institution's decision to keep documents confidential. In December 2011, 28 digital civil rights associations complained to the Ombudsman about the European Parliament's refusal to disclose documents relating to the negotiations on the Anti-Counterfeiting Trade Agreement, known to many of you as ACTA. Parliament explained that it was bound by a confidentiality agreement negotiated by the Commission. The Ombudsman accepted this explanation but told Parliament to ensure that the Commission and Council do not sign confidentiality agreements in the future that could undermine Parliament's ability to deliberate openly on such issues.

Parliament President Martin Schulz sent his reply to me earlier this year, promising that future trade negotiations, and in particular the on-going negotiations with the US on the Transatlantic Trade and Investment Partnership (the TTIP) will be more transparent and open for stakeholder involvement. No confidentiality agreement has been signed with the US in the context of the TTIP negotiations, he said. The negotiators instead committed themselves to implementing the EU's access to documents rules. Moreover, the Commission took the unprecedented step of publishing important documents at the start of the TTIP process and invited stakeholders to submit their views.

I recently met the US lead negotiator who is responsible for regulatory transparency. I emphasized to her that transparency of the negotiating process itself is essential to ensure the legitimacy of the outcome. Of course, I am aware that there is a legitimate need for certain documents to remain confidential in the context of such important negotiations. But the public needs to know about the issues that will ultimately affect their daily lives, and, in the face of falling faith and declining trust in public authorities, citizens are less and less willing to give those who represent them this space to negotiate in secret on their behalf. I will be monitoring the transparency element of these talks very closely and I have no doubt that civil society and journalists such as those here today will be extremely vigilant in relation to this matter.

These cases raise important issues of trust and transparency. So too does my ongoing inquiry into "revolving doors", the phenomenon whereby EU public servants take up jobs in the private sector and vice versa. The complainant alleges that the Commission is failing to implement the relevant rules adequately and, as a result, allows real, apparent and potential conflicts of interest to occur.

The complainant claims the Commission does not ensure that staff comply with their obligations and does not impose sanctions where rules are breached. Following an inspection of relevant files, I asked the Commission a range of questions in relation to these issues, including whether it would be willing to publish online regularly its assessment of applications from senior staff to engage in work after leaving the service.

I have also asked the Commission if it would be willing to introduce a more independent assessment system. There may be a case for setting up an independent body to decide, on a case-by-case basis, whether EU officials moving into and out of the private sector have conflict of interest issues.

When the Commission is dealing with crucial issues, making decisions that may have a significant impact, for example, on the profit margins of private industry, the 'revolving doors' syndrome needs to be carefully monitored.

And related to much of this is the very current issue of whistleblowing. Are these individuals conscientiously acting in the public interest or tearing at the fabric of responsible government, as Hilary Clinton put it after masses of diplomatic cables were leaked? Interestingly, the public, or at least the US public, seem conflicted on the issue, with a majority glad to have the information but a much smaller number approving of the actions of the whistleblowers.

The Commission, in its recent and first EU Anti-Corruption Report highlighted whistleblowing as an area in which effective policies can help reduce the opportunities for corruption. The Report noted, however, that *"(...) whistleblowing faces difficulties given the general reluctance to report such acts within one's own organisation, and fear of retaliation. In this regard, building an integrity culture within each organisation, raising awareness, and creating effective protection mechanisms that would give confidence to potential whistleblowers are key.(...)"*

Recent events in my own country in relation to police whistleblowing, for example, have demonstrated the correctness of the Commission's observations and I think that, increasingly, as the drive for greater transparency continues, and as initiatives such as the Open Government Partnership take root with its anti corruption focus, whistleblowing as an issue will assume much greater importance and I can see my office dealing with this matter perhaps in a systemic way.

You, of course, play a key role in exposing corrupt practices and grave irregularities and given the political sensitivity of some of your work the life of an investigative journalist can be increasingly challenging.

David Miranda, the partner of the former Guardian journalist Glenn Greenwald, was stopped and questioned for nine hours while transiting through Heathrow airport in a move that Greenwald claimed was *"clearly intended to send a message of intimidation to those of us who have been reporting on the NSA and GCHQ"* . As the solicitor representing David Miranda wrote recently, *"the revelations of mass surveillance are certainly embarrassing for the UK and other governments, and the information is sensitive, but to ride roughshod over fundamental constitutional freedoms and 'shoot the messenger' is to perpetrate a further injustice on a public who have the right not to be kept in the dark"* .

A German journalist has alleged to my Office that the Commission wrongly refused his request for public access to documents related to the surveillance of the internet by UK state

intelligence agencies. The complainant requested access Commission documents on the surveillance, retention and use of data from the internet by UK authorities and for documents that show what steps and measures the Commission has taken to investigate these allegations. The inquiry in this case is ongoing.

All of this, of course, begs the question: "what are public authorities entitled to know about us?" You will have followed the debate on the EU's Data Retention Directive, which the Court of Justice recently declared to be invalid. This legislation, which required the retention of electronic communications data for up to two years, was found to infringe the Charter of Fundamental Rights and, specifically, the fundamental rights to respect for private life and to the protection of personal data.

The Court said that, by requiring the retention of these data and by allowing national authorities to access these data, the Directive interfered in a particularly serious manner with those fundamental rights.

What is particularly interesting to note is that the Data Retention Directive did not extend to the retention of the content of the communication or of information consulted - in other words, the type of information that we now understand some public authorities, both within and outside the Union, may have been accessing without our knowledge.

I would encourage other journalists also to use my Office if refused access to documents. As part of an inquiry, my Office can inspect any documents, no matter how confidential, held by any EU institution or agency. As part of an inquiry, I can also call on any EU official to testify to ascertain the facts of a case.

As regards the legal framework of transparency at the EU level, to my mind the problem is not the scope of the right of access that exists in theory, which is quite extensive but rather the remedies - or rather, the lack of remedies - to enforce the right. When compared to the remedies in many Member States, those at the EU level are less than adequate.

As European Ombudsman I can only recommend that a document be released. If the institution refuses, then I can take the issue to the European Parliament. When I was Irish Information Commissioner, I could direct disclosure and the public body had to release the record or else take me to the court, something that was done in relatively few cases.

At the EU level, it is the applicant who must go to court to obtain a legally binding decision. Even then, all the court can do is annul the decision refusing access and send the matter back to the institution to make a new decision. It cannot, curiously in my view, order that the document be released.

Since neither the court nor the Ombudsman can oblige an institution to disclose a document, the short theoretical time limit to answer an application for access is not so much a deadline as a dead letter. If an institution does not want to release a document, it can, in practice, frustrate the theoretical right of public access for years.

So, unfortunately, the EU legislation that is supposed to give effect to the fundamental right of public access does not match its rhetoric. For six years now, the Parliament has been pushing for amendments to the scope and substance of that right. There has been no change because the other institutions do not particularly want to see those changes come into force.

I think the time has now come to re-focus the debate on improving remedies, so citizens can enjoy in practice the right of public access they already have in theory.

I hope that the new European Parliament that we shall elect in a few weeks time will be ready to take up this challenge from a legislative point of view. For my part, I am going to continue to argue, advocate and explore the possibilities for a better framework for EU-level transparency.

Ladies and gentlemen, let me conclude with a quote from Martin Luther King who said, "Darkness cannot drive out darkness; only light can do that." I hope that you continue to shine a light on the issues that are central to citizens and that you report them responsibly to a public who, indeed, "have the right not to be kept in the dark".