



ЕВРОПЕЙСКИ ПАРЛАМЕНТ PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
PARLEMENT EUROPÉEN PARLAIMINT NA HEORPA PARLAMENTO EUROPEO EIROPAS PARLAMENTS
EUROPOS PARLAMENTAS EURÓPAI PARLAMENT IL-PARLAMENT EWROPEW EUROPEES PARLEMENT
PARLAMENT EUROPEJSKI PARLAMENTO EUROPEU PARLAMENTUL EUROPEAN
EURÓPSKY PARLAMENT EVROPSKI PARLAMENT EUROOPAN PARLAMENTTI EUROOPARLAMENTET

Committee on Legal Affairs
The Chairman

Ref. D(2011)52171

Mr Jerzy BUZEK
President of the European Parliament
PHS 11B011
Brussels

317087 14.10.2011

Subject: Recommendation from the Committee on Legal Affairs concerning Case C-280/11 P Access Info Europe (appeal to the Court of Justice by the Council)

Dear President,

I am writing to transmit to you a recommendation which the Committee on Legal Affairs has made on 10 October under Rule 128(4) for Parliament to intervene in case C-280/11 P Access Info Europe in support of side of Access Info Europe. This recommendation was adopted by the Committee by eight votes in favour, six votes against and one abstention¹.

Given that the deadline for notifying a decision to intervene has been running since 13 August, date of publication of the Council's appeal in the Official Journal, and in order to ensure a smooth handling of the file within Parliament, a recommendation to take precautionary action under Rule 128(4), subparagraph 4, was already sent to you on 22 September 2011.

Background

Back in 2008, Access Info Europe, an NGO, requested access to a Council document under the Regulation on Access to Documents (hereinafter, the Regulation)². The requested document, drafted by the Council's General Secretariat and sent to a Council Working Party, reproduced the proposals for amendments, and for re-drafting, of several Member States made at an earlier Council Working Party meeting. The subject-matter of the document requested concerns a legislative procedure which was ongoing at the time, and which is still ongoing, in which Parliament had not yet adopted its position at first reading³.

¹ The following Members were present: Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Marielle Gallo, Sajjad Karim, Kurt Lechner, Toine Manders, Antonio Masip Hidalgo, Paulo Rangel, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Dimitar Stoyanov, Pablo Zalba Bidegain

² Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43, 31.5.2001

³ Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM/2008/0229 final - COD 2008/0090

The present dispute concerns the interpretation of the Regulation and in particular whether the Council is entitled to refuse to disclose those parts of a Council Secretariat note to a Council Working Party which would identify Member States on the grounds that, there being no "overriding public interest in disclosure", "disclosure would seriously undermine the decision-making process"⁴.

Access Info Europe, having met with two decisions by the Council granting only restricted access to the document requested, decided to take the matter to Court. Greece and the United Kingdom decided to intervene in favour of the Council. The European Parliament did not intervene.

On 22 March 2011, the General Court ruled in favour of Access Info Europe and annulled the Council's decision⁵. In particular, the General Court rejected the Council's arguments that:

- the delegations' room for manoeuvre would be reduced by their identification with a certain proposal;
- publication of the names would cause the positions of those delegations to become entrenched, since they would lose some of their ability to modify their positions in the course of discussions and to justify before their public a solution which may differ from their initial position;
- the pressure which the public could exert would be such that it would no longer be possible for a delegation to the Council to submit a proposal tending towards the restriction of openness;
- disclosure of the identity of those who made the proposals would have the foreseeable effect of written communication being abandoned in favour of oral communication.

The General Court, rejecting those arguments as abstract, too general and not sufficiently substantiated, reasoned thus:

Those [delegations] responsible for the various proposals (...) must, in a system based on the principle of democratic legitimacy, be publicly accountable for their actions. In that regard, it should be noted that public access to the entire content of Council documents – including, in the present case, the identity of those who made the various proposals – constitutes the principle, above all in the context of a procedure in which the institutions act in a legislative capacity, and the exceptions must be interpreted and applied strictly. If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. The identification of the Member State delegations which submit proposals at the stage of the initial

⁴ The exception relied upon in order to refuse access to the information relating to the identity of those who had made the proposals was that provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, under which access to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, is to be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

⁵ Case T-233/09 *Access Info Europe v Council*, 22 March 2011, not yet reported.

discussions does not appear liable to prevent those delegations from being able to take those discussions into consideration so as to present new proposals if their initial proposals no longer reflect their positions. By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently.⁶

On 6 June 2011, the Council brought an appeal against that judgment⁷, requesting that it be set aside by the Court of Justice.

Conclusion

After careful examination of the Council's appeal, and although the case does not involve the validity of an act adopted by the Parliament, the Committee considers that its wider legal and political significance warrants an intervention by Parliament before the Court of Justice in support of Access Info Europe under Article 40 of the Statute of the Court of Justice⁸ in order to ensure as far as possible that the Union's legislative process is transparent⁹ and the Union's legislation on access to documents is correctly interpreted, in particular the "space to think" exception¹⁰, in line with its latest resolutions on the matter¹¹.

Given that the deadline for notifying a decision to intervene has been running since 13 August, date of publication of the Council's appeal in the Official Journal, and in order to ensure a smooth handling of the file within Parliament, a recommendation by myself to you to take precautionary action under Rule 128(4), subparagraph 4, was already sent on 22 September 2011.

Yours sincerely,



Klaus-Heiner LEHNE

⁶ At paragraph 69 (emphasis added)

⁷ OJ C 238/6, 13.8.2011

⁸ Article 40: Member States and institutions of the Union may intervene in cases before the Court of Justice. (...) An application to intervene shall be limited to supporting the form of order sought by one of the parties.

⁹ See in particular Article 15(2) TFEU, introduced by the Treaty of Lisbon, which provides that "the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act"

¹⁰ See footnote 3 *supra*.

¹¹ See in particular the Report on public access to documents (rapporteurs: Hautala, Sargentini) (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)), in particular paragraph 15 ff (resolution tabled for vote on 14.9.2011).