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Committee on Civil Liberties, Justice and Home Affairs
The Chairman

IPOL-COM-LIBE D (2012) 17361

Mr. José Manuel BARROSO
President of the European Commission
1049 Brussels, Belgium

305671 27.03.2012

Dear President,

I am writing you as Chairman of the Committee on Civil Liberties, Justice and Home Affairs on behalf of the Rapporteur Mr. Cashman concerning the proposed amendment of Regulation 1049/2001 on access to documents. The first reading vote in Parliament took place on 15 December 2011 with a substantial majority of Members supporting the report. In February 2012 the Commission expressed in a Communication its position on the Amendments adopted by Parliament at first reading (SP(2012)90). With regards to the mentioned position I would like to point out on behalf of the Rapporteur several mistakes and provide further clarifications.

It was claimed in the Commission Communication that several Amendments (Ams 31, 37, 39, 41, 42, 44, 45, 47 to 49, 51 to 57, 62 to 66, 68 and 69) are outside the scope of the Interinstitutional Agreement on recasting. In that regard I would like to recall the file's legislative history. The Commission's proposal was issued in 2008 before the entry into force of the Treaty of Lisbon. Despite the entry into force of the new Treaty giving, inter alia, the Charter the status of a legally binding document (and through this the right to access to documents the status of a fundamental right), the proposal has not been withdrawn by the Commission. Moreover, the Commission had the possibility to withdraw its proposal also in December 2011 when the EP plenary voted in first reading, but did not do so. It should be recalled that the LIBE committee raised the issue of the use of the recasting procedure already at the beginning of Parliament's work on the file making clear that on this proposal LIBE and Parliament is invoking paragraph 8 of the Interinstitutional Agreement on recasting which allows to switch from "recasting" to the "ordinary" legislative procedure on a request by one of the three legislative Institutions. When the "switch" takes place amendments can be submitted also to the unchanged part. The LIBE position to use paragraph 8 of the IIA was formally notified by the EP to the Commission by a letter of 20 February 2009 sent from EP President Pöttering to you. It was then up to the Commission to decide to withdraw its 2008 proposal by submitting a new legislative proposal focused only on the articles which should be amended according to the Commission.

I would also like to recall that the 2009 LIBE report (A6-0077/2009) on the file clearly

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withdraw its 2008 proposal by submitting a new legislative proposal focused only on the articles which should be amended according to the Commission.

I would also like to recall that the 2009 LIBE report (A6-0077/2009) on the file clearly stated that *"according to the competent Parliamentary committee, the recasting procedure was decided by the Commission without informing the other Institutions and ignoring the letter and the spirit of Parliament's resolution of 4 April 2006 with recommendations to the Commission on access to the Institutions' texts under Article 192 of the EC Treaty, whose aim was to amend substantially Regulation 1049/01, stressing moreover the fact that in its proposal the Commission has even refused to deal with issues such as the ones highlighted in the Court of Justice's landmark "Turco" case"*. As the Commission decided to maintain the "recasted proposal" on the table, the LIBE Committee and the plenary continued their work on the full text by following the objectives stated by the Parliament and by dully informing the Commission about the use of paragraph 8 of the Interinstitutional Agreement on recasting. Therefore, I would like to reiterate that the procedural position of LIBE and the Parliament was clear and consistent during the whole legislative procedure on this file, and therefore no amendments should be considered outside of scope.

At the same time I would like to provide you with further clarification on Parliament's amendments, as it seems that there is a misunderstanding of their meaning. First, the Parliament followed existing jurisprudence based on the fact that there should be no group exemptions to certain categories of documents (no carte blanche). All fields, except the ones specifically excluded by the Treaties (ECB, Court and EIB in the course of their basic tasks), should be covered by the common Regulation. No special treatment should be granted to a specific field, for example competition, as to all the fields and phases the same fundamental right on access to documents (as a Charter category) applies (AM 29). Any rights of third parties and the Commission prerogatives are fully taken into account and preserved through the proposed general exemptions (such as "inspections, investigations and audits" or "data protection").

The Parliament's definition of the term "document" (Am 30) fully reflects the Treaties stating in Article 15(3) TFEU *"documents whatever their medium"*. It was never claimed that data bases would extend to outside third parties without any connection with data storage on behalf of the EU (Am 30). At the same time the Commission needs to clarify if it fully accepts the *Turco* case-law (C-39/05) regarding availability of legal opinions in the legislative procedure. Parliament's amendments fully reflect the EUCJ case-law. Legal opinions in a legislative procedure have to be in generally fully accessible, and any rare exceptional situations where a withholding could be justified would have to be duly and substantially reasoned, applying the strictest standard due to the strict transparency requirement for the legislative procedure. Therefore, no special category of legal opinions outside court proceedings should be created, as the proposed exemptions (for example, public security) offer enough space for protection (Am 35).

The same applies to legal opinions in other procedures, where the provided exemptions of Article 4 could fully apply if necessary (space to think, inspections, data protection, etc.).

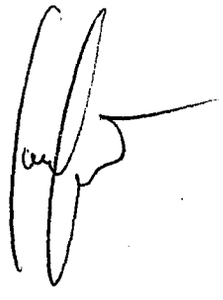
At the same time the Parliament integrated the provisions of the Aarhus Convention in line with the existing exemptions in the Regulation (Am 38), as the system has to function as a coherent common system. It would be illogical and legally unbearable to have inside the same legal framework one system in place for the Aarhus Convention exemptions and another one for the other exemptions. The Parliament (Am 43) also fully followed the Court's case law on the non-existence of the so-called "Member States veto" (*Sweden v. Commission*, case C-64/05 P). According to the Court (para. 76) such a veto does not exist and the whole procedure should be seen as *"a form of assent confirming that none of the grounds of exception is present"*. This existing case-law should be fully supported by the Commission as the "guardian of the Treaties".

The pro-active approach of disclosure (Am 58) was reiterated several times by the European Ombudsman (for example, his speech of 28 September 2011: *"To facilitate public access to documents, I have repeatedly called for the appointment of information officers in the EU Institutions and bodies. Their role should be to secure citizens' rights of access to EU documents by encouraging the Institutions to adopt a proactive approach, as well as ensuring that they react correctly to requests for access."*). Pro-active transparency avoids long-lasting procedures and court challenges and creates trust in the EU Institutions. Therefore, any claim that the pro-active disclosure of non-legislative documents creates a disproportionate administrative burden is wrong and non acceptable as access to documents is a fundamental right. I should also point that the Parliament never demanded the publication of all non-legislative documents relating to individual decisions, as exemptions under Article 4 are possible. But it demanded that, as a rule, the maximum amount of documents should be identified and made public beforehand as transparency of EU Institutions is a fundamental right and this would help to avoid legal disputes and enhance the trust of the citizens in EU Institutions. As could be seen from the intervention of the Ombudsman, he calls on the establishment of information officers as something reflected in Am 62. The Commission, on the other hand, considered Am 62 on information officers even out of scope of the Regulation.

I hope that the given explanations will help to make the matter clearer for the Commission and allow the Institutions to continue to find a commonly acceptable text. At the same time I can assure you that the Rapporteur and the LIBE Committee will act in a constructive way, and I would like to use the opportunity to request you as the President of the Commission and the College of Commissioners to pay utmost attention

to the file at the political level, as this would allow us to finally conclude this procedure that has already taken far too long, thereby undermining the trust of citizens in EU Institutions and the sincerity of the Institutions to act in a transparent and citizen-friendly way.

Yours sincerely,



Juan Fernando LÓPEZ AGUILAR

CC: Martin Schulz, President of the European Parliament
Maroš Šefčovič, Vice President of the Commission
Presidency
Secretariat of the Council