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Our ref

Your ref

Date
15 July 2014

By email

Dear General Secretariat

Request for access to documents / Commission reference Gest/Dem 2014/2070

We refer to the letter dated 8th July from Mr Luis Romero Requena of the Commission's Legal Service, which responded to our request of 16th April 2014 asking for access to certain Commission documents in accordance with Regulation 1049/2001 ("**the Regulation**"). As permitted by Article 7(2) of the Regulation (and as foreseen by section 5 of the letter of 8th July), we hereby make a **confirmatory application**, requesting the Commission to reconsider its position and to grant us much more extensive access to the relevant documents than that foreseen in your letter of 8th July.

By way of reminder, our request of 16th April was for access to the following:

Any documents (including internal documents and drafts) authored by officials at the Commission's Legal Service that relate to the Legal Service's assessment of the legal basis of proposals for a new Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products ("TPD2") and that were drafted in preparation for, in response to, in consequence of, or that otherwise refer to, trilogue meetings relating to TPD2 in 2013. As part of the Commission's Legal Service's response to this request, we expect to receive (at least) documents (including internal documents and drafts) relating to the Legal Service's review or consideration of Article 24 of the proposed TPD2.

Your letter of 8th July identified 13 email documents as falling within the scope of our request. Your letter granted so-called "full access" to six of these documents, granted partial access to one document (Document 7) and refused in full access to six other documents. The six documents to which we are given "full access", as well as Document 7 to which partial access has been given, are all very short emails from which the names of some of the senders and recipients have been

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deleted. These disclosed documents do not reveal any of the substantive analysis carried out by members of the Legal Service relevant to TPD2. This leads us to conclude that all such substantive analysis is contained in the six documents to which we have been refused access in full (i.e. the documents numbered 1, 3.1, 4, 5, 9 and 11) and in the redacted part of Document 7 (collectively, "**the Undisclosed Documents**"). For the reasons set out below, we maintain that the Commission is obliged to disclose to us in full all of the Undisclosed Documents.

Your letter of 8th July claims that disclosure of the Undisclosed Documents would undermine the protection of legal advice under Article 4(2) of Regulation 1049/2001 and that this concern outweighs the public interest in disclosure. As you are no doubt aware, the European Court of Justice ("**CJEU**") has consistently held that all exceptions from the right of public access to documents "must be interpreted and applied strictly" (e.g. see Case C-64/05 P *Sweden v Commission*, paragraph 66). The EU institution in question therefore has to balance the claimed interest (here, protection of legal advice) against the overriding public interest in the document being made accessible.

It is well-established that the public interest in disclosure is particularly strong where the EU institutions are acting in a legislative capacity. Recital (6) of the Regulation states that "*Wider access must be granted to documents in cases where the institutions are acting in their legislative capacity... Such documents must be made directly assessable to the greatest extent possible.*"

Against this backdrop, the CJEU ruled in Joined Cases C-39/05 P and C-52/05 P *Maurizio Turco v EU Council* ("**the Turco case**") that the public interest in the disclosure of an internal Council legal opinion concerning proposed EU legislation outweighed the need for the protection of legal advice. In that case, the CJEU annulled a Council decision rejecting an application for access to an opinion of the Council's Legal Service regarding a proposed Directive laying down minimum standards for handling asylum seekers.

The CJEU stressed in *Turco* that openness as regards proposed EU legislative acts contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The CJEU therefore dismissed as incorrect a finding by the Court of First Instance that there was a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters (paragraph 57 of the Judgment). The CJEU ruled that the opposite was true: "*Regulation 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process*" (paragraph 68).

In the *Turco* case, the Council had argued that there was a risk that disclosure of legal advice relating to legislative processes may give rise to doubts regarding the lawfulness of legislative acts. The Commission had also argued that such disclosure would make it difficult for an institution to defend the lawfulness of an act if it became publicly known that the legal service had initially expressed a negative opinion regarding that act. However, the CJEU dismissed these arguments as being mere assertions which were not supported by detailed arguments. For example, at paragraph 65, the Court stated that:

"as regards the Commission's argument that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation 1049/2001."



Your letter 8th July seeks to justify the refusal to grant access to the Undisclosed Documents by arguing that: (i) the documents are particularly sensitive as the adoption of TPD2 is very likely to be the subject of litigation; and (ii) their disclosure would seriously undermine the ability of the Commission's Legal Service to effectively defend the validity of TPD2 before the courts on an equal footing with other parties and thus would breach the principle of equality of arms. However, these claims are merely general assertions which (like those rejected in the *Turco* case) are not substantiated by any detailed arguments or evidence. In particular, you have not explained precisely how or why knowledge of the content of the requested documents would prejudice the ability of the Legal Services to defend the EU institutions effectively in any litigation regarding TPD2 or to give frank, objective and comprehensive advice in future.

Furthermore, it is not clear to us why the concept of "equality of arms" should play a role in a context where the legality of a legislative measure may be questioned. Surely, the public interest requires that control of the legality of an EU legislative measure can take place in the best possible circumstances and with access to all relevant information. The prevailing public interest objective cannot be merely for the EU institutions to "win the case".

Finally, you have not explained adequately why the above assertions mean that the Undisclosed Documents (other than Document 7) must be withheld in their entirety. It is incumbent on the Commission to consider whether any parts of the requested documents could be disclosed and to withhold only those parts which fall within an exemption and for which there is no overriding public interest in disclosure. In any event, we believe that we need to see all of the Undisclosed Documents in their entirety (including all of Documents 1 and 3) in order to fully understand the content and context of the Legal Service analysis of the legal basis for the TPD2 proposal.

For all the above reasons, we consider that the Commission is obliged to disclose all documents falling within the scope of our request, including the Undisclosed Documents. We therefore request the Commission to re-consider the position set out in your letter of 8th July. In accordance with Article 8 of the Regulation, you are required either to grant the requested access or to send us your reasoned refusal within 15 working days of this confirmatory application (i.e. by 6th August at the latest). If you fail to do so, we reserve our right to institute court proceedings against the Commission and/or make a complaint to the Ombudsman, as foreseen by Article 8(3) of the Regulation.

Yours faithfully

