

THE RISE AND EVOLUTION OF FREEDOM OF INFORMATION LEGAL REGIME IN THE EUROPEAN UNION

Dacian C. DRAGOȘ

Associate Professor, Department of Public Administration, Faculty of Political, Administrative and Communication Sciences, Babeș-Bolyai University, Cluj-Napoca

Bogdana NEAMȚU

Assistant Professor, Department of Public Administration, Faculty of Political, Administrative and Communication Sciences, Babeș-Bolyai University, Cluj-Napoca

The article presents the struggle for openness in the European Union and the establishment of regulations regarding freedom of information in the activity of European institutions. The issue of public access to documents held by European institutions was taken into consideration rather late, strangely enough considering the experience of some member states, like Sweden, which has freedom of information regime in place since the 18th century.

Introduction. Free access to public information has always heated debate and generated controversy, probably more than other aspects of contemporary government and administration. The concept typically means having access to files, or to information in any form, in order to know what the government is up to (Birkinshaw, 2001). Freedom of expression is one of the best known and most fundamental of human rights. A number of different explanations have been offered as to why freedom of expression is so important, and these accounts often differ as to the kinds of expression which should be protected. Nonetheless, there is broad consensus that the extent to which freedom of expression is protected is perhaps the most basic indicator of a liberal democratic society. This is because freedom of expression is considered, among other things, as an essential element of democracy itself – in order for members of a democracy to deliberate properly about what the law should be requires free and open exchange of different ideas and opinions.

The importance of assuring *free access to public documents* and, through that, the openness and transparency in administration is evident, because:

*Transylvanian Review
of Administrative Sciences,
16 E/2006, pp. 12-24*

a) in this way the citizens' trust in governance is increasing; b) it helps making a more efficient system of public administration; c) the evaluation of the performance in governance is more effective; d) communication between the citizens and administration is better when administration is more open and transparent, and the citizens well informed; e) the autonomy of public administration from the politic influence is increasing as well; f) the public administration is more oriented to change and less resistant to that; g) the corruption is reduced as the process of government is more open and the individuals, the companies and the media can freely access the public documents. In this context, it is necessary to highlight the fact that the access to information in the public administration identifies problems concerning its integrity. A very important aspect of the impact of the freedom of information upon public administration is the *weakening of the monopoly on information*. The very curiosity of the public is a strong anticipatory weapon against corruption if it uses effective tools. Nearly each of the quarrels regarding information (except vexatious requests) not only that identifies the problem in the relevant office (at least in communication with public) but it also often reveals corruption behaviour.

The legal regime of freedom of information in European Union. Most European Union member states have now Freedom of Information legislation, the exceptions being Austria, Italy and Luxembourg, where under existing legislation only those directly affected by, or with a legal interest in a particular decision can apply for access to information contained in it. The limitations of this approach are illustrated by the fact that a journalist writing about on an issue, but not personally affected by it, would have no right to information.

However, it should be noted that general access to information is not regulated at the level of European Union (as applying to all member states) and Europeanization of public administration is not yet finalized. The European Union, thus, has distinct regulations on this issue, applicable only to the European institutions. After a great effort carried out by journalists, open national governments and even European institutions, the results start to confirm that the struggle was not in vain. Whether or not transparency can be counted among the general principles of EC law remains open to debate, but it's undeniable that its importance and status increased considerably, in particular since the time of Maastricht Treaty. The European Union system of access to documents is similar to systems of access to documents or information in force in most countries that have legislation in this field (Österdahl, 1998) and tries to respect the recommendation of the Council of Europe Recommendation (2002) and the Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) (EC Commission Report, 2004).

The Maastricht Treaty. The *evolution* of regulations regarding free access to documents in European Union started thus with the Maastricht Treaty (1992), which contains a new Article 255 which enshrines the principle of public access to European Parliament, Council and Commission documents; the treaty had annexed also a declaration on the "right of access to information"; the use of the word "right" in the title of this declaration was rather misleading, since the text of the declaration merely recommended that the Commission should draft a report on "measures designed to improve public access to the information available to the institutions." (Deckmyn, 2002)

The Code of conduct from 1993. The *second* stage of evolution was the enactment of a Code of conduct¹, adopted jointly by Commission and Council in 1993 as a response to the Recommendation

¹ Code of conduct (1993) O.J. L340/41

enclosed in the Maastricht Treaty. The Code was implemented through two separate regulations (Council Decision 93/731 and Commission Decision of 8 February 1994). The Code had a number of shortcomings, like the lack of right to access documents that were only partially accessible under it and the lack of provisions for establishing records of documents by the European institutions. The shortcomings were addressed later by the European Court of Justice in cases like *Hautala v Council of the European Union* and *Kuijer v Council of the European Union*. The Code remained in force until 2001 when the Council of the European Union adopted a new Regulation.

During the timeframe when the Code of conduct was in place, a series of court cases agitated the easy life of European Union institutions (Peers 2002, Naôme 2002, Öberg, 1999). Thus, in *Carvel and Guardian Newspapers Ltd. v. Council of the European Union*², John Carvel, the European Affairs editor of the *Guardian*, wrote to the Secretary-General of the Council and asked for preparatory reports, minutes, the attendance and voting records, and the decisions of three meetings of the Council for Social Affairs, Justice and Agriculture in October and November 1993. He was given from the General Secretariat of the Council a copy of the preparatory reports, the minutes and the attendance and voting records of the Social Affairs Councils of 12 October and 23 November 1993 (by mistake, apparently) (Armstrong, 1996, Chitti, 1996, Constantinesco, 1996). On the other hand, he was refused access to the minutes, the attendance and voting records and the decisions of the Justice Council of 29 and 30 November 1993, on the ground that the documents in question “directly refer to the deliberations of the Council and cannot, under its Rules of Procedure, be disclosed”. The Council also refused access to the preparatory reports to the Justice Council of 29 and 30 November 1993 on its future work program, on the ground that these were “preliminary texts preceding the decision of the Council (Justice and Home Affairs) to recommend the adoption by the European Council of 10/11 December 1993 of the plan of action to be taken in the fields of Justice and Home Affairs”. Instead, the Council sent the definitive texts, which had been adopted. The applicant renewed the request for justice affairs documents, asking the Council to reconsider its decision. After a new refusal, John Carvel filed an action to the European Court of Justice. In its findings, the Court stated that the Council had a discretionary power to allow access or to deny access to documents requested, and it failed in exercising its discretion when refused the disclosure under the pretext that the Regulation does not permit it. The Council should have balanced its own interest in withholding the information and the public interest in disclosure before making any decision, and this fact should have resulted from the case; on the contrary, from the case resulted only that the Council believed it had no option regarding the disclosure of the documents. Consequently, the Council was required to pay applicant’s costs of the case.

Another relevant case, *Svenska Journalistförbundet v. Council of the European Union*³, came to the attention of the courts soon after Sweden joined the European Union in 1995. The Journalists’ Union, in an attempt to test the way in which the Swedish authorities allowed access to documents relating to European Union activities, applied to the Swedish government for 20 documents of the Council of Ministers on Europol. 18 of the 20 documents were provided with some sections blanked out. Later, the Union asked again for the same set of 20 documents, but this time directly the Council of Ministers; the Council supplied only two documents, and then, in the confirmatory application (appeal) two other documents were supplied, making 4 out of 20 documents. In its response the Council claimed access was refused on the grounds of maintaining the confidentiality of its proceedings (Article 4.2 of the 1993 Decision on access) as the documents mentioned the views of member states, and that the documents’ disclosure would be harmful to the “public interest” (Article 4.1). It should be

² Case T-194/94 - 19.10.1995, available at <http://europa.eu.int/ISPO/legal/en/access/carvel.html>

³ Case T-174/95 (1998) ECR II-02289

observed in this context the division between “Open” governments and “Secret” governments among the members of the European Union, as the Council was joined in the action by the governments of France and the UK, while the governments of Denmark, Netherlands and Sweden intervened in support of the Swedish Journalist Union.

The first strategy of the Council, and the two supporting governments, was to challenge the admissibility of the Union’s case in part on the grounds that they were already in possession of the documents in question. Nevertheless, the Court’s opinion on the issue is categorical: “the fact that the requested documents were already in the public domain is irrelevant; the objective of the 1993 Council Decision on access to document is to give effect to the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions”.

One of the most interesting aspects of the Court’s judgment is its findings on the concept of “public security”, in the sense that it covers “internal security” and “external security” as well as the interruption of essential services and could equally well include “attempts of authorities to prevent criminal activities”. Moreover, the Court was able to differentiate between documents concerned with “operational matters of Europol itself” (which none of the documents enclosed) and the negotiations (including the views of European Union governments) on the adoption of the Europol Convention (which the documents did include), observing that there was no evidence that disclosure would “be liable to prejudice a particular aspect of public security”. The Court seems here to be creating a crucial distinction between policy-making (which properly belong in the public sphere) and particular (specific) operational matters (which do not) (Bunyan: 1999: 37). In the end, the Court *annulled* the decision of the Council to refuse access to the documents to the Swedish Journalists Union. When deciding the financial aspects of the ruling, though, the Court unveiled that it was very annoyed at the newspaper placing on the internet (without consultation of their lawyers) the Council’s defense in the case, and as a consequence ordered the Council to pay only two-thirds of the applicant’s costs as well as its own.

In an equally important case, *Hautala v. Council of the European Union*⁴, Heidi Hautala, a member of the European Parliament, submitted in 1996 a question to the Council requesting clarification of the eight criteria for arms exports. The Council replied that “the Political Committee approved a report from the Working Group on Conventional Arms Exports, with a view to further enhancing of the common criteria”, meaning that it is only a preliminary draft of a future decision. The report was though never formally approved by the Council, and it was drawn up under a special correspondence system, which limited its distribution. Hautala submitted therefore a confirmatory application for access to the report, but the Council rejected the request, stating this time that the report’s release could be harmful to its relations with other countries. Furthermore, the applicant lodged a complaint with the Court of First Instance. The Council raised a jurisdictional objection, asserting that the report dealt with questions falling within Title V of the Treaty of European Union, which expressly excludes jurisdiction of the Court of Justice, but the court held that the content of the report had no effect on its jurisdiction: “the fact that under Article L of the Treaty on European Union the Court of First Instance does not have jurisdiction to assess the lawfulness of acts falling within Title V thus does not exclude its jurisdiction to rule on public access to those acts.” Further more, the court rejected Hautala’s first assertion that the confirmatory application was given inadequate consideration by the Council. It further dismissed her second argument that access to the report would not harm foreign relations.

The court limited its review to verifying whether the decision of the Council was properly reasoned, finding that the Council produced the report for internal use, not general publication, and the report

⁴ European Court reports 1999, page II-02489

contained information that could cause tension with non-member states. Finally, the court looked at whether the Council overreached Article 4(1) of Decision 93/731 by refusing to grant access to passages in the report that were not covered by the protection of public interest exception, and found that the Council could decide to grant partial access to the report, this being the turning point of the case. In light of these considerations, the court turned to its decision in *Svenska Journalistförbundet* stating that “the objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions”, and concluding that the Council would achieve its goal of public access to documents if it removed the passages that might harm institutional relations. Finally, the court decided that Article 4(1) of Decision 93/731 must be interpreted under the principle of proportionality and the right to information and ultimately *annulled* the Council’s decision, which refused access to the report of the Working Group on Conventional Arms Exports. On 6 December 2001 the Court of Justice upheld the decision of the Court of First Instance.

Similar issues were raised in *Kuijer v. Council of the European Union*⁵. Aldo Kuijer, a university lecturer and researcher in asylum and immigration field from Utrecht in the Netherlands, made a request to access certain European Council’s reports: reports from 1994-1997 and for 1998, on the situations in 28 third countries in relation to asylum-seekers; reports carried out by member states and sent to the Council’s Centre for Information, Discussion and Exchange on Asylum (CIREA); a list of contact persons used by CIREA in asylum cases. He was refused access to these documents and told that the CIREA reports did not exist. Kuijer made a confirmatory application appealing against the decision and saying that he believes the documents did exist. The Council turned down the appeal on general grounds saying that disclosure could undermine international relations. On top of that the Council tried to argue that the 1993 Decision on public access was only to allow the public to have access to the Council’s documents, not to the information contained in them. In its decision on 6 April 2000 the Court reaffirmed the approach in *Hautala* case, stating that the applicant should have been granted access to the documents with the exception of those parts properly covered by the exception, and the Council should have supplied the list of contact names (without the fax and phone numbers as the applicant had suggested). An examination of 10 reports supplied showed that the Council had failed to show how the exemption applied to the documents refused and had, in the applicant’s words, used “short, identical and ritualistic” responses. However, on 5 June, the Council still refused access claiming new grounds for refusal and the case went back to the Court of Justice.

In its judgment on 7 February 2002, the court found against the Council new arguments. The Council’s basic argument was that the content of the documents could be construed as criticism of the third countries in question and that their disclosure could therefore be prejudicial to the European Union’s relations with those countries. The court, after ordering the production of the documents so that they could be examined, dismissed this view on several grounds: a) the fact that the documents contained “information or negative comments” did not of itself mean there was a risk of the public interest being undermined. Refusal must, the court said, “must be founded on an analysis of factors specific to the contents or context of each report”; b) the documents contained analyses of the political situation and many of the facts “have already been made public” and the European Union may “itself, through its institutions, in particular the Council and the Presidency, have already officially criticized the internal situation of the countries concerned” and its relations “may be such that they cannot be damage by disclosure of any criticism”; c) the court also said the Council “erred in law” when it refused access to the names of contact persons which had been

⁵ See Case T-188/98, available at <http://www.statewatch.org/docbin/caselaw/cfit188-98.html>

made public in certain Member States. Therefore, the Court of First Instance annulled the Council's decision of 5 June 2000 refusing the applicant access to certain reports drawn up by the Centre for Information, Discussion and Exchange on Asylum, to certain reports of joint missions or reports of missions undertaken by member states sent to the Centre, and to information contained in the list of persons responsible in the Member States for asylum applications to which access is permitted in certain member states, with the exception of those persons' telephone and fax numbers and ordered the Council to pay the applicant's costs and to bear its own costs (Bunyan 1999).

In a recent decided case, *Mattila v Council of the European Union and Commission of the European Communities* 1999 with decision on appeal in 2004 (C-353/01 P), the European Court of Justice in appeal set aside the decision of the Court of first instance and the decisions of the Commission and the Council refusing Mr. Mattila, a Finnish citizen, access to 11 documents concerning principally the relations of the European Union with Russia and Ukraine, based on the failure by the Community institutions to fulfill their obligation to examine the possibility of granting the public partial access to documents in their possession (Press release No 10/04, 22 January 2004, www.statewatch.org).

The Amsterdam Treaty. The *third stage* of evolution is represented by the signing of the Amsterdam Treaty (1997). In accordance with art.255 of the EC Treaty, article introduced with this occasion, "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents (...); general principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, (...) within two years of the entry into force of the Treaty of Amsterdam". Each institution referred to above had the duty to elaborate in its own Rules of Procedure specific provisions regarding access to its documents (Öberg, 1998).

The 2001 Regulation. Following the aforementioned provisions, the right to access public documents was regulated by *Council Regulation (EC) 1049/2001*⁶ which replaced the Code of conduct and came into force in 3 December 2001 as directly applicable in all member states (Peers, 2002). The Regulation, a very short and concise document unlike other freedom of information laws, was designed to "give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty"(Recital no.4). Specifically, the Regulation is intended to help create a culture of openness that enables citizens to assume more active roles in the decision-making processes and general life of the European Union. However, Regulation 1049/2001 has introduced a number of innovations which have considerably changed the regime of access to public information: the right of access has been extended to all documents held by the institutions concerned, including documents from third parties, thus excluding the "originator rule" under which only documents issued by the public authority could be disclosed upon request. Another novelty, this time not in the interest of applicants, was the insertion of new specific exception intended to cover defense and military matters. A very important provision allows exceptions to be overridden as a result of a public interest test. Thus, the Regulation states that the protection of certain interests must be balanced with the public interest in disclosure, and if there is an overriding public interest in disclosure, the document will be made accessible even if an exception is applicable to the right of access. Each institution must establish a public register of documents that can be consulted on the Internet. In addition, the Regulation lays down the objective that the documents should, where possible, be made directly accessible in electronic form. Finally, the Regulation imposes shorter time-limits for replies: the one-month time-

⁶ Official Journal of the European Communities L 145/43, 31.5.2001

limit for reply has been cut to 15 working days, with the possibility of an extension of 15 working days in duly justified cases.

Furthermore, the Court of Justice has extended through its jurisprudence the exemptions also to include legal opinions (Case T-610/97 R, *Carlsen and others v. Council*, and Case T-44/97, *Ghignone and others v. Council*)⁷. On the other hand, a principle laid down in case law (T-14/98 *Hautala v. Council*)⁸ now forms part of the Regulation (Article 4(6)). Thus, all parts of a document not covered by an exception must be disclosed, unless the selection of passages to be disclosed represents a disproportionate administrative burden compared with the value of the information contained in these passages.

In accordance with the obligation imposed by the Article 17 of the Regulation, the Commission, the Council of the European Union and the Parliament have submitted annual reports that provide a general overview how each Institution implemented the Regulation in the previous year⁹. They encompass the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

Analyzing these reports and the independent reports that came out, and especially the one drawn up by European Citizen Action Service (Ferguson, 2003) the conclusion is that at the very most, the Institutions fulfilled the minimal requirements for correctly and consistently implementing Regulation 1049. Moreover, in certain cases, such as the implementation of Article 4 (exemptions), the Institutions do not seem to be compliant with the Regulation. Furthermore, the annual reports¹⁰ released by the Council and Commission do not contain enough useful information to give a thorough and accurate assessment of each Institution's implementation of the Regulation. It is cases such as these that are the most worrisome, and therefore require the closest attention. Above all, it is premature to claim that the implementation of Regulation 1049/2001 has thus far resulted in a greater "culture of openness" in the Union. Significant strides are still needed by the Institutions to ensure that there will be a greater culture of openness and transparency in the Union (Ferguson, 2003). At the latest by 31 January 2004, the Commission was required to publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action program of measures to be taken by the institutions.

The Report was published as promised, and it analyzes some of the problems encountered by the institutions when applying the Regulation (Commission's Report, 2004). It was noted for instance that very few journalists use the right to access to documents, although they act as vectors of information for the public and they should profit more from this regulation. This seems to happen because journalists are mainly interested in immediate news, in information on the spot and they won't wait fifteen working days to receive a reply. Usually, journalists are interested in sound recordings of European Parliament meetings, documents concerning negotiations at the Council, in particular in relation to the common foreign and security policy, the common foreign and defense policy and justice and home affairs, as well as investigations into specific issues such as the Commission's real estate policy or the practice of granting leave on personal grounds to officials. This last type of application clearly falls within the domain of investigative journalism. Another observation is that the vast majority

⁷ (1998) ECR II-485 and Reports – public service 2000, p. IA-223 ; II-1023

⁸ [1999] ECR II-2489

⁹ Parliament: Review of the implementation within the European Parliament of Regulation (EC) 1049/2001(PE 324.892/BUR.); Commission: Report from the Commission on the application in 2002 of Regulation (EC) No 1049/2001 (COM (2003) 216, 29.4.2003); Council: Annual report of the Council on the implementation of Regulation (EC) 1049/2001 (6353/03, 7.3.2003)

¹⁰ Commission: Report from the Commission on the application in 2002 of Regulation (EC) No 1049/2001 (COM (2003) 216, 29.4.2003); Council: Annual report of the Council on the implementation of Regulation (EC) 1049/2001 (6353/03, 7.3.2003)

of applications come from a very small number of journalists. In other words, journalists who are “specializing” on European affairs and have experience in requesting information are the most likely to use fully the regulation regarding access to documents.

Regarding the rate of refusals, the Commission’s Report (2004) and the independent reports (Ferguson, 2003) are colliding on the conclusions. In Commission’s opinion, taking into consideration that the number of applications doubled in 2002 compared with the previous year, during which the institutions applied the old system of access to their documents, and the figures for 2003 indicate another considerable increase in demand, the stable rate of positive responses and consequently the constantly growing number of documents made directly accessible is a positive development. In an opposite evaluation, the independent report observed that paradoxically, as access to documents became statutory with Regulation 1049/2001, the refusal rate for access to documents has actually *increased* rather than decreased. For instance, the rate of refusal by the Commission has steadily increased from 19% in 1999 to 23.4% in 2000, to 29.7% in 2001, and, finally, to over 33% in 2002 (counting as refusals the partial access, too). As concerns the exceptions invoked, the highest rate belongs to a combination of exemptions (38%), while inspections, investigations and audits count for 35.9% and protection of decision making for 8.6%. Protection of personal data counts only for 5.2% of the refusals, court proceedings and legal advice for 3.7% and international relations for 1.8%.

The situation in the Council of the European Union is a little better: in 2002, it granted 76.4% full access and 12.2% partial access, which brings the refusal rate (counting also partial withholding) to 23.6%. Most of the withholding was based on protection of decision-making process (28%), followed by international relations (24.5%), public security (22.9%), court proceedings and legal advice (11.4%), only 0.2% on protection of personal data, while 10.5% were based on a combination of exceptions. From 1 January 2003 to 9 September 2003, the Council had received a total of 1,933 total applications requesting a total of 9,249 documents, which means that the Council only released 71.1% of those documents, resulting in 28.9% refusal rate. Once the partial release of documents is included, the rate of release increases to a more impressive 86% (resulting in a 14% refusal rate). Based on the Council’s preliminary 2003 statistics, their 28.9% refusal rate (based only on documents released wholly) is nearly twice as high as their refusal rates for the past four years (again based only on documents released wholly) – it was 14.6% in 2002; 11.8% in 2001; 16.1% in 2000; and 16.3% in 1999. While there are possible explanations for this (such as the increase in the number of requests for documents), according to Ferguson (2003), the fact that the refusal rate continues to go up, rather than stabilize or go down is still considered unacceptable.

Parliament appears to be the institution with the most openness, since it refused access only to 9 out of 528 admissible applications, hence a rate of positive response of 98.3%. One refusal led to a confirmatory application, following which partial access was granted. As regards the reasons for withholding, 22.2% of the refusals are based on protection of personal data, 55.6% on court proceedings and legal advice, while 11.1% on protection of decision-making process (Commission’s Report, 2004).

The difference in figures regarding exceptions used as a reason for withholding the documents reflects the different missions and activities of the institutions, not a different interpretation of the provisions in the Regulation. Thus, over half of Parliament’s refusals are based on the need to protect legal opinions, while the Council is concern with protecting its activities in the areas of intergovernmental cooperation (external and security policy, defense and cooperation on justice and home affairs) as well as its deliberation process. By far the most significant reason for refusing access invoked by the Commission concerns the protection of its work of inspection, investigation and auditing. It has to be noted here that taking into consideration all three institutions, this exception (alone or together with other) is used to justify about two-thirds of the refusals. The doctrine has critically observed that

requests seem to be systematically refused when they fall within a category of exempted information, rather than taken on a case-by-case basis as instructed by Regulation 1049/2001 (Ferguson, 2003).

Rules of procedure for implementing the 2001 Regulation. After the adoption of the 2001 Regulation on access to public documents of the European Union institutions, each institution has revised or adopted Rules of procedure for granting access to own documents: Bureau Decision C 2001/374/01 for Parliament¹¹, the Decision 13465/01 of amending the Council's Rules of Procedure for the Council of the European Union, respectively the Detailed rules for the application of Regulation (EC) No 1049/2001 for the Commission¹². During a review of all the regulations establishing the Agencies, a provision was included in the founding instruments making Regulation 1049/2001 applicable to the agencies and stating that the latter should adopt implementing rules by

April 1st 2004. As a result, some agencies have adopted their own regulations: Decision 2004/508/EC of the Administrative Board of the European Agency for Safety and Health at Work¹³; Decision 2004/605/EC of the Translation Centre for the bodies of the European Union¹⁴; Decision 2004/321/EC of the Administrative Board of the European Foundation for the Improvement of Living and Working Conditions¹⁵; Rules on public access to documents 2002/C 292/08 of the European Investment Bank¹⁶. The Committee of the Regions adopted a system of access to its documents on 11 February 2003, which is appreciated by the Commission to be "quite in line with the provisions in Regulation 1049/2001"¹⁷ (Commission Report, 2004). The Economic and Social Committee adopted a similar system on 1 July 2003¹⁸. The Court of Auditors, the European Investment Bank and the European Central Bank apply rules on access to their documents that are more restrictive than Regulation 1049/2001 (Commission Report, 2004). As judicial bodies, the Court of Justice and the Court of First Instance have not adopted rules on access to their documents.

The Charter of Fundamental rights. In December 2000 the Parliament, the Commission and the Council jointly signed the Charter of Fundamental Rights of the European Union¹⁹, which is incorporated into the Constitution of the European Union that is now in a stalemate due to its reject by Netherlands and France. In art.42 the Chart proclaims the right to access public documents in European Union: "any citizen of the Union and any natural or legal person residing or having its registered office in a Member State have a right of access to European Parliament, Council and Commission documents". This phase, which was supposed to mark the development of the right to access public documents in the European Union into a fundamental human right, was delayed unfortunately by the rejection of the Constitution of the European Union by two countries (France and the Netherlands) followed by the postponement of the debate regarding this issue indefinitely.

Proposals for improving the 2001 Regulation and its implementation. Upon analyzing the annual reports made available by the institutions, the European Citizen Action Service has made some proposals for a better regulation in this field. Their proposals include establishing a single

¹¹ Official Journal of the European Communities C 374/1, 29.12.2001

¹² Official Journal of the European Communities L 145, 31.5.2001

¹³ Official Journal L 210, 11/06/2004 P. 0001-0003

¹⁴ Official Journal L 272, 20/08/2004 P. 0013-0015

¹⁵ Official Journal L 102, 07/04/2004 P. 0081-0083

¹⁶ Official Journal C 292, 27/11/2002 P. 0010-0012

¹⁷ Decision No 64/2003, OJ L 160, 28.6.2003, p. 96

¹⁸ Decision No 603/2003, OJ L 205, 14.8.2003, p. 19

¹⁹ Available at http://www.europarl.eu.int/charter/default_en.htm

register for all the Commission documents; standardize the reporting mechanisms, harmonize the statistical information, and develop a common coding system within the three Institutions to make it easier for citizens to trace certain legislative issues through all of the Institutions; revising Article 4 of Regulation 1049 that allows for concrete guidelines to be developed by each Institution to help its employees perform public interest tests consistently and successfully.

In the same context, the Commission is requested to investigate the high rates of refusal in the Institutions and the possible misuse of the partial release of documents; look into the possibility of funding an independent help desk that would assist citizens with their requests for documents; submit a proposal that would require the Council to not only release the positions of Member States but also the *identity* of those Council members that are responsible for such positions; address the Commission's responsibility and accountability to complainants; draft a proposal that clarifies the Institutions' treatment of applications requesting opinions drafted by the legal services departments; review and enforce the responsibility of the Institutional agencies to submit annual reports (like the Institutions themselves) regarding their implementation of Regulation 1049 in the previous calendar year; launch a publicity campaign to increase citizens' awareness of their right to access European Union documents (Ferguson, 2003).

Inter-institutional cooperation regarding access to documents. Under the provisions of the Art.15 of the Regulation, the institutions are required to establish an inter-institutional committee to examine best practice, to address possible conflicts and discuss future developments on public access to documents. An independent evaluation of this requirement (Ferguson, 2003) observed that Commission, Council and Parliament do not categorize requests for documents in a standardized manner, thus making it quite difficult to accurately compare the types of requests the Institutions receive. This also makes it challenging to assess how one Institution handles a certain category of requests as compared with the other Institutions. Moreover, the statistical information cited in the Institutions' annual reports is not harmonized, making it difficult to draw inter-institutional comparisons and assessments about document requests, refusals, partial access etc. The Institutions should therefore use the same statistical categories and reporting mechanisms in their annual reports. It was suggested also that such inter-institutional cooperation should include a general "coding system" for "the types of documents and for the decisional procedures to which they refer", in order to alleviate the current confusion surrounding the use of several different coding systems among the Institutions, as well as enable citizens to trace certain legislation or issues through all of the European Union Institutions with greater ease. Yet, the author also believes that "inter-institutional cooperation can be extended too far, potentially harming or restricting the citizens' ability to access documents". It is important thus to admit that the powers of the Institutions should in fact be kept separate. Thus, as each Institution has its own positive and negative attributes in terms of its policies and practices regarding public access to documents, if the three Institutions were to pool together their documents in a single repository, our fear is that the lowest common degree of public access would result. This would therefore represent a weakening, rather than an improvement, of the citizen's access to documents.

In the context of inter-institutional cooperation and good practices, a Parliament resolution²⁰ mentioned the possibility of setting up an "inter-institutional help desk" that would assist citizens with their requests for documents. In Ferguson's opinion (2003), the idea of a help desk is a good one and the citizens of the Union could benefit greatly from its formation. The author proposes though that the help desk should be organized independently from the Institutions and staffed by representatives

²⁰ <http://www3.europarl.eu.int/omk/omnsapir.so.html>

of NGOs and other groups that are the primary applicants for access to documents (hence they could share their knowledge and experience with those less initiated with the process). The help desk would be in this way of a great value when writing the applications for access to documents, because, although applicants are not required to state their reasons for requesting documents, those applicants who provide compelling reasons for the release of documents (such as an overriding public interest) often have a greater chance of accessing those documents. The danger of setting the help desk alongside the institutions (i.e. as a formal body of the European Union) consists in the fact that it would become increasingly likely that the citizen's access to documents would be determined by the lowest common standard on which all of the Institutions could agree, which would be a step backward, rather than forward.

Court Cases under the 2001 Regulation. It is worth mentioning that the European Union has two courts. The lower court, the Court of First Instance, deals with cases where individuals sue the European Union institutions. Since most disputes over access to documents involve disputes between the institutions denying access to documents and individuals disputing legality of the decision, most of them are before the Court of First Instance. The second court is the European Court of Justice, which hears appeals against the judgments of the Court of First Instance (by individuals, the European Union institutions or Member States). It also hears cases where the European Union institutions sue each other and cases between the European Union institutions and the Member States, including for example cases where a Member State sues to annul an act of the institutions. Also, it answers questions about European Union law referred from national courts. The European Court of Justice is assisted by Advocate-Generals, who release a non-binding but influential Opinion about how to decide each case before the Court's judgment. In addition to issuing full judgments, the Courts can also issue orders, for example where an applicant has requested emergency measures, where they believe a case is inadmissible and so there is no need to rule on the merits of the argument (because, for instance, the applicant is out of time to sue), or where they are striking out a case because it has been settled.

A very important feature of the legal regime of the decisions issued by the courts is that they cannot order the European Union institutions to release documents when they refused to do so. They have only the more limited power to annul an institution's refusal to release them, which still leaves the institution free to refuse the documents on other grounds.

Two years after the implementation of the Regulation, the Court of First Instance had issued only one ruling and the Ombudsman had resolved eleven complaints²¹. Thus, in *Messina v. Commission* 2003 (T-76/02 ECR II-17), a law lecturer asked for documents concerning state aids. The dispute concerned Italian documents held by the Commission, and the Italians disagreed with their release. The Commission therefore referred to Article 4(5) of the Regulation, allowing Member States to request that their documents not be disclosed. The Court ruled that the Commission had not committed a manifest error of assessment in agreeing with the Italian request, but on the other hand it did not rule expressly that Member State's 'requests' are in all cases binding on the European Union institutions.

The European Union has still a long way to go towards openness and transparency. Nevertheless, the ascending trajectory followed by the freedom of information regime from the Carvel case is also impressive and reflects the progress in reforming the European institutions and a hope for the future.

²¹ Six complaints against the Council: 917/2000/GG, 1542/2000/PB, 573/2001/IJH, 648/2002/IJH, 1015/2002/PB and 1795/2002/IJH. Five complaints against the Commission: 1128/2001/IJH, 1184/2002/PB, 1437/2002/IJH, 1753/2002/GG and 412/2003/GG

On the other hand, new developments triggered by the terrorist threats makes it harder to advance on the path of transparency and already puts a lot of tension on the decision-making process in the European Union, in the same way as it does across the ocean, in the United States.

References

1. ARMSTRONG, K. A., "Citizenship of the Union? Lessons from Carvel and *The Guardian*", *The Modern Law Review*, 1996, pp. 582-588
2. BIRKINSHAW, P., *Freedom of information. The Law, the Practice and the Ideal*, third edition, Butterworths, 2001
3. BORRAS RODRIGUEZ, A., *Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas*, *Revista Juridica de Catalunya*, 1996, pp. 901-904
4. BUNYAN, T., *Secrecy and Openness in the European Union*, Kogan Page, 1999
5. CAMPBELL, K., "Access to European Community Official Information", *International and Comparative Law Quarterly*, 1997, pp. 174-180
6. CHITI, E., "Il diritto di accesso ai documenti nel caso *The Guardian*", *Rivista italiana di diritto pubblico comunitario*, 1996, pp. 369-380
7. Commission of the European Union, *Report on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents*, 2004
8. CONSTANTINESCO, V., "Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Institutions et ordre juridique communautaire", *Journal du droit international*, 1996, pp. 464-467
9. CURTIN, D., "Betwixt and Between: Democracy and Transparency in the Governance of the European Union", in De Witte, et al, (eds.), *Reforming the Treaty on European Union: the Legal Debate*, Kluwer 1996, p. 95
10. CURTIN, D., "Citizens. Fundamental Rights of Access to European Union Information: An Evolving Digital Passepartout?..", (2000) 37 *Common Market Law Review*, p. 41
11. CURTIN, D., "The fundamental principle of open decision-making and EU (political) citizenship", in O.Keeffe and Twomey, (eds.), *Legal Issues of the Amsterdam Treaty* (Hart, 1999), p. 71
12. CURTIN, D., MEIJER, H., "Access to European Union Information: An Element of Citizenship and a Neglected Constitutional Right", in Neuwahl and Rosas, (eds.), *The European Union and Human Rights*, Kluwer 1995, p. 77
13. CURTIN, D., MEIJER, H., "The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?" (1995) 32 *Common Market Law Review*, p. 392
14. DAVIS, R. W., "Public access to community documents: a fundamental human right?" *European Integration On-Line Papers*, 3 (1999)
15. DECKMYN, V., "Introduction" to Deckmyn (ed.), *Increasing Transparency in the European Union?* European Institute of Public Administration, Maastricht, The Netherlands, 2002, pp. 3-5
16. DRIESSEN, B., "The Council of the European Union and access to documents", *European Law Review Issue 30*, 2005 pp. 675-696
17. DYRBERG, "Current Issues in the Public Debates on Access to Documents", *European Law Review* vol.24 (1999), p. 157
18. FERGUSON, J., *Improving Citizens' Access to Documents: European Citizen Action Service's Recommendations to the European Commission and Other Institutions*, 2003, available at www.ecas.org
19. HARDEN, I., "Citizenship and Information", *European Public Law* no.7, 2001, pp. 165-193
20. HARDEN, I., "The European Ombudsman's Efforts to Increase Openness in the Union", in DECKMYN, V. (ed.), *Increasing Transparency in the European Union?* European Institute of Public Administration, Maastricht, The Netherlands, 2002, pp. 123-146
21. HARLOW, C., "Freedom of Information and Transparency as Administrative and Constitutional Rights", *Cambridge Yearbook of European Legal Studies*, no.2, 1999, pp. 285-303
22. MACDONALD, J. and JONES, C., (editors), *The Law of Freedom of Information*, Oxford University Press, 2005
23. MANZELLA, G. P., Ziotti, P., "Trasparenza e diritto di accesso ai documenti", *Giornale di diritto amministrativo*, 1996, pp. 141-142

24. NAÔME, C., "The Case-Law of the Court of Justice and of the Court of First Instance of the European Communities on Transparency: From Carvel to Hautala II (1995-2001)", in DECKMYN, V., (ed.), *Increasing Transparency in the European Union?* European Institute of Public Administration, Maastricht, The Netherlands, 2002, pp. 147-198
25. O'NEILL, M., "The right to Information in the European Union", in *Gazette of the Incorporated Law Society of Ireland*, 1995, Suppl. EURLEGAL, Nr. 54, pag. 1
26. ÖBERG, U., *European Citizens. Rights to Know: The Improbable Adoption of a European Freedom of Information Act*. Cambridge Yearbook of European Legal Studies no.2, 1999, pp. 303-329
27. ÖBERG, U., *Public Access to Documents after the Entry into Force of the Treaty of Amsterdam: Much Ado about Nothing?* (1998) European Integration On-Line Papers
28. ÖSTERDAHL, I., "Openness and Secrecy: Public Access to Documents in Sweden and the European Union", *European Law Review* vol.23 no.4 (1998), p. 336
29. PEERS, S., "The New Regulation on Access to Documents: A Critical Analysis", *Yearbook of European Law*, vol. 21, 2002
30. PEERS, S., "From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the European Union", in DECKMYN, V., (ed.), *Increasing Transparency in the European Union?* European Institute of Public Administration, Maastricht, the Netherlands, 2002, pp. 7-32
31. RAGNEMALM, H., "The Community Courts and Openness Within the European Union", in *Cambridge Yearbook of European Legal Studies* no.2/1999, pp. 19-31
32. Resources for the Future, *Public Access to Environmental Information and Data: Practice Examples and Lessons from the United States, the European Union, and Central and Eastern Europe*, November 2001, Washington, D.C.
33. RICATTE, J., "Transparence ou confidentialite du fonctionnement du Conseil de l'Union europeenne et de la Comission: Le cas exemplaire de l affaire "Guardian" et ses suites jurisprudentielles", *Gazette du Palais*, 1998, III Doct, pp. 1618-1625
34. SANDULLI, A., "L'accesso ai documenti nell ordinamento comunitario", *Giornale di diritto amministrativo*, 1996, pp. 448-449
35. TOMKINS, A., "Transparency and the Emergence of a European Administrative Law", *Yearbook of European Law*, OUP, Volume 19: 1999/2000, p. 217
36. Van BIJSTERVELD, S., *Transparency In The European Union: A Crucial Link In Shaping The New Social Contract Between The Citizen And The European Union*, 2003, available at www.ip-rs.si
37. WACHSMANN, A., „Droit d'accès des particuliers aux documents des institutions europeennes“, *L'Observateur de Bruxelles*, 1997, pp. 12-14