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26 June 2001

## REPORT

on the amendment of Article 3 of the Statute of the European Ombudsman  
(1999/2215(ACI))

Committee on Constitutional Affairs

Rapporteur: Teresa Almeida Garrett



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At the sitting of 18 February 2000 the President of Parliament announced that she had asked the Committee on Constitutional Affairs to draw up a report on the amendment of Article 3 of the Statute of the European Ombudsman and had asked the Committee on Petitions for its opinion.

The Committee on Constitutional Affairs had appointed Teresa Almeida Garrett rapporteur at its meeting of 26 January 2000.

It considered the draft report at its meetings of 25 May 2001 and 21 June 2001.

At the latter meeting it adopted the motion for a resolution by 20 votes to 1 with 0 abstentions

The following were present for the vote: Giorgio Napolitano, chairman; Ursula Schleicher and Christopher J.P. Beazley, vice-chairmen; Teresa Almeida Garrett, rapporteur; Guido Bodrato (for Giorgios Dimitrakopoulos), Richard Corbett, Andrew Nicholas Duff, José María Gil-Robles Gil-Delgado, Sylvia-Yvonne Kaufmann, Jo Leinen, Neil MacCormick (for Monica Frassoni), Hanja Maij-Weggen, Cecilia Malmström, Iñigo Méndez de Vigo, Jacques F. Poos (for Carlos Carnero González), Reinhard Rack (for François Bayrou), Konrad K. Schwaiger (for Lennart Sacrédeus), Mariotto Segni, The Earl of Stockton, Margrietus J. van den Berg (for Enrique Barón Crespo) and Joachim Wuermeling (for Luigi Ciriaco De Mita).

The opinion of the Committee on Petitions is attached

The report was tabled on 26 June 2001.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

## MOTION FOR A RESOLUTION

### European Parliament resolution on the amendment of Article 3 of the Statute of the European Ombudsman (1999/2215(ACI))

*The European Parliament,*

- having regard to the Treaty establishing the European Community, and in particular its Article 195(4),
  - having regard to the Treaty establishing the European Coal and Steel Community, and in particular its Article 20d(4),
  - having regard to the Treaty establishing the European Atomic Energy Community, and in particular its Article 107d(4),
  - having regard to its decision of 9 March 1994 on the Statute and general conditions for exercising the office of Ombudsman, as incorporated into Annex X to the Rules of Procedure of Parliament<sup>1</sup>,
  - having regard to the report of the Committee on Constitutional Affairs and the opinion of the Committee on Petitions (A5-0240/2001),
1. Decides to introduce the following modification into its decision of 9 March 1994 on the Statute and general conditions for exercising the office of Ombudsman:

Ombudsman's statute	Proposal for amendment
2. The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and <b><i>give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy.</i></b>	The Community institutions and bodies shall be obliged to supply the Ombudsman with any information that he has requested of them and <b><i>to allow him to inspect and take copies of any document. 'Document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording).</i></b>
They shall give access to documents originating in a Member State <b><i>and classed as secret by law or regulation only where that Member State has given its prior agreement.</i></b>	They shall give access to <b><i>all classified</i></b> documents originating in a Member State <b><i>after having informed the Member State concerned.</i></b>
<b><i>They shall give access to other documents originating in a Member State after having informed the Member State concerned.</i></b>	<b><i>Delete</i></b>
<b><i>In both cases,</i></b> in accordance with Article 4, the Ombudsman may not divulge the content of such documents.	<b><i>In all cases where documents are classified as 'secret' or 'confidential',</i></b> in accordance with Article 4, the Ombudsman may not divulge the content of such documents.

<sup>1</sup> OJ L 113, 4.5.1994, p. 15

Officials and other servants of Community institutions and bodies <b><i>must</i></b> testify at the request of the Ombudsman; <b><i>they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy.</i></b>	Officials and other servants of Community institutions and bodies <b><i>shall</i></b> testify at the request of the Ombudsman. <b><i>They shall give complete and truthful information.</i></b>
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2. Instructs its President to forward this resolution to the Council and Commission with a view to the implementation of Article 195(4) of the EC Treaty.

## EXPLANATORY STATEMENT

### Introduction

1. The deepening of democracy and the associated greater involvement of the citizen in the workings of the Community necessarily call for greater openness in the EU institutions' decision-making processes.
2. In addition to the Treaty articles which proclaim closeness to the citizen and openness as basic Community principles, the right to proper administration is enshrined in the Charter of Fundamental Rights. Article 43 of that Charter states that any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.
3. Transparency of decision-making is one of the key principles of the reform of the institutions currently under way. The adoption of new rules governing public access to documents is a concrete reflection of the efforts being made in this field.
4. This new framework of law forms the background to the request made by the Ombudsman in a letter of 13 December 1999 to the President of the European Parliament proposing the amendment of Article 3 of the Statute of the European Ombudsman.
5. What is being asked for is clarification of the Ombudsman's powers of inquiry, as regards both access to the documents which are necessary to the performance of his duties and the modification of the provisions on the giving of evidence.
6. Article 3(2) of the Statute in its present wording sets limits on the Ombudsman's powers of inquiry insofar as it states that access to a document may be refused 'on duly substantiated grounds of secrecy' and that where officials and other servants of Community institutions and bodies testify at the request of the Ombudsman, 'they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy'.
7. In the course of her endeavours to arrive at a proposal for amendment of the Ombudsman's statute, your rapporteur engaged in a number of extremely open and illuminative discussions with Mr Söderman, Mrs Loyola de Palacio and Mr Danielsson, the representative of the Swedish Presidency.
8. Your rapporteur stresses that in the various comments made by or on behalf of the Union institutions on this subject, there was universal agreement that when approached by the Ombudsman those institutions have cooperated in full and have shown every desire to find solutions. It was also underlined that if today's climate is compared with that prevailing when the Ombudsman's statute was first established in the early 1990s, there is now a far greater emphasis on administrative openness and transparency and the need to gain the confidence of the public and promote a modern administrative culture at Community level.
9. A detailed account of the various political and legal aspects of the subject and the problems

it raises may be found in the working document (PE 294.729) submitted on 15 December 2000 by the rapporteur of the Committee on Constitutional Affairs. The present explanatory statement will confine its scope to the aspects directly related to your rapporteur's formal proposal.

10. The Committee on Constitutional Affairs heard the European Ombudsman, Mr Söderman, on 25 May 2000 and, on a second occasion and at his request, on 5 March 2001. It heard the Commission Vice-President Mrs Loyola de Palacio on 24 January 2001.

#### Access to documents

11. The Treaty entrusts the Ombudsman with the specific task of conducting inquiries. This means that, as he constitutes a body of the Community, the Ombudsman must have general access to Community documents.

12. Article 195 of the EC Treaty places no restrictions on the documents or information media which the Ombudsman may consult in the course of his inquiries. The legislator does not appear to have intended to place legal obstacles in the way of the right of the Ombudsman and his staff to consult a very wide range of documents, even where such documents are internal or confidential, or indeed secret, in order to enable the Ombudsman to determine whether there has been maladministration in an action of (one of the other) Community institutions and bodies.

13. This interpretation is confirmed by the wording of Article 3(1) of the Statute, which states: 'The Ombudsman shall, on his own initiative or following a complaint, conduct all the enquiries which he considers justified (...)'.

14. The Ombudsman does not reject the notion of confidentiality. He considers that 'access should be the rule, and secrecy the exception for which there should be an express justification'.

15. The Ombudsman's request for clarification of his powers must be considered in the context of the broader debate on the implementation of Article 255 of the EC Treaty, which, following the adoption of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, has introduced greater transparency in the interests of enhancing public confidence. Article 42 of the Charter of Fundamental Rights of the European Union lays down, besides, the right of public access to European Parliament, Council and Commission documents.

16. The promotion of sound administrative practice as regards access to documents, to which all the Community institutions have pledged themselves, and the specific role of the Ombudsman in this field as guarantor of the rights of European citizens, call for the Ombudsman to have wider access to documents than the individual citizens whom it is his task to defend.

17. In practice, the Ombudsman has never actually been refused access to a dossier, despite a number of discussions in which conflict of one or other kind has raised its head. All the institutions agree that the present system has worked reasonably well. There is no question of a de jure obligation to amend the existing rules; however, such amendment appears desirable



in the interests of clarifying the nature of the Ombudsman's powers of investigation and achieving greater coherence of the rules with the new legislative developments arising from Article 255 of the Treaty.

#### The hearing of witnesses

18. The Ombudsman considers that it is necessary to remove the limitations imposed by Article 3(2), fifth subparagraph, of the Statute, and, in particular, the provision that officials and other servants 'shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy'.

19. In his initial proposal for amendment, the Ombudsman additionally asked for the right to hear Commissioners, on the grounds that they should not be excluded from the duty to testify, even if their testimony should take a different form.

20. The Ombudsman revised his position as to the desirability of proposing the above change after he discovered, having heard Mrs Loyola de Palacio and, in her wake, a number of MEPs, that others did not share his view and that such a provision could give rise to a confusion between control of the institutions' administrative practices and control over the political acts of members of those institutions. In fact, in the rare cases in the past in which the Ombudsman has felt the need to ask a Commissioner to supply further information on a dossier, he has, as he confirms, always received a written reply enabling him to pursue his inquiry<sup>1</sup>.

21. Your rapporteur's amendments, accordingly, are intended purely to clarify the procedure by which true and complete testimonies are to be obtained from officials and other servants of the Community institutions and bodies.

#### The obligation of professional secrecy

22. Your rapporteur considers that no contradiction exists between EC Treaty Articles 195 (on the Ombudsman) and 287 (on the obligation of professional secrecy incumbent on the members of the institutions and on Community officials). The Ombudsman and his staff are themselves subject to this obligation, which is set out and reinforced in Articles 3 and 4 of the Statute.

23. The Ombudsman recognises that he and his staff remain subject to the obligation imposed on them by Article 4(1) of the Statute not to divulge information or documents which they obtain in the course of their inquiries.

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<sup>1</sup> European Ombudsman, note prepared for the attention of Mrs Almeida Garrett, 14 March 2001

24. Thus, and despite Article 17 of the Staff Regulations, under which an official 'shall not in any manner whatsoever disclose to any unauthorised person any document or information not already made public', it remains necessary for the Ombudsman to be considered a person empowered to receive such documents or information. This status is conferred on him by the Treaties, his Statute and the Charter of Fundamental Rights of the European Union.

25. Your rapporteur considers that Article 287 of the EC Treaty and Articles 3 and 4 of the Statute are absolutely clear concerning the obligation of professional secrecy incumbent on all members of the institutions and all Community officials. The same applies in the area of the Community's contractual liability (Article 288 of the EC Treaty).

26. There is therefore no reason to amend Article 17 of the Staff Regulations. Nor is there any case for amending their Article 19, since there is no suggestion of removing the requirement of prior permission from the appointing authority before an official can testify before the Ombudsman, nor is the official 'disclos[ing] information' in the context of 'legal proceedings'. When the Ombudsman asks for a testimony, this should be considered a request for information of an oral and non-solemn nature, not requiring a declaration on oath, which, therefore, does not fall within the scope of Article 19 of the Staff Regulations.

27. While there is, then, no need to amend the Staff Regulations to achieve the objectives in question, it nonetheless remains the case that a subsequent codification of the new provisions would be desirable, and that such codification could usefully be appended to the Staff Regulations.

#### Proposal for amendment

28. The EP decision (94/262) concerning the regulations and general conditions governing the performance of the Ombudsman's duties was adopted, pursuant to Article 138e (now Article 195) of the EC Treaty, on 9 March 1994<sup>1</sup>.

29. The table below sets out, side by side: the provisions of the draft decision; the definitive text of the Statute; and the amendments proposed by the Ombudsman in 1999.

<b>Draft of 17 December 1992</b>	<b>Definitive Statute adopted in 1994</b>	<b>Amendments proposed by the Ombudsman in 1999</b>
The Community institutions and bodies shall be obliged to supply the Ombudsman with the information requested and give him access to the files concerned. <i>They may not refuse on the grounds of their duty of confidentiality.</i>	2. The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy.  They shall give access to documents originating in a Member State and classed as secret by law or regulation only	The Community institutions and bodies shall be obliged to supply the Ombudsman with any information that he has requested of them and <i>to allow him to inspect and take copies of any document or the contents of any data medium.</i>  They shall give access to documents originating in a Member State and classed as secret by law or regulation only

<sup>1</sup> OJ L 113, 4.5.1994, p. 15

<p>Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman.</p>	<p>where that Member State has given its prior agreement.</p> <p>They shall give access to other documents originating in a Member State after having informed the Member State concerned.</p> <p>In both cases, in accordance with Article 4, the Ombudsman may not divulge the content of such documents.</p> <p>Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman; they shall speak on behalf and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy.</p>	<p>where that Member State has given its prior agreement.</p> <p>They shall give access to other documents originating in a Member State after having informed the Member State concerned.</p> <p><i>The members and staff of Community institutions and bodies shall testify at the request of the Ombudsman. They shall give complete and truthful information.</i></p> <p><i>The Ombudsman and his staff shall not divulge any confidential information or documents obtained during the course of inquiries.</i></p>
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5 June 2001

## **OPINION OF THE COMMITTEE ON PETITIONS**

for the Committee on Constitutional Affairs

on the amendment of Article 3 of the regulation governing the performance of the Ombudsman's duties (1999/2215(ACI))

Draftsman: Luciana Sbarbati

## **PROCEDURE**

The Committee on Petitions appointed Luciana Sbarbati draftsman at its meeting of 21 June 2000.

It considered the draft opinion at its meetings of 22 March and 29 May 2001.

At the latter meeting it adopted the following conclusions unanimously.

The following took part in the vote: Roy Perry, vice-chairman and acting chairman; Proinsias De Rossa, acting chairman; Luciana Sbarbati, vice-chairman and draftsman; Mary Elizabeth Banotti (for Jonathan Evans), Alima Boumediene-Thiery (for Jean Lambert), Felipe Camisón Asensio, Janelly Fourtou, Laura González Álvarez, Margot Kessler, Guido Sacconi (for Herbert Bösch), Christian Ulrik von Boetticher and Eurig Wyn.

## SHORT JUSTIFICATION

### PRELIMINARY REMARKS

1. The Committee on Petitions has stressed on many occasions, inter alia when presenting the Ombudsman's Annual Reports, the importance it attaches to the activities of this office, which forms an integral part of the major institutional question of 'A People's Europe'. In the Esteban-Martin report on the subject, adopted by Parliament on 15 April 1999, the committee asked for the Committee on Constitutional Affairs to be allowed to examine the question of reinforcing Article 3 of the regulation governing the performance of the Ombudsman's duties, with special reference to inspection of documents and hearing witnesses.
2. The current holder of the office of Ombudsman, Mr Jacob Söderman, sent a letter dated 13 December 1999 to the President of the European Parliament in which he set out the substance of the changes he wished to see made to his powers of investigation. He has indicated very recently, in a note addressed to the rapporteur for the Committee on Constitutional Affairs and to your draftsman, that the obligation to give evidence before the Ombudsman was not to apply to members of the Community institutions, as he had initially very much wished it to.
3. Your draftsman welcomes this, because she takes the view that the European Parliament would in any case have been unable to follow the Ombudsman along this path without in some way calling into question its exclusive prerogatives in the exercise of political control over the Commission or opening a wider debate on the extent of the European Ombudsman's powers in the current institutional structure of the Community.
4. It is, furthermore, no coincidence that Commission Vice-President Mrs Loyola de Palacio, when heard by the Committee on Constitutional Affairs on 24 January 2001, expressed similar sentiments, albeit diplomatically and *mutatis mutandis*.
5. But the European Parliament cannot ignore the Ombudsman's call to adjust the extent and scope of Article 3 of the regulation governing the performance of the Ombudsman's duties in order to bring them into line with the changes that have taken place in the Community since its drafting and to meet the expectations of European public opinion. The principle of openness and closeness to the citizen is enshrined in the new Article 1 of the Treaty on European Union, where it is stated that '*decisions are taken as openly as possible and as closely as possible to the citizen*'.

6. It is the task of the European Parliament to amend the regulation governing the performance of the Ombudsman's duties in a procedure which calls for an opinion from the Commission and approval from the Council acting by qualified majority. It must therefore ensure that these amendments:
  - (a) are in keeping with the nature and the role of the European Ombudsman, who, together with the institution of the petition, acts on complaints submitted by European citizens,
  - (b) fit into a coherent overall legal framework,
  - (c) gain the consent of the Commission, with which Parliament has a special relationship,
  - (d) are able to be adopted without difficulty by the Council.
7. In the final analysis, Parliament must find the right balance between what is desirable and what it is possible to grant the Ombudsman; the opinion of the Commission, in its role as guardian of the Treaties, can be of use to it in this task. Your draftsman takes the view that this balance can easily be achieved by taking account of the following considerations:
  - (a) the Commission has set out resolutely along the route of transparency with the administrative reform undertaken by Vice-President Kinnock,
  - (b) the European Parliament is on the point of delivering its opinion on the introduction of a code of good administrative practice,
  - (c) last but not least, the principle of openness and closeness to the citizen is clearly spelt out in the Treaty on European Union.
8. The Committee on Petitions and your draftsman cannot but welcome the fact that the European Ombudsman has already interpreted his powers and exercised his investigative prerogatives in a progressive fashion without this having called forth any negative reaction from the Commission; the European Ombudsman and the Commission have testified in plenary sitting, as well as before the Committee on Constitutional Affairs and the Committee on Petitions, to the fact that relations between them have always been extremely correct. This means that there is ***no hurry*** and that we can therefore move without undue haste towards introducing the changes to Article 3 of the regulation governing the performance of the Ombudsman's duties as part of an overall, coherent whole.
9. Reinforcing Article 3 of the regulation, while it could bring with it a change in certain outdated Community legal provisions, such as the Staff Regulations, must also tie in with other provisions currently in the process of adoption, such as those concerning access to confidential documents; we would recommend this in the interests of complying with the principle of legal certainty.
10. Does this mean, in this particular case, that Article 19 of the Staff Regulations must be amended and the requirement of authorisation by the appointing authority abolished in advance? The European Parliament's Legal Service recommends this, and your draftsman is in favour of it, particularly as the Staff Regulations are currently - and not without conflict! - in the process of being reviewed. However, in the final analysis, this is something for the lawyers to decide!
11. What your draftsman must stress, and what the European Parliament must demand of

all the Community institutions is that their officials must, as of now, be allowed to give evidence before the Ombudsman unhindered, i.e. without any kind of authorisation or instruction. Establishing the facts and seeking truth must always be the prime considerations in a modern, open, transparent administration such as the Community's administration aspires to be.

12. The lawyers must set out *in black and white* the Ombudsman's powers of access to confidential documents in accordance with the rules on public access to sensitive documents, especially those originating in the Member States or in other international institutions. This question is the subject of an ongoing discussion in the various bodies concerned in the legislative procedure being undertaken in application of Article 225 of the EC Treaty.
13. Your draftsman takes the view that the Committee on Constitutional Affairs should also take account of the European Parliament, Council and Commission Decision of 19 April 1995, which set up a committee of inquiry. The latter decided that Community institutions and bodies should provide the committee of inquiry with *'the documents necessary for the performance of its duties, save where prevented from doing so by reasons of secrecy or public or national security arising out of national or Community legislation or rules'*.
14. Finally, it is clear that the obligation on the Ombudsman and his staff to maintain professional secrecy and respect the confidential nature of the documents to which they have access will stand; this rule has been rigorously observed in the past, and no-one doubts that it will continue to be in future.

## CONCLUSIONS

The Committee on Petitions calls on the Committee on Constitutional Affairs, as the committee responsible, to incorporate the following points in its motion for a resolution:

- (a) confirming the importance it attaches to the office of Ombudsman, who, in the words of Article 195(1) of the EC Treaty, is *'empowered to receive complaints from any citizen of the Union or any natural or legal person residing ... in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role'*;
- (b) recalling that it is incumbent upon Parliament to lay down - and hence to amend - the regulations and general conditions governing the performance of the Ombudsman's duties after seeking an opinion from the Commission and with the approval of the Council acting by qualified majority;
- (c) recalling that the European Ombudsman has expressed a wish, as part of his duties, for Article 3 of the regulations to be amended, with particular regard to inspection of documents and hearing of witnesses;
- (d) welcoming the fact that the Ombudsman has recently expressed the wish that only

officials and other servants of the Community Institutions and bodies should be obliged without any restriction to give evidence before him;

- (e) whereas the Treaty and the regulation governing the performance of the Ombudsman's duties already impose duties of confidentiality on the Ombudsman and his staff which require them to maintain the confidentiality of the information and documents of which they acquire knowledge in connection with their investigations;
  - (f) noting that the Ombudsman must have access to all information and all documents which he deems necessary for him in the performance of his duties,
  - (g) noting that the text on access to documents adopted by the European Parliament on 3 May 2001 declares that those rules are without prejudice to the right of access to documents of investigative bodies (Recital 16),
  - (h) noting the advice of the Committee of Independent Experts that officials and other servants be released from professional secrecy,
1. Notes that, on the basis of the provisions of the EC Treaty, there is no legal obstacle to the Ombudsman's obtaining access to any document drawn up by the Community institutions or bodies which he may need in the exercise of his vital task;
  2. Welcomes all the wishes expressed by the Ombudsman as regards the strengthening of the provisions of Article 3 of the regulation governing the performance of the Ombudsman's duties with a view to creating greater transparency in Community activities in the interests of the European citizen;
  3. Welcomes the fact that both the Ombudsman and the Commission have on every occasion provided Parliament and its bodies with total cooperation in the inquiries carried out by the Ombudsman on his own initiative or following complaints submitted by European citizens;
  4. Considers it necessary to amend Article 3 of the regulation governing the performance of the Ombudsman's duties as proposed by the Ombudsman in the letter dated 13 December 1999 to the President of the European Parliament.