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*Committee on Civil Liberties, Justice and Home Affairs*

*(In association with the Committee on Constitutional Affairs, according to rule 50 of the Rules of Procedure)*

**1 June 2010, 15.00 – 18.30**

**14. Interventions of EU institutions, bodies, offices and agencies on access to EU documents after the Lisbon Treaty.**

**The transcript of the intervention of the European Data Protection Supervisor, Mr Peter Hustinx, titled "Transparency and data protection".**

Thank you Mr Chairman, I very much welcome this opportunity to take stock of the impact of the Lisbon Treaty in this particular area and I congratulate the two Rapporteurs for creating this opportunity.

Now, I want to mention at the out-set that of course our debate has a substantial background in terms of looking into the interface of transparency and data protection and I have, over the last 5 years, been involved extensively; publishing a paper in 2005, coming up with suggestions on how to deal with this interface, on that basis I have contributed an opinion, various comments and further contributions to the revision of the transparency regulation which is now on the table and I am pleased to see important elements of that input in the report. We'll come back to this, but we've also been involved in a number of court cases, and one, a very important one dealing with the interface of data protection and transparency, the Bavarian Lager case, is close to a judgement of the Court of Justice. I want to make you aware that on the 29th of June, the Court will decide on that case which is on appeal of this important decision of the Court of First Instance. Now, however this decision may be, it will have its impact, of course, in the revision. It may be that the position of the Court of First instance is confirmed, and I would be extremely pleased by that result but I can't predict.

Now what has happened due to the entry into force of the Lisbon Treaty? I would say that two provisions which were somewhere at the back of the EC Treaty have now moved up to the general provisions of a horizontal scope; article 15 and 16 next to each other, public access and data protection. That also means that both principles,

both rights are part of good governance and are, as such, based on the Charter as they have been mentioned as well. Now looking at this from the angle of article 15 on public access, it is of course true that the scope of the right of access has increased. Importantly, this is at the background of this discussion but also as previously, the precise scope in terms of substance needs to be subject to principles and conditions as defined and it is mainly the role of the transparency regulation to further develop these principles and conditions. I think it is important to make sure that they are clear, they are precise and they can be applied effectively in practice. If we end up with general, puzzling language, it is not going to be helpful, neither for transparency, nor for the rights and interests to be protected by the exceptions.

So against this background, I will come back to this, I think it is helpful to see the right of public access as a right subject to principles and conditions, in other words it is a conditional right of access and one of the principles and conditions to measure the scope of the right of this access will no doubt relate to the protection of private interests, privacy and sensitive personal data. But, the right to data protection cannot be understood as a conditional right not to publish; it is not a right which is in principle opposed to transparency. That is very clear if you see the substantive elements of the right to data protection as they have been summarised in article 8 of the Charter which has now also become a binding element of the Lisbon Treaty. It refers, inter-alia, to the right to either see data processed on the basis of consent or some other legitimate basis laid down by law - and here we are dealing with a case with a legitimate basis [*which*] needs to be laid down by law on the basis of article 15, under the principles and conditions called for in the Treaty and it is there where we need to provide clear language, precise conditions. I think a reference to just the generalities of data protection will simply not do.

It is against this background that I have argued repeatedly for language which is precise, which provides for a balanced approach and is also workable in practice and I am very pleased to see that that suggestion is now taken up in amendment 44 in the report of the Rapporteur, the revised report which now also deals with a wider scope. Amendment 44 basically takes up the text as I have suggested. However, the old approach, as we have it now, the approach which led to substantial discussions in Court and on which the Court of Justice will decide on the 29th of June, is also included in a report and that is amendment 37. I think it is very unhelpful to make all that language even more complicated by adding more conditions, so I would certainly suggest both Rapporteurs to reconsider amendment 37, which is the opening paragraph of the revised article. But the emphasis on 44 - and I am pleased to see that confirmed.

Now, having said this, I want to make you aware of another interesting interface, where the transparency rules, perhaps in the context of data protection can be somewhat more precise and more effective in terms of helping the person concerned to see his own data. In practice it quite often happens that the request to have access to your own personal data is misunderstood and is handled under rules of public access and it even happens that the answer is, '*personal data, we can't give you anything so you don't get anything'*, which is of course is not very helpful because the data protection regulation is the right of access subject to some exceptions but certainly not such as to discourage requests for subject access. In light of this problem, I was very pleased to see the amendment 99 in the previous report, which suggested that the text

in the preamble make the institutions and bodies aware that whenever a data subject submits a request for access to his own personal data, this should be dealt with under data protection rules rather than public access rules and we are now in court arguing this on the basis of the previous regulation and that is a case which will take some time to arrive at the main court. So, we could save time in the interest of data protection and transparency, if the Rapporteurs would consider to re-insert their amendment 99, in the old report in the course of a preamble, it could also be done in a provision but I was pleased to see the flag.

Having said that I don't have any further concerns, I wish you very well with keeping the balance of transparency and data protection.

Thank you.