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**OPINION OF THE LEGAL SERVICE\***

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to : Working Party on Information

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Subject : Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast)  
- Cashman report: recommended amendments by the European Parliament

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**I. INTRODUCTION**

1. On 17 February 2009, the European Parliament's LIBE Committee adopted a report including recommended amendments on the above recast proposal.<sup>1</sup> This report raises a number of legal issues, regarding both the procedure and substance.

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\* **This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.**

<sup>1</sup> Report on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast) (A6-0077/2009 - PE415.164v03-00)

Accordingly, the present opinion, which has been requested by the Council's Working Party on Information, intends to provide a preliminary legal analysis of such issues: to that effect, it reproduces and develops the oral intervention made by the representative of the Council Legal Service at the Working Party meeting on 19 February 2009.

## **II. ISSUES OF PROCEDURE**

2. The LIBE Committee report raises issues of procedure, concerning both the intended split of the Parliament's vote (amendments and legislative resolution) (a) and the scope of the recommended amendments (b).

### **a) Split of the Parliament's vote on the amendments and on the legislative resolution**

3. The LIBE committee's rapporteur recommended that only the draft amendments to the recast proposal, but not the draft legislative resolution, be tabled for a vote by the Parliament.<sup>2</sup> This would allow the Parliament to make known its position on the legislative proposal without formally concluding the first reading. According to the rapporteur, the suspension of the Parliament's vote at first-reading will allow the necessary flexibility for the Parliament to negotiate a compromise on the legislative proposal rapidly, still at first reading, preferably on the basis of an amended Commission proposal.

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<sup>2</sup> A split between the vote on the amendments to a legislative proposal and on the legislative resolution concerning that proposal is not without precedents in the Parliament's practice. Amongst other examples, the Parliament had recourse to this procedure for the adoption of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43), Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (OJ L 262 of 7.10.2005, p.1) and Decision 2008/587/EC, Euratom of the European Parliament of 18 June 2008 amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 189 of 17.7.2008, p. 25).

4. Article 251(2) TEC provides that at the first reading under the codecision procedure, the Council acts by a qualified majority "*after obtaining the opinion of the European Parliament*". Rule 51 of the Parliament's Rules of Procedure, entitled "Conclusion of first reading" gives guidance on what constitutes an "opinion of the European Parliament": the Parliament's vote on a legislative proposal consists of a vote on the amendments to the proposal and on the legislative resolution. Pursuant to Rule 51(3), "*[t]he text of the proposal as approved by Parliament and the accompanying resolution shall be forwarded to the Council and Commission by the President as Parliament's opinion*" (emphasis added). Under Rule 53(2), second subparagraph, the Parliament may decide to postpone the vote on the legislative resolution in order to enable it to seek compromise with the Commission. The matter is then referred back to the committee responsible for reconsideration. Consequently, in accordance with the Parliament's internal rules, the Parliament's opinion concluding the first reading is expressed when the legislative resolution containing the Parliament's approval of the legislative proposal, possibly with amendments, is adopted.
  
5. Under those circumstances, the Council cannot but wait until the Parliament's first-reading opinion is given in accordance with the Parliament's internal rules, for which Article 251(2) TEC does not fix any time limits. However, the institutions must cooperate in good faith throughout the codecision procedure and are also required to have due regard for the interinstitutional balance and the respective role conferred on them by the Treaty.<sup>3</sup> The Legal Service is of the opinion that the European Parliament would not fulfil its duty of genuine cooperation in the codecision procedure, if, by splitting the vote on the amendments and on the legislative resolution, it sought to obtain a modified proposal from the Commission before the Council could act on the legislative proposal. Should that be the case, the Council would be entitled to preserve its own negotiating position, for example by adopting a general approach before it can formalise it, after receiving the Parliament's opinion, as a common position.

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<sup>3</sup> See Joint Declaration on Practical arrangements for the codecision procedure (Article 251 of the EC Treaty), OJ C 145 of 30.6.2007, p. 2.

**b) Extent of the legislator's power of amendment of the recast proposal**

6. According to the constant doctrine of the Council Legal Service, in cases where the Treaty provides for the Council to take a decision on the basis of a Commission proposal, the power of the Council to amend the Commission proposal pursuant to Article 250(1) TEC is limited by the object of the proposal.<sup>4</sup> Going beyond the object of the Commission's proposal would infringe the Commission's right of initiative. Accordingly, where the purpose of a proposal is to modify an existing act, the Council may not amend an unchanged provision of the existing act - not even acting unanimously - which has not been subject of a proposal by the Commission and which is not directly and intrinsically linked to the proposal unless the Commission alters its proposal.<sup>5</sup> In the codecision procedure, the two branches of the legislative authority must exercise their power of amendment with due regard for the Commission's right of initiative.
7. This rule applies equally to the present proposal, which the Commission chose to submit following the recasting technique in conformity with the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts<sup>6</sup> (IIA). As the Legal Service has recently clarified, *"in the legislative process leading to a recast, the scope for substantive changes which the legislator is allowed to bring to the Commission proposal is strictly limited to those parts which are identified in the proposal as substantive amendments (by means of "grey-shaded" type), as opposed to unchanged provisions which (...) have not undergone any substantive amendment."*<sup>7</sup>
8. It follows from that amendments 24 (Art.1(a)), 25 (Art. 1(c)), 26 (Art. 1(c)a), 27 (Art. 2 - title), 29 (Art. 2 (2)), 30 (Art. 2(3)), 31 (Art. 2(4)), 34 (Art. 2(7)), 35 (Art. 2a), 37 (Art. 3(aa), 38 (Art. 3(ab), 39 (Art. 3(ac), 40 (Art. 3(ad), 41 (Art. 3(ae), 42 (Art. 3(af), 43 (Art. 3, subpara. 1a), 44 (Art. 3a), 45 (Art. 4 - title), 46 (Art.4(1)), 48 (Art. 4(2)), 50 (Art. 4(2) c), 52 (Art.4(3)),

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<sup>4</sup> See opinions 11903/00, 12151/02, 8748/04 and 6096/09.

<sup>5</sup> See opinion of 19 September 2002, 12151/02, p. 2.

<sup>6</sup> Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77 of 28.3.2002, p.1.

<sup>7</sup> Opinion of 20 November 2008, 16110/08, point 9.

55 (Art. 4(7)), 56 (Art. 4(7a)), 57(Art. 5 - title), 58 (Art. 5(1)), 60 (Art. 5(3)), 61 (Art. 5a), 63 (Art. 7(1)), 64 (Art. 7(2)), 65 (Art. 7(3)), 67 (Art. 8(2)), 68 (Art. 9), 69 (Art. 10(4)), 70 (Art. 11(3)), 73 (Art. 12(4)), 74 (Art. 13), 75 (Art. 14a), 76 (Art. 14b), 77 (Art. 15 - title), 78 (Art. 15(1)), 79 (Art. 15 (1a) ), 80 (Art. 15(1b)), 81 (Art. 15(2)), 83 (Art.17(1a)) and the corresponding recitals contained in the report adopted by the LIBE Committee **go beyond the object of the Commission's proposal** either by modifying unchanged provisions of Regulation 1049/2001 or by proposing new provisions which have not been subject of Commission proposal.<sup>8</sup> As long as the Commission does not alter its proposal by taking up some or all of the European Parliament's recommended amendments, **those amendments cannot to be admitted for negotiation** between the two branches of the legislative authority.

### III. **SUBSTANTIVE ISSUES**

9. Some of the amendments voted in the LIBE Committee raise very serious legal problems, either because they go beyond the scope of the powers conferred upon the legislator in Article 255 TEC or because they would risk undermining the institutions' decision-making capacity.

#### a) **Amendments going beyond the scope of Article 255 TEC**

10. Under the general principle of attribution of powers, "*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein*" (Article 5, first subparagraph TEC). Furthermore, Article 7(1), second subparagraph TEC, provides that "*each institution shall act within the limits of the powers conferred upon it by this Treaty*". Accordingly, each legal instrument must be based on a Treaty legal basis conferring power on the Community to act and allocating the respective roles of the institutions in the procedure to be followed for the adoption of the legal instrument.

11. The Commission based its recast proposal on Article 255 TEC, which confers power on the legislator to define the general principles and limits of the right of public access to documents of the European Parliament, the Council and the Commission. Article 255 TEC reads as follows:

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<sup>8</sup> The numbering of the amendments follows the LIBE Committee report contained in A6-0077/2009.

- "1. *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member States, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.*
2. *General principles and limits on grounds of public or private interest governing the right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.*
3. *Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."*

12. The legislator, who may only act for the purpose of implementing that Article, may not adopt either measures in respect of which no Community competence exists or measures which, in view of their aim and content, go beyond the limits set by Article 255 TEC. In respect of the amendments voted by the LIBE Committee, the following needs to be stressed:

- i) Article 255 TEC does not confer power on the Community legislator to harmonise national legislation on access to documents. The legislator would therefore act *ultra vires* if it adopted amendment 61 (Article 5a (6)), requiring Member States to provide at least the same level of transparency when implementing Community acts as is granted at the Community level.
- ii) The scope of the right of public access may not lawfully be extended to other institutions and bodies beyond those provided in Article 255 TEC. Amendment 24 (Art. 1(a)), which enlarges the scope of the Regulation to agencies and bodies established by the institutions, goes beyond what is legally possible under the Treaty legal basis.

- iii) The security rules for handling classified information are based on the specific Treaty provisions on which the Council's and the Commissions rules of procedure are founded.<sup>9 10</sup> The purpose of those security rules is to lay down basic principles and minimum standards for handling classified information: they are without prejudice to the right of public access to documents under Article 255 TEC.<sup>11</sup> Amendments 37 (Art. 3(aa), 44 (Art. 3a), 79 (Art. 15(1a)) aim at laying down common security rules on handling classified documents by the institutions. Such rules may not be adopted on the basis of Article 255 TEC, since their aim goes beyond the scope of that Article and would encroach upon the institutional autonomy of the institutions to lay down their own internal security rules.
- iv) Article 255 TEC governs the right of access of the general public to documents of the institutions: its purpose is not to protect the particular interest which one may have in gaining privileged access to those documents. Amendments 44 (Art. 3a), 60 (Art. 5(3)), relating to the European Parliament's privileged access to classified documents as well as to parliamentary scrutiny of non-published documents may not be adopted on the basis of Article 255 TEC, since their aim goes beyond the scope of Article 255 TEC. Specific mechanisms for informing the European Parliament on sensitive issues are subject-matter of special arrangements between the institutions, as set out in Article 9(7) of Regulation 1049/2001.<sup>12 13</sup>

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<sup>9</sup> Article 207(3) and Article 218(2) TEC, respectively.

<sup>10</sup> Article 24 of the Council's Rules of Procedure provides that "[t]he rules on security shall be adopted by the Council acting by a qualified majority".

<sup>11</sup> In order to ensure coherence between the two sets of rules as far as the treatment of "sensitive" documents is concerned, Article 9 of Regulation 1049/2001 lays down special rules for the purpose of applying the Regulation.

<sup>12</sup> Article 9(7) provides that "*The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions*". Recital 9 clarifies that "*On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.*"

<sup>13</sup> See Interinstitutional Agreement on 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy and Framework Agreement of 26 May 2005 between the European Parliament and the Commission on relations between the European Parliament and the Commission, OJ C 298 of 30.11.2002 p. 1.

- v) The scope of the right of public access to documents held by the institutions, as provided in Article 255 TEC, does not cover all facets of transparency. Rules on the historical archives<sup>14</sup>, on the organisation and operation of the Official Journal<sup>15</sup>, on better lawmaking<sup>16</sup>, on the quality of drafting<sup>17</sup>, on good administrative practices<sup>18</sup>, as well as on a common register for interest representatives<sup>19</sup> go beyond the scope of the right of public access to documents, as defined in Article 255 TEC. Most of these issues are already the subject-matter either of legal acts adopted on different legal bases, or, in the absence of a specific legal basis in the Treaties, of an interinstitutional cooperation, subject to the agreement of the concerned institutions and in compliance with the Treaty provisions. Amendments on issues unrelated to public access to documents thus go beyond the scope of Article 255 TEC. It is notably the case for amendments 41 (Art. 3(ae)), 42 (Art. 3(af)), 43 (Art. 3(1a)), 79 (Art. 15(1a)), 26 (Art. 1 (ca)), 74 (Art. 13(1)), 51 (Art. 5a (3)), 8 (recital 12), 78 (Art. 15 (1)), 80 (Art. 15 (1b)), and 11 (recital 13a).

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<sup>14</sup> See Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community, as modified by Council Regulation (EC, Euratom) No 1700/2003 of September 2003, OJ L 243 of 27.9.2003, p. 1. That Regulation is based on Article 308 TEC and Article 203 Euratom.

<sup>15</sup> See Decision 2000/459/EC, ECSC, Euratom of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions of 20 July 2000 on the organisation and operation of the Office for Official Publications of the European Communities. That decision is based on the institutions' general power to organise their interinstitutional cooperation. The procedure for the adoption of a new decision repealing and replacing Decision 2000/459/EC, ECSC, Euratom is currently under way by the institutions (see 14485/02/08).

<sup>16</sup> Interinstitutional Agreement on better lawmaking, OJ C 321 of 31.12.2003, p.1.

<sup>17</sup> Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73 of 17.3.1999, p.1.

<sup>18</sup> The European Parliament, the Council, the Commission, the Court of Auditors and several agencies have adopted codes of good administrative behaviour. Those of the Council and Commission are both based on the Treaty provisions for their rules of procedure, notably Articles 207(2) and 218(2) TEC respectively.

<sup>19</sup> In a Communication of 27 May 2008 (COM 2008(323) final), the Commission launched a voluntary register for interest representatives in relations with the Commission. It also invited the other institutions to reflect on the possibility of closer cooperation on the area.



- vi) The proposed amendment 76 (Art. 14b) introducing disciplinary action against officials or other servants of the institutions for non-compliance with the Regulation is *ultra vires* insofar as the conditions under which an official may be subject to disciplinary action are set out in the Staff Regulations, adopted on the basis of Article 283 TEC. Moreover, that amendment ignores the fact that applications for public access are dealt with by the administration on behalf of the institution, as well as the fact that officials and other servants of the institutions are required, pursuant to Article 287 TEC, not to disclose information covered by the obligation of professional secrecy.
- vii) Amendments 65 (Art. 7(3)) and 75 (Art. 14a) aim at intensifying the role of the Ombudsman under the Regulation. They envisage establishing a consultation mechanism of the Ombudsman following a refusal by the institution of an initial application, in order to provide an independent and objective view on the necessity to protect the interest relied upon by the institution and on the existence of an overriding public interest. They propose for the Ombudsman to be consulted by an "information officer", who would be appointed in each DG of the institutions, on the proper and sound implementation of the Regulation. In accordance with Article 195 TEC, the purpose of the complaints procedure before the Ombudsman is to identify instances of maladministration by the institutions and to help to put an end to that. A possible intervention of the Ombudsman in the two-stage access to documents administrative procedure before a final decision is taken, and consequently, before the question of maladministration could be invoked, would be contrary to the nature of the Ombudsman's functions and therefore to the Treaty.

13. **All the above amendments ought to be rejected on the ground of competence and cannot be subject of negotiations between the two branches of the legislative authority.**

**b) Amendments likely to undermine the institutions' decision-making capacity**

14. The further weakening of the protection of legal advice - which the legislator had tried explicitly to set out as an exception to the widest access to documents in Regulation 1049/2001 and which has inevitably been reduced since the judgment of the Court of Justice of 1 July 2008 <sup>20 21</sup> - in amendments 50 (Art. 4(2)(c)) and 61 (Art. 5a (4)), the removal of the institution's decision-making process in amendment 52 (Art.4(3)), as well as the complete transparency of the legislative procedure as contained in amendments 35 (Art. 2a (2) second subparagraph), 55 (Art. 4(7)), 61 (Art. 5a (4)) and 72 (Art. 12 (1)) would seriously undermine the effectiveness of the institutions' decision-making and hamper the capacity of the institutions to carry out the tasks assigned to them under the Treaties. In accordance with the second subparagraph of Article 207(3) TEC, there is a balance to be struck between greater access to documents and the necessary preservation of the effectiveness of the institutions' decision-making process.

**IV. CONCLUSION**

15. The Council Legal Service is of the opinion that

- should the European Parliament vote the LIBE Committee amendments without voting the corresponding legislative resolution, the Council would be entitled to preserve its own negotiating position;
- in doing so, the Council should notably reject those amendments which go beyond the object of the Commission's proposal and go beyond the scope of Article 255 TEC, as well as those which are likely to undermine the institutions' decision-making capacity.

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<sup>20</sup> C-39/05 P and C-52/05 P Sweden, Turco v. Council of 1 July 2008 (not yet reported)

<sup>21</sup> See in this regard opinion 5671/09 ADD 1 of 27 January 2009, page 2.