

Swiss Federal Archives working day, Berne, June 2001

***Privacy and raison d'Etat versus transparency and democratic legitimacy.
Evolution and revolution in relation to access to documents of the European Union
institutions, 1983-2001***

By Jean-Marie Palayret

The issue raised by this workshop, namely what interaction there may be between national and international archive systems, might at first sight seem not really to have anything to do with the specific case of the European Union's archives. Was the system set up after the Second World War by Jean Monnet and the other European 'founding fathers' not aimed at creating an unheard-of type of solidarity and setting up a new type of international organization, called 'supranational', with institutions and employees typified by independence vis-à-vis the States, who would abandon part of their sovereignty to the Community thus created? When it drew up its first rules for archives, the nascent Community had to draw inspiration from other international organizations already in existence. It should also be recalled that the Community did not, until the Maastricht Treaty, have the legal instruments enabling it to intervene in the cultural area, of which the archival heritage is an integral part. In particular, while the archives were essential in terms of administrative practice, to ensure authenticity and document transmission in the complex interplay of shuttling back and forth (proposal - decision – consultation) between the institutions, and the exercise of the normative power conferred on the Community, the democratic deficit the latter suffered from at the outset involved no notion of an 'appeals document' or 'culture of openness' aimed at the European citizen – a figure that remained largely virtual. Faced with this regulatory more-or-less 'vacuum', administrators, archivists and all those responsible for producing and administering documents were not coming from nowhere. They borrowed from the traditions and training of their home countries. Nor could they totally rely on national legislation, if only because of the constant interaction there is between Member States' national administrations and the Union's administrative services, and the number of documents produced by Member States that filled their depositories.

The situation turned round as from the late eighties, under the influence of two factors. On the one hand there was a significant expansion in the Communities, both in geographical terms as a consequence of successive enlargements and in terms of legislative action, which was extending to a growing number of policies following the bringing in of the *Single Act*. Increasing numbers of individuals, States, firms and organizations now found themselves directly affected by Community legislation, and as a consequence felt a need to be informed on the production of directives and regulations, and their implications. On the other hand, since Maastricht (November 1993) the European Union that succeeded the Community had developed its own regulations in order to emphasize the new dimension brought to it by the provisions relating to European citizenship, with as a corollary institutional transparency.

I.A legal framework long marked by empiricism

From the legal point of view the European Union's historical archives were at the confluence of two traditions, those of international organizations and those of Member States.

Charles Kecskemeti has given the following definition of the legal framework for the archives of international organizations: *'each institution is in perpetuity the owner of its archives, and if it ceases to exist the archives are transferred to the institution that takes over its powers.... The headquarters agreements between the intergovernmental organizations and the host-country governments always specify that the archives are the property of the organization and are inviolable.'*¹

Thus there are legal theory and the legal instruments to protect the integrity and confidentiality of the archives of the European Union as an international organization, and the host country is bound to protect this integrity against any violation that might be committed by third parties. This insistence on the independence of each organization in relation to its archives has the consequence that the Community archives, like those of other international organizations, are not subject to control by national archives or any other outside archive managing body,

but at the same time do not enjoy the regulation or protection that national laws confer.

By contrast, for long there was not either in theory or in terms of practical instruments anything able to impose on these organizations the obligation to organize and conserve their archives or make them accessible. The first texts we may refer to in this connection were the 1984 and 1989 resolutions of the UN administrative co-ordination committee recommending all agencies to preserve the institutional memory and equip themselves with an archive service, under resolutions issued since its creation in 1976 by the section for archivists of international organizations of the International Archives Council. One might add point 5 of the resolutions of the 13th International Archives Congress held in 1996 in Beijing, which stated:

‘The 13th International Archives Congress, hailing the collaboration efforts undertaken to date, recommends the International Archives Council to declare that the archives of international governmental or non-governmental organizations, which contain documentation of vital importance for understanding the world of the second half of the twentieth century, must be paid growing attention, with an emphasis on sorting documents and access to them, as well as on strengthening the bonds of co-operation in particular with the Commission for the history of international relations, to ensure that researchers’ needs are taken into account in the development of archival programmes within the international organizations’².

These regulations, however, proved insufficient to underpin a genuine archiving policy within the European institutions.

This is why, at the same time, the national traditions have not failed – albeit indirectly – to influence the organization and treatment of the Community’s historical archives. This influence has been more especially felt when archives were created and opened up, points when Member States were consulted as they always are when, at European Union institutions, documents that would be ‘reserved’ within national administrations have to be declassified, but also, more pragmatically, through the officials in charge of the various institutions’ archives services. These often, in

¹ C. Kecskemeti "Towards on Archival Policy in Major Intergovernmental Systems" in *International Congress of Historical Sciences*, Madrid, August 1990.

pragmatic fashion, impose methods inherited from their professional training, or traditions specific to their countries of origin.

II. The 1980s: genesis and evolution of access to the European Union historical archives

On top of the two traditions described above, in the early 1980's a third factor came along: this time an outside one associated with the international academic community, which acted as a stimulus and catalyst in the process of opening and centralizing the EC historical archives.

The 1983 opening: creation of historical archives services in the various Community institutions.

At the outset the European Community institutions – the European Coal and Steel Community (ECSC) created in 1951, and the European Atomic Energy Community (EURATOM) and European Economic Community (EEC) both created in 1957 – were keen on maintaining a certain discretion regarding their archives. This has no doubt to be seen as a concern not to make delicate negotiations fail by making concessions accepted by this or that State public, governments always being concerned to keep face before public opinion. More profoundly, it should be remembered that at the outset European integration was a matter for an elite more often concerned with efficiency than with democracy. For these organizations, things were as they often are in large State administrations, which often tend to see archives as only an opportunity for immediate functional use, without always thinking of their later scholarly value. The fact is that the Community institutions generally considered the question of specifically historical archiving only once, in course of time, the mass of documents had grown, raising storage and administration problems, while outside requests for communications were becoming more numerous and more pressing.

The Commission of the European Communities was, however, a pioneer in comparison with other international organizations, in giving itself an 'archives

² International Council of Archives, "Acts of the 13th International Council of Archives ", Peking, 2-7 September

regulation' providing for transfers from the Directorates-General to a 'central and historical archives' service as from 1959. But things only really started to move in the early 1980s. The ECSC was then about to celebrate its 30th anniversary, the usual period in Europe for the opening of access to public archives, and the community of historians, represented at the Commission by the 'Liaison Group of Professors of Contemporary History', stepped up its pressure to secure access to the Community documents. At the same time a concern for transparency was emerging within the Community institutions themselves. The Community's enlargement in 1973 to new States which, like the United Kingdom and Denmark, had a strong democratic tradition was no doubt not entirely foreign to this development.

This movement led to two basic texts, which are in fact one and the same text adapted to the different Communities: Council Regulation (EEC, EURATOM) no. 354/83 of 1 February 1983 on the opening to the public of the historical archives of the European Economic Community and European Atomic Energy Community; and Commission decision no. 359/83/ECSC of 5 February 1983 on the opening to the public of the historical archives of the European Coal and Steel Community. Drawn up by Commission lawyers in collaboration with national archives directors and Member States' foreign ministries, this text was in part inspired by archives laws in force in Member States, but presents a number of special features specific to the European Communities, resulting from their status as an international organization.

Historical archives are defined by Article 1(2)(b) as archives for 'permanent preservation' (the same idea as *definitive archives* in France). They are the outcome of weeding of the current archives transferred not later than fifteen years after their production to each institution's archive service (Article 7).

Access is on a thirty-year rule, the common one amongst Member States.

Some categories of document of course fall outside the thirty-year rule, either because they are freely available (Article 1(3)), or because they remain closed beyond that period. The latter are in principle accessible once declassified (Article 3), in

1996, in *Archivum*, vol. XIII, 1997, p. 377.

accordance with the principle in force in, for instance, the United Kingdom. In practice, there is a declassification committee in each institution, made up of archivists, administrators from the services that produce documents and lawyers.

However, and this is a first peculiar feature of the Community regulation, some documents are declared inaccessible without specifying a time limit: files on European Communities staff, and documents and records containing information on the private or professional life of individual persons, are completely excluded from the area of the texts we are concerned with (Article 2); documents and records of cases submitted for judgment to the Court of Justice of the European Communities (Article 3(1)(c)), for their part, cannot be declassified. Even if in the light of the archive laws of most European States these documents would not be communicable except after a very long period, the silence of the Community rules is instructive.

The text we are concerned with is also marked – and this its second peculiarity – by the great latitude left up to the Community institutions. The latter have in fact the possibility of declassifying documents outside the categories defined by the texts ‘according to the rules and practices of each institution’ (Article 3 (2)). They also have the right to define the rules readers must obey in order to secure access to the documents (Articles 4, 9). Last but not least, the institutions are free to deposit their historical archives where they see fit (Article 8(1)), i.e. to create their own archive service. This is what actually took place, since the Commission, Council, Parliament, Court of Auditors and Economic and Social Committee do today have their own services.

As we can see, the desire for openness displayed in 1983 indeed reflects the Community tradition, despite the sources in national inspiration: a certain taste for secrecy has not been entirely lost, and the autonomy of the institutions has been largely preserved.

III. The 1990’s: the revolution in access to documents of Union institutions: the outcome of institutional transparency and of progress with the concept of European citizenship

Like most of its Member States, the EU administration after 1993 set up a system intended to assure citizens of access to its internal documents. This transparency policy put an end to a tradition of confidentiality for which there were historical reasons. It will be recalled in this connection that the institutions that preceded the European Union were the outcome of a benevolent conspiracy among European elites in league against popular nationalism and moved by a desire to prevent a new war. The aim was noble. European integration was thus the outcome of the action of diplomats operating under discretion.

The approach could not last. In fact it became increasingly suspect after 1987 when hundreds of directives and regulations binding Member State governments were taken behind closed doors in the Commission and Council bodies in order to establish the single market. The question became a burning one once the Maastricht Treaty (which created the European Union) established the notion of European citizenship. The ensuing Danish and French referendums acted on European technocrats and politicians like an electric shock, making them suddenly realize the suspicions that could be aroused by decisions taken without the assent of public opinion. European decision-makers then began to ask how to bring the Union's institutions closer to European citizens: democracy, subsidiarity and transparency then became the slogans and the reference to follow. The new procedures laid down in the Maastricht Treaty, including the declaration that '*transparency of the decision-making process strengthens the democratic nature of the Institutions and the public confidence in the administration*', led in December 1993 and February 1994 to joint adoption of a Code of Conduct for the Commission and the Council³.

In virtue of these provisions, which the Ombudsman extended in 1997 to the other institutions and even to other agencies of the Union, each citizen could ask the Commission or Council for access to their internal documents, without having to justify the request. These internal documents were still-incomplete documents, ones not intended for publication, like SEC documents, information notes, studies etc. Each Directorate General (DG) was to be responsible for dealing with requests

³ Ian Thomson, "The Emergence of the Transparency Theme" in Veerle Deckmyn and Ian Thomson (eds.), Openness and Transparency in the European Union, European Institute of Public Administration - Maastricht, 1998, p. 1-8.

relating to documents within its province. The system was accordingly a decentralized one. If the Commission refused to give access to one of its documents it had to justify this specifically in detail within a binding period of one month⁴.

Though the balance sheet one could draw up of this openness policy would immediately be fairly positive – the number of citizens approaching the Commission to obtain documents showed a clear advance (from 180 in 1994 to 500 in 1996) - in practice things were a bit different. A fairly long list of exceptions to the general principle of access had been explicitly provided for in the Commission's Code of Conduct (though in 1996 90% of requests met with a positive answer). The biannual review at that time stressed the '*difficulties in applying the Code because the culture of openness is still lacking among officials*'. Transparency was still less at the Council, which had converted the joint code into a decision promising '*the broadest possible access to its documents*', with an exception so as '*to protect the Institution's interests in the confidentiality of its proceedings*'. In reality a majority of Member States considered in practice that any document revealing a specifically national viewpoint had to be reserved, and this resulted in imposing a downright '*blackout*' on the Council's minutes⁵.

The years 1999-2000 saw '*the biggest advance towards the creation of a citizens' Europe*'⁶. The accession of the Nordic countries Sweden and Finland, which have since 1776 had a freedom of information act and incorporate the right to information in their constitutions, profoundly called in question the 'security' tradition hitherto prevailing in the Community institutions.

Amsterdam for the first time inserted into the EC Treaty provisions relating to the right of public access to documents of the European Institutions. Article 255, first paragraph, states that '*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access*

⁴ EC Official Journal, 18 February 1994. Commission decision of 8 February 1994 on the opening to the public of Commission documents (94/90/ECSC/EC/EURATOM). For more details consult the Guide to Public Access to Commission Documents, Brussels, European Commission, Secretariat, 1996.

⁵ Hans Brunmayr, "The Council's Policy on Transparency", in Veerle Deckmyn and Ian Thomson, Openness and Transparency in the European Union, *op. cit.* p. 69-74.

⁶ Annual Report for 2000 by the European Ombudsman, M. Soderman, to the European Parliament's Committee on Petitions, 17 April 2001.

*to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with [...] the Council...within two years of the entry into force of the Treaty of Amsterdam.*⁷

Setting the general principles and the limits on entitlement to access documents was accordingly the object of an EC regulation, namely Regulation no. 1049/2001 of 30 May 2001. Additionally the EU Charter of Fundamental Rights, proclaimed at the Nice European Council (December 2000), recognized the right to ‘good administration’. In November 2001 the Commission published a White Paper on governance proposing specific measures to make good administration an everyday reality for citizens. These two texts also provide a right of access to documents. They aim particularly at ensuring better participation for citizens in the decision-making process and at guaranteeing the broadest access to documents where the Institutions are acting as legislators, which explains the distinction between the three institutions and the others (Court of Justice, Court of Auditors).

The draft regulation was the object in the year 2000 of tough discussion between the European Parliament, favorable to the broadest possible access (report by British Labour MEP Michael Cashman) and the Commission and Council, keen on securing a certain level of security and confidentiality. The Council in particular wanted to keep the right to classify a whole series of documents relating to security and defence policy or to the third pillar (cooperation on justice and home affairs). As to the Commission, it felt it was best for ‘room to be left for reflection’, and called for introduction into the provisions of a ‘damage test’ whereby a body considering a question of access to certain ‘internal’ documents, particularly ‘preparatory’ ones, would have to balance the need for protection against the public interest in having access to such informal documents.

Despite this resistance, under pressure from the Nordic countries and a number of pressure groups specializing in the defence of civil liberties (like the British *Statewatch* or the European Federation of Journalists), the secrecy and opacity that had marked the Commission’s activities, and particularly the Council’s, had been broken.

⁷ Regulation (EC) no. 1049/2001, published in OJ L 145, 31.05.2001, p.43.

The new regulation, published in the Official Journal for 30 May 2001, on the whole follows the same logic as the 1994 Good Conduct Codes. The term document is defined broadly, and no category of document is *a priori* excluded from the right of access, including classified documents. Any refusal of access must be based on one of the specified exceptions and justified by the harm that might be caused by publication of the document.

The chief innovations brought in by the new document were:

- access is to be extended to documents coming from third parties;
- a document protected by an exception (other than public interest or the protection of privacy) will nonetheless be divulged if the public interest in divulging it exceeds the interest in protecting the document;
- a register of documents will be made available to the public;
- times for answers are reduced to 15 working days;
- access to documents may be either by on-the-spot consultation, or delivery of a copy including an electronic copy.

It should be noted that the regulation does not amend the national legislation applying to access in Member States (the subsidiarity principle). In accordance with the loyalty principle governing relationships between the Community institutions and Member States (Article 10 of the EC Treaty), the institutions will consult the author before taking a definitive decision on divulging a document.

The regulation does not abrogate Council Regulation (EEC, EURATOM) no. 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community. It sets a six-month period for the Commission to consider conformity with the new procedures.

Regulation 1049 is to become applicable only on 3 December 2001. In the meantime each institution is to draw up internal rules of application. These rules are currently under study. A practical guide aimed at the public, specifying the

details of the right to access, will be drawn up during autumn, before the regulation comes into force.

In conclusion, there has indeed been a revolution in mentalities. The action of the Ombudsman and of Member States with rich traditions of a Freedom of Information Act have succeeded in lightening the procedures which (particularly in the Council) betrayed a strong temptation towards security. The concerns for transparency and for accountability have regained interest with the recent referendums in Ireland and the ‘*scandals*’ that brought down the previous Commission. The battle for free access has however not yet been won. In his report for 2000, Mr Soderman notes that ‘*lack of experience*’ in the area led certain Member States (France, Spain, Germany) to ‘*exaggerated reactions*’. The result was that ‘*the Council drew up texts that were needlessly long. They introduced new powers allowing documents to be kept secret even when they had nothing to do with military or security questions*’. The Ombudsman reaffirmed that protection of personal data ought not to become ‘*a new weapon to defend administrative secrecy*’.