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*Promoting Accountability in Multi-Level Governance:
A Network Approach*

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Abstract

This paper seeks to address problems of accountability in systems of multi-level governance organized around networks, more particularly the system obtaining in the European Union. Discussion of these problems has previously focused on the ‘accountability deficit’ created when gaps are left by the accountability machinery of two of the several levels of government, supranational and national. This paper suggests that the hierarchical and pyramidal assumptions that presently underpin accountability theory in the EU context need to be tested and that new evaluative frameworks may be necessary. Using case studies of the Community Courts and European Ombudsman as examples, the paper suggests that new, flatter ‘accountability networks’ are emerging, composed of agencies specializing in a specific method of accountability, which come together or coalesce in a relationship of mutual dependency, fortified by shared professional expertise and ethos. These might ultimately be capable of providing effective machinery for accountability in network governance systems.

Keywords: governance, accountability, networks, European Court of Justice, European Ombudsman

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1 Accountability and the European Union¹

For Bovens (Bovens 2006), whose definition we shall adopt without further discussion as a convenient framework for this paper, accountability consists of three main elements: (i) giving an account, in the attenuated sense of narration; (ii) questioning or debating the issues; and (iii) evaluation or passing judgment. The implication, accepted in this paper, is that accountability is primarily retrospective. We recognise both that the term may be more generously interpreted so as to encompass prior participation in the policy-making process, and also that an ancillary standard-setting function may be comprised (Scott 2002). However, we reject the idea that either provides an adequate substitute for *ex post facto* political and legal accountability; indeed, participation may tend to undercut accountability by internalising a process that we see as inherently external.

Again in common with Bovens, we take accountability to be essentially a public procedure: the account giving is done in an open forum or is at least accessible to citizens. By taking this line, we necessarily exclude institutional, managerial and hierarchical accountability. We are of course aware that managerial accountability can be a most effective accountability tool and recognise its important contribution; indeed we have always argued for greater input of managerial techniques into EU governance (Harlow 2002, 18-22, 187-188; Harlow 2004, 57-89; Rawlings 2000, 4; Harlow and Rawlings forthcoming). However, they fall outside the scope of this particular paper.

For Bovens, 'thick' accountability adds (iv) an element of sanction. Here we would inject a note of caution. It is in our view by no means clear that sanction – unless the term is stretched so far that informal 'sanctions' of publicity or apology are included – is an essential element in accountability, though we accept that lawyers may be predisposed to think that it is. The point is illustrated in this paper, in our first case study of courts. In our view, 'sanction' is very often illusory and may, rather than 'thickening' it, even act as an obstacle to accountability by creating incentives to deny responsibility. We believe reparation and effective redress to be key factors in legitimation through accountability. It is therefore sufficient for accountability that the machinery operates so as 'to put matters right if it should appear that errors have been made' (Oliver 1991, 22). This variation becomes important in the context of our second case study of the office of European Ombudsman (EO). We shall argue both that the EO is properly classified as machinery for accountability despite the inability of his office to enforce its recommendations; and also that the office is – or perhaps is on the way to becoming – relatively efficacious in securing redress.

Fisher describes accountability as 'the ultimate principle' for the new age of transnational governance regimes, where the exercise of power transcends the boundaries of the nation state and crosses the public/private border. Its virtue lies in pliability; it can 'seemingly adapt to novel modes of governing while at the same time ensuring such modes are legitimate' (Fisher 2004, 495). Fisher herself expresses doubt, however, whether accountability and accountability processes can operate

¹ This paper was produced for the workshop convened by Ioannis Papadopoulos and Arthur Benz at the Mannheim Connex meeting in November 2005. We are grateful to the conveners for the opportunity to present our paper and to the members of the workshop for their comments. We are also grateful to our researcher, Shelley Brownlee, and to Susan Hunt.

outside the context of liberal, democratic government (Fisher 2004, 496). This paper is cautiously optimistic. It argues that a partial answer to the acknowledged problems of network governance may lie in the construction of 'accountability networks'.

Since 'accountability network' is a term used in several different senses, it is important at this early stage to establish a meaning for it. Scott in particular talks, in the context of the delivery of public services, of 'dense networks of accountability' (Scott 2000, 38, 40). On to the traditional or formal accountability mechanisms exercised by institutions external to the network, typically parliaments or courts, Scott grafts informal and internal accountability exercised by participants in a functional or 'policy network'. This encompasses 'any actors, public or private, within a domain with the practical capacity to make another actor, public or private, account for its actions' (Scott 2000, 50) – in Stone's terminology (Stone 1995, 505), a 'mutual accountability' network, composed of the actors concerned with the planning and execution of a specific area of activity such as environmental policy or the delivery of policing and immigration services. For Scott, an 'extended accountability network' is created when standard organs of accountability, such as a parliamentary committee entrusted with supervision of a given activity area such as environment, or a regulator supervising provision of a public service such as telecommunications, are grafted on to a mutual accountability network. In this way, Scott links the two disparate concepts of 'policy network' and 'accountability network', internalising the accountability process. It should be emphasised that this is not the usage we are adopting in this paper. We are reserving the term 'accountability network' for (i) a network of agencies specialising in a specific method of accountability, such as investigation, adjudication or audit, which (ii) come together or coalesce in a relationship of mutual dependency, (iii) fortified by shared professional expertise and ethos. We would see this ideal-type as 'thickened' by the addition of a further element: (iv) the execution of a common purpose. This point becomes important in our case study of courts.

In Section 2 of this paper, concepts of network governance are briefly examined and we consider how far the conceptual framework suggested by Scott can cope satisfactorily with accountability in a network system of governance. We move on to discuss our own concept of an accountability network, as defined above. In Sections 3 and 4, we single out for further consideration two potential accountability networks: the Community judicial system, best known and best developed of EU accountability systems, and the European ombudsman network, which we see as on the point of evolving into an accountability network. Both raise similar questions: why have the actors come together? What holds the network in place? Is it effective? And so on. The question also arises whether some accountability machinery is better adapted to network governance than others. These and other questions are reserved for our conclusions.

2 The Challenge of Network Governance

Whether or not the terms 'governance' and 'network' are synonymous, there is at least substantial overlap. Rhodes defines a socio-cybernetic system of governance as one composed of 'self-organising networks' (Rhodes 1996, 656-658), and the governance concept has been used to refer to 'self-organising and inter-

organisational networks' (Niemi-lilahti 2003, 59). However this may be, the essence of 'governance' is co-operation between, or co-ordination of, a multiplicity of public and private actors: in other words, a network. Multilevel governance thus depends, as Marks puts it, on a process of continuous negotiation (Marks 1993). But as systems of governance replace hierarchical and centred structures of government, the traditional control systems and machinery for accountability are undermined. Kickert surely puts his finger on an accountability problem when, asserting that these 'networks of accountability' are left largely to control themselves because 'government does not have enough power to exert its will on other actors', he also implies that the network actors are not strong enough to control government. A vacuum is left in which 'autonomy not only implies freedom, it also implies self-responsibility' (Kickert 1993, 275).

In EU governance, all these characteristics are immediately apparent. Even in the First or Community Pillar, where the more regular and institutional 'Community method' of government obtains,² the task of the Commission involves networking (Metcalf 1996, 43). Long chains of actors need to be co-ordinated. Composed in matters of policy-formation or rulemaking largely of national government representatives, the committee structure is typically expanded for implementation purposes by the addition of regional and local actors. On many occasions too the networks cross the public/private border, including private and corporate actors, interest group representatives and the voluntary sector. In the field of structural funding, used by Rhodes as a paradigm of 'governance' (Rhodes 1997, 4), this type of network proliferates.³ In areas where 'new governance' methods (such as the 'Open Method of Co-ordination') are in use, the Commission's co-ordinating and harmonising function is more striking still. Defined by the *White Paper on European Governance* as a way of encouraging co-operation, the exchange of best practice, and agreeing common targets and guidelines for Member States, OMC operates through 'soft law' without formal enforcement mechanisms; instead, it 'relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others' (Regent 2003, 190; Porte 2002, 38). This is a network of accountability in precisely the senses used by Scott (2000) and Kickert (1993), where accountability is largely left to participants in the network, through 'report back' mechanisms and 'peer review', and the only 'sanction' lies in recommendations for improvement issued by the Commission.

To date three main strategies have been suggested to alleviate these problems. The first, of recourse to techniques of participatory decision-making, we would discount on the ground that accountability is essentially retrospective. Not only is it doubtful whether participatory decision-making satisfies the Bovens criteria of explanation, questioning and evaluation, but it possesses the added disadvantage of sucking outsiders into the network and rendering them complicit in the policy-making process; to put this differently, those to whom account should be rendered become part of the network of mutual accountability. Regulatory theory, the second accountability strategy, is generally somewhat weak on accountability in the sense in which the term is used by Bovens; indeed, regulators frequently conflate the two concepts of

² For further explanation, see White Paper on European Governance, COM (2001) 428 at 8; Lenaerts and Verhoeven (2002) and Joerges and Dehousse (2002).

³ As discussed for example by Scott (1998).

regulation and accountability, conceptualising accountability as a bipolar dialogue between regulators and regulated and showing a marked preference for negotiated methods of problem-solving (Braithwaite 1997, 47; Baldwin 1995, 273-283).⁴ Regulators then become part of the extended network of mutual accountability, a standpoint that pays insufficient attention to the accountability of regulators.

In this respect, indeed, Scott's extended study of regulatory accountability is somewhat exceptional. Scott, convinced of the potential to harness 'dense networks of accountability within which public power is exercised... for the purpose of achieving effective accountability or control' (Scott 2000, 38), suggests two alternative models. His interdependence model takes the form of a mutual accountability network, whose participants are portrayed as 'dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a precondition for acting' (Scott 2000, 50). This autonomous self-responsibility may, as Kickert implies, be a substitute for the formal accountability to public law institutions eroded by network governance or, Scott suggests, be supplemented by formal accountability to public law institutions. Applied to EU multi-level governance, this model allows the Commission's general supervisory powers, or the audit machinery operated by the European Court of Auditors, to shore up and fill gaps left by decreased accountability at national level – a process usually discussed by students of EU governance in terms of 'democratic deficit' (Lodge 1996). In Scott's redundancy model, 'overlapping (and ostensibly superfluous) accountability mechanisms reduce the centrality of any one of them' (Scott 2000, 52). Scott describes this as a 'belt-and-braces' or 'failsafe' model of accountability, in which two or more independent mechanisms, each capable of working on its own, are deployed to ensure the system does not fail. He instances jointly funded national and EU expenditure programmes, notably in the area of structural funding. Redundancy is here built into the system by the requirement of joint funding, which helps to ensure that both domestic and EU audit institutions take an interest in expenditure programmes within Member States (Scott 2000, 53-54).

We agree that the presence of state agents in a network can operate as a control device to limit opportunistic behaviour by private parties and ensure respect for the public interest. We would add that this process can work in reverse. We cannot, however, accept such behavioural pressures as a substitute for accountability properly so called. Scott himself makes mention of the chance of 'simultaneous failure', or rupture of both belt and braces, as when a failure of information on which both sets of actors rely to exact accountability occurs (Scott 2000, 60). There is too a very real risk that networks of mutual accountability will degenerate into a complacent 'old boy network', their accountability function blunted by mutual interest. Mutual accountability networks tend to be more concerned with policy input and long-term relationships than retrospective evaluation; even external actors may then be 'captured' and sucked into the network, rendering the possibility of thin accountability remote and of thick accountability even more so. And, as Scott also notes (Scott 2000, 57-58), there are obvious problems of transparency. It is therefore questionable whether a mutual accountability network really adds the requisite element of

⁴ A slight change in attitude noticed by Baldwin (2004, 351) does not affect our argument here.

legitimacy to the accountability process. As argued earlier, we suggest that these deficiencies call for the construction of accountability networks. This hypothesis is tested in the next two sections, where we seek to evaluate first, the judicial accountability process, and secondly, the emerging ombudsman network, against the Bovens criteria of 'thin' and 'thick' accountability.

3 Courts as an Accountability Network

Whether courts are correctly classified as machinery for accountability is a moot point, the preferred terminology of lawyers being that of the rule of law. But both lawyers and political scientists would certainly subscribe to Mulgan's assertion that an effective, independent judicial system is a 'fundamental prerequisite for effective executive accountability' (Mulgan 2003, 75-76). There would also be general agreement that courts are machinery for accountability at least insofar as they provide machinery for enforcement. Similarly, there might be agreement around the assumption that judicial process provides the element of sanction to render accountability 'thick', though this term could be generously interpreted so as to include in the notion of sanction other forms of redress administered by courts, especially pecuniary compensation. Mulgan notes the way too in which the methodology of legal accountability has seeped more generally into public affairs, bringing a preference for public inquiries, conducted by judges and lawyers and adopting adjudicative procedure, over classical methods of political accountability. This is a point to bear in mind in the EU context, where two investigative parliamentary inquiries, conducted by lawyers and auditors,⁵ arguably did more to nudge the Commission towards effective forms of accountability than a decade of judicial review.

In conformity with the view of Mulgan, who describes judicial review as 'in some respects the most powerful form of external review of executive action' (Mulgan 2003), we would reserve the term 'judicial accountability network' for those courts with jurisdiction to engage in some form of judicial review of executive or legislative action – in practice, administrative or constitutional courts. It is not always understood how greatly the twenty-five national legal orders vary. Some have specialised administrative jurisdictions, modelled on the prestigious French Conseil d'Etat; some have separate constitutional courts; others, notably the United Kingdom, have a single hierarchy of civil courts to which the state is subject. They differ too in terms of procedure and with respect to the principles of judicial review that they apply.

3.1 Networking

The deep-rooted problem with which any EU judicial network has to deal is the highly complex division of responsibility among many different courts. It falls to national courts to hold national agencies accountable, whether or not engaged on EU business, while review of the acts of Community institutions is the responsibility of

⁵ See Committee of Independent Experts, First Report on Allegations regarding fraud, mismanagement and nepotism in the European Commission, 15 March 1999, Brussels; Second Report on Reform of the Commission – analysis of current practice and proposals for tackling mismanagement, irregularities and fraud, 10 September 1999, Brussels. And see Shackleton (1998, 115).

the two Community Courts,⁶ which have competence 'within their respective jurisdictions' to 'review the legality' of the acts and omissions of the Community institutions: for these purposes, Council, Commission, Parliament and European Central Bank (TEC Articles 230 and 232). Their competence also extends to agencies and other Community entities, but only if the Council so provides. It is not open to a national court to pronounce on the validity of Community acts. Because the EU possesses only limited competences, both courts can also review of the validity of secondary EU legislation, a species of 'constitutional review'.

The two tiers of the Community judicial structure are held together by preliminary reference procedure, authorised by TEC Article 234, which applies to all courts or tribunals within the EU, including the civil and criminal courts (Maher 1994, 226). Article 234 provides that any national 'court or tribunal' may pose questions concerning the interpretation of EC law to the ECJ in the course of litigation, the answers to which are then applied by the national court to the facts of the case before it; those courts whose decision is final must refer. As drafted, Article 234 contains the potential for a 'flat' network in that, by according the power of reference to every national 'court or tribunal,' it appears to place these bodies in a position of technical equality. Article 234 does not set the ECJ in a hierarchical position, allowing it to over-rule, or hear appeals from, the decisions of national courts. In other words, the provision seems to point to a non-hierarchical, co-operative judicial machinery, with the ECJ enjoying a consultative function *inter pares*.

This is not the way, however, in which this formal network has functioned in practice. From the outset, the ECJ seems to have viewed itself as a constitutional court, dedicated to European integration and determined to act as *primus inter pares* by giving itself 'the last word'. The position of the ECJ in this respect was staked out by Judge Lenaerts in an informal answer given, significantly, in reply to a question posed during the visit of a delegation of the European Commission to the United States Supreme Court in March 2005:

You can't imagine the federal system without having a central court as the umpire of the lines drawn by the Constitution. The Court drew that competence for itself from the system of the Treaty, reflected in the preliminary rulings procedure, the fact that the Commission can bring Member States to the Court, the fact that only the Court apparently has the power to annul or invalidate acts of the institutions. From these discrete provisions, the Court inferred the system of the Treaty resting on the Court having the last word within that system.

The remark of course begs a number of important questions, notably whether the European Union is a federal or even a halfway federal system, and whether the ECJ is in fact entitled to the last word.

The main device used by the ECJ to incorporate national courts into a network of 'Community Courts' is purely doctrinal. It grew from the seminal case of *van Gend en Loos*,⁷ which established the primacy of EC law and gradually enabled EC law to be

⁶ TEC Art. 234, ex 177, as interpreted by the ECJ in Case 31/85 *Foto-Frost (Firma) v Hauptzollamt Lübeck-Ost* [1987] 4199

⁷ Case 26/62 *Van Gend en Loos v Nederlandse Administratie Belastingen* [1963] ECR 1

enforced in national courts.⁸ In this way, the structure of a formal accountability network was set in place, at least in respect of Member States on whom accountability machinery not apparently envisaged by the Treaty had been turned. The machinery evolved as *hierarchical*: Article 234 procedure had been subtly subverted, to set in place a judicial hierarchy with the ECJ at its apex (de la Mare 1998; Shapiro 1998). There was, however, an inhibition, in the shape of a rule of deference to national courts on procedural matters and on judicial remedies, set in place by the ECJ at an early stage in the forging of EC law.⁹ Although subsequently this principle has met with important exceptions, these remain both limited and highly controversial.¹⁰ It is possible, as we shall see later, to read this rule of deference as recognition of a 'flatter' judicial accountability network.

According to Judge Mancini, the ECJ initially showed 'unlimited patience' vis-à-vis the national judges when making preliminary references, where necessary reformulating their questions and 'coaching them in the elements of Community law'. It was by following 'this courteously didactic method that the Luxembourg judges won the confidence of their colleagues' (Mancini 1998, 595, 605-606). According to one view, the outcome was a network of 'responsible partners', who by and large trusted each other; in other words, a 'form of judicial partnership in which governmental intrusion is resented' (Dehousse 2002; Mancini 1998, 595). One way to read this is as a burgeoning judicial accountability network. Thus Weiler, Slaughter and Sweet suggest that the construction of a constitution and of a Community legal order has taken the form of a 'conversation, discourse or tale' in which 'national courts have played as important a role as the European Court of Justice itself' (Slaughter, Stone Sweet and Weiler 1998). Alternative readings seem more plausible however. In practice, the ECJ has always had to draw heavily on the 'fidelity clause' of TEC Article 10 (which calls on the Member States 'to take all appropriate measures' to ensure fulfilment of obligations arising out of the Treaty or resulting from measures taken by the Community institutions), to underscore the obligations of national courts. And several of the most powerful national jurisdictions have manifested strong resistance to the ECJ's primacy doctrine,¹¹ a dispute that seems on the point of resurgence.¹² Thus it seems preferable to characterise national courts as sceptical 'interlocutors' (Weiler 1994, 510), and although the ECJ has for the most part succeeded in satisfying them, there is no clear evidence of a relationship more cordial than mutual respect.

⁸ For steps on the way, see Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 43/75 *Defrenne v Sabena (No 2)* [1976] ECR 455; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. And see Snyder (1993, 19).

⁹ Case 33/76 *Rewe-Zentralfinanz AG and Rewe-Zentral AG v Land Wirtschaftskammer für das Saarland* [1976] ECR 1989.

¹⁰ See Case C-213/89 *R v Secretary of State for Transport ex p Factortame (No 2)* [1990] ECR I-2433; Case C 312/93 *Peterbroeck* [1995] ECR I-4599.

¹¹ The most sustained resistance came from the powerful German Constitutional Court in its famous *Solange I and II* and *Maastricht* decisions. These are respectively: (1974) BVerfGE 37, 271; (1986) BVerfGE 73, 339; (1993) BVerfGE 89, 155. And see Alter (2001, ch 3).

¹² See now the German 'Arrest Warrant Case': 2BvR 2236/04 (18 July 2005). And see the Polish Constitutional Court, *Accession Treaty Case*, Decision K 18/04 (11 May 2005).

Recently, an element of sanction has been added in the remarkable case of *Köbler*,¹³ where the ECJ decreed that a Member State could incur liability to compensate someone who suffered loss or injury flowing from a 'manifestly incorrect' judicial ruling on EC law. Whatever its logical force, this decision suggests neither a network of 'responsible partners' nor a 'judicial partnership in which governmental intrusion is resented' – very much the reverse! The judgment underscores both the claim to hierarchical superiority of the ECJ and its hierarchical conception of the EU judicial system. Judicial comity will hardly be assisted by rendering network members legally liable at the behest of a member of the network, which is – or so we suppose – subject to no such liability nor will judicial independence be safeguarded from governmental intrusion by a ruling that makes Member State governments financially liable for judicial 'errors' (Wattel 2004, 177).¹⁴

This formal 'Europe of the judges' is increasingly underpinned by 'soft' networking. The well-developed network of criminal and civil courts centres around three separate strands of activity. The first centres on the Brussels Convention for recognition of jurisdiction and judgments negotiated under TEC Article 220. From 1996, the Commission's Grotius programme (now replaced) was funding training programmes, exchanges, studies and research in the national and Community courts. By 2005, the programme's budget had reached EUR 3 750 000. This was augmented by a second, Single Market initiative for consumer protection, which resulted in a Commission proposal, adopted by the Council in May 2001, to set up a European Judicial Network 'to facilitate the life of people facing cross-border litigation'. This led to cooperative programmes on alternative dispute resolution, legal aid and criminal injuries compensation. A network of civil judicial authorities became operational in 1998 with a sophisticated website, operated by the Commission, which provides information on, and links to, the judicial systems in Member States (Europa 1998). These Commission programmes were later augmented under the rubric of human rights, reaching into civil society with a programme designed to enhance implementation of EC law by targeting funding to NGOs engaged in promoting fundamental rights, the rule of law and democracy in the Enlargement states. This falls outside our strict definition of an accountability network.

A third stream of activity involving criminal process followed the Maastricht Treaty, which formally inaugurated cooperation in the field of the Justice and Home Affairs. There is a dedicated server and information network, which aims to supply judicial authorities with information necessary for sound judicial cooperation; to identify best practice; and to resolve problems of judicial cooperation (Europa 2001). A secondary network centre is Eurojust, an EU agency describing itself as 'the first permanent network of judicial authorities to be established anywhere in the world' (Eurojust 2002). The agency hosts meetings between investigators and prosecutors where good practice and ideas for improving investigations and prosecutions are exchanged, working alongside the European Judicial Network. The two have in common that both extend outside the judiciary to prosecutors, and that the 'contact points' for the network are typically sited in national justice ministries or prosecutorial

¹³ Case C-224/01 *Köbler v Republic of Austria* [2003] ELR I-10239. This has encouraged the Commission to bring infringement proceedings in a case involving national courts in Case C-129/00 *Commission v Italy* [2003] ECR I-4637.

¹⁴ For a fruitful comparison with the attitude of the US Supreme Court, see Pfander (forthcoming)

offices. These are, in other words, 'policy networks' or 'networks of mutual accountability', composed of actors concerned with the planning and execution of criminal and civil justice policies throughout the European Union, which operate through a soft form of 'OMC' to foster collaboration and best practice. As such, they are tangential to our theme of accountability networks. As such, they are tangential to our theme of accountability networks – though admittedly they may on occasion provide accountability.¹⁵

The first public relations policy of the ECJ was set in place by Judge Robert Lecourt when President of the Court (Lecourt 1976).¹⁶ Since 1965, the ECJ has hosted meetings of superior national judges, sponsored judicial conferences and educational visits, and in return paid regular visits to national jurisdictions. Judges and Advocates General regularly lecture to the national judiciary on EC law. The declared objective of this policy is simply to promote mutual knowledge and trust between national and Community judges, so as to guarantee smooth co-operation between the two levels. All this helped no doubt to foster acceptance of the ECJ as constitutional court and constitution-maker. Informal, professional relationships of this type were calculated to appeal to judges as part of a professional community of lawyers, giving them the sense of belonging to the 'tight epistemic community' (Shapiro 1980, 537-538; Schepel and Wesseling 1997, 165) that surrounds that prestigious court. Amongst national judges too there were surely many who were deeply sympathetic to the European enterprise and happy to number themselves among the elite that preferred the vision of European integration to national politics.

Alongside these informal arrangements, however, we find a grouping that much more closely fits our definition of a professional network: the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ASC). Initiated in 1963, during an informal visit from the Belgian to the Italian Council of State, so much common ground had been identified by 1968 that the administrative courts of the six EEC countries decided to hold regular colloquiums (there have now been nineteen) on matters of common interest. The supreme administrative jurisdictions of each Member State were added as they joined. Although it receives financial support from the EU, the ASC functions from the Belgian Council of State, while the German Federal Administrative Court holds the presidency; the ECJ is a member and is represented on the Executive Board. Currently, the ASC is trying to deepen its relations with the ECJ, with which it has been discussing the problems of delay in Article 234 proceedings. In 2000, statutes were officially adopted, transforming a 'family reunion of personally acquainted delegates' into a 'professional association with a formal legal framework'. The ASC's objectives, as recorded in the statutes, are the promotion of exchanges of views and experience on matters concerning the jurisprudence and functioning of its members in the performance of their duties and more particularly with regard to EC law. In collaboration with the EU funded college of law at Trier, ASC also conducts training sessions for judges in the Enlargement Member States.

¹⁵ See Harlow (2002, 16-17), instancing the Italian Tangentopoli and French 'contaminated blood' affairs, to which must now be added the Berlusconi affair: Joined cases C-387/02, C-403/02 *Berlusconi and Others* (3 May 2005).

¹⁶ Dehousse (Dehousse 2002, 139) contains a Table of study visits; a little further information is available from the European Court of Justice's website: <http://curia.eu.int/en/index.htm>.

A key activity of the ASC is the organisation of seminars and colloquiums on matters of topical and mutual interest. Significantly, these interests have shifted from comparative studies of different national approaches to 'specific questions of Community law'. Preliminary reference procedure has twice been the subject of study: at Helsinki in 2002 and at Trier in 2004. The second event brought together sixty-two judges from Member States plus Turkey, Bulgaria and Rumania, leading the European Commission to promote a further, similar event (ASC 2005a). In 2005, immigration procedures, increasingly absorbing the time and resources of national courts, were the focus of ASC studies (ASC 2005b). Founded on a lengthy questionnaire addressed to members, a seminar aimed to 'compare the solutions adopted or planned by the Association's members.' In parallel, ASC is collaborating with an ambitious French initiative to make an overall study of administrative justice in Europe. At first sight this represents an earlier, comparative interest but could in time come to form the basis of a project for harmonisation of national administrative laws.

Described as 'the real core of [the] Association', however, is its information network. ASC maintains two vital databases, DEC-NAT, a record of national administrative decisions involving EC law maintained by the ECJ and JuriFast, the Association's database of Article 234 references and other interesting cases involving EC law. In addition, there is a regular Newsletter and a recently established interactive Forum, designed to promote exchanges between members of the Association. Currently, improvements to this network are under consideration (ASC 2005c). As we shall see in the next section, electronic links of this kind have a real potential for grounding accountability networks.

Membership of the Conference of European Constitutional Courts (CECC), a similar network set up in 1972 under the aegis of the constitutional courts of Germany, Austria, Italy and the then Federal Republic of Yugoslavia, is not confined to EU Member States. It now numbers 34 European constitutional courts and other similar institutions exercising constitutional jurisdiction, including courts in a majority of Member States. CECC, which meets triennially, exists to promote the exchange of information on the working methods and constitutional case law of members, together with the exchange of opinions on 'institutional, structural and operational issues as regards public-law and constitutional jurisdiction'. Its website, created by the Belgian Court of Arbitration, affords electronic access to the national reports together with the general report and the reports of the European Court of Human Rights and ECJ. Perusal of its website.¹⁷ suggests, however, that the networking is so far less well developed. This may be why, at the 2004 conference held in Bled in conjunction with the Venice Commission on Democracy Through Law (the Council of Europe's advisory commission on constitutional affairs), members laid great emphasis on 'the advantage of continuous communication between the Courts, the intensification of a truly efficient network of data exchange' (CECC 2004).

Unlike the EJM, already defined as a policy network, the ASC and CECC fit more clearly inside our ideal-type. Made up of courts specialising in namely administrative and constitutional review (a specific method of accountability), both networks have come together at the volition of their members. They are not Commission-inspired or organised nor are they directly linked to Member State ministries. Neither network is

¹⁷ <http://www.confcoconsteu.org/>

pyramidal or hierarchical in character, as they might be if dominated by the ECJ. Shared professional interests, expertise and ethos hold them together. Whether the members subscribe to common accountability objectives is, however, much more questionable. ASC certainly brings Member State judges regularly together to discuss matters of common concern. Its first interest took the form of comparative studies of judicial review. At present, however, the focus seems to have shifted slightly, the chief concern now being the proper administration and implementation of EC law, an overlap with the concern of the ECJ to secure the effectiveness of EC law. In terms of accountability, this interest could be said to diverge from the primary task of national administrative courts, whose function is to hold national institutions accountable. Whether the common interest of the network could be extended to holding EU institutions accountable, and in particular to closing the gaps in network governance identified above, is far from clear.

3.2 Accountability

Whether or not national courts do in fact make any substantial contribution to holding national governments accountable in respect of their EU activities is a moot point. The information is fragmentary and would certainly not be greatly amplified by reference to the websites we have been discussing. It is somewhat easier to form a judgment concerning the performance of the two Community Courts in their function of reviewing the legality of acts of the institutions under TEC Article 230.¹⁸ We should note first that the Treaty of Amsterdam created a significant gap in judicial review by deliberately curtailing the jurisdiction of the Community Courts in the case of the 'Third Pillar'.¹⁹ We should further note that some academic criticism has been directed at the two Courts for failure to adapt quickly enough to the 'new' forms of network governance and the 'soft' methodologies of OMC etc. (Scott and Trubeck 2002, 1) Further and more sustained criticism has been directed at the severe attitude of the ECJ towards access.²⁰

Access to the Community Courts is, in comparison to the law of many of the Member States, restricted. Applications for review by Member States and 'privileged' Community institutions – Council, Commission and European Parliament – are always admissible; in the case of private parties, however, 'standing' or 'interest' to sue is limited to those 'directly and individually affected.' Whatever the merits of this test and the restrictive jurisprudence built on it by the ECJ, it has the effect of limiting the flow of cases to the two Community courts; this is indeed, the purpose for which the ECJ uses the restrictive rules. The narrow test flies in the face of Lord's understanding that the legal system must allow 'any citizen on a basis of equality' to access a court 'with a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account' (Lord 1998, 96). But the response of the ECJ to this type of criticism has always been that any gaps can be filled by Article

¹⁸ We are using this term in the narrow sense of the ECJ and CFI and not in the wider sense of all courts concerned with the operation of EU law: see further Maher (1994, 226).

¹⁹ TEC Article 35 empowers preliminary rulings but only in respect of Member States which have opted in and subject to the proviso of Art 35(5). In respect of title IV, see TEC Art 68. And see now Case C-105/03 *Pupino* (16 June 2005).

²⁰ See, for an excellent introduction to the issues, Arnulf (1999, 40-49) and for a more specialised approach, Hare (2000).

234 procedure. This is far from true, as Advocate General Jacobs recently reminded the ECJ, inviting it to reconsider the standing issue.²¹ Most persuasively, he argued that the rules of access to the Community Courts breached the principle of 'effective judicial protection', which required the possibility of referring a case directly to the court competent to grant a remedy; indirect reference through TEC Article 234 by national courts, which have no jurisdiction to annul Community acts, was not enough. Considerable delay and cost was involved, besides which, the national court might, at the end of the day, refuse to refer; A-G Jacobs therefore recommended reconsideration of the case law to allow individual applications to the CFI, at least where a case was exclusively concerned with the validity of a Community measure.

The ECJ, however, refused to accept the Opinion, pointing out that it was for 'Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'; it was therefore inappropriate to change the rules in this way. It was unacceptable for the Community Courts to 'consider whether this protection is effectively guaranteed and, if it is not, to hold that proceedings brought by an individual are admissible. That would lead the community judicature to interpret national procedural law and thus go beyond its jurisdiction' – a reference to the division of competence in procedural matters mentioned earlier. One way to justify this ruling is in terms of 'network comity': a change in standing rules might have the effect of sweeping cases into the Community courts. The negative side of the ruling is that the change advocated by A-G Jacobs would have gone some way to filling the gap left by network governance, where joint decisions involve cooperation between actors at national and EU level.²²

Evaluation of judicial review as machinery for accountability suggests that we ask also how far it results in a reasonably full and accurate narration of impugned administrative activity; permits or facilitates opportunities for questioning; and results in a judgment or reasoned evaluation. Central to the answers is the obligation under TEC Article 253 of all the Community institutions to give reasons for their acts and decisions, a praiseworthy provision not always replicated in national administrative law systems. This, as the Courts repeatedly state, is no mere formality: not only does the availability of reasons give an opportunity to the parties to defend their rights but it also renders judicial review possible.

For Shapiro, all judicial review is built upon the duty to explain and give reasons, which, he argues, enables an artificial 'synoptic dialogue' to be built between court and decision-maker. By this he means that the decision-maker must always present enough evidence and good enough reasons to persuade the more or less sceptical judge that the decision-making process, and ultimately the decision, is rational (Shapiro 1992, 179, 183). Courts possess two further weapons in the battle for accountability. First, they may annul decisions for failure to observe procedural requirements, whether self-imposed in Commission guidance or memoranda; laid

²¹ Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR II-2365. For the very different approach of the CFI see Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365, reversed on appeal to the ECJ by Case C263/02P *Commission v Jégo-Quéré et Cie SA* [2004] ECR I-3425.

²² See for a notable example, involving construction of a power station in the Azores with funding from EU structural funds, Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) v Commission* [1998] ECR I-1651.

down by the legislator in regulation; or, as is more often the case, formulated by the courts in case law (Schwarze 1993, 229; Schwarze 2004, 146). Secondly, a proportionality test may be applied, according to which administrative decisions must demonstrably be: (i) suitable to achieve the administrative objective; (ii) necessary for the achievement of the administrative objective; and (iii) proportionate in the burden imposed on individuals (de Búrca 1993, 105). Very rapidly, this toolkit allows the court to progress from merely checking that reasons have been given; to imposing procedural requirements and assessing proportionality; to 'hard look' review and even concealed review of the merits – the path Shapiro predicted from US experience that the Community Courts would follow.

A landmark case shows the ECJ skilfully using this toolkit to review a Commission decision taken on the advice of a group of experts to impose import duties on importers of an electronic telescope on the ground that similar apparatus was available within the Community.²³ The Court clearly felt the decision to be spurious and probably discriminatory, but this was an area of discretionary power where previously it had exercised only a limited power of review, the favoured formula usually being: 'given the technical nature of the questions which arise, the Court may only declare a decision of the Commission invalid where there has been a manifest error of appraisal or a misuse of power'.²⁴ The ECJ was able, however, to evade this self-imposed restriction by unexpectedly imposing due process rights on the Commission, affording an opportunity to the importer to make a case and to have an adequately reasoned decision.²⁵ A novel duty of care imposed on the Commission 'to examine carefully and impartially all the relevant aspects of the individual case' again reflects accountability: 'only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present'.²⁶ In marked contrast to the decision on standing, the imposition on all authorities administering EC law of procedural rights did help to fill the gap created by network governance, which occurs whenever an administrative process is administered by different entities not susceptible to the same accountability machinery.

Reasoned decisions, the Court has said, contribute to accountability by opening up the decision-making process for Member States and 'all interested nationals' to 'see how the Treaties have been applied'.²⁷ Perhaps then it is unfortunate that the Courts' own procedures are so often less than ideally transparent. On the credit side, the proceedings are always 'contradictory', which gives an opportunity for the parties to counter opposing arguments. There is provision too for Member States and other interested parties to make 'interventions', allowing a third party (more often than not a civil society organisation) to lend support to the arguments of one of the parties (Lenaerts and Arts 1999).²⁸ To a rather limited extent these provisions can be said to

²³ Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469.

²⁴ Loc. cit. at para 9.

²⁵ Loc. cit. at para 26.

²⁶ Loc. cit. at para 14.

²⁷ Case C-350/88 *Delacre v Commission* [1990] ECR I-395 at para 15.

²⁸ Article 40 of the Court's Statute. Institutions and Member States have a right to intervene; third parties need to show standing.

promote dialogue and discussion. Again, the parties' arguments are always rehearsed, while fact finding by the CFI is commendably thorough. On the debit side, however, judgments are stylistically dense and the reasoning notably difficult to follow. In the absence of dissenting judgments in which opposing views or reasoning are presented, the final unanimous judgment is often Delphic and laconic (de Lasser 2004).²⁹ In Article 234 proceedings, the jurisdictional split adds to obscurity. The style adopted by national courts in referring questions is quite unnecessarily legalistic and obscure, while only the questions expressly asked by the national court receive an answer, based squarely on the facts as found by the national court. These may, but often do not, find their way into the final ruling. In the *Bolzano Airport* case, for example, the issue, of absorbing local interest and importance, was whether an airport was exempt from an environmental impact assessment normally required by EC law. The applicants wished to challenge the facts on which the findings of the national court were based. The ECJ refused to allow this, on the ground that the Treaty creates 'a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it'.³⁰ Again we may see this line of reasoning as going some way to foster judicial comity but, from the angle of public accountability, it falls short of giving satisfaction.

Courts can, however, contribute to public transparency in other ways. As one of the Court's Advocates General has said:

The fact that citizens are aware of what the administration is doing is a guarantee that it will operate properly. Supervision by those who confer legitimacy on the public authorities encourages them to be effective in adhering to their initial will and can thereby inspire their confidence, which is a guarantee of public content as well as the proper functioning of the democratic system. At the highest level of that system, providing the public with information is also the surest method of involving them in the management of public affairs.³¹

If this is true, then the contribution of the Community Courts is less than substantial. In the celebrated *Swedish Journalists* case,³² for example, the journalists' union, making the point that joining the EU could damage the tradition of openness in Swedish government, set out to measure the EU rules against the more generous Swedish rules. They applied under Swedish law for documents used by the Justice Council, obtaining around 80%; under EU law, the Council released just 20%. In the CFI, this decision was annulled, but only on the narrow ground that inadequate

²⁹ See for a contrary view, Bell (2005, 449).

³⁰ Case C-435/97 *World Wildlife Fund (WWF) and others v Autonome Provinz Bozen* [1999] ECR I-01563 at para 31.

³¹ Case C-353/99P *Hautala v Council (No 2)* [2001] ECR I-9565 (Opinion of Advocate General Léger at para 52).

³² Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289. At the time, the relevant EU provisions were the Council Decision 93/731/EC, OJ 1993 L 340, p. 41 and Code of Conduct, p.43; and Commission Decision 94/90 EC on public access to Commission documents, OJ L 46/58. The law now in force is Regulation EC 1049/2001 of the European Parliament and the Council.

reasons for refusal had been given. In *Hautala*³³ again, a Finnish Green Party MEP asked to see a policy statement made in the framework of the Common Foreign and Security Policy dealing with arms exports. The Council refused access, pleading the public interest exception to disclosure of international relations. The case raised some hopes, because the CFI hinted that it might be prepared to treat access to information as a general democratic right, a line that the ECJ has steadily refused to take.³⁴ In the end, however, the CFI fell back on the standard proportionality test, though it did introduce the burdensome practice of 'redaction', which requires officials to examine documents with a view to partial disclosure. These are 'halfway house' decisions, presenting the institutions with a second opportunity to refuse access. Less boldly still, the CFI in *Turco*³⁵ blocked access to advice provided to the Council by its legal service on Commission legislative proposals. But the problem is a policy difference between Member States: by some the Courts are censured for missing opportunities to create for the EU some sort of public 'right to know', while others no doubt find the case law unduly generous (Granger 2004, 3).

What has been added to the accountability process is the 'thick' accountability of sanction, though significantly, only in respect of the Member States. The original pattern of the Treaties provided for invalid administrative acts to be annulled or declared void, placing the onus on the institution or Member State to comply with the judgment (TEC Article 231 and 233). Under TEC Articles 235 and 288 compensation orders could also be made against the Community. The standard EU procedure for infringements (TEC Articles 226 and 228) followed the same pattern; infringement proceedings resulted in a declaration that the Member State was in breach of Treaty obligations. A list of unexecuted judgments annexed to the Annual Report of the ECJ records frequent non-compliance, leaving the Commission to raise the matter again before the Court of Justice. This was the gap filled by the celebrated *Francovich* decision,³⁶ where the ECJ, provoked by Italian inertia in implementing a directive coupled with non-implementation of its own declaratory judgments in infringement proceedings, created a right in cases of Member State failure to implement EC law for individuals to sue for damages – a provocative step, taken in direct opposition to the wishes of the Member States expressed at an inter-governmental conference (Tallberg 2000, 104).

The judge-made system of state liability heightened legal accountability by opening the door to enforcement actions brought by private parties in national courts, whose verdicts Member State governments were thought more likely to obey; a bow, perhaps, in the direction of an accountability network. It was left for an inter-governmental conference to provide a more direct sanction for non-compliance by authorising lump sum or penalty payments in the case of prolonged non-compliance (TEC Article 228). The Court and Commission are now beginning to utilise their new powers of sanction. In the first case to reach the Court, involving five years of non-compliance with an ECJ ruling concerning a toxic waste dump, a daily penalty payment of Eur 20,000 was imposed on Greece, coupled with an order to close the

³³ Case C-353/99P *Hautala v Council (No 2)* [2001] ECR I-9565.

³⁴ Case C-68/94 *Netherlands v Council* [1996] ECR I-2169.

³⁵ Case T-84/03, *Maurizio Turco v Council* (23 November 2004).

³⁶ Joined Cases 6, 9/90 *Francovich and Bonafaci v Italy* [1991] ECR I-5357. On sanction theories of liability see Harlow (1996, 204-210).

dump.³⁷ In *Commission v France*,³⁸ the two allies took a further step forward. The Commission had evidence from its own inspectors that France had never properly enforced the fisheries regulations, in force since the 1980s, and had been found to be in default as long ago as 1991.³⁹ The Commission took Article 228 proceedings, recommending penalty payments. Clearly concerned that France would escape too lightly, Advocate General Geelhoed advised the addition of a lump sum payment in respect of the period of infringement between the two judgements – a change of such magnitude that it was found to merit an adjournment for re-argument.⁴⁰ His Opinion was adopted by the ECJ. It will clearly be much harder from now on for recidivist Member States to avoid. Whether the same is true of the Commission, never the subject of ‘thick’ accountability, is much more questionable (Harlow and Rawlings forthcoming).

4 European Ombudsmen – building an accountability network

4.1 Accountability

Recently celebrating its tenth anniversary (Peters 2005, 697), the Office of the European Ombudsman (EO) is a paradigm of Bovens’ ‘thin’ concept of accountability, being closely engaged in ‘account giving’, ‘questioning’ and ‘passing judgement’, while lacking in ‘sanction’. Here as elsewhere in the ‘Ombudsman world’ this is seen as a strength – an institutional design feature that not only establishes the ombudsman technique as a genuine alternative to courts but also enables procedures and criteria of accessibility to be more flexible. The basic outlines of a common understanding across Europe of what an ombudsman should be and do as recently identified by the EO serves to underscore the point (Diamandouros 2005c):

- Personal dimension of the office, with a publicly-recognised office-holder
- Independence
- Free and easy access for the citizen
- Primary focus on the handling of complaints, whilst having the power to recommend not only redress for individuals but also broader changes to laws and administrative practices
- Use of proactive means, such as own-initiative inquiries and providing officials with guidance on how to improve relations with the public
- Effectiveness based on moral authority, cogency of reasoning and ability to persuade public opinion, rather than power to issue binding decisions

³⁷ Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

³⁸ Case C-304/02 *Commission v France* (judgement of 12 July 2005).

³⁹ Case C-64/88 *Commission v France* [1991] ECR I-272.

⁴⁰ See Opinion of 29 April 2004; Order for Reopening of Case C-304/02 of 16 June 2004; and Opinion of 18 November 2004.

- Broad review function that can encompass legal rules and principles, the principles of good administration, and human rights

The EO Office is in fact a modest entity, with much to be modest about. In accordance with the mandate to combat ‘maladministration’, and so ‘enhance relations’ between citizens and the EU level of governance as contemplated in the Maastricht Treaty, it has so far dealt with more than 20,000 complaints. Yet the great majority of these – some 70% (Diamandouros 2005b) – prove inadmissible, mostly because they are against national, regional and local administrations in the Member States, over which the EO – investigating Community bodies – has no jurisdiction. Indeed, confronted with a potential constituency of 450 million people, the EO could not hope to do a great deal more, armed as he currently is with a budget of some Euro 7M and only fifty staff.⁴¹ For our purposes, the jurisdictional limitation also has special resonance, since the EO has been pressed from the outset to promote an accountability network. Given the evident mismatch or lack of ‘fit’ between, first, the formal reach of the Office, and, second, the practical experience of citizens of implementation of Community law by domestic authorities under the rubric of ‘indirect administration’, the EO would otherwise be lacking in credibility. In its somewhat propagandistic style, the Office regularly claims credit for advising complainants how to go elsewhere: most often, to another (domestic) ombudsman.⁴²

One way of looking at the Ombudsman’s contribution to accountability is through the lens of alternative dispute resolution (ADR). As compared with courts, the EO rightly stresses the informality and flexibility of this particular administrative law technique; a complaints service that is not only free at the point of delivery but also free from strict standing rules and relatively swift. Likewise, whereas legal process is indelibly associated with the concept of a zero-sum game, promoting ‘positive-sum outcomes that benefit both the complainant and public authority’ is seen as very much part of the Ombudsman’s job (Diamandouros 2004b). It is however the ability to self-start – in the case of the EO, the so-called ‘own initiative inquiry’ – which so clearly sets him apart.

Another angle of approach is through the EO’s contribution in helping to reconcile executive delegation with parliamentary democracy (Magnette 2003, 677), which may show added value in terms of the legitimisation of the EU, precisely because of the increasing reliance on independent agencies etc., in the (new) governance of Europe, and the evident fragility of classic forms of political accountability in such an intricate institutional system. Special reference must here be made to the Petitions Committee of the EP: at one and the same time, a parallel system for redress of grievance more oriented to collective or explicitly ‘political’ issues; and, via presentation of his annual report, a (thin) machinery for the accountability of the Ombudsman.⁴³ Two particular features should be noted however: first, a certain

⁴¹ Figures that include substantially increased resources in the light of enlargement: see for details, AR (2004, 181-188).

⁴² During 2004, the EO directed some 900 complainants to a domestic ombudsman and transferred some 50 cases (AR 2004, 126).

⁴³ As for the EO’s limited line of accountability to the courts via the action for damages, see Case C-234/02 P *European Ombudsman v. Frank Lamberts* [2004] ECR I-2803.

historical tension in relations between these two sets of complaints-handlers⁴⁴; and, second, internal weaknesses in the committee,⁴⁵ which effectively leaves the EO without a secure anchor or strong power base. A special premium has been placed in this context on the need for 'co-operation' between the EO and those bodies and institutions, pre-eminently the Commission and Council, which it is his task to hold accountable (Diamandouros and others 2005).

Highlighting the need for a more rounded or holistic approach, one that further stresses the inspectorial function or parallel with audit, the authors have long used the terms 'fire-watching' and 'fire-fighting' to describe the role of ombudsman (Harlow 1978, 446).⁴⁶ In similar vein, reflecting the classical Nordic tradition that originally informed the Office, a leading commentator was soon ascribing to the EO a dual function: the first, clearly very relevant for present purposes, of helping to make the EU more accountable by 'providing an independent critical appraisal of the quality of administration by Community institutions and bodies and a stimulus towards improvement'; the second that of court substitute (Heede 1997, 588).⁴⁷ A little extravagantly perhaps, complaints (to the ombudsman) can themselves be seen as 'jewels' in the case of comparative public administration: a useful means of feedback for managers and prompt for learning outcomes.⁴⁸

Looking more closely at the investigative function, the Office has elaborated its own flexible form of 'contradictory procedure' in the name of fairness.⁴⁹ For example, in the *Parga* case,⁵⁰ a sensitive investigation into allegations of bias by a Commission official in infringement proceedings, the EO, armed with the complainant's detailed observations, repeatedly went back to the Commission for further explanation. Admittedly, some elements of restriction as regards access to documents and the hearing of witnesses that derive from the original 1994 'Statute of the Ombudsman' continue to vex⁵¹. However, the present EO cleverly presses the line that, unless the complainant has the opportunity of notice and comment, his inquiries 'cannot take into account documents supplied by a Community institution or body to contest an allegation of maladministration' (European Ombudsman Annual Report 2004, 43).

The most recent annual report has the EO completing some 250 inquiries (European Ombudsman Annual Report 2004, 43-45 and Annex A), of which 44% were closed with no finding of maladministration and 25% were settled by the institution. As

⁴⁴ Traceable to hostility in the Petitions Committee to the creation of the Office: see Magnette (2003, 677). Relations, however, clearly have improved: see Baviera (2005).

⁴⁵ As for example in terms of resources and specialist support: see Committee on Petitions, Weiland Report (2004).

⁴⁶ That is, in the Anglo-Saxon context.

⁴⁷ See generally on the influence of the 'Danish model', Heede (2000).

⁴⁸ A recurring theme for example in the work of the current UK central government ombudsman: see Annual Report of the Parliamentary Commissioner for Administration 2004, especially chapter 1. And see Soderman (2005b).

⁴⁹ See for the detailed procedural rules, Decision of the European Ombudsman adopting implementing provisions, as adopted on 8 July 2002 (and later amended).

⁵⁰ Decision on complaint 1288/99/OV against the Commission, AR 2002 p 98; discussed in Harlow and Rawlings (forthcoming).

⁵¹ Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ 4.5.94 L113/15, Article 3.2. And see Committee on Petitions, Mavrommatis Report (2005).

regards findings of maladministration, the more routine work is characterised by critical remarks (14%), where there are no general implications and no follow-up action by the Ombudsman seems necessary.⁵² Meanwhile, illustrating the quest for 'positive-sum' outcomes, the EO 'always tries to achieve a friendly solution if possible' (1%). At the top end of instruments in the toolkit, the making of draft recommendations to the institution (17 cases), and ultimately a special report to the Parliament in the face of recalcitrance (1 case), illustrate both the strengths and weaknesses of the ombudsman technique as non-judicial machinery for accountability.

More criticisable, however, is what has not happened, namely a generous use of the own initiative inquiry. Notwithstanding the constraints on resources, some thirty completed inquiries in the course of a decade is a low return in the context of a sprawling administrative apparatus that is no stranger to public criticism, more especially since many of these investigations have been of strictly limited interest (European Ombudsman Annual Report 2004, 28).⁵³ This is the more surprising in that, on those few occasions when it has been deployed to tackle major systemic issues or problems, the own initiative inquiry has served to illuminate the proactive potential of the Office as machinery for promoting a more responsive and service-oriented administrative culture. Focusing more closely on 'outputs', we would cite the EO's well-known contribution to the cause of transparency in the EU, which serves to illustrate his key attribute as a 'repeat-player' in what obviously is a continuing struggle: an own initiative inquiry; followed by a special report on access to documents;⁵⁴ expansion of transparency requirements into secretive areas of Council activity via individual complaints;⁵⁵ plus various interventions in the public discussion of a critical (Leino 2004, 351-352)⁵⁶ and/or agenda-setting kind (Soderman 2003, 206).⁵⁷ Of course the precise impact of the Ombudsman is difficult to assess, not least given the close and complex interaction with other actors, including in this field the courts.

Then there is the Ombudsman's repeated involvement in the matter of Article 226 infringement proceedings. Here the EO can take credit for the gradual elaboration of a basic procedural code on the Commission's treatment of complainants (Harlow and Rawlings forthcoming),⁵⁸ an example of internal institutional action fostered by the EO that is especially noteworthy because of the complete lack of interest in individual protection demonstrated here by the Community judiciary.⁵⁹ Once again, the various

⁵² Articles 6-8 of the EO's implementing provisions specify the various options.

⁵³ Recent examples include the administration of the European schools in Brussels and the treatment of seconded national experts.

⁵⁴ Special Report and Decision by the European Ombudsman following the Own-Initiative Inquiry into Public Access to Documents held by Community Institutions and Bodies. December 1997.

⁵⁵ As in the 'Statewatch cases': Decisions on complaints Nos. 1053, 1056, 1057/25.11.96/STATEWATCH/UK/IJH against the Council.

⁵⁶ As in controversy surrounding the drafting of the 'new' transparency regulation (Regulation No 1049/2001).

⁵⁷ As in the debate on 'the future of Europe'.

⁵⁸ Communication to the European Parliament and European Ombudsman on relations with the complainant in respect of infringements of Community Law (COM (2002) 141 final).

⁵⁹ E.g., Case C-141/02P *Commission v T-Mobile Austria GmbH* (22 February 2005, PR No 14/2005).

elements of ombudsman technique are seen locking up together: an early own initiative inquiry prompted by concerns about Commission 'arrogance';⁶⁰ later detailed investigation of a complaint culminating in 'further remarks' on the need for procedural guidelines;⁶¹ and thence cases elaborating on particular points such as reason-giving (Harlow and Rawlings forthcoming). A potentially very significant development is currently under way in this area, which sees the EO effectively seeking to thicken the line of accountability from the Commission by recourse to a concept of 'due diligence'.⁶² This approach neatly sidesteps the standard objection to the EO challenging the substantive exercise of discretion (Clariana 2005), and also sits comfortably with the internal disciplines of managerial administration, linking back in turn to the Ombudsman's 'fire-watching function' of promoting good administration.

More generally, the EO has aimed to play an active role in standard-setting, a not insignificant feature in the development of accountability structures and processes. Exemplifying another element in his proactive method, which sees the European Ombudsman functioning as a source of 'soft law' (Bonnor 2000, 39), his *European Code of Good Administrative Behaviour*⁶³ deserves a special mention even if, as a distillation of legal principles and administrative requirements, there is little of added value in the content. The interactive nature of the 'fire-watching' and 'fire-fighting' functions is further illustrated here, with the EO promptly invoking the code as a set of benchmark tests for maladministration in individual cases, while the EO in public advocacy mode is currently pushing for the next step: a binding codification in the guise of 'hard law'. The informal code, which is somewhat grandly presented as giving practical expression to Article 41 of the EU Charter on Fundamental Rights, for which the previous EO (Jacob Söderman) successfully lobbied in the Convention (European Ombudsman 2005, 6-7),⁶⁴ provides the building bricks for formal codification, perhaps under the auspices of the proposed 'Constitution for Europe' (Söderman 2002, 76).⁶⁵

But what, it may be asked, of 'the strong personal dimension' to the Office? On the one hand, the first EO clearly did much to establish the Office on a secure footing, guiding it through the early, developmental years (Diamandouros and others 2005; Söderman 2005a, 80). As a Finn, Mr. Söderman was able to draw on a highly developed national tradition of administrative law (Leino 2004, 333), most obviously in promoting the cause of transparency (Söderman 1998). On the other hand, especially given the quality of 'relations with citizens' that the Office was set up to address, Mr. Söderman may be criticised for excessive caution, a slow start (Tomkins 2000, 217), and perhaps for disregarding an obvious problem of comparative method, the question of the applicability of Finnish-style understandings and

⁶⁰ Decision in the own initiative inquiry 303/97/PD (AR 1997, at 270); following on Decision on complaint 206/27.10.95/HS/UK against the Commission ('Newbury by-pass').

⁶¹ Decision on complaint 995/98/OV against the Commission ('Macedonian Metro').

⁶² See especially Draft recommendation to the Commission in complaint 146/2005/GG (15 June 2005) ('German waste oils').

⁶³ Originating in the Own Initiative Inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV), and subsequently revised and adopted by resolution of the Parliament on 6 September 2001.

⁶⁴ See further, Diamandouros (2005e)

⁶⁵ Article III-398. See further Swedish Agency for Public Management (2005).

practices among the proverbial 'big beasts' of the Brussels jungle (Leino 2004, 365-366). Nor should we ignore the non-contribution by the Ombudsman in the major 'crisis' of accountability – extending to issues of corruption – under the Santer Commission.⁶⁶

The authors sense a step-change in the activities of the Office following the arrival from Greece of the second EO, Professor Nikiforos Diamandouros, in 2003. As well as a new vigour, we detect a more pluralistic conception of the ombudsman role, one to which – happily – the foundational Nordic tradition is still a major contributor, but which also reflects a more general re-orientation in the 'Ombudsman world', associated especially with human rights concerns and the emergence of the new democracies (Hossain 2000; Hossain 2003). Expressed slightly differently, there is in the contemporary workings of the Office the sense of a changing ethos associated with the great expansion of the Union into Central and Eastern Europe.

The step change is made manifest in various ways. One key strand, perhaps reflected in a sharp increase in the number of complaints reaching the Office (over and above what is attributable to Enlargement) (European Ombudsman Annual Report 2004, 24), is the drive for increased visibility or reach, for example, through more targeted information and visits to all four corners of the EU. Similarly, the hitherto dull and uninspiring definition of maladministration as failure by a public body to act in accordance with a rule or principle which is binding upon it, (European Ombudsman Annual Report 1997, 23) is now glossed up with an express reference to fundamental rights: so too, there is for the first time unequivocal recognition of the fact that maladministration encompasses unlawfulness but is not confined to it (Diamandouros 2005, 232-233).⁶⁷ At the same time – and with reference to Bovens' criteria of 'account giving' and 'passing judgment' – there are indications of a more robust and intensive style of review: for example, greater questioning of interpretations by the Commission's legal service;⁶⁸ and one especially bold direct attack on the Council, on the basis of a stretched interpretation of Treaty provisions, for its habit of lawmaking in secret.⁶⁹ Professor Diamandouros is also committed to a more creative approach to own initiative inquiries, one that effectively signals a re-balancing in the priorities of the Office in favour of the important 'fire-watching' role of the ombudsman (Diamandouros 2005d). Only time will tell whether this more assertive approach bears fruit, or whether the Office effectively finds itself kicked back by other, more powerful, institutions.

⁶⁶ See Committee of Independent Experts, First Report on Allegations regarding fraud, mismanagement and nepotism in the European Commission, 15 March 1999, Brussels; Second Report on Reform of the Commission – analysis of current practice and proposals for tackling mismanagement, irregularities and fraud, 10 September 1999, Brussels.

⁶⁷ And see Case T-337/02 *Lutz Herrera v Commission* (28 October 2004).

⁶⁸ Subject of course to the ultimate interpretative power of the ECJ: see especially Decision on complaint 1273/2004/G against the Commission ('Azores fisheries'). While the first EO established early on that misinterpretation of law could itself constitute maladministration, he applied a (very) 'soft touch' standard of review: AR 1999 at 18-19.

⁶⁹ Decision on complaint 2395/2003/GG against the Council (17 October 2005), referring to Special Report following the draft recommendation to the Council in complaint 2395/2003/GG (4 October 2005).

4.2 Networking

For present purposes, however, it is one aspect of the new sense of vigour that commands attention: in Professor Diamandouros' words, 'co-operation among Ombudsmen is the way forward' (Diamandouros 2005d, 229). As indicated, Jacob Söderman had been interested in this aspect from the very beginning, the first concrete step to what are deepening forms of collaboration being the creation in 1996 of a system of liaison officers linking the EO and national ombudsmen (European Ombudsman Annual Report 1996, 92-93). As well as redirecting complainants or transferring cases, the aims naturally included promoting the flow of information about Community law and its implementation (Diamandouros 2005b). Today, however, a fresh discourse is on offer: 'European ombudsmanship', the European 'family of ombudsmen', and even 'ombudsmanship as part of the European legal and political tradition'.⁷⁰ Likewise, with a view 'to establishing a clearer public identity for our co-operation', the preferred term of art is now 'The European Network of Ombudsmen' (Diamandouros, 2005c).

There has been a substantial widening of the network. Comparative public administration has witnessed serial bouts of so-called 'ombudsmania' in recent times, a phenomenon especially pronounced in the expanding landmass of the EU (Gregory and Giddings 2000). In the case of the ten new Member States, the establishment of ombudsmen is rightly seen as a significant step in the transition from communist rule to democracy. In addition, many of the old Member States that previously lacked ombudsman have caught the fever; Italy, with no national ombudsman or functional equivalent,⁷¹ is today the exception. Layering – a strong development of regional ombudsmen in various Member States (this time including Italy), and subsequent inclusion in the EO's network – is also important because of the many responsibilities for the practical application of EC law familiarly associated with this sub-national tier of governance.⁷² In short, whereas Mr. Söderman's original liaison network was an intimate affair, with national ombudsmen in only 7 out of 12 Member States, Professor Diamandouros' 'European Network' can currently boast some 90 bodies in 29 countries.

Three particular features bear directly on the form and style of this emergent accountability network. The first concerns the existence of an 'ombudsman world'. In a striking reversal of so much in the contemporary development of transnational or global administrative law, the 'regional' or European dimension is here being superimposed on an already highly developed form of networking on the international plane. Pride of place goes to the International Ombudsman Institute (IOI), which in true pioneering spirit has operated to promote, foster and validate the ombudsman technique around the globe.⁷³ Closer to home, there is of course a considerable history of ombudsman development and education and training under the aegis of the Council of Europe, more especially 'in the context of the fundamental changes in central and eastern' parts following the end of the Cold War (Council of Europe 1996,

⁷⁰ Diamandouros (2005a).

⁷¹ Such as a parliamentary petitions committee, as is the case in Germany: see Arts 17 and 45c(1) of the Basic Law.

⁷² This is not to overlook the huge diversity among the 'regions' of Europe: see Rawlings (2001).

⁷³ The IOI operates from a University of Alberta portal: <http://www.law.ualberta.ca/centres/ioi>.

5). Plans for 'empowering the ombudsman... so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration' have naturally featured prominently.⁷⁴ It is important too that the emergent accountability network should not be visualised simply in terms of bipolar relationships between the EO and ombudsmen in individual Member States: the British and Irish Ombudsman Association (BIOA), for instance, is the model of a 'sub-regional' network. This point has resonance in the case of the 'new democracies' in the EU and in existing and potential 'candidate countries'. Ombudsman networking activity, sponsored under such major initiatives as the EU's Stability Pact and the joint EU and OECD Sigma programme, is particularly intense in and among the countries of south-eastern Europe, not least with a view to the protection of minorities.⁷⁵

Secondly, we should note that very considerable diversity exists within 'the family of ombudsmen', grounded in but not confined to different conceptions of the role. Even inside a single state, let alone across the EU, substantial differences in terms of functions, powers and orientations between public sector ombudsmen may well occur (Lawson 2005). The idea of the EO's accountability network affording a uniform and universal service thus remains something of a chimera, but the current EO is found actively promoting an agreed statement, or skeletal 'codification', of the ombudsman function in Europe inside the network (Diamandouros 2005c).

The third and related feature is the voluntary and flexible character of the co-operation, in what is a paradigm of a self-organising network. There is no equivalent of Article 234 reference procedure or legal 'glue' for the network nor does the EO have at his disposal anything resembling the legal doctrine of 'effective remedy' with which to frame and structure ombudsman practice and procedure in Member States. The 'dialogue' in this way differs qualitatively from that within the judicial community, reflecting an altogether looser form of pan-European arrangement. If the EO is to be characterised as *primus inter pares*, the primacy is not – or not yet – that sought by the ECJ.

The scale of ambition is well illustrated, however, in contributions from the previous EO to the Convention on the Future of Europe, which aimed explicitly at a generous legal base (Söderman 2002, 2003). As represented in the figure attached to this paper, Mr Söderman visualised formal recognition of a multi-layered system of extra-judicial remedies, incorporating petitions, centred round an explicit obligation on the respective domestic and EU complaints-handlers to co-operate 'in a spirit of trust while maintaining their independence'. Alongside, there would also be significant extensions to the EO's own role and jurisdiction.⁷⁶ Formal networking was envisaged, with ombudsmen (or petitions committees) in a Member State empowered to transfer any case involving fundamental rights under EC law.⁷⁷ Finally, echoing the practice of certain ombudsman systems, the EO – following an investigation – would have a

⁷⁴ Committee of Ministers' Recommendation No. R (85) 13 on the institution of the ombudsman.

⁷⁵ See for details, <http://www.stabilitypact.org/wt1/040607-ombudsman.asp>.

⁷⁶ Which themselves echo some of the more expansive proposals for an EO originally put forward ahead of Maastricht: see Marias (1994).

⁷⁷ It was further envisaged, as a stopgap, that the EO would investigate such cases and for maladministration in the application of EC law more generally if there was no local complaints machinery with competence in the matter.

direct right of access to the ECJ in respect of failure by a Member State or Community institution or body to respect fundamental or human rights binding in EC law. Not surprisingly, these lofty ambitions failed to win favour in the Convention, the implicit demand that each Member State be obliged to ensure effective and appropriate machinery for ADR jarring both with respect for national constitutional traditions and with the subsidiarity principle, in respect of direct investigation by the EO of the activities of Member States. There is too a serious threat of overload through centralisation: there are gains in terms of efficiency and effectiveness of local processes, against recourse to the EP petitions procedure and/or the centralised infringement machinery of Article 226 (Harden 2002, 495). Finally, the EP's Petitions Committee, prioritising the EO's role as 'conciliator' between European public administration and citizens, has articulated a major stylistic objection to the EO invoking judicial process (EP Petitions Committee 2005), a concern shared by the authors. The present EO is now redoubling efforts to promote voluntary co-operation in the face of the subsequent 'failure' of the proposed Constitutional Treaty in the ratification process.

The authors would emphasise two rather different facets of the work of the network. The first is its nurturing and standard-setting role for the many 'young' ombudsman systems in the new democracies. Thus the EO's Code on Good Administrative Behaviour has been translated into 13 more languages and several Ombudsmen in the Enlargement states have used it as a resource to enhance the quality of public administration in their own countries (Diamandouros 2005d). We see this proactive role of helping to promote ombudsman systems inside Member States, with a view to building and improving the administrative capacities of public bodies, as setting in place the machinery of accountability. Secondly, and indicative of the quest for a pan-European complaints service, we note the development of a user-friendly website, the next step contemplated by the EO being a shared point of access or electronic 'one stop shop', such as an interactive facility to help direct citizens to the appropriate ombudsman, be it at EU, national or regional level (Diamandouros 2005d). Meanwhile, around the network, rapid exchanges of information, shared analysis of problems and dissemination of best practice are founded on increasingly sophisticated use of IT.

Finally, we note the potential for joint inquiries, building on instances of informal sharing of information in particular cases. A first step has been taken with a 'parallel inquiry' in close cooperation with the EO's Spanish counterpart, concerning a dispute over the power to operate free public libraries. No fewer than ten members of the network responded for the EO's request for information on alternative ways of implementing Community law, against which the Commission's decision to bring infringement proceedings against Spain could be measured.⁷⁸ This might be a further way to fill the gap in areas of 'shared' EU and national administration. 'To shed light on exactly who is responsible for what and, if appropriate, use our powers to ensure that the full range of legally possible solutions is adequately and duly examined'⁷⁹ would be the very model of an accountability network approach in such matters.

⁷⁸ Decision of the EO on joint complaints 3452/2004/JMA against the Commission (19 October 2005).

⁷⁹ See for practical illustration, Diamandouros (2005c).

5 Conclusions

Much of the debate about accountability in the European Union is conceived in terms of a two-tier structure, with an institutional division of responsibility between the two levels. The tendency is perhaps clearest in discussions of democratic legitimacy, where the European Parliament is seen as the instrument of accountability in EU affairs, while national parliaments, though anxious to obtain a toehold at this level, are restricted to dealings with national governments. The point is illustrated again by our case study of courts, where the emphasis on the primacy of EC law has from the start encouraged hierarchical thinking. In this paper, we have argued that, to resolve or even make sense of the problems of accountability in the European system of multi-level governance, accountability networks are necessary.

As our case studies show, the idea is beginning to be put into practice. In some ways, the ombudsman network seems the more hopeful. A striking feature here is the extent to which developments are happening on the initiative of those who deal in accountability and not at the instigation of Commission, Council, or indeed the central governments of Member States. There is a strong sense already of a self-organising and self-generating network of investigative officials, fortified by shared professional expertise and ethos, who have come together to execute the common purpose of fostering and encouraging good administration, and of holding administrators throughout the EU accountable for acts of maladministration. With this in mind, training, advice and assistance are rendered to, and experience shared among, participants, who are beginning to coalesce in a relationship of cooperation, if not yet dependency. Moreover, although the original initiative was due to the EO and has been stimulated and accelerated by the energy and resourcefulness of the second holder of that post, the network is neither pyramidal nor hierarchical. Indeed, in this respect we see the previous EO's proposals to the Constitutional Convention as damaging, carrying a threat to the voluntary accountability network, capable of leading to hierarchy. Admittedly much remains to be done if the informal arrangements are to burgeon into an accountability network properly so called. Thus joint investigations are on the 'wish list' of the ombudsmen but it is not yet clear whether the necessary legal changes are a political possibility or operationally feasible. Somewhat to the authors' surprise, however, the ombudsman network seems further advanced towards an accountability network as we have defined it than the better-known circle of (in the wider sense) Community Courts .

Although the working relationship between the ECJ and national courts is older, and although its members undoubtedly share professional expertise and a common ethos, there are ways in which the network does not conform to our ideal-type. We have seen that judges network. In the areas covered by the Brussels Convention and the mutual cooperation programmes of the JHA, we have, however, concluded that this is a policy network or network of mutual accountability. The ACS is different. It is a 'flat' network, created voluntarily by its members, of which the ECJ, though represented on the Council, is no more than a member. The members specialise in accountability, in this case judicial review, and are also involved as (national) Community Courts, in holding national governments accountable.

This informal network contrasts, however, with the formal judicial arrangements for the implementation of Community law as conceptualised by the ECJ. Unlike the

evolving ombudsman network, this is not based on 'non-hierarchical method[s] of mediating conflict' (Scharpf 1994, 225), where the characteristic outcome would be 'not the displacement of one jurisdiction by the other, but the obligation of both to choose mutually acceptable means when performing the proper functions of government at each level': that is to say, a 'flat hierarchy' involving recognition of 'co-ordinately valid legal systems' (MacCormick 1996; MacCormick 2004, 852). That idea is undercut by the ambition of the ECJ to occupy the place of supreme constitutional court. Clearly this places national courts in an ambiguous position, charged as they are primarily with the mandate of maintaining the integrity of the national legal order, while at the same time upholding the primacy of EC law. The judicial pyramid produces gaps and generates internal tensions, impeding the development of a true accountability network capable of meeting the challenge of network governance.

In focusing on courts and ombudsmen, we are aware that this is only part of the picture. Accountability networks are part of a fast moving situation in European governance and our paper is consciously designed to open a broader enquiry. What, it may be asked, of other kinds of accountability networks? We would single out for attention two further areas.

Financial audit is an accountability technique of some significance to a system of governance where, for more than ten years, the books have never been properly closed. What is the scale of and potential for interplay for financial auditors operating both at Union level and under various domestic laws? The European Court of Auditors (ECA) audits the books of EU institutions and public entities, while national and sub-national audit systems deal with the other tiers. Cooperation across the divide by those who operate national and sub-national audit systems has been encouraged for some time. Quietly and behind the scenes, it is beginning to be a reality (Harlow 2002; White and Hollingsworth 1999). A wider and 'flatter' accountability network also exists, based on cooperation between national audit systems. The European Organisation of Supreme Audit Institutions (EUROSAI) is an independent, non-political organization established to promote co-operation and foster exchange of ideas, experiences and techniques.⁸⁰ It is a branch of the wider international organization INTOSAI, which brings together the supreme audit institutions of 186 countries and is ranked as an advisory organisation to the United Nations. EUROSAI extends outside the EU and was set up in 1990 with 30 members, now 47 including the ECA. EUROSAI has all the characteristics of a network, its objectives being to promote professional co-operation among SAI members, to encourage the exchange of information and documentation, and to advance the study of public sector audit. Although it has apparently not yet done so, it has the potential to mirror the ombudsman network.

Much the same is true in respect of parliaments. There is of course much discussion of the contribution to accountability of the European Parliament, as also of individual national legislatures, while COSAC, bringing the two levels together in this regard, has commanded some attention. Yet is there not a missing link? What of relations between the national parliaments in the context of the European project? A recent study by a French 'think tank' based on a survey of the European affairs committees of national parliaments speaks of an expanding inter-parliamentary 'network.' divided

⁸⁰ Eurosai can be contacted at <http://www.eurosai.org>.

horizontally into inter-parliamentary relations and hierarchically, or as a pyramid based on the European Parliament and COSAC. The author sees an urgent need for further coordination of parliamentary work in the face of what he calls a 'double democratic deficit': more EU legislation and the continuing gaps in parliamentary control (Larhant 2005).

Nineteen national parliaments have in fact already designated representatives to the EU institutions – though some are still designated solely to the EP – the only parliaments not yet represented being Germany, Spain, Portugal, Cyprus and Malta.⁸¹ All are hosted by the EP in Brussels, where they receive office space and certain office facilities free of charge. Representatives have a more-or-less direct reporting relationship with the appropriate committee(s) of their own parliament or the chamber from which the national delegation to COSAC is nominated, and many attend COSAC meetings as part of their chamber's delegation. Since January 2004, COSAC has had a small permanent secretariat to provide administrative support for its work, consisting of one permanent member; significantly, funding for this project comes not from the EU but for 2004-05 from the Danish Folketing and for 2006-07 from the Finnish Eduskunta. Potentially far more important, an inter-parliamentary EU Information Exchange (IPEX) has also been put in place to provide a platform for the electronic exchange of EU-related information between Member State parliaments. The aim is to build up a common website, linked to various parts of national governmental portals, each country being responsible for its own information. Again, this is operated from the Swedish Parliament.⁸² There is as yet little evidence of inter-parliamentary cooperation on matters of mutual interest and the potential for joint action is as yet unexplored. But a time could be coming when national parliaments can and will exchange views on controversial policies such as the European Arrest Warrant. They could then adopt a common position by majority before the Council considers them, in a manner presaged by the European Constitution. This would have accorded much greater prominence to national parliaments through its new Protocol on Subsidiarity and Proportionality, imposing on the Community institutions an obligation to reconsider proposals opposed by one-third of national parliaments (European Constitution, Arts I-41(2), III-160 and III-174(2); Title II, Protocol 2). Increased opportunities, not to say obligations, for national parliaments 'to network and coordinate' would have been created. These are signals, on which we would not care to base firm deductions; nonetheless, they are suggestive.

Our conclusions remain modest. We are not proffering the concept of accountability networks as 'the ultimate accountability principle' nor, indeed, as a final solution to the multifaceted problems of accountability associated with the rise of multi-level governance in Europe. We are, however, suggesting that the hierarchical and pyramidal assumptions that presently underpin accountability theory in the EU context need to be tested and that social scientists need to develop new evaluative frameworks for this to be done. The case studies on which we rely are also modest, in the sense that they are necessarily brief and limited in their ambit; more detailed empirical studies are necessary to provide information on which new theory can be based.

⁸¹ Relevant information in the text was obtained by the authors via the (United Kingdom) Study of Parliament Group.

⁸² The portal to IPEX is at <http://www.ecprd.org/ipex/>.

While we have pointed to further accountability networks that are already evolving or are on the point of evolving, they are not – though undoubtedly rendered more likely by the exigencies of Enlargement – so far highly developed. We suggest, however, that it may be a strength to ‘hasten slowly’, in that speed and depth of development is dictated by the willingness of network members to go further. This introduces a counterweight to EU institutional ambition. The present EO, in a reference to ‘the increasing intensity of co-operation among administrations at all levels of the European Union’, has spoken of the need for this to be ‘matched by co-operation among ombudsmen’ (Diamandouros 2005d). This is another way of articulating the authors’ thesis that the development of network governance invites in response the development of accountability networks.

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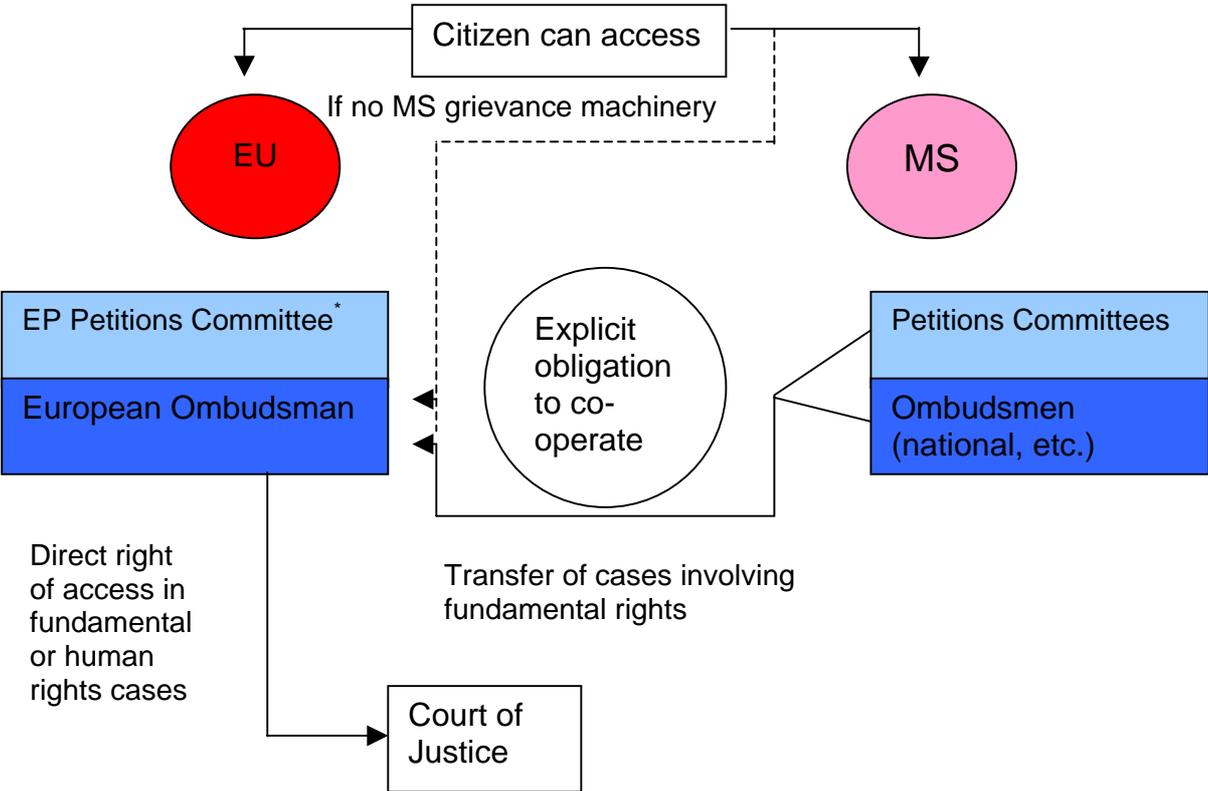
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Figure: The European Ombudsman’s proposals on grounding an accountability network



* The European Ombudsman further envisaged a specific obligation on the Commission to cooperate with the Parliament in dealing with petitions concerning possible infringement of Community Law by Member States, applying procedures used for the purpose of Article 226.