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### Conference Speech

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#### Introduction

- I am delighted and honoured to address this 4th International Conference of Information Commissioners.
- Let me begin with some preliminary remarks about the title that I was given for my presentation: "FOI: a European Perspective"
- The term "freedom of information" – FoI for short – is not much used in the European Union institutions. Instead, we speak of transparency, or openness. Earlier this month, for example, I welcomed the Commission's "European Transparency Initiative".
- Although there have been attempts to distinguish between them, "transparency" and "openness" tend to be used interchangeably. (The best explanation I have heard as to why there are two terms instead of one, is that transparency was used to translate the French "transparence", because the translators were unfamiliar with English word "openness" in this context.)
- Another phrase that is widely used is public access, especially to documents. This reflects the strong Nordic influence on how the principle of openness has been put into effect at the EU level.
- So, although the title mentions "FoI", I shall speak about transparency, openness and public access.
- I should also give a preliminary warning about the other element of the title: "a European Perspective". It is indeed a European perspective, not the European perspective, for three reasons.
- First, 46 countries now belong to the Council of Europe, which has produced useful recommendations on public access to official information and documents . However, I shall

focus on the European Union, which has 25 Member States, with two more – Bulgaria and Romania - scheduled to join and others knocking at the door.

- Second, I shall be talking – for reasons that I shall explain later – about openness and public access at the level of the European Union institutions, rather than at the level of the Member States.
- Finally, the European Ombudsman is only one of the European institutions and you might get a different perspective from other institutions, such as the Council or the Commission.
- I plan to speak for no more than half an hour, so as to leave adequate time for questions and discussion.
- In the first part of my presentation, I shall explain the significance of openness for the European Union and how it has developed in the 12 years or so since the Maastricht Treaty came into force.
- Then I shall give an overview of the legal framework for public access to documents held by the EU institutions. This will not be comprehensive, since I shall focus only on certain key issues.
- Finally, I shall explain the system of remedies, which offers applicants an explicit choice between judicial review by the Court and non-judicial review by the European Ombudsman.

### **Why openness matters for the EU and how it has developed**

The nature of the European Union and its institutions

- To explain the significance of openness for the European Union requires a brief explanation of what the Union is, or rather, what it is not.
- The European Union is not a state. It is perhaps best described as a multi-level system of governance. Administrations in the Member States, at national, regional and local level have the primary role in implementing many aspects of EU law and policy.
- The Commission is often described as the European “Executive”, but it is not a government. Although the Commission is, in many ways, a classical bureaucracy, much of its relationship with the external world is conducted through networks involving a variety of public and private organisations at different levels.
- For its part, the Council has not just one, but two, dual identities.
- First, it is both supranational and intergovernmental. That is to say, it is an EU institution, but its structure makes it also function as a kind of standing process of diplomatic negotiation between the Member States, through a dense structure of committees.
- Second, the Council is a legislative body, but it also has an executive role, especially in relation to police and judicial co-operation and the common foreign and security policy.

- The European Parliament is directly elected, but there is widespread agreement that the European Union as a whole suffers from a “democratic deficit”, being perceived as technocratic, elitist and unconnected to ordinary citizens.
- Whilst the diagnosis of democratic deficit is widely shared, there is less agreement about the remedy.
- The idea of a federal Europe still has its advocates. Critics point out that preconditions for the legitimacy of a federal structure, in particular a European public sphere and a widely shared European identity, are currently lacking. At the extreme, this idea is pushed so far as to say that European democracy is impossible because there is no European demos, or people.
- The Constitution for Europe is an attempt to recognise explicitly, and to rationalise, the multi-level system of governance that has been created in the European Union over the last fifty years. To simplify to the point of caricature, the Constitution represents not more Europe, or less Europe, but an acknowledgement of the Europe that we now have. However, to obtain agreement even on that has not yet proved possible.

### **Openness and democracy**

- The problems that the European Union now faces - summed up in the phrase “democratic deficit” - were already visible in outline when the Treaty of Maastricht was negotiated at the beginning of the 1990s.
- Part of the response at that time was a commitment to openness; the idea being that openness of the decision-making process strengthens the democratic nature of the EU institutions and that access to information promotes an informed public opinion by enabling citizens to monitor and scrutinise the exercise of the powers vested in the EU institutions .
- Time does not permit me to engage in a detailed discussion of the concept of democracy. I will say only that openness and public access to information play an essential role in a pluralist version of democracy, which is marked by institutional checks and balances that mediate the exercise of public power and promote its accountability to citizens not only at periodic elections, but also between them.
- The pluralist conception also maintains a balance between egalitarian and libertarian principles and provides optimal conditions for the observance of the rule of law and respect for the enjoyment of rights and obligations linked to it.
- The quality of a pluralist democracy largely depends on its capacity to offer choices, both political and personal. It is, or should be, obvious that choice is most meaningful when those who exercise it have access to the information they consider relevant to their choice.

## Public access as a legal right

- Although there is little if any overt opposition at the EU level to the idea that openness is linked to democracy in the ways that I have described, there is debate as to the precise legal nature of rights of access to documents and information.
- Some of the arguments put forward in favour of public access are instrumental: for example, that it reduces corruption and increases the efficiency and effectiveness of public authorities, as the Council of Europe claims in its 2002 Recommendation on access to official documents .
- Furthermore, although the European Court of Human Rights strongly protects the role of the Press in imparting information and ideas to the public , it does not recognise a general duty on public authorities to provide access to official information, nor any right to obtain such information .
- The fact that there are instrumental reasons to favour public access and the lack of recognition of public access as a human right within the framework of the European Convention on Human Rights have led some people to argue, in substance, that public access is merely a policy choice of the legislator, rather than a fundamental right.
- On the other hand, some commentators argue that the case law of the Court of Justice logically implies that public access is indeed a fundamental right under EU law. However, the Court has not, or at least not yet, expressly defined it as such.
- This is more than semantics. If public access were a fundamental right under EU law, that right would be binding not only on the EU institutions, but also on the Member States when they are implementing EU law.
- At present, however, EU law obligations on Member States to provide public access are limited to specific fields. The most important such field is the environment, for which the relevant Directive was updated in 2003, to take account of the Aarhus Convention .
- In its recent Transparency Initiative, the Commission also raises the question of whether Member States should be legally obliged to disclose the beneficiaries of certain EU funds.
- In general, however, the EU legal framework for public access does not apply to the Member States and there is a great deal of variety in national laws and practices on the matter.

## The development of the right of access at EU level

- As I mentioned a few minutes ago, the European Union's commitment to openness dates back to the Treaty of Maastricht. The first Danish referendum rejecting that Treaty gave added impetus to the drive for more openness as a way of enhancing the Union's legitimacy.
- Shortly after the Treaty had finally entered into force in November 1993, the Council and Commission adopted a joint Code of conduct on public access to documents . Although the Code was an important step forward, it had three major limitations:
  - 1) First, it applied only to the Council and the Commission, not to the other EU institutions and bodies;
  - 2) Second, it only covered documents of which the Commission or Council was the author. Documents received from outside -- from private parties, other institutions, or Member States, for example -- were excluded ;
  - 3) Finally, there was no requirement to produce public registers of documents. This severely limited the usefulness of the rules, particularly in a system of governance marked by extensive reliance on networks and committees that are difficult to map from the outside – or even from the inside.
- The European Ombudsman tackled the first of these limitations through two own-initiative inquiries in 1996 and 1999. These resulted in almost all the other EU institutions and bodies (including, for example, the Court of Auditors and the European Central Bank), adopting rules on public access.
- The Ombudsman also dealt with complaints against both the Council and Commission regarding lack of registers .
- The Council's response was to inform the Ombudsman that it had agreed to set up a register from the beginning of 1999.
- The Commission reacted to a draft recommendation to establish a register by accepting the principle, but asking for more time. In response, the Ombudsman suggested that public registers could form part of the Commission's implementation of Article 255 of the EC Treaty, which was introduced by the Treaty of Amsterdam.
- That Article provides for any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, to have a right of access to European Parliament, Council and Commission documents, subject to general principles to be laid down by secondary legislation.
- In due course, the Commission did indeed include a requirement for public registers in its proposal for a Regulation to implement Article 255 and the measure finally adopted - Regulation 1049/2001 - includes that requirement.

## The main features of the legal framework

- Regulation 1049/2001 now constitutes the basic legal framework for analysis of the right of public access to documents held by the EU institutions and bodies.
- The Regulation applies directly to the Council, Commission and European Parliament and it has been extended ad hoc to cover certain EU agencies. Many of the other institutions and bodies that adopted rules on public access following the Ombudsman's own-initiative inquiries subsequently revised them in line with the principles in the Regulation.
- Unlike the earlier Code of conduct, Regulation 1049/2001 applies to all documents held by the institution or body concerned, including those received from outside.
- Article 4 of the Regulation provides for exceptions to the right of access. Most of the exceptions include a "harm test": that is to say, the exception applies if disclosure would undermine the protection of the interest concerned.
- Some exceptions are, in addition, subject to the possibility of an overriding public interest in disclosure. This is the case for the protection of: commercial interests; court proceedings and legal advice; and the purpose of inspections, investigations and audits. If an overriding public interest exists, then there is an "exception to the exception" and public access must be granted.
- There is, however, no possibility of an overriding public interest in disclosure as regards the exceptions for: public security; defence and military matters; international relations; financial, monetary or economic policy; and the protection of privacy and the integrity of the individual.
- A stronger version of the harm test applies to the exception which is intended to allow the institutions a so-called "space to think". The exception applies only if disclosure would seriously undermine the institution's decision-making process. There is also the possibility of an overriding public interest in disclosure.
- The Regulation makes a distinction between cases where the institution has not yet finished its thinking; that is to say, where it has not yet made a decision on the matter to which the document relates and those where the thinking period is over because the decision has already been made.
- If the decision has not yet been made, the exception applies to documents drawn up by the institution for internal use and to all incoming documents.
- If the decision has been made, the exception applies only to documents containing (quote) "opinions for internal use as part of deliberations and preliminary consultations within the institution." (end quote)

## **Problematic areas in the application of Regulation 1049/2001**

- Given the nature of the European Union, it is not surprising that the interface between national laws on access and EU law should have turned out to be one of the points of conflict in relation to Regulation 1049/2001.
- The Court of First Instance has resolved the main controversy in favour of giving each Member State the right to veto public access to any document of which it is the author, either at the time of sending the document to an EU institution, or subsequently, without giving a reason .
- This right applies not only as regards contributions to policy-making, but also to documents which the Member State submits to the Commission when the Commission is investigating a possible violation of EU law in the so-called "Article 226" process.
- Another question that proved controversial, but which has now received judicial resolution, concerns opinions of the legal services of the institutions.
- In a Special Report to the European Parliament, the Ombudsman took the view that the exception for "court proceedings and legal advice" should only apply to opinions given by the legal service of an institution in the context of possible future court proceedings.
- In contrast, opinions from a legal service prepared during the process of drafting legislation should, according to the Ombudsman, be exempt from disclosure only if they fell within the exception protecting the institution's "space to think". This would have meant that once the legislation was adopted, public access to legal service opinions would be subject to the "seriously undermine" version of the harm test, with the possibility of an overriding public interest in disclosure.
- The Court of First Instance, however, gave a different interpretation in a judgement on another case, holding that the "court proceedings and legal advice" exception applies to all legal service opinions. The Ombudsman therefore suggested to the European Parliament that no further action be taken on the Special Report and, in accordance with the Court's interpretation, closed the inquiry into another complaint in which a draft recommendation had been based on the same reasoning as the Special Report .
- Finally, questions concerning public registers of documents continue to give rise to disputes. This is no surprise, because the density of networks and the complexity of various committee structures make the provision of comprehensive registers a significant administrative challenge but, at the same time, also means that public registers are essential if the right of public access is to be used effectively.
- As I mentioned already, Regulation 1049/2001 contains an obligation on each institution to provide public access to a register of documents.

- In a case that I decided at the beginning of this year, the complainant alleged that the Commission's register of documents is incomplete. In its opinion, the Commission accepted, in effect, that it does not yet have a comprehensive register. It said that it had begun by listing documents that cover its legislative activities and that the coverage of the register would be extended gradually. It added that there could never be an exhaustive Commission register, given that the definition of a document in the Regulation is extremely broad. I found that these general remarks did not justify the shortcomings pointed out by the complainant as regards the documents involved in the complaint and made a critical remark on this point .
- Finally, the relationship between public access and data protection was expected to produce controversy. In practice, however, few problems have arisen. Last year, the European Data Protection Supervisor, Mr Hustinx, produced an excellent paper on the relationship. Since we will have the privilege of listening to him this afternoon, I will not develop the subject in my presentation.

## **Remedies**

- As regards procedures for making an application for access and remedies against a refusal, Regulation 1049/2001 retains the system established under the Code of Conduct.
- There is a two-stage administrative procedure for making applications: an initial application, followed by a confirmatory application if access to the documents requested is not provided. The time limits for both initial and confirmatory applications are 15 working days, with a possible extension of a further 15 working for an application relating to a very long document, or to a very large number of documents.
- If a confirmatory application is refused in whole or in part, the applicant has a choice of remedy. He or she may either seek judicial review of the decision, or complain to the European Ombudsman.
- In practice, the Ombudsman and the Court receive roughly comparable numbers of cases. The latest comparative statistics available are from 2004, when nine cases were lodged with the Court, whilst the Ombudsman made decisions on 11 complaints.
- Last year, I made 14 decisions under Regulation 1049/2001, of which 11 concerned the Commission, two the Council and one the European Parliament. Two further cases concerned the application by the European Central Bank and the European Investment Bank of their own rules on access to documents.
- As for who chooses to complain to the Ombudsman, putting the figures for 2004 and 2005 together, there were 14 complaints from NGOs, 10 from individuals, one from an industry association and two from companies.

### **The distinctive features of the Ombudsman remedy**

- The availability of an alternative remedy with different characteristics allows applicants to choose the more appropriate remedy for their case.
- Two obvious advantages of choosing the Ombudsman are that the service is relatively quick and free to the complainant. The most obvious advantage of judicial review is that the Court's decisions are legally binding. It can therefore give authoritative rulings on questions of legal interpretation, whereas the Ombudsman's interpretation of the law is not binding as, for example, in the case I mentioned earlier about opinions of the legal services.
- Not having the power to make legally binding decisions, the Ombudsman's effectiveness is ultimately based on moral authority and the ability to persuade public opinion. Since the European institutions are sensitive to the need to improve their relations with citizens, I find the prospect of adverse publicity is quite effective at encouraging them to comply with my recommendations.
- There are also certain positive advantages for complainants flowing from the fact that my decisions are not legally binding. These advantages concern both the criteria of review and procedures. I shall develop both aspects in more detail, beginning with the criteria.

### **Legality and maladministration**

- The mandate of the European Ombudsman is to inquire into maladministration.
- European institutions and bodies must respect the rule of law, so if they act unlawfully, that is maladministration. However, the converse is not necessarily true, because the principles of good administration require more of the institutions than merely avoiding unlawful behaviour. As I like to say, there is life beyond legality. Let me give you two examples to illustrate what I mean.
- The first concerns access to information as opposed to documents. Regulation 1049/2001 is about public access to existing documents. It does not require the institutions to create new documents containing information that someone would like to have. A few years ago, however, the Ombudsman drafted a Code of Good Administrative Behaviour, which contains, among other things, an obligation to provide members of the public with information on request .
- Such an obligation cannot, of course, be absolute. As a principle of good administration, it amounts, essentially to the presumption that information should be provided unless there is a good reason not to do so.
- Last year, I applied this principle in a case where the complainant had asked the European Central Bank whether it had intervened to soften the fall in the value of the US

Dollar and the rise in the value of the Euro. I took the view that if the Bank was not prepared to release this information, it should provide the citizen with sufficiently specific reasons to show clearly and unequivocally its reasons for the refusal. The Bank did indeed provide such reasons and I found no maladministration .

- The second example which shows that illegality and maladministration are not necessarily identical is a complaint made against the Council concerning the fact that it does not always meet in public when legislating.
- I took the view that the principle in Article 1 (2) of the Treaty on European Union that decisions should be taken “as openly as possible” applies to the Council and that the Council’s own past actions made clear that steps to increase the transparency of its legislative activity had to, and could be, taken under EU law as it stands at present. Since the Council gave no valid reasons why it should not meet in public whenever legislating, I found maladministration and made a Special Report to the European Parliament, which adopted a Resolution approving my recommendation that the Council should review its position .

### **Flexible procedures**

- As regards procedures, I have already mentioned the Ombudsman’s power to conduct own-initiative inquiries, which led many EU institutions and bodies to adopt rules on access to documents. The procedural flexibility of the Ombudsman can also be valuable to individual complainants.
- In one case, for example, an NGO made a rather generally phrased application to the Commission for access to documents concerning certain negotiations in the World Trade Organisation. The outcome of the complaint was a friendly solution in which the Commission supplied the complainant with a full list of the relevant documents, so facilitating a more precise application .
- Two further examples are provided by cases in which the Commission refused to give the complainant access to a document from a Member State. In one of the cases, the document concerned was the response of the United Kingdom authorities to the Commission’s requests for information in an Article 226 investigation. The other case concerned a letter sent to the Commission by the Portuguese minister of finance in the framework of the excessive deficit procedure.
- In dealing with these cases last year, I adopted a new approach. As well as asking the Commission for an opinion, I also asked the authorities of the relevant Member States to give me their views. In both cases, the result was that the Commission changed its position and agreed to provide access to the documents concerned .

## Conclusion

- In conclusion, I would like to emphasise that although I have focused on the Ombudsman in discussing remedies, the right to a judicial remedy is the fundamental guarantee of the rule of law.
- The availability of judicial review as a remedy is thus essential to the status of public access as an enforceable legal right at the level of the European Union.
- The Ombudsman's role is complementary to that of the Court, providing an alternative remedy that applicants may choose if they consider it appropriate for their case.
- As I have mentioned, the Ombudsman's effectiveness depends on moral authority and the ability to persuade public opinion. This implies that the institution works best in a democratic environment.
- Furthermore, the Ombudsman not only promotes respect for legal rights and hence for the rule of law, but also develops and applies principles of good administration.
- These principles provide, in the shorthand phrase that I have already used, a kind of "life beyond legality". In my view, they are closely linked, or perhaps even derive from, the democratic idea that public institutions exist to serve the citizen and not vice versa. (I have no time to develop this argument now, but would gladly do so in the time for questions and discussion.)
- The Ombudsman thus straddles the rule of law and democracy in an institutional sense, whilst the principle of openness links them at a conceptual level.
- I therefore find it particularly fitting that individuals who wish to contest a refusal of access to documents or information at the EU level have a choice of remedy. I also believe that, as European Ombudsman, I have a special responsibility to help tackle the democratic deficit by encouraging greater openness, whenever possible.
- Thank you for your attention.