THE CITIZEN, THE ADMINISTRATION

AND COMMUNITY LAW

General report prepared by

The European Ombudsman
Jacob Söderman

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Contents

1 CITIZENSHIP OF THE UNION

1.1. The significance of citizenship

When the Maastricht Treaty on European Union entered into force in November 1993, every national of a Member State became, in addition, a citizen of the Union.

The provisions concerning citizenship of the Union were inserted into the Treaty establishing the European Community as a new Part Two of the Treaty (Articles 8 to 8e). Hence they are firmly anchored in Community law. The concept of citizenship thus provides an important element of unity in the complex constitutional architecture of Union/Community that has emerged from the Treaties of Maastricht and Amsterdam.

As amended by the Treaty of Amsterdam, Article 8 EC reads as follows:

> *1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.*
>
> *2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.*

The third sentence of Article 8 §1 concerning the complementary nature of Union citizenship was added at Amsterdam. It emphasises a point already stressed by the European Council at Edinburgh in 1992.

By referring to rights and duties under the Treaty, Article 8 § 2 provides a clear link between the concept of Union citizenship and the principle, established by the case-law of the Court of Justice, that the subjects of the Community legal order comprise not only Member States but also their nationals. This principle is, in turn, closely connected to the idea that the Community Treaties are the constitutional charter of a Community which is based on the rule of law.[1]

Both the rights of individuals as subjects of Community law and adherence to the rule of law as a fundamental principle have been re-inforced by the case-law of the Court concerning general principles of law, which include fundamental rights as an integral part. Of particular importance in this context are the cases in which the Court has drawn on the constitutional traditions common to the Member States and on

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

international treaties for the protection of human rights, in particular the European Convention on Human Rights.[2]

As is well-known, from the time of its decision in *van Gend en Loos*[3], the Court of Justice has progressively developed the principle that national courts must uphold the rights that individuals enjoy under Community law. In particular, national courts should protect such rights *vis-à-vis* the public authorities of the Member States, through the application of directly effective provisions of Community law and indirectly through the award of damages, according to the principle established in the *Francovich* case.[4]

The citizenship of the Union also consists, in part, of rights that individuals possess *vis-à-vis* public authorities in the Member States. Article 8a concerns the right to move and reside freely within the territory of the Member States. Article 8c confers on every citizen in the territory of a third country, in which the Member State of which he is a national is not represented, an entitlement to protection by diplomatic and consular authorities of any Member State, on the same conditions as the nationals of that State.

The right of free movement and the right to diplomatic representation could both be characterised as "civil" rights. Here again, the citizenship of the Union marks a further step, in a process begun by the case-law of the Court of Justice,[5] towards the treatment of individuals as human beings rather than as an economic resource.

Furthermore, the scope of Union citizenship is not limited to rights *vis-à-vis* the Member States. It also extends to the connexion between individuals and the Union institutions and includes rights which are intended to facilitate political participation by citizens.[6] In particular, Article 8b provides that citizens who are resident in a Member State, other than that of which they are a national, shall possess the right to vote and stand as a candidate in elections to the European Parliament, as well as in

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2 See for example Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; Case C-260/89 *ERT* [1991] ECR I-2925; Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

3 Case 26/62 [1963] ECR 1.

4 Joined Cases C-6 and C-9/90 [1991] ECR I-5357.

5 See G. F. Mancini, "The free movement of workers in the case-law of the European Court of Justice" in D. Curtin and D. O'Keeffe (eds.) *Constitutional Adjudication in European Community and National Law*, 1992; E. A. Marias, "From market citizen to Union citizen", in E. A. Marias (ed) *European Citizenship,* EIPA 1994.

6 In this sense, the citizenship of the Union creates, for the first time a direct link between the Union citizen and the institutions of the Union Cf. European Commission, Report on the Citizenship of the Union (COM/93/702 final), 21 December 1993.

municipal elections. Article 8d provides for citizens to have the right to petition the European Parliament and to complain to the Ombudsman, in accordance with Articles 138d and 138e of the Treaty respectively. The latter two Articles provide for the right to petition and to complain also to be enjoyed by resident non-nationals[7], as well as by legal persons.

The Treaty of Amsterdam makes important amendments and additions to the Articles of the Treaty on European Union which state the constitutional principles on which the Union is founded and in terms of which the citizenship of the Union must therefore be understood. In particular, as amended at Amsterdam, the first paragraph of Article F TEU states that:

> *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*

Regardless of debates about the future constitutional development of the Union, its institutions have already become a level of governance: that is to say, they exercise judicial, legislative and administrative powers. In the constitutional traditions common to the Member States, public authorities which exercise such powers are accountable to citizens, who can also participate in the processes of governance, both directly and through elected representatives. Accountability and possibilities of participation are made concrete through rules and procedures of public law which govern the functioning of the public authorities.

The topic "*The citizen, the administration and Community law*" gives the opportunity for discussion at the 1998 FIDE congress in Stockholm of how to enhance both the accountability of the European Union's institutions to its citizens and the opportunities for citizens to participate in the activities of the institutions. Two themes are of particular importance for this purpose.

The first theme is "transparency." Section 1.2 below examines the meaning of transparency and its significance for citizenship.

The second theme is good administration. Section 1.3 below begins by looking at the administration of Community law and policy from the standpoint of the citizen. It then considers how standards of good administration, including respect for the rule of law, may be established and enforced. It concludes by examining the possible advantages of a formal code of good administrative behaviour.

Parts 2 and 3 of this General Report focus, from the perspective of the citizen, on the enforcement of good administration.

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[7] In 1994, there were over 9 million resident non-nationals in the Member States, according to Eurostat figures. See generally K. Hailbronner, "Third country nationals and EC law" in A Rosas and E Antola (eds.) *A Citizens' Europe*, Sage 1995.

Part 2 of the report examines the possibility for citizens to complain to the Commission, in its role as "guardian" of the Treaty, about infringements of Community law by national administrative authorities. The main questions in this part of the Report concern the Commission's own administrative behaviour in dealing with such complaints.

Part 3 of the report examines citizens' access to judicial and non-judicial remedies in order to enforce standards of good administration, *vis-à-vis* both national bodies dealing with Community law and policy and Community institutions and bodies.

Part 4 of the report brings the two themes together. It focuses on standards of good administration in relation to an especially important aspect of transparency: that is, public access to official documents.

1.2 Transparency

Everyone is in favour of "transparency", but too much popularity risks depriving the term of a precise meaning. The sense in which the word is used in this general report will therefore be defined. Transparency means that:

- the processes through which public authorities 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.

Transparency so defined is fundamental both to accountability and to the possibility of participation. To function effectively, a democratic system requires that the public be adequately informed about issues of public life.[8] Without such information, citizens cannot understand what public authorities are doing and why. The possibilities of rational consent and of participation are thereby reduced. The level of public debate also diminishes, reducing the possibility to make effective use in relation to public affairs of the freedom of expression, which is one of the fundamental freedoms to which Article F of the Treaty on European Union refers.

Furthermore, in order to protect his or her private interests, it is necessary for the citizen to have access to the information on which public authorities base decisions affecting those interests. From this perspective, access to information relates both to fair procedure and the rights of defence on the one hand and, on the other hand, to individual privacy, particularly as regards personal data.

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[8] See generally on this theme, Council of Europe, *The Administration and You: a handbook*, 1996 p. 18.

The Union's commitment to transparency has been re-affirmed in the Treaty of Amsterdam. The second paragraph of Article A TEU, as amended, makes specific reference to the principle of openness:

> *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.*

The provision reinforces the Declaration on the right of access to information, which was annexed (as Declaration 17) to the Final Act of the Maastricht Treaty on European Union and which linked the right of access to information with the democratic nature of the Union institutions.[9]

In relation to the provision of information, transparency imposes two requirements on public authorities. The first requirement is to take the initiative in providing information to citizens. To communicate effectively requires an information strategy targeted to the needs of particular audiences. Many Community institutions and bodies have developed such strategies in a genuine effort to explain and inform. The second requirement is to react properly when citizens take the initiative by asking a Community institution or body for information and, in particular, for access to documents that have not already been put in the public domain.

In 1993, the Commission and the Council adopted a joint Code of Conduct about access to their documents. The Code was implemented through separate Decisions made by the two institutions.[10]

In its judgment in the case of *Netherlands v Council,*[11] the Court of Justice 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 and referred to a trend towards "a progressive affirmation of individuals' right of access to documents held by public authorities." This trend is reflected by the Treaty of Amsterdam, which adds to the EC Treaty a new Article 191a

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9 *"The conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends 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*."

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

11 Case C-58/94 [1996] ECR I-2169.

concerning citizens' access to documents of the European Parliament, the Council and the Commission.[12]

In view of the importance of public access to documents as an right of citizenship, the issue is treated fully in Part 4 of this general report, in the light of the responses from national rapporteurs to the relevant parts of the questionnaire.

1.3 The citizen and the administration

1.3.1 Administrative activity from the perspective of the citizen

The public authorities with which citizens are most likely to have personal contact are bodies carrying out administrative tasks. In relation to Community law and policies administrative tasks are carried out partly by Community institutions and bodies and partly by public authorities in the Member States.

From the standpoint of the citizen, the administrative activity of public authorities, at the Community level as well as at the national level, has three main aspects.

First, it may involve restrictions or interference with private rights that normally enjoy legal protection, such as property or privacy. This aspect is evident when, for example, administrative sanctions such as a fine are imposed, or when premises are searched and documents seized.

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[12] *"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 189b 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."

See also Article 151 § 3:

"The Council shall adopt its Rules of Procedure....
For the purpose of applying Article 191a(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public."

Second, the administration provides benefits that an individual citizen may wish to acquire such as subsidies, enforcement of his rights against third parties, or a job.

Third, administrative bodies aim to provide public services which are of general benefit,[13] such as high standards of food safety and protection of the environment.

In general, all three aspects of administrative activity may give rise to dealings between individual citizens and a public body. This is obvious in cases where administrative activity affects private rights or interests. However, it is also true in relation to public services, as for example, when an individual citizen requests information from an administrative body about its activities, or seeks to participate in the processes through which its policies are formulated, implemented and reviewed.

In the case of Community institutions and bodies, a large category of those whose private rights or interests are affected by administrative activities consists of legal persons, especially companies. However, individual citizens are also so affected. For example, they frequently approach the Commission to seek advice or assistance in relation to problems they experience in relation to obtaining their rights under Community law. They also seek employment opportunities with the institutions.

However, Community institutions and bodies are not direct providers of the typical services of the welfare state, such as education, social security, housing and health. Furthermore, Community spending programmes in fields such as agriculture and social policy normally involve national bodies as the administrative authorities in direct contact with individual citizens. For this reason, it is to expected that a relatively high proportion of administrative contacts between individual citizens and Community institutions and bodies will concern requests for information or documents, or for opportunities to participate in the policy process.

1.3.2 Standards of good administration and their enforcement

In dealing with public authorities, a citizen is entitled to expect that certain standards of good administration will be observed.

Firstly, public authorities are subject to the rule of law. Hence they must act in accordance with the law, including respect for the fundamental rights of individuals, both substantive and procedural. It can never be good administration to fail to act in accordance with the law.

Secondly there is an important principle which derives from the very purpose of public administration. At the level of national systems of administration, the principle is formulated and expressed in different ways including, for example: service-mindedness, citizen-friendliness, the citizen as "customer" and the concept of public

[13] In the language of economics these are “public goods”.

service. The basic idea which underlies all these notions is that the administration exists to serve citizens, not *vice versa*.

If a citizen considers that a public body has fallen below the standards of good administration, the question arises of what remedies may be available.

The possibility to bring proceedings in the courts against an administrative body is normally governed by rules of two main kinds. First there are rules of standing (*locus standi*) concerning the interest which a person must show in relation to the subject-matter in order to bring legal proceedings. The absence of such rules allows the possibility of an *actio popularis*, but more usually some specific interest is required. Second, there are rules concerning the kinds of administrative acts or omissions which may be the subject of challenge. These two issues - standing and the nature of the act or omission which can be challenged - are often connected in practice.

In proceedings brought by natural or legal persons in the Court of First Instance, the rules of standing are quite narrow. Furthermore, there are restrictions on the kinds of acts or omissions which can be challenged. Together, these rules mean that there are only limited possibilities for a citizen who considers that a Community institution or body has fallen below the standards of good administration to bring the matter to court. This issue is discussed in detail in the report on the Community.

The citizen's right to petition the European Parliament "on a matter which comes within the Community's fields of activity" (Article 138d EC) is broad enough to include a failure by a national body to observe standards of good administration in those fields. If the failure is that of a Community institution or body, the citizen may complain to the European Ombudsman about maladministration.

Citizens' access to both judicial and non-judicial remedies in respect of failure to observe standards of good administration in matters in relation to Community law and policy is examined in detail in Part 3 of this general report below.

The final section of this first part of the general report examines a different aspect of the enforcement of standards of good administration: how can the standards be made concrete enough to guide the activities of administrators, citizens and supervisory bodies?

1.3.3 A code of good administrative behaviour

Standards of good administration may be made concrete in a number of ways. Firstly, supervisory bodies such as courts, ombudsman and similar bodies may develop and

apply, on a case-by-case basis, general principles, such as the "general principles of Community law", or the “principles of good administrative behaviour.”[14]

A second possibility is for the legislator to enact rules. In many Member States, there are specific laws governing administrative activity, especially the procedures used in reaching administrative decisions. Such laws may apply generally to all administrative activity, or to particular fields of administration. The national reports discuss the general laws concerning administrative procedures of Denmark (1986); Germany (1977); The Netherlands (1994); Austria (1925-91); Portugal (1991); Finland (1982) and Sweden (1986) and a procedural code which is in preparation in Greece.

Thirdly, an administrative body itself may have a power of internal organization, which enables it to adopt rules to govern its own activities, either in a formal way or as some type of "soft" law. In the UK, for example, the "Citizen's Charter" set out general principles of public service which were intended to be implemented through more detailed charters, elaborated by the providers of specific services themselves. Similar public service charters have been promulgated in Belgium[15] and Italy[16]. Soft law may also be used to codify principles established by supervisory bodies. The Irish Ombudsman, for example, has published a checklist as a guide to standards of best practice.[17] A similar checklist can be found in the pamphlet entitled "The Ombudsman in your files", prepared by the UK cabinet office as a guide to civil servants.[18]

The contents of a code of good administrative behaviour normally include at least some of the following: the giving of reasons for decisions; fair procedures and the rights of defence; avoidance of discrimination; taking into account all relevant considerations and excluding irrelevant ones; maintaining adequate records; avoiding unnecessary delay; providing information in a clear and understandable form; giving correct advice; applying established rules and procedures; if a decision is unfavourable, providing information about the possibilities of review; acting consistently; acknowledging and replying to letters; transferring letters to the

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14 J. A. Usher, ‘The “good administration” of European Community law’,1985 *Current Legal Problems*, p. 269. On administrative procedures, see Keon Lenaerts and Jan Vanhamme, “Procedural rights of private parties in the Community administrative process” 34 *Common Market Law Review*, 531-569 (1997); Jürgen Schwarze, "procedural guarantees in the recent case-law of the European Community" in Festschrift for H. J. Schermers 1994;

15 *Charte de l'utilisateur des services publics*, 4 December 1992, *Moniteur Belge* 22.01.1993 p. 1150.

16 Sabino Cassese, "The Difficult Profession of Minister of Public Administration", Jean Monnet Chair Paper 31, European University Institute, 1995.

17 See his Annual Report for 1996: http://www.irlgov.ie/ombudsman/report96/default.htm

18 (ISBN 0 7115 0306 0) December 1995, see the section entitled "Learning from experience."

competent service; apologising for errors; having a proper system for dealing with complaints.

In the case of the Community, there are numerous sets of rules applying to specific areas of administration; for example, guidelines in the field of state aids; procurement of goods and services; competition (Regulation 17/62) and anti-dumping (Regulation 384/96) proceedings; and rules laid down for applications under specific Community funding programmes. However, some important areas of administration are not governed by published rules. In particular, there are no such rules for the Commission's handling of complaints about infringements of Community law. Procedures for dealing with such complaints are laid down in the Commission's internal *Manual of Operational Procedures*, but this is not a published document.

As already noted in the discussion of transparency, there are also more 'horizontal' rules which apply to all areas of administrative activity, such as the rules on public access to Council and Commission documents.[19] The EC Treaty requires that acts adopted by Community institutions must state the reasons on which they are based and that they must be published, or notified to those to whom they are addressed (Articles 190, 191). The Treaty of Amsterdam adds a new paragraph to Article 8d of the EC Treaty to provide that every citizen of the Union may write to a Community institution in any official language and have an answer in the same language.

An important point emerges from the latter provision. The duty to answer *in the same language* presupposes a duty to reply to citizens' correspondence. However, there is no other Treaty provision or Community legislation expressly stating that Community institutions and bodies must reply to letters which they receive from citizens. The duty to reply to a citizen's letters, and to do so within a reasonable time, derives from general principles of good administrative behaviour, the existence of which has been recognised by the Court of Justice. However, it could be more satisfactory for such duties were set down in a published code of good administrative behaviour.

In December 1997, the Secretary General of the Commission sent to the European Ombudsman the first draft of a *Code of Conduct for European Commission Officials in their relations with the public* with an invitation for comments. The publication of such a Code would have benefits both for the administration and for citizens, provided that its provisions were concrete and precise. By informing officials of the service they should provide it would enhance the quality of administration and help to maintain consistency between different institutions and agencies. For citizens, a code would have the additional advantage of making more transparent and concrete the service which they are entitled to expect.

At the time of writing this general report it is not clear whether the Commission will adopt the Code of Conduct in the form of a decision, as in the case of its rules on

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[19] See also the Commission communication concerning "an open and structured dialogue between the Commission and special interest groups" 1993 OJ C63/2.

public access to documents[20], or as a soft law instrument. The relative merits of these two approaches could form a useful subject for discussion in Stockholm. Adopting the Code as a decision would mark the importance which the Commission attaches to relationships with citizens. One motive for a "soft law" approach might be a wish to limit the extent to which the provisions of a Code would be enforceable through the courts.

Would the method of adoption make any difference in this respect in view, on the one hand, of the fact that Article 173 refers to infringement of an *essential* procedural requirement and, on the other hand, of the case-law[21] concerning the enforceability of rules which an institution has imposed on itself?

2 THE EUROPEAN COMMISSION AS THE "GUARDIAN OF THE TREATY"

2.1. The Rule of Law

The rule of law is the foundation of the relationship between citizens and public authority. It is an essential part of the constitutional traditions common to the Member States of the European Union. The rule of law implies that no person or body, however powerful, can break the law with impunity. In particular, every citizen is entitled to expect that public bodies will obey the law. Disregard of the law by public bodies is a threat both to individual rights and to the principle that the holders of public offices should be accountable to the citizens for their actions.

Citizens of the Union are entitled to expect that Community law will be obeyed by all public authorities whether at local, regional, national or Union level. In such a multi-level system of governance, decentralized enforcement of the law can be both efficient and effective and thereby correspond with the principle of subsidiarity. In particular, national courts have a fundamental role in ensuring that individual rights under Community law are respected by public bodies in their Member State. As Part 3 of the report below explains, non-judicial mechanisms can also make an important contribution in this respect.

Decentralized enforcement is complemented by a centralized system of enforcement which is established by the Treaties. Article 155 of the EC Treaty imposes on the Commission the duty to "*ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied*"**.** The importance of the

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[20] Commission Decision of 8 February 1994 on public access to Commission documents, *OJ* 1994 L 46/58.

[21] see e.g. Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711; Case C-310/93 *BPB Industries PLC and British Gypsum Ltd v Commission* 1995 ECR I-865.

Commission's role as "guardian of the Treaty" under Article 155 was emphasised by Declaration 19 attached to the Final Act of the Maastricht Treaty.[22]

Vis-à-vis the Member States, the main instrument of enforcement which the Commission has available as guardian of the Treaty is the procedure established by Article 169.[23]

2.2. The Procedure under Article 169[24]

Article 169 provides as follows:

> *If the Commission considers that a member state has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
>
> *If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.*

The application of Article 169 may result in a finding by the Court of Justice that a Member State has failed to fulfil an obligation under the Treaty. Such a finding comes at the end of what is usually referred to as the "judicial stage" of the Article 169 procedure, which begins if and when the Commission brings the matter before the

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[22] Paragraph 2 of Declaration 19:
"The conference calls on the Commission to ensure, in exercising its powers under Article 155 of this Treaty, that Member States fulfil their obligations. It asks the Commission to publish periodically a full report for the Member States and the European Parliament."

[23] Article 141 of the Euratom Treaty is in identical terms to Article 169 EC. The corresponding provision of the ECSC Treaty (Article 88) is significantly different and is not dealt with in this report. Other provisions of the EC/Euratom Treaties modify the Article 169 procedure in relation to specific matters: Articles 93 (2), 100a (4), 225 EC; Articles 38 and 82 Euratom. Article 104c provides for a special enforcement procedure in relation to excessive government budget deficits: see Alexander Italianer, “The excessive deficit procedure: a legal description” in M. Andenas, L. Gormley, C. Hadjiemmanuil and I. J. Harden (eds) *European Economic and Monetary Union: the Institutional Framework*, Kluwer, 1997 and Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 1997 L 209/6.

[24] 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, J-L 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.

Court of Justice. The procedure before reference of the matter to the Court constitutes an administrative stage.[25]

The administrative stage can itself be sub-divided into informal and formal phases. The informal phase begins when the Commission is first alerted to a possible infringement. At this point, it decides whether or not to investigate the matter. If it does investigate, the informal phase ends when there is a decision either to close the file, or to proceed to the formal phase.

The formal phase begins with the "letter of formal notice" *(lettre de mise en demeure*) from the Commission to the Member State. This specifies what the State is alleged to have done wrong and sets a time-limit for the submission of observations. After the time-limit has expired, the next step is for the Commission to deliver a reasoned opinion. The opinion sets a further time-limit for compliance by the Member State, after the expiry of which the judicial stage of the procedure could begin.

2.3. Complaints to the Commission

The Commission becomes aware of possible infringements of Community law by Member States either through its own activities, which include routine monitoring of the transposition of Directives into national law, or through complaints. In 1989, the Commission published in the *Official Journal* a standard form on which complaints may be made. In 1997, it announced the forthcoming publication of a new complaint form.[26]

In its Thirteenth Annual Report on Monitoring the Application of Community Law (1995), the Commission described the possibility of complaint as*:*

> *"an indispensable instrument, not only for the Commission but also for the individual citizen. This is especially true where a citizen fails to secure respect for the rights he enjoys under Community law."*[27]

In the following year's Annual Report, the Commission drew attention to what it saw as a gap between complainants' expectations of the Article 169 procedure and the reality:

> *"... the Commission is perceived as capable of solving every individual situation - a kind of Community Supercourt, as it were - whereas in fact the object of the Article 169 procedure is to induce a Member State to come back into line with*

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25 Case 48/65 *Lütticke v Commission*, [1966] ECR 19.

26 Fourteenth Annual Report on monitoring the application of Community law (1996) COM (97) 299 final, 1997 OJ C 332/1.

27 COM (96) 600 final, 1996 OJ C 303/1.

Community law. 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. It should not be forgotten that the citizen can rely on Community law in the national courts and have rights conferred by Community law secured by them."[28]

The protection by national courts of the rights that individuals enjoy under Community law is of immense importance. However, enforcement through this mechanism alone is not adequate to ensure the full degree of compliance with Community law which citizens are entitled to expect, because the duties of national authorities under Community law do not always correlate with rights enjoyed by individuals. As the Commission has recognised, many complainants only have the Commission to rely on.[29]

Setting aside the fact that its operation may ensure respect for the Community law rights of individuals -- rights which could also be enforced through national courts -- the Article 169 procedure has a dual significance for the citizen's interest in the rule of law:

(i) in practice, the procedure provides the only way in which infringements of Community law by Member States can be sanctioned in cases where there is no correlative right of an individual. The procedure is therefore essential to ensure the complete enforcement of Community law which citizens are entitled to expect in a Community and Union based on the rule of law.

(ii) citizens are entitled to expect that, in fulfilling its responsibilities under Article 155 through the Article 169 procedure, the Commission will itself act in accordance with the law.

Complainants cannot, therefore, be considered merely as a valuable source of information for the Commission. An individual who makes a complaint to the Commission about an infringement of Community law by a Member State does so as a citizen of the Union, not as a kind of informer.

Naturally the Commission's obligations towards citizens have to be understood in terms of the nature and purpose of the Article 169 procedure. The Court of Justice has stated that the administrative stage of the procedure is intended to give the Member State concerned the opportunity of conforming with the Treaty.[30] If it does so, the Commission no longer has power to take any further formal steps to bring the

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28 Fourteenth Report, Introduction section II A.

29 Thirteenth Report, Introduction p 6.

30 *Lütticke v Commission*, note 25 above.

matter before the Court.[31] The legal structure of Article 169 therefore provides implicit support for the Commission's practice of seeking to achieve compliance, as far as possible, through negotiation. Regulatory authorities frequently use negotiation and persuasion as a method of law enforcement.[32] However, the available evidence suggests that Commission has not succeeded in convincing citizens that its practices and procedures under Article 169 represent a legitimate method of enforcing Community law.

2.4. The citizens' perspective on the complaints procedure under Article 169

The national reports contain a number of critical observations concerning the way in which citizen's complaints are dealt with by the Commission. Several reports mention excessive delay in dealing with complaints and the perception that the procedure is unduly politicised. To put the matter bluntly, there is a widespread view that the Commission contains channels for, or at least fails to resist, political interference to prevent the consistent and effective enforcement of Community law.

Other criticisms focus on the lack of consistency in dealing with complaints. According to the Danish report the "most important deficiency of the complaints procedure is the absence of accessible rules of procedure" and the Portuguese report criticizes the blanket acceptance by the Commission of Member States' arguments for confidentiality. The UK and Austrian reports mention that the treatment complainants receive depends upon how persistent they are in contacting the Commission and German report claims that citizens have impression they will not get very far using the German language. Overall, the Commission's reputation for independence and fairness suffers from the lack of a proper procedure for dealing with complaints.

On this matter, the national reports confirm the experience of the European Ombudsman in dealing with complaints that he has received from citizens who have complained to the Commission about infringements of Community law by Member States. The allegations in the complaints submitted to the Ombudsman have concerned, in particular, excessive time taken to deal with complaints to the Commission, lack of information about the on-going treatment of the complaint and not receiving any reasoning as to how the Commission has reached a conclusion that there is no infringement by a Member State.

In its first replies to the Ombudsman in these cases, the Commission recognised its obligation to deal with complaints "in accordance with the principles of good administrative behaviour". However, it also stated that the subject matter of the

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[31] Once the judicial stage has begun, the Commission may pursue the case even if the Member State comes into compliance: Case 7/61 *Commission v Italy* [1961] ECR 317.

[32] See e.g. I. Ayres and J. Braithwaite, *Responsive Regulation*, Oxford University Press 1992.

complaints involved the exercise of its discretion with regard to proceedings under Article 169: "in deciding not to open infringement proceedings, the Commission exercised its discretion as fully recognised by the Court."[33] These remarks led some complainants to accuse the Commission of arrogance and to believe that it was claiming that it could act arbitrarily. It is therefore important to examine carefully the issue of the Commission's discretion in the Article 169 procedure.

2.5. The Commission's Discretion

The case law of the Court of Justice establishes that the Commission's decision whether or not to initiate the judicial stage of the Article 169 procedure is discretionary. It cannot, therefore, be required to bring an infringement before the Court of Justice. In *Sonito v Commission*, for example, the Court said:

> *As regards the Commission's decision not to bring an action for failure to fulfil obligations, it is clear from the scheme of Article 169 of the EEC Treaty that the Commission has no obligation to commence proceedings under that article; it has a discretionary power precluding the right of individuals to require it to adopt a particular position and to bring an action for annulment against its refusal to take action.*
>
> *It is only if the Commission considers that the Member State in question has failed to fulfil one of its obligations that it delivers a reasoned opinion. Moreover, in the event that the member state does not comply with the opinion within the time allowed, the Commission has in any event the right, but not the obligation, to apply to the Court of Justice for a declaration establishing the failure the member state is accused of (see most recently the judgement of 14 February 1989 in Case 247/87* Star Fruit v Commission *[1989] ECR 291)*.[34]

No comprehensive theory of discretionary power is to be found either in the case-law of the Court of Justice, or in academic commentaries on Community law. It is important therefore to avoid both unwarranted extrapolation from the case-law and assumptions based on national theories of discretion, which are often tied to a particular constitutional context.[35]

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[33] Complaint 206/27.10.95/HS/UK and others (Newbury Bypass), complaint 132/21.9.95/AH/EN (M40 Motorway). See European Ombudsman*, Annual Report* 1996 pp 66, 75.

[34] Case 87/89 [1990] ECR-I 1981, paras 6-7.

[35] In particular, there is no justification for interpreting the case-law on Article 169 in terms of the French administrative law theory of *acte de gouvernement*. For a survey of national concepts of discretion see, Jürgen Schwarze, *Europäisches Verwaltungsrecht*, Nomos Verlagsgesellschaft, 1988 (published in English as *European Administrative Law,* Sweet and Maxwell and Office for Official Publications of the European Communities, 1992).

The reasoning of the Court of Justice in the cases dealing with Article 169 does not focus on the nature of the Commission's decision-making in the abstract, but on the admissibility of proceedings brought by individuals. The case-law has consistently rejected the possibility of such proceedings on the basis of the two kinds of rules referred to in Part 1 of this general report: rules concerning the interest (*locus standi*) which a person must show in order to bring legal proceedings under Articles 173 and 175 EC and rules concerning the kinds of administrative acts or omissions which may be the subject of challenge**.**

The result of the case-law is that an action brought by a natural or legal person for a declaration that, in infringement of the Treaty, the Commission failed to act by not initiating proceedings for failure to fulfil Treaty obligations with regard to a Member State is inadmissible. However, it would be a mistake to think that this position implies that the Commission's discretionary power in the administrative stage of the Article 169 procedure is absolute and arbitrary. Discretionary power is not dictatorial power.

In the first place, there is nothing in the case-law of the Court of Justice concerning Article 169 which justifies the view that the Commission's discretion is unlimited. On the contrary, there are cases in which the Court of Justice has imposed on the Commission legal requirements which it must observe during the administrative stage of the Article 169 procedure.[36]

More generally, the principle of the rule of law excludes absolute power. "Discretion" exists when an administrative authority may choose between two or more possible courses of action. However, the normal position, reflected for example in Council of Europe Recommendation No. R (80) 2[37], is that an institution or bodymust act within

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[36] E.g. Case 31/69, *Commission v Italy* [1970] ECR 25 (Member State must receive an adequate opportunity to submit observations on an alleged infringement); Case 211/81, *Commission v Denmark* [1982] ECR 4547 (state must be told exactly what the allegations against it are); Case 293/85, *Commission v Belgium* [1988] ECR 305 (Time limit for submission of observations and for compliance with opinion must be reasonable); C-296/92, *Commission v Italy* [1994] ECR I-1 (scope of application to court is delimited by pre-litigation procedure).

[37] An administrative authority, when exercising a discretionary power :

1. does not pursue a purpose other than that for which the power has been conferred;
2. observes objectivity and impartiality, taking into account only the factors relevant to the particular case;
3. observes the principle of equality before the law by avoiding unfair discrimination;
4. maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
5. takes its decision within a time which is reasonable having regard to the matter at stake;
6. applies any general administrative guidelines in a consistent manner while

the limits of its legal authority when making a discretionary decision. Very broad discretionary powers may exist, but they are always subject to legal limits. General limits on such authority are established by the jurisprudence of the Court of Justice which requires, for example, that administrative authorities should act consistently and in good faith; avoid discrimination; comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms.

Furthermore, discretionary power does not mean the power to act arbitrarily. A public authority must always have good reasons for choosing one course of action rather than another. A normal part of exercising a discretionary power is to explain the reasons why a particular course of action has been chosen.

In carrying out the task of inquiring into possible instances of maladministration, the European Ombudsman does not seek to question discretionary administrative decisions provided that the institution or body concerned has acted within the limits of its legal authority. This principle is also applied in dealing with complaints concerning Article 169.[38] Furthermore, as a rule the Ombudsman's inquiries in such cases focus on the procedures that have been used.

2.6. The procedural position of complainants

It is also a normal requirement for the exercise of discretionary administrative powers that fair procedures should be used. In its reply to the Ombudsman in the *Newbury Bypass* case the Commission acknowledged that the principles of good administrative behaviour require that it should duly register complaints and keep the complainants informed of the treatment of the case. Indeed its invitation to citizens to submit complaints about infringements of Community law expressly promises to do this.[39]

In April 1997, the European Ombudsman began an own-initiative inquiry into the possibilities for improving the quality of the Commission's administrative procedures for dealing with complaints from citizens about infringements.[40] The inquiry focused particularly on the idea that the Commission could itself decide to create more developed procedural rights for complainants as a matter of good administrative

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at the same time taking account of the particular circumstances of each case.

See *The Administration and You: a handbook*, 1996 p. 362.

[38] See for example, the decision in case 175/97/JMA.

[39] *OJ* 1989 C 26/6.

[40] The inquiry (303/97/PD) was closed on 13 October 1997 and is reported in the Ombudsman's Annual Report for 1997.

behaviour, consistent with the case-law that individuals cannot challenge before the Court of Justice the Commission's decision not to bring proceedings under Article 169.

In its reply, the Commission stated that it had adopted an internal rule that, within a maximum period of one year from the date on which a complaint is registered, there must be a decision either to close the file without taking any action, or to initiate the formal stage of the Article 169 procedure. Exceptions may be made only in special cases, the reasons for which must be stated. The Commission also pointed out that delays in processing complaints are often related to the fact that discussions and exchanges with national authorities take considerable time and declared that one of its priority objectives is to reduce such delays.

The Commission also acknowledged that complainants have a place in the infringement procedure and that, in the period before judicial proceedings may begin, they enjoy procedural safeguards which the Commission has constantly developed and improved. The Commission declared itself ready to continue along those lines. In particular, it stated that all complaints are registered and acknowledged by letter to the complainant with an annex attached, explaining the details of the infringement procedure. The complainant is then informed of the action taken in response to the complaint, including representations made to the national authorities. The complainant is also informed about the outcome of the investigation of his complaint, whether no action has been taken on it, or infringement proceedings have been instituted. The complainant is also notified if other proceedings on the same issue are already under way.

The Commission also indicated its willingness to inform the complainant of its intention to close the file with the reasons why the Commission finds that there is no infringement of Community law, except where a complaint is manifestly unfounded or where the complainant appears to have lost interest in the complaint. The Ombudsman understood this to mean that citizens will thereby have the possibility to put forward views and criticisms concerning the Commission's point of view before it commits itself to a final conclusion that there is no infringement of Community law.

2.7. Discussion: towards improving citizens' confidence in the Article 169 procedure.

There is probably no single answer to the question of how to improve citizens' confidence in the Article 169 procedure.

Although naturally the question could be discussed at Stockholm, this general report assumes that attempts by complainants to bring proceedings against the Commission under Article 173 or 175 EC will remain inadmissible. A change in the present position seems unlikely for reasons both of practicality and of principle. Even if the possible increase in the workload of the CFI could be accepted, it needs to be kept in mind that "the administrative process cannot be a series of justiciable controversies."

Furthermore, an action brought to compel the Commission to bring proceedings could undermine the rights of defence of the Member State in the administrative stage of the Article 169 procedure and deprive it of the opportunity to remedy an infringement before it became the subject of judicial proceedings.[41]

Part 3 of this general report considers the possibility that further development of decentralised enforcement of Community law, by national Ombudsman and similar bodies, could be valuable in complementing the role of national courts. By providing an additional non-judicial possibility of redress for citizens who believe that a Member State is failing to comply with its obligations under Community law, national ombudsmen and similar bodies could help reduce the burden of complaints addressed to the Commission.

As regards improvements to the Article 169 procedure itself, the Commission's response to the Ombudsman's own-initiative inquiry is a valuable step in the process, to which the Commission has committed itself, of constant development and improvement in the procedural position of complainants.[42] A number of new complaints to the Ombudsman have raised the issue of implementation of the Commission's pledge to inform a complainant of its intention to close the file with the reasons why the Commission finds that there is no infringement of Community law. Naturally, inquiries into these cases will have to be completed before any conclusions can be drawn.

A question which could be discussed in Stockholm is whether there should be published procedures for the Commission to follow in dealing with Article 169 complaints from citizens. In particular, should a complainant be recognised not just as a valuable source of information, but as a party in the administrative procedure that precedes the possible initiation of the judicial stage? Experience in dealing with complaints generally shows that giving the complainant an opportunity to make observations on the other party's opinion can be helpful in establishing the facts and focussing the issues that remain in dispute.

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[41] See the following passage in the Advocate-General's opinion in *Star Fruit*:

> "... if the Commission did not see any reason for commencing proceedings, the disputed conduct of the Member State would in a way directly become the subject-matter of judicial scrutiny (in an action brought so as to compel the Commission to bring proceedings in which action the question of whether there was sufficient evidence of a breach of the Treaty would at least be considered). That means that the Member State concerned would not have the opportunity provided for in Article 169 to submit its views beforehand and to remedy the alleged breach of obligations."

[42] See also the report of the Committee on Legal Affairs and Citizens' Rights of the European Parliament on the Fourteenth Annual Report of the Commission on the monitoring of the application of Community law (*rapporteur* Astrid THORS).

Despite improvements in their procedural position, many citizens who complain to the Commission will naturally remain dissatisfied if their complaint does not lead to the matter being brought before the Court of Justice. Although there is at present no possibility for them to challenge the Commission in judicial proceedings under Article 173 or 175, they have the possibility to complain to the European Ombudsman.

There are two main factors that could constrain the Ombudsman in his investigations. The first - resources - must be tackled through the budgetary process. The second is access to documents. So far, the Ombudsman has asked to inspect documents in only one Article 169 case.[43] The request was made to the Commission in accordance with Article 3 (2) of the Statute of the Ombudsman[44] and the Commission agreed that the Ombudsman could inspect the whole file.

It is likely that in future cases the Ombudsman will normally ask to inspect the file as part of his inquiry. Naturally, it is important that citizens should understand that, in the present state of Community law, their own access to documents is governed by different rules and that the Ombudsman cannot disclose to a complainant documents which he inspects in pursuance of Article 3 (2) of the Statute.

As already stated, the Ombudsman does not seek to question the Commission's discretionary administrative decisions under Article 169, provided that it has acted within the limits of its legal authority. Furthermore, the Ombudsman is not a judicial instance and he can neither annul a decision, nor give orders. Complaint to the Ombudsman is not therefore a process through which an individual can seek indirectly to compel the Commission either to adopt a particular position during any of the steps of the administrative stage of the Article 169, or to initiate the judicial stage. Nonetheless, complaint to the Ombudsman offers a procedure whereby the citizen can allege maladministration by the Commission in its handling of a complaint. Provided that the Ombudsman's inquiries are a serious investigation of the allegations, they could help to reassure citizens that there is no arbitrary and absolute power in this field.

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[43] Complaint 132/21.9.95/AH/EN (M40 Motorway). See the Annual Report 1996 p 75.

[44] The relevant part of Article 3 § 2 imposes a heavy burden of proof on a Community institution or body which seeks to deny the Ombudsman information or documents:

"The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy.

They shall give access to documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement.

They shall give access to other documents originating in a Member State after having informed the Member State concerned.

(....)"

A question that could be discussed in Stockholm is whether the Commission could provide further reassurance to citizens by publishing a statement of policy concerning the use of its discretionary powers. Such a statement could indicate clearly the factors which the Commission considers relevant to take into account. Naturally, if experience or changed of circumstances made it appropriate to modify the policy, the statement could be amended accordingly. By improving its transparency such a statement would enhance public understanding of the Article 169 procedure. Could improved transparency also be of value to the Commission services responsible for dealing with Member States in particular policy areas, or would it weaken the Commission's ability to secure compliance through negotiation?

3 CITIZENS' ACCESS TO JUDICIAL AND NON-JUDICIAL REMEDIES

This part of the general report deals with matters covered in section I, section II and section IV of the questionnaire which was addressed to the national rapporteurs. This material has been brought together in order to facilitate discussion in Stockholm about the possibilities that non-judicial mechanisms in the Member States can offer to citizens for the protection of their Rights under Community law, thereby also reducing the pressure of work for courts and for the Commission in its role as guardian of the Treaty.

Section 3.1 presents judicial and non-judicial remedies at Member State level. Section 3.2 presents judicial and non-judicial remedies at the Community level. In both sections the focus as regards judicial remedies is on access to the courts. As regards non-judicial remedies, there is an analysis of the nature and functioning of the institutions concerned, before the discussion of access.

Section 3.3 considers the scope for non-judicial remedies in the Member States to deal with issues of Community law and outlines some possible topics for discussion.

3.1. Judicial and non-judicial remedies at Member State level

3.1.1 Access to judicial remedies

In general, the legal systems from which national reports have been received do not know of an *actio popularis*. The only exception is the United Kingdom report which indicates that British courts also recognize "citizen" or "public interest" standing. In all other systems, some kind of interest must be proved in order to contest an administrative decision in the courts. This *locus standi* requirement is differently expressed in the various legal orders (for instance; a personal, direct, certain, actual and legitimate interest in Belgium; a legal interest in Denmark; an interest which is individual, direct and actual in Greece). In some contributions it is indicated that the notion is interpreted narrowly (for instance Germany) while other contributions leave the impression that there may be a trend to interpret the notion more extensively.

However, the hard core of the requirement can reasonably be assumed to be similar in all the legal orders.

As for the question of how this requirement applies to associations which represent broader interests, such as the environment and consumer protection, the picture is less clear. In some legal systems, special provisions regulate the *locus standi* requirement for environmental associations. Taking these systems together with those which are generally more favourable to associations' right to go to court to protect the interest of their members, there appears to be a general trend towards a more liberal approach to *locus standi* for environmental associations. Apart from this observation, however, it does not seem possible to identify any general trend concerning the *locus standi* of associations bringing cases in the general interest of their members.

The time limits within which legal proceedings must be brought vary considerably. The extremes are to be found in two neighbouring countries. In Sweden, the general time limit for challenging an administrative measure is just three weeks. In Denmark there is no general time limit at all. However, Danish courts are entitled to dismiss old cases the facts of which cannot be properly ascertained, or in which the plaintiff is considered to have been too passive. Within these two extremes the general time limit appears to vary from one month to three months.

As for the scope of judicial review of the exercise or non-exercise of discretionary powers, the reports vary considerably. An overall assessment is made more difficult by the substantial differences in the concepts that are used. It is unclear to what extent these differences bring about substantially different results in practice, the one common denominator being that judicial review is in some way limited. The extremes on this question seem to be the Danish contribution in which it is stated that the review is fairly limited, and the German contribution which argues and leaves the impression that the intensity of the judicial review by German courts is comparatively very high.

3.1.2 Non-judicial remedies

In all the countries from which reports have been received, there exists either the right to complain to an Ombudsman, or the right to petition the Parliament, and sometimes both. Ombudsmen and petitions committees exist at the regional and municipal, as well as at the national level.[45]

<u>National Ombudsmen</u>

[45] For a general survey see the comparative tables published as a working paper by the Research Directorate of the European Parliament, January 1995 (PE 165.093).

There are national ombudsmen in Austria, Belgium, Denmark, Finland, France, Greece, Ireland, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. In both Sweden and Finland there is a parallel institution to the Ombudsman, the Chancellor of Justice. However, the reports from these two countries focus on the Ombudsman institution. In Greece and Belgium the national and federal ombudsman offices respectively are of very recent origin. In Italy there is as yet no national ombudsman office, nor does the right to petition exist in the traditional sense. The establishment of a national ombudsman office has been recently discussed in the framework of proposed constitutional reform, but without leading to a positive result.

Ombudsmen often have a constitutional anchorage, with the mandate to supervise the correct application of law. Sometimes their task is defined by the word maladministration. The first parliamentary ombudsman was introduced in the Swedish constitution in 1809, followed by Finland in 1919. This classical version of the ombudsman is characterized by a broad responsibility to supervise the application of law in the public administration, including the courts. The ombudsman's powers even include the right to decide on the prosecution of public officials. The model usually followed elsewhere is the Danish ombudsman system, which dates from 1953. Its remit is more limited; in particular supervision of the judiciary is excluded. Its powers are less repressive; the Ombudsman argues, recommends and reports in order to undo maladministration and raise the quality of public administration. Naturally he is obliged to inform the police or the prosecutor if he believes that crimes may have been committed, but he does not decide on prosecution. The Danish model of the ombudsman is therefore more conciliatory. It could be called the modern ombudsman, because it is the most general system in the world today.

The right to petition

The right to petition is the dominant system in Germany and Luxembourg. The philosophy behind the right of petition is that it is for the Parliament to supervise the application of the laws it has adopted. Therefore citizens can petition the Parliament about grievances concerning the application of the laws. Petitions are normally dealt with by a petitions committee of the Parliament.

In some Member States, there is both an Ombudsman and a petitions committee. That is the situation in Austria, Belgium, Greece, the Netherlands and Portugal. In the contributions from Belgium, Greece and the Netherlands it is indicated that the petitions committee plays only a limited role and therefore the respective contributions concentrate on the Ombudsman. In the United Kingdom, there is no special committee to deal with petitions, but there is tradition that individual members of Parliament address the relevant minister on a topic on behalf of a constituent. In the contribution from the United Kingdom it is indicated that this mechanism appeared inadequate in supervising the administration and the contribution thus concentrates on the Ombudsman, the "Parliamentary Commissioner for Administration".

The regional level

In Member States with a federal or decentralized administrative structure, the right to complain to a regional Ombudsman or petition the regional Parliament is particularly important. Regional ombudsman offices exist in Austria, Belgium, Germany (i.e, at the level of the Länder), Italy and Spain, nominated by the regional parliaments. In France, the Ombudsman (*Médiateur de la République*) nominates delegates in the departments. In Germany, citizens also have the right to petition the Parliaments of the Länder, as well as the Federal Parliament. Three Länder have also established ombudsman offices, which work more closely with the petitions committees than is usual in other systems, where the independence of the work of the Ombudsman is considered essential.

The work of an Ombudsman

The very core of the Nordic ombudsman idea is that the Parliamentary Ombudsman should carry out all his activities independently under the law.[46] No other authority or person should interfere in his work with the complaints or his investigations, nor should he seek advice from anybody. The parliament only has power to make observations on his work when dealing with his annual or special reports.

In some Member States, the ombudsman's functions include initiating legal proceedings in order to bring cases of principle, for example involving fundamental rights and freedoms, before the constitutional court (for instance Austria, Portugal and Spain). In Finland and Sweden the judiciary are included in the ombudsman's remit. However, the main workload for all Ombudsmen consists in supervising the public administration on the basis of complains from the citizens and often with the additional possibility of opening investigations on his own initiative.

Whilst the ombudsman is a non judicial institution he should still apply and follow the law. His way of dealing with complaints or own-initiative investigations is of course more flexible and less formal than the judicial procedure. As for the scope of his review, the legal systems generally recognize that the Ombudsman both examines the legality of administrative action as well as the exercise of discretionary administrative powers.

The review of legality includes respect of fundamental rights, the substantive law in issue, as well as the observance of the relevant procedural rules and guarantees. As the European Convention on Human Rights is incorporated into national law in most Member States, the Ombudsman also deals with complaints related to human rights issues. This has given them experience in dealing with international law. Since Community law is law in the Member States, it also falls within the national

[46] Bengt Wieslander, *The Parliamentary Ombudsman in Sweden*, 1994

Ombudsman's remit to deal with cases where a citizen's complaint involves his or her rights under Community law.

As regards discretionary powers, most ombudsmen check that the administration has stayed within the limits of its legal authority. However, some also go beyond the scope of traditional judicial review. The Portuguese report, for example, states that "regarding administrative discretion, the Ombudsman may compel authorities to adopt decisions which strike a better balance between the public interest and the private interests involved." According to the Danish report, "the Ombudsman may conduct a full review of an administrative measure, including the administration's discretionary powers." In the French system, the concept of *équité* allows the ombudsman to intervene when the administration has acted lawfully, but the decision is not reasonable and fair to the citizen.

3.1.3 Access to non-judicial remedies

In all ombudsman systems, citizens have the right to complain. Some extend the right also to legal persons. There is usually no requirement as to nationality. Access to the Ombudsman is normally easy to obtain, direct and free of costs. However, in the United Kingdom and France there is a "political filter". In the United Kingdom, the citizen can only lodge a complaint through a Member of Parliament. In France the citizen must apply to the Médiateur de la République through a deputy or a Senator, though there is direct access to his departmental delegates.[47]

As for *locus standi* requirements, the citizen often needs to prove some interest in the matter complained about. According to the reports, there are no requirements as to the citizen's interest in at least four legal systems: Denmark, Finland, Portugal and Sweden. However, in Denmark the lack of interest in the matter complained of may influence the Ombudsman's decision whether to investigate the complaint. This underlines the Nordic idea that complaining to the ombudsman is an *actio popularis*.

As the Ombudsman institutions in Belgium and Greece are very new, there are not conclusive elements as to the application of the requirement of an interest in the matter complained about. In Austria, the requirement takes the form that the matter complained of has to concern the complainant. In the Netherlands, the Ombudsman takes a wide view of who can be an interested party, but the Ombudsman is not required to investigate a complaint if the interest of the complainant or the gravity of the matter complained of is manifestly insufficient, or if the complainant is a person other than the person in respect of whom the administrative action occurred. In the United Kingdom, the requirement takes the form that complaints can be lodged by a citizen who claims to have suffered injustice because of maladministration.

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[47] See generally Le Médiateur de la République, *La Médiation: Quel avenir?* Actes du colloque des 5 et 6 février 1998.

Before lodging the complaint with the Ombudsman, it is normally required that the citizen shall have undertaken some previous approaches to the administrative authority concerned or exhausted administrative appeal possibilities. The reader may consult the national contributions for more detailed information.

The authorities subject to inquiry

The jurisdiction of an ombudsman generally includes the whole public administration at the relevant level. In a number of systems, all administrative authorities on the national, regional and municipal level are included in the remit of the national ombudsman (for instance; Denmark, Finland and Sweden). In countries which have a decentralised or federal organisation, national ombudsmen may be confined to examining federal authorities and perhaps other authorities when discharging tasks under federal legislation (as is the case, for instance in Belgium, where there are also regional ombudsmen in Flanders and in Wallonia.) Alternatively, the national ombudsman's remit may include regional authorities only to the extent they are not supervised by regional ombudsmen (as in Austria, for instance, where there are regional Ombudsmen in two of the nine Länder; Tyrol and Vorarlberg).

Time limits

The time limits for lodging a complaint to the Ombudsman vary considerably. The shortest appears to the six months limit applied in Greece. In Belgium, Denmark and the United Kingdom the time limit is one year, in Sweden two years and in Finland five years. These time limits are usually soft, the Ombudsman can open an inquiry even after the time limit has expired, if he considers it justified to do so. In Belgium there are clearly expressed exceptions to the time limit. Finally in some Member States, as for example in Austria and Portugal, there are no time limits for the admissibility of a complaint.

The division of labour between ombudsmen and the courts

The mere possibility of judicial review does not normally act as a bar to the Ombudsman's competence. The exception is the United Kingdom Ombudsman who does not normally investigate complaints if there is a possible judicial remedy. At the other extreme is the Danish Ombudsman office, which to some extent functions as a substitute for an administrative court, which does not exist in Denmark. Its work has a major impact on the development of the administrative law in that country. The Swedish ombudsmen are reluctant to take up a matter which can or could have been brought before the courts. In the Netherlands, the relation between the courts and the Ombudsman appears to be complex: the reader is referred to the Dutch report.

On the other hand, if judicial proceedings are actually initiated which might have a bearing on the Ombudsman's inquiries in a case, it appears that the Ombudsman will

terminate his consideration of the complaint. This is formulated differently in the national systems. In some contributions it is stated that the Ombudsman will terminate his dealings with the complaint if the judicial proceedings involve the same person; in other contributions, it appears that the crucial question is to know whether the legal proceedings concern the same substantive issue even if the proceedings do not involve the complainant himself.

Usually the Ombudsman is a more flexible way to solve disputes between the citizen and the administration than the courts. But it must be underlined that an independent judiciary is the main guarantee for the upholding of the rule of law. The courts' rulings in a case have to be respected by everyone and can accordingly be executed. The ombudsman is a non judicial institution, something extra, with the task of helping citizens when they have difficulties with the administration and promoting the observance of standards of good administration, including acting in accordance with the law. The ombudsman's findings and judgements are recommendations to the administration, which has itself to decide to follow them in order to undo the problem. The fact that the recommendations are mostly followed in many countries underlines that rule of law and democratic principles prevail. Still it should not give one the impression that the Ombudsman's advice, recommendations or reports are orders or binding instructions.

It follows from its complementary nature that lodging a complaint with the Ombudsman does not suspend time limits for bringing judicial proceedings in any legal system in the Member states according to the national reports.

3.2. Judicial and non-judicial remedies at Community level

3.2.1 Access to judicial remedies

The *locus standi* requirements under Article 173 of the Treaty are generally considered to be quite restrictive. The Community report contains valuable information on the hitherto unsuccessful attempts to modify the provision and the general trend in the national contributions is that modification will not be possible without reinforcing in some way the judicial branch in the Community (either by providing more resources to the Community courts or by the creation of further judicial instances).

The national contributions identify two situations where the restrictive *locus standi* requirements under Article 173 are particularly problematic. The first is when the national court is reluctant to make use of Article 177. The second is where there is no national implementing measure (in the wide sense of the term) to attack before a national court and thus no possibility to bring about a referral to the Court of Justice under Article 177. As concerns the possibility to bring proceedings under Article 178, it is generally noticed that this possibility is obviously conditioned by the occurrence of damage and furthermore that there is little chance of such proceedings against acts of a general nature.

Furthermore, the Community report questions the appropriateness of the limitations of the Court's jurisdiction under Article 177 that the Amsterdam Treaty establishes in the new fields of visa, asylum and immigration and cooperation in penal matters.

As for the scope of judicial review undertaken by the Community courts, this meets generally with approval. However, the German contribution mentions that criticism has been voiced in Germany, and the United Kingdom contribution seems to contain certain doubts in this respect.

3.2.2 Non-judicial remedies

In the Maastricht Treaty, the right to complain to an Ombudsman and the right to petition the Parliament were introduced on the Community level. The Community report indicates that the right to petition had already been inserted in the Rules of the Assembly under the ECSC Treaty and from 1981, in the Rules of Procedure of the European Parliament. In the Maastricht Treaty it was formally established as a right of Union citizenship.

The Ombudsman is a more recent figure on the European level. Although there were initiatives in the 1970s and 80s to create a Ombudsman Office at the Community level and even a resolution of the European Parliament to that effect, it was not until the Maastricht Treaty that the office of European Ombudsman was established. The first European Ombudsman started to exercise his functions 1 September 1995 and has published three annual reports, two of them covering full years of activity.[48]

The scope of the non-judicial possibilities

A petition to the European Parliament may concern any "matter which comes within the Community's fields of activity". The remit of the Ombudsman is more narrow. According to the Art 138e of the Treaty he may receive "complaints concerning instances of maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance in their judicial role".

This means that the Ombudsman does not have any possibility to supervise the authorities of the Member States, while the remit of the right to petition the European Parliament does include that level. To rationalize the process of dealing with complaints and petitions, the Committee on Petitions transfers, with the consent of the petitioner, any petition containing only allegations of maladministration in the activities of the Community institutions and bodies to the Ombudsman, to be dealt with as a complaint. Similarly, when appropriate the Ombudsman transfers complaints to the

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[48] The 1995 and 1996 Annual Reports are published in the *Official Journal*: *OJ* 1996 C 234/1 *OJ* 1997 C 272/1 and are also available on the Ombudsman's website: http://www.euro-ombudsman.eu.int

Parliament, with the consent of the complainant, to be dealt with as petitions. So far this cooperation has worked fairly well and it will be discussed and developed from time to time.

Most of the work of the Committee on Petitions of the European Parliament concerns the application of Community law by authorities of the Member States. The Committee's usual procedure is to send the petition to the Commission for an opinion. Often the Commission registers it as an Article 169 complaint to be dealt with under that procedure. The Committee on Petitions adopts every year an annual report on its activities.[49]

In the original initiative by the Spanish government a European Ombudsman was proposed to promote and supervise the application of the European citizens' rights, which also had a much broader scope in that proposal.[50] This supervision activity was meant to be exercised at all levels in the European Community. As this was not accepted by all Member States, the Danish government put forward a proposal to set up a European Ombudsman whose primary task would be to supervise the activities of Community institutions and bodies, helping to uncover maladministration and work for better quality in the administration in its relations to the European citizens.

The European ombudsman office is thus strongly inspired by the Danish model of the ombudsman, with a high level of independence and wide powers of investigation on the one hand, but more limited powers to undo the maladministration on the other hand. As in the national systems, the European Ombudsman is vested with broad powers of inquiry but cannot quash an administrative decision. He can, after a finding an instance of maladministration, propose a friendly solution and if it is not accepted, issue draft recommendations to the authority concerned. In case the authority does not comply with these draft recommendations, the Ombudsman can submit a special report to the European Parliament. The Ombudsman also makes public critical remarks in decisions closing an inquiry. This is in line with national practice and helps to promote better administrative behaviour in future.

Maladministration

Maladministration is a concept with different meaning in the Member States. Influenced both by the Danish institution, on the basis of which it was proposed into

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[49] The report for 1996-7 (rapporteur Mr Roy Perry) is A4-0190/97.

[50] See E.A. Marias *op. cit.(5)*

the Treaty, and by the jurisprudence of the Community Courts the Ombudsman adopted a description of maladministration in the first Annual Report (1995)[51]:

> *Clearly, there is maladministration if a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance.*
>
> *For example, the European Ombudsman must take into account the requirement of Article F of the Treaty on European Union that Community institutions and bodies are to respect fundamental rights.*

This description is elaborated and further developed in the Annual report for 1997, in accordance with the needs and experiences gained during the Ombudsman activities for more than two years and after asking the national ombudsman and similar bodies for information about the meaning given to the term in their Member States.

3.2.3 Access to non-judicial remedies

The citizens can complain directly to the European Ombudsman, but they may also send in their complains through a Member of the European Parliament. So far this alternative has been seldom used. It is not necessary for a citizen to show any specific interest in order to complain to the Ombudsman. There is no express *locus standi* restriction in the Treaty nor in the Statute of the Ombudsman and the tradition is that the right to complain is an *actio popularis* especially in the classical ombudsman version.

Under Article 2 § 4 of the Statute of the Ombudsman, a complaint must be lodged within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint and must be preceded by the appropriate administrative approaches to the Community authority concerned.

As for the impact of judicial review on the Ombudsman's competence to deal with a complaint, Article 138e of the EC Treaty provides for the Ombudsman to conduct inquiries "*except where the alleged facts are or have been the subject of legal proceedings*" Article 1 § 3 of the Statute provides that the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. Article 2 § 7 of the Statute provides that when the Ombudsman has to declare a complaint inadmissible or terminate his consideration of it because of legal proceedings in progress or concluded the outcome of any inquiries he has carried out up to that point is filed without further action.

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[51] OJ 1996 C 234/1, also available on the Ombudsman's website: http://www.euro-ombudsman.eu.int

As noted in Part 2 above in the discussion of Article 169, the European Ombudsman does not seek to question discretionary administrative decisions provided that the institution or body concerned has acted within the limits of its legal authority. General limits on such authority are established by the jurisprudence of the Court of Justice which requires, for example, that administrative authorities should act consistently and in good faith; avoid discrimination; comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms.

The main problem so far for the citizens has been that their right to complain to the Ombudsman or petition the European Parliament is not very well known, despite intensive information activities that have been carried out with the help of the Commission and Parliament offices in the Member States and the national ombudsmen and similar bodies. The second problem has been that European citizens are complaining to the European Ombudsman in large numbers about problems related to Community law they have with authorities of the Member States. If there seem to be grounds for the complaint in such cases, the European Ombudsman always tries to suggest another course of action to bring the matter before a competent body, which might be a complaint to a national ombudsman or similar body, or to the European Commission, or to petition the European Parliament.

3.3 Non-judicial remedies in the Member States and Community law

Since Community law is law in the Member States, its application by the national authorities, can be supervised by national ombudsmen.[52] This seems to be the case in all the legal systems from which reports have been received. However, it appears that in general, the Ombudsmen so far have played only a limited role in this field despite the fact that poor application of Community law seems to provoke many grievances among the European citizens. The number of complaints from citizens to the European Commission and to the European Ombudsman and the petitions to the European Parliaments as well as the contacts from citizens to the Commission representations and the Parliament information offices in the Member States indicate that many citizens have problems related to Community law, especially when they exercise their right to move freely, to reside, work or study in another Member State.

The main reason for the low level of activity by ombudsmen and similar bodies in supervising the application of Community law on the national level is that European citizens do not seem to know about the possibility to complain to them. If they are from another Member State, they may not know the system of remedies and sometimes have a poor knowledge of the language of the host country. Hence they refrain from complaining on the national level and either their grievance is not dealt with at all, or it ends up at the European level. From the citizens point of view, this

[52] To the extent that they are competent, there is probably also an obligation to do so, flowing from Article 5 of the Treaty, since ombudsmen are also authorities of the Member States.

is unsatisfactory because complaining or petitioning at the European level is a time consuming affair, often involving many authorities in a multifarious procedure. The numbers of complaints and petitions represents also a considerable workload at the European level.[53] Therefore there is an urgent need, in accordance with the principle of subsidiarity, to promote a situation in which a number of these grievances could be solved without delay by a competent body on the most proper level in the Member States.

To encourage and support the national ombudsmen and similar bodies (usually the parliamentary petition committees) to deal with complaints concerning the application of Community law within the Member States, the European Ombudsman has organized two seminars one for the National ombudsmen and similar bodies, in Strasbourg 1996, and another for their legal officers dealing with the Community law related complaints in Brussels 1997. These legal officers have been nominated as liaison officers for the liaison network between the European and national ombudsmen and similar bodies offices and with other Community institutions in this field. The European ombudsman office will in cooperation with the European Commission to organize an additional seminar for the liaison officers, specifically to deal with the new fields of Community law introduced by the Amsterdam Treaty. A "Liaison letter" has also been published to raise the knowledge about significant case law from the Court of Justice and inform about Community law cases dealt with by national ombudsman offices.

The Catalonian ombudsman, Antonio Canellas, organized in Barcelona in October 1997 a similar seminar for the regional ombudsmen and regional petition committees to promote the knowledge of community law on that level.

The results of this cooperation have been encouraging. There is clearly a commitment to deal with Community law issues as long as competent legal advice can be provided from the European level when needed in more difficult cases. The cooperation will prove even more necessary, when the Amsterdam Treaty comes into force, because complaints about issues related to visas, immigration and asylum form a significant part of the workload of most national ombudsmen.

3.3.1 What more could be done?

It should be obvious that the judiciary is the basic upholder of Community law at the national as well as at the Community level. Court proceedings are normally the first choice when a company or business wants to obtain its rights under Community law.

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[53] It is worth noting in this context the Commission's efforts to concentrate its resources on, amongst others, infringement cases with so-called horizontal implications. See the Commission's 14th annual report on monitoring the application of Community law (1996), Introduction, point A "Quicker processing of cases".

The situation for a citizen who has a problem with the national administration in a Community law issue is different. Court proceedings can be time consuming and costly and are not a practical possibility in many cases. Furthermore, in some conflicts with national authorities no judicial remedy may be available even in principle.

The cooperation initiated by the European ombudsman with his fellow ombudsmen and similar bodies may in the future lead to a situation where the European citizens also can consider to address their grievances to a competent non-judicial body. It would be interesting to hear views in the discussion in Stockholm as to what further steps could be taken to encourage this development. Although the role of national courts in protecting rights under Community law is not directly mentioned in the Treaty, the Court of Justice has effectively promoted it through its case law. But should both the judicial and the non-judicial possibilities be clearly mentioned in the Treaty, perhaps in the part dealing with citizenship, to underline these important responsibilities and make them known to the citizens?

There have also been voices raised that the European Ombudsman should be given powers to deal with complaints concerning citizens' rights under Community law which involve authorities in the Member States. The European Ombudsman has not been in favour of that alternative, considering that remedies should also be as close as possible to the citizen and that the voluntary cooperation already under way could soon produce effective results. It should then of course be of utmost importance that the national Ombudsmen and similar bodies should actively inform citizens about the service they could offer them. Should there be a right to complain or petition also in the Member states in any of the eleven official languages of the Community to make this remedy accessible for the citizens?

It has also been suggested that the national ombudsman should have the possibility to ask the European Ombudsman for an opinion on the relevant Community law in a pending case, by analogy with the Article 177 procedure. There could be practical difficulties in establishing a formal obligation, but the European Ombudsman and the European Commission could cooperate informally to ensure that the national ombudsman offices receive prompt and accurate advice on Community law questions to which they need an answer to resolve a case.

Another possibility might be for the Commission representations to provide even more direct legal assistance to citizens than the present "Euro Jus" system can give (which although valuable consists of only one part-time lawyer in each member State advising citizens on Community law issues). In any event, the essential objective is to secure a fair and proper application of Community law at the level of the Member States. To achieve this, requires considerable additional efforts to improve the possibilities for citizens to obtain their rights under Community law. It is important for all Europeans that the principle of rule of law is a reality at all levels in the Union and its Member States.

4 PUBLIC ACCESS TO DOCUMENTS

As explained in Part 1 above, public access to official documents is an essential aspect of transparency. A valuable contribution to transparency can be made by public authorities taking the initiative in presenting information to the public. However a positive information strategy needs to be complemented by rules which envisage citizens taking the initiative by asking for documents that have not yet been put in the public domain.

Section 4.1 below contains a general presentation of the rules governing public access in those Member States for which reports were available at the time of writing. Section 4.2 presents the current Community rules on the matter.

These two sections do not aim to be comprehensive. They focus on topics which could serve as inspiration in the debates which may precede the adoption, at Community level, of new rules governing public access under Article 191a of the Amsterdam Treaty.[54]

Section 4.3 suggests some issues which could be addressed in such debates.

4.1. National rules on public access

It appears from the national reports received that the legal systems in the Member States generally establish some kind of right for the public to have access to information held by the administration. In several Member States, this right is expressed in rules on public access to official documents and in some countries, these rules have a constitutional anchorage. Ireland has recently adopted legislation on freedom of information and the United Kingdom plans to adopt in the near future a Freedom of Information Act which will provide for a right to public access to official documents. In Germany, however, it appears that a principle of the non-public nature of the administration's documents applies.

4.1.1 Scope of rules on public access

In those legal systems which have general rules on public access, the scope of the documents covered appears to vary substantially. In a number of legal systems it seems that, in principle, the rules apply to more or less all documents held by public authorities (which is not the same as giving access to all documents). This seems to be the position in Sweden, Finland and the Netherlands. In such legal orders it seems that both incoming and outgoing documents are in principle covered. Other countries limit the range of application of the rules. In Greece, for instance, the rules apply to documents established by the administration itself, in the general sense of the term and in Portugal the rules are limited to documents in closed files. However, it appears

[54] See footnote 12 above.

that no national legal system knows of a rule limiting access solely to documents established and held by the specific authority to which the request is addressed.

As for the range of authorities covered, it appears that all the legal systems which have rules on public access apply them to all administrative authorities. There are some nuances in the delimitation; some national reports explicitly mention that public enterprises are included (for instance Greece), while other reports do not mention this kind of entity. The Finnish report mentions that a bill pending before the Finnish Parliament aims to extend the scope of the public access rules so that they apply to private persons performing a public function on the basis of statute. This provision appears to be intended to ensure that public access to documents is maintained despite privatisation. In any case, it appears that there is no legal system which restricts the scope of its rules public access to specific bodies. The normal rule is that all the administration is covered.

As for registers, there seems to be no general trend as to whether these are covered by rules on public access. In some systems, there are explicit provisions as to registers (for instance Sweden and Portugal).

4.1.2 Exceptions to the right to access

Exceptions to the principle of access fall mainly into three groups. Access may be denied to protect (i) a public interest; (ii) a private interest, or (iii) the authority's own interest in the proper functioning of its services.

Public interests include: the internal and external security of the State; relations with other States or international organisations; monetary policy and the fight against crime. Private interests include respect for the private life of individuals, protection of commercial or industrial secrets, or of other information transmitted in confidence by private parties. The authority's own interest in its functioning leads, for example, to denial of requests that are too vague or requests for incomplete documents, or for documents established in view of legal proceedings.

Some exceptions are drafted in an unconditional or absolute way, while others require that the authority balances the interest in obtaining access to the document concerned against the interest in not disclosing it.

Some systems (e.g. Denmark) provide that a document which is not covered in its entirety by an exception clause, shall be partly disclosed.

It is worth noting that there is normally some kind of restriction on the disclosure of internal documents. In Belgium, the interest in the confidentiality of the deliberations of the authority appears likely to entail limits as to the extent in which internal documents are disclosed. In Sweden, public access rules apply only to documents which can be considered final (*"allmänna*"), the implication of which is that internal documents in pending files normally do not have to be disclosed. In Denmark,

internal documents are explicitly exempted. However, it should be noted that, in both the Swedish and Danish systems, a document loses its internal character if it is forwarded to another authority.

4.1.3 Other aspects

In most systems with rules of public access, there is a time limit within which a request for access must be dealt with. The time limit is either laid down by the relevant texts or follows from practice. In some systems the time limit is quite short (for instance: promptly, or at the most within a few days, in Sweden and Finland; 10 days in Portugal and Denmark; two weeks in the Netherlands). In others, it is relatively long (e.g. one month in Belgium). There does not appear to be a general trend as concerns the question whether failure to respect the time limit is considered as an implicit refusal.

As for remedies, a refusal to give access can normally be reviewed by a court. The extent to which non-judicial controls are active in this field seem to vary considerably. For example the Austrian Ombudsman appears to have a very limited role in the enforcement of the relevant Austrian rules on the provision of information, whereas the Nordic Ombudsmen are more active. A general trend seems to be that control instances do not have the power to issue injunctions to the administration requiring it to give access.

4.2. Community rules on public access

There is no Treaty Article, or general Community legislation, about public access to documents. As is well known, however, Declaration 17 annexed to the Final Act of the Maastricht Treaty[55] led the Council and the Commission to adopt a Code on access to documents in December 1993, subsequently implemented through decisions adopted by the two institutions.[56]

As for the other Community institutions and bodies, the European Ombudsman began an own-initiative inquiry in June 1996 to find out whether they had adopted or planned to adopt rules, or instructions to staff, concerning how to deal with requests from the public for access to documents.[57]

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55 See note 9 above.

56 OJ 1993 L 340/43 and OJ 1994 L 46/58.

57 The institutions and bodies covered by the inquiry were the European Parliament, the Court of Justice, the Court of Auditors, the European Investment Bank, the Economic and Social Committee, the Committee of the Regions, the European Monetary Institute, the Office for Harmonization in the Internal Market, the European Environment Agency, the European Agency for the Evaluation of Medicinal Products, the European Monitoring Centre for Drugs and Drugs Addiction, The

The subject of the Ombudsman's inquiry was not the "quality" of possible rules, but the existence and the public availability of rules. In reply, most but not all of the institutions and bodies informed the Ombudsman that they envisaged the adoption of rules on public access. No institution or body covered by the inquiry informed the Ombudsman that the adoption of rules governing public access to documents would be impractical or unduly burdensome in its specific circumstances.

In considering this position, the Ombudsman's starting point was the decision of the Court of Justice in the case of *Netherlands v Council*.[58] The Court stated:

> *"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."*

In December 1996, the Ombudsman adopted a reasoned decision closing the inquiry. Recalling that the Court of Justice is the highest authority on questions of Community law and taking into account the above case-law, the Union's commitment to transparency and the existence of a single institutional framework, the Ombudsman concluded that failure to adopt and make easily available to the public rules governing public access to documents could be an instance of maladministration. In accordance with Article 3§ 6 of the Statute, he addressed draft recommendations to the institutions and bodies concerned, to the effect that they should adopt rules on public access to all documents which were not already covered by existing legal provisions allowing access or requiring confidentiality, and that the rules should be easily available to the public.[59] As regards the Court of Justice, the European Parliament and the European Monetary Institute, the draft recommendations applied only to administrative documents.

European Training Foundation, the European Centre for the Development of Vocational Training (Cedefop), the European Foundation for the Improvement of Living and Working Conditions and the Translation Centre for the Bodies of the European Union.

Two agencies were not covered by the inquiry because they had not been set up yet in practice, when the inquiry started: The European Agency for Safety and Health at Work and the Community Plant Variety Office.

[58] Case C58/94, [1996] ECR I-2169, paragraphs 34 to 37. See also Case T-105/95, *World Wide Fund for Nature (WWF) v Commission*, [1997] ECR II-313, paragraph 54.

[59] The decision is reported in the Ombudsman's Annual Report for 1996, *OJ* 1997 C 272/40 also available on the Ombudsman's website: http://www.euro-ombudsman.eu.int

Following these draft recommendations, all the institutions and bodies covered by the inquiry have adopted rules on public access, with the exception of the Court of Justice.[60] The detailed opinions that the authorities had to submit to the Ombudsman in accordance with Article 3§ 6 of the Statute were the subject of a Special Report by the Ombudsman to the European Parliament in December 1997.[61]

Most of the authorities have adopted rules identical or very similar to the ones in force in the Council and the Commission. Given this identity or similarity, reference in the following will be made to the "Community rules."

4.2.1 The scope of the rules.

The Community rules set out the general principle that the public can have access to documents. The importance of this general principle is underlined by the case law of the Community courts to the effect that exceptions to this general principle shall be interpreted narrowly.[62] However, the general rule is limited by provisions to the effect that the rule shall only apply to documents which are both *held* and *established by* the authority to which the request for access is addressed. It should also be noted that the Community rules include documents which cannot be characterized as "administrative", in contrast to the national rules presented above.[63]

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60 A number of authorities have published their rules in the *Official Journal*: European Parliament, OJ 1997 L 263/27; European Investment Bank, OJ 1997 C 243/13; Economic and Social Committee, OJ 1997 L 339/18; Committee of the Regions OJ 1997 L 351/70; European Environment Agency OJ 1997 C 282/5; European Training Foundation OJ 1997 C 369/10. The European Agency for the Evaluation of Medicinal Products published its rules on its website: http://www.eudra.org/emea.html.

In its detailed opinion, the Court of Justice stated that it had extreme difficulty in establishing a clear separation between documents which relate to its judicial role and those which do not. The Court also informed the Ombudsman that it had instructed its Committee on the Rules of Procedure to study all questions concerning access to judicial documents and that there was a strong possibility that this could result in proposed amendments of the Rules of Procedure of the Court.

61 OJ 1998 C 44/9.

62 See judgments of the Court of First Instance in cases T-194/94, *John Carvel and the Guardian Newspapers v Council*, [1995] ECR II-2765 and T-105/95, *World Wide Fund for Nature (WWF) v Commission*, [1997] ECR II-313.

63 The application of the Community rules to documents under the so-called second and third pillars of the Union will not be pursued here. The Court of First Instance may consider the issue in the pending case T- 174/95, *Tidningen Journalisten v Council*. In the *Bunyan* cases, the Council raised an initial objection to the competence of the Ombudsman to deal with complaints concerning access to documents under the third pillar. However, it answered on the substance of the complaints after an exchange of correspondence with the Ombudsman in which the

The concept of a "document" to which the public can request access is defined broadly. In the joint Code of Conduct of the Council and the Commission, document means "any written text, whatever its medium, which contains existing data and is held by the Council or the Commission". This definition appears wide enough to include any registers of documents established by the authority. However, the Community rules do not expressly require such registers to be established, although for practical reasons administrative authorities normally establish such registers.

4.2.2 The exceptions

The exceptions established to the general principle of access are mostly drafted as follows (taken from the Council's decision):

> *"Access to a Council document shall not be granted where its disclosure could undermine:*
>
> - *the protection of public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),*
>
> - *the protection of the individual and of privacy,*
>
> - *the protection of commercial and industrial secrecy*
>
> - *the protection of the Community's financial interests,*
>
> - *the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member State which supplied any of that information.*
>
> *Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings."*

Ombudsman took the view that the interpretation and application of the Council decision on public access to documents was a first pillar matter, even if the documents in question related to the third pillar: See European Ombudsman, Annual Report 1997.

The Amsterdam Treaty makes clear that the new Article 191a on public access will apply to the second and third pillars. The question whether the Regulation to be issued under Article 191a is to cover documents relating to the Euratom and ECSC treaties seems to be partly addressed in Declaration 41 to the Amsterdam Treaty.

The question of the status of documents from "comitology" committees appears also to be pending before the Court of First Instance, Case T-188/97, *Rothmans v Commission*.

The case law of the Community courts establishes that the interests mentioned in the first paragraph are mandatory, while refusal to give access under the second paragraph is optional and must be preceded by a balancing of the interest of the citizen in gaining access against the authority's interest in protecting the confidentiality of its proceedings. Referral to one of the mandatory interests requires that the authority, at the very least for the categories of documents requested, give reasons why it considers that these interests should prevent disclosure.[64] As for documents related to possible Article 169 cases, it appears that the Court of First Instance has accepted that they could fall within both the public interest exception and the second paragraph concerning confidentiality of the institution's deliberations.[65]

The Community rules do not expressly provide for the possibility to give partial access in situations where an exception clause applies only to part of the document requested. Some authors have considered, however, that the possibility of partial disclosure could follow either from the general principle established in the Code of Conduct that the public shall have the widest possible access or from the general principle of proportionality. [66] It is worth recalling that the Community legislator does not seem unfamiliar with partial disclosure when one of the interests hindering disclosure only relates to part of the information requested. Thus, Article 3 of Council Directive No 90/313 on the freedom of information on the environment provides, after having enumerated the interests which may prevent disclosure, that information "held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above."[67]

4.2.3 Other aspects

As for the time limits for dealing with a request for access, these vary slightly. Most Community institutions and bodies appear to apply a one month time limit for dealing with an initial request. However, the European Parliament has deemed it necessary to provide for a time limit of 45 days. As for confirmatory requests or appeals, most authorities equally provide for a one month period to deal with such requests. However, some authorities have deemed it necessary to specify longer periods; e.g. the Parliament has provided for 45 days and the Court of Auditors and the European Environment Agency for a two months period.

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64 Above mentioned judgment in the *WWF* case, paragraph 64.

65 Judgment in the *WWF* case, paragraph 61.

66 See Niels Fenger, "Aktindsigt i EU-sager", in Juristen, 1995, p. 209, Fredrik Sejersted, "Innsyn og Integrasjon", Oslo, 1997, p. 76; Peter Dyrberg, "El Acceso público a los documentos y las autoridades comunitarias", in Revista de Derecho Comunitario Europeo, 1997, p. 406.

67 OJ 1990 L 158/56.

As for control instances, most decisions concerning access to documents make reference to the European Ombudsman and to the possibility of bringing legal proceedings under Article 173 of the Treaty. However, in some cases (for example the Environment Agency) mention is made only of the Ombudsman.

The Community rules on public access to documents will have to be reviewed in the foreseeable future. Within two years following the entry into force of the Treaty of Amsterdam, general principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, through the "co-legislation" procedure of Article 189b.

Consistency and equal treatment of citizens require that when this Regulation becomes part of Community law, the general principles and limits which it lays down should be applied throughout the Community administration. In this respect, Article 191a and the results of the Ombudsman's own-initiative inquiry into public access to documents are complementary. The Treaty Article creates a "constitutional" right of access to documents of three specific Community institutions. Other Community institutions and bodies should also have rules governing public access to documents they hold, as an appropriate measure to enable them to respond to and to process requests for access in a manner commensurate with the interests of good administration.

4.3. Discussion

The prospect of a Regulation establishing general principles and limits on grounds of public or private interest governing the right of access to documents gives practical significance to a comparative discussion of the existing Community rules and national rules.

It should be noted, in particular, that the Community rules give no right of access to documents which originate elsewhere than in the institution to which the request for access is addressed. So, for example, a Commission document contained in a file in the Council cannot be disclosed by the latter institution; the request for access must be addressed to the Commission. The rule is often drafted like this:

> *"Where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author."*[68]

As can be seen, the rule is not presented in the form of an exception to the general principle of access. However, it functions in practice as a considerable limitation of

[68] See for instance Art 2 § 3 of the Parliament decision and Art 2 § 2 of the Council decision.

the general principle, since its consequence is that incoming documents are completely excluded from the range of application of the principle. This creates considerable practical difficulties for citizens who wish to study a single file containing documents from several sources.

The preambles to the Community rules are not very informative about the reasons for this limitation. If there were legal doubts as to the feasibility of including such documents in the rules on public access, one could consider that these have now been removed by Declaration 35 to the Amsterdam Treaty. The Declaration provides that Member States will be allowed "to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement." The implied premise of the Declaration appears to be that incoming documents will be covered by the Regulation to be adopted under Article 191a.[69]

It appears that none of the national legal systems which know of a general right to public access excludes all incoming documents. Of course, not all such documents must be disclosed, because in some cases one or more of the standard exemptions will apply. It could therefore be worth discussing in Stockholm whether there are any special circumstances affecting Community institutions or bodies which justify having such an additional restriction.

A further significant difference between the Community rules and at least some national systems concerns registers of documents. As noted above, the definition of the term "document" in the Community rules is wide enough to include such registers as may exist, so that access to such registers should be given unless one or more of the exemptions applies. However, the present Community rules do not expressly require that registers of documents should be established.

Registers appear to be an appropriate instrument to obtain the objectives underlying a system of rules on public access, since they both facilitate citizens' use of their right of access and promote good administration by preventing the loss of documents. It would therefore be useful that future Community rules provide for an obligation to establish public registers of documents. In that case, it can be discussed which documents should be covered by such an obligation. Although it could be argued that such registers should only contain documents which are not classified as secret, it would be better for all documents, including confidential documents, to be listed in the register, though in a form which does not reveal the contents of the confidential documents.

As for the impact that Community rules may have on national rules governing public access, it is difficult to compare the national reports. The questionnaire asked whether the national courts or administration had adopted the view that Article 5 of the Treaty, or other provisions of Community law, limit the national authorities'

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[69] See in this sense, Deirdre Curtin, "Democracy, Transparency and Political Participation", in "Openness and Transparency in the European Union", edited by Veerle Deckmyn and Ian Thomson, 1998, p. 114, and Peter Dyrberg, op.cit, p. 377.

possibility to give access to documents that originate from Community institutions, for instance. In particular, does the fact that a document is classified as confidential within the Community institutions have any bearing on either administrative practice, or the legal provisions applied by national control instances, if a refusal to release the document is challenged?

Some rapporteurs state that the question has not arisen in practice or has not been discussed. Some others state that, in principle, there can be no interference in the application of national rules on public access, deriving from the status that a Community document may have under Community law. The practical implications of this are limited, however, by exceptions which will normally apply to Community documents (e.g. exceptions as to foreign relations). In other cases, it appears that the national administration will take into account the Community point of view (this seems for instance to be so in Denmark). The Dutch report stands out in this context as it appears that, in a decision of 1995, the Dutch Council of State found that the Council's internal Rules of procedure imposing confidentiality prevailed over Dutch law on public access; the applicant in the case had requested access to Council minutes in the Dutch Government's possession.

As mentioned in a number of reports, the factual background to the pending case T-174/95 Tidningen Journalisten, is relevant to this question as the applicant in that case obtained access to a number of Council documents under the Swedish rules on public access while access to the same documents was refused under the Council's own rules. Although, according to information available, the question does not appear to be at the centre of the pending case, it cannot be excluded that the judgment of the Court of First Instance could shed light on the question. Hopefully the judgment will be delivered before the Congress takes place in June 1998.