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Public hearing on "The right to access to EU documents: implementation and future of Regulation (EC) No 1049/2001"

"Promoting the citizens informational self-determination: how transparency and data protection can strengthen each other"

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Introduction

- Mr. President, Honourable Members, thank you for inviting me to speak today during this hearing on the implementation and future of Regulation (EC) No 1049/2001 on public access to documents.

- I am very pleased to see that throughout the last couple of years the European Data Protection Supervisor has become one of the 'usual suspects' who discuss the revision of the current regulation on public access to documents. I say 'very pleased', because being one of the usual suspects in my view rightly confirms that government transparency and data protection are intrinsically linked.

- Transparency, privacy and data protection are amongst the fundamental rights contained in the Charter of Fundamental Rights. The fundamental rights to access to EU documents and data protection can even be found in the Treaty on the Functioning of the European Union and are placed next to each other as provisions having general application.

- It goes without saying that the societal importance of these rights grows every day, due to the impressive expansion of what is referred to as the 'information society'. In this context, informational self-determination, as referred to in the title of my speech, goes beyond 'control over ones own personal data', it also concerns the possibility to make well-informed decisions about oneself, which implies transparency of government, but also transparency in the private sector.

- As regards the government, citizens are entitled to both: an open and accountable government and a government which ensures that citizens' personal data are processed lawfully and fairly. Although in some cases transparency, privacy and data protection might lead to opposing claims, they generally go along very well and, indeed, strengthen each other, which in the end should ensure the government to be trustworthy.

- Let me emphasise today once again that the role of privacy and data protection is not to prevent public access to information whenever personal data is involved. To apply data protection rules in such a way would not only

encroach upon the transparency of the EU administration, it would also be detrimental to the credibility of data protection rules as such.

- Privacy and data protection should rather be seen as setting out the conditions under which public access to personal data can be considered legitimate.

- Obviously, there is a lot of personal information the public disclosure of which would not be legitimate without the consent of the person concerned - think, for instance, about the public disclosure of medical files of EU officials. However, some general or purely professional information might be made public, even without the explicit consent of the person concerned, as long as it is assured that the legitimate interests of this person are not prejudiced.

- That brings me to the famous *Bavarian Lager* case before the Court of Justice in which the names of business representatives were blanked out from the publicly available minutes of a Commission meeting. In its judgment of June last year the Court agreed with the Commission that disclosure of the five names would not be in line with the data protection rules.

- The conclusion to be drawn from this case however should not be that such information can only be publicly disclosed if the persons involved consent to it. In my view, the conclusion should be that public disclosure could have been in conformity with the data protection rules if the Commission had acted differently before and the moment it put those names down on paper.

- Disclosure of the five names of the business representatives would have been allowed if the Commission had taken, what I would call - and you have heard the European Ombudsman mentioning it earlier this morning - a <u>proactive approach</u>.

- A proactive approach means making clear in advance to the persons concerned which personal data will be subject to public disclosure.

- On the 24th of March of this year, we published a paper on the EDPS website explaining the proactive approach in greater detail.

- The proactive approach in our paper ensures that, for situations in which public disclosure of personal data is justified, such disclosure is fair and lawful and that the data subjects involved are well-informed and fully enabled to invoke their rights under the data protection regulation.

- The proactive approach serves the interests of the citizens who seek access to EU information, the interests of the person whose personal data are concerned and, last but not least, the interests of the EU institutions, bodies and agencies. A proactive approach reduces future administrative burdens and will reduce the number of complicated situations following requests such as in *Bavarian Lager*.

- In the paper, we encourage EU institutions to develop policies as to the proactive approach to be taken on this subject. These policies should reflect the outcome of a careful balance of the different interests at stake. Whilst developing such policies, EU institutions, agencies and bodies should engage in constructive cooperation and learn from each other through exchanging examples of good practice.

- Relevant for the discussion this morning is that the current legal framework does not offer sufficient substantive guidance on the situations in which the balance of the different interests in general favours disclosure. In other words, institutions do not know what level of transparency is justified with regard to the personal data they keep. For that reason and for the sake of legal certainty, the current legal framework should be amended.

- It was precisely this substantive guidance the European Parliament added to the proposal for a revised regulation when it adopted the amendment by the plenary sitting of March 2009 on this point. This amendment reappeared in the draft report of this Committee in May last year.

- The amendment provides the necessary guidance and clarifies that a fair balance in principle favours the public disclosure of personal data:

    - if the data solely relate to the professional activities of the person concerned;
    - if the data solely relate to a public person acting in his or her public capacity;
    - if the data have already been published with the consent of the person concerned.

- We fully support the amendments adopted by the Parliament and sincerely hope that this Committee and the Parliament in general will stay on this track in the discussions which are ahead of us.

- With a possible adoption of the recent Commission proposal to align Regulation 1049/2001 with the requirements of the Lisbon Treaty, the legislative necessity of the general revision might disappear. However, there still is a moral necessity to enhance the current framework, not least as regards the reconciliation of the public access rules with the rules on privacy and data protection.

- I would like to conclude with offering you our help, if needed. My services remain available, for instance to have a fresh look whether the proposed amendments are still fully in line with developments in the last year. Don't hesitate to contact me.

  Thank you for your attention.