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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7.5.2008  
SEC(2008) 1878 final

**COMMISSION OPINION**

**on the Draft Decision of the European Parliament adopted on 22 April 2008 amending its Decision 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties**

## EXPLANATORY MEMORANDUM

Article 195 of the Treaty establishing the European Community (EC Treaty) and Article 107 d Treaty establishing the European Atomic Energy Community (Euratom Treaty) stipulate that the regulations and the general conditions governing the performance of the Ombudsman's duties are laid down by the European Parliament. The European Parliament adopted a decision - known as the Statute of the Ombudsman – establishing such regulations and general conditions in March 1994<sup>1</sup> and amended it in 2002<sup>2</sup>.

In a letter dated 11 July 2006 to the European Parliament, the Ombudsman considered that the Statute continues to provide a good framework for his activities. However, he identified several possible changes that would help the Ombudsman to work more effectively, for the benefit of the European citizens. Consequently, he requested the European Parliament to amend Articles 1, 3, 4 and 5 of his Statute.

Some of the amendments suggested by the Ombudsman are purely technical, as they concern deleting the reference to the European Coal and Steel Community. Others are substantial and concern the right to intervene before the Court of Justice of the European Communities; the refusal of access to files on duly substantiated grounds of secrecy; the testimony from officials; the information concerning possible criminal activities; and the cooperation in the field of fundamental rights. By letter dated 6 March 2008, the Ombudsman indicated that he would withdraw his request to intervene in actions brought before of the Court of Justice of the European Communities.

At its plenary session of 22 April 2008, the European Parliament adopted seven amendments to the Statute of the Ombudsman, on the basis of the Ombudsman's requests.

By letter of 23 April 2008, Parliament requested the Commission, in accordance with Article 195(4) of the EC Treaty and Article 107d(4) of the Euratom Treaty, to give its opinion on these amendments.

The Commission can agree to the amendments relating to the European Coal and Steel Community, which are of purely formal nature. The Commission can also agree to the amendment relating to hearing of witnesses, which confirms the principle whereby officials do not speak on a personal basis but as officials and thus continue to be bound by the relevant provisions of the Staff Regulations, in particular the duty of professional secrecy.

With regard to the remaining amendments, the Commission submits the following observations:

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<sup>1</sup> Decision of the European Parliament 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and the general conditions governing the performance of the Ombudsman's duties, (OJ L 113, 4.5.1994, p. 15).

<sup>2</sup> Decision of the European Parliament of 14 March 2002 amending Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties (2002/262/EC, ECSC, Euratom) (OJ L 92, 9.4.2002, p. 13).

## Access to files

The Commission shares Parliament's concern for enhancing the citizen's confidence in the capacity of the Ombudsman to conduct thorough and impartial inquiries in alleged cases of maladministration. With this aim in view and considering the provisions on public access to documents held by the three Institutions<sup>3</sup> and the rules on security governing the treatment of classified information applicable to the Commission<sup>4</sup> and the Council<sup>5</sup>, a better definition of the conditions to be applied for access by the Ombudsman and his staff to sensitive and classified information is necessary.

With regard to classified documents, the Commission welcomes Parliament's proposal that the Ombudsman shall apply rules strictly equivalent to those in force in the institution or body concerned.

With regard to other information covered by the obligation of professional secrecy on the basis of rules of Community law affording such information specific protection, the Commission shares Parliament's concern regarding the need for the Ombudsman and his staff to treat requests from third parties for access to documents obtained in the course of inquiries in accordance with the conditions and limits provided for in Regulation 1049/2001, in particular Article 4 thereof.

The Commission also shares Parliament's view that the Ombudsman may agree with the institutions the operational conditions for access to information or documents.

Therefore, the Commission can agree with the aim of the amendments on access to documents, subject to a more precise wording as follows:

*Article 3(2), first subparagraph: 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. Access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, shall be subject to **the rules on security of the institution or body and to the** observance by the Ombudsman of rules strictly equivalent to those in force in the institution or body in question.*

*Article 4(1): The Ombudsman and his staff, to whom Article 287 of the Treaty establishing the European Community and Article 194 of the Treaty establishing the European Atomic Energy Community shall apply, shall be required not to divulge information or documents which they obtain in the course of their inquiries. They shall, **in particular** ~~also~~ be required not to divulge any classified information or any document supplied to the Ombudsman, **in particular** as sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, or as documents falling within the scope of the Community legislation regarding the protection of personal data, as well as any information which could harm the person lodging the complaint or any other person involved, without prejudice to paragraph 2.*

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<sup>3</sup> 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, (OJ L 145, 31.5.2001, p. 43).

<sup>4</sup> Commission Decision of 29 November 2001 amending its internal Rules of Procedure (2001/844/CE, CECA, -Euratom), (OJ L 317, 3.12.2001, p.1).

<sup>5</sup> Council Decision of 19 March 2001 adopting the security regulations of the Council (2001/264/CE), (OJ L 101, 11.4.2001, p.1).

*The Ombudsman and his staff shall deal with applications from third parties for access to documents obtained by the Ombudsman in the course of inquiries in accordance with the conditions and limits provided for in Regulation (EC) No 1049/2001, in particular Article 4 thereof.*

### **Information concerning possible criminal activity**

With regard to information concerning possible criminal activities about which the Ombudsman learns in the course of his enquiries, in the Ombudsman's view, the formulation of Article 4, paragraph 2 of the Statute might be interpreted as requiring the Ombudsman to act in a way that could hinder a European Anti-fraud office (OLAF) investigation within OLAF's mandate by having to bring it only to the attention of national authorities before OLAF itself is ready to do so.

The Commission agrees with Parliament that the Ombudsman should be able to notify OLAF of any information on matters within its remit. However, the Commission takes the view that the amendment proposed by Parliament does not necessarily meet this concern, since it is not clear that the notion of "competent institution or body" would cover OLAF. At the same time, it is already envisaged that the Ombudsman notifies the institution or body with authority over the official in the following sentence. Finally, OLAF should only be notified in matters within its competence.

In order to solve such potential problems, the Commission could agree to the following alternative wording, which specifies that the Ombudsman should immediately notify the competent national authorities via the Permanent Representations of the Member States or the Community service in charge of combating fraud, in cases falling within its mandate.

*Article 4(2): If, in the course of inquiries, he learns of facts which he considers might relate to criminal law, the Ombudsman shall immediately notify the competent national authorities via the Permanent Representations of the Member States to the European Communities **or the relevant service in charge of combating fraud, in cases falling within its mandate;** if appropriate, the Ombudsman shall also notify the Community institution or body with authority over the official or servant concerned, which may apply the second paragraph of Article 18 of the Protocol on the Privileges and Immunities of the European Communities. The Ombudsman may also inform the Community institution or body concerned of the facts calling into question the conduct of a member of their staff from a disciplinary point of view.*

### **Co-operation in the field of human rights**

The current statute has proved to be a good basis for the Ombudsman to cooperate with national ombudsmen and similar bodies in the Member States. The Commission fully encourages this practice. However, the Treaties have not granted the Ombudsman the competence to deal with human and fundamental rights in general.

Concerning Parliament's amendment on cooperation with national and international institutions for the promotion and protection of fundamental rights, the Commission therefore considers that this proposal goes beyond the mandate given to the Ombudsman by the Treaties.

According to Articles 302 and 303 of the EC Treaty, it is the Commission, as representative of the Community, which establishes all appropriate forms of cooperation with international organisations in general and with the Council of Europe in particular. It should also be noted that in 2007 an Agreement was concluded between the Community and the Council of Europe on co-operation between the European Union Agency for Fundamental Rights and the Council of Europe.

With this in mind, the Commission could, however, agree to an alternative wording, which would address the concerns expressed above, as follows:

*Article 5. The Ombudsman may, under the same conditions and within the scope of his functions as laid down in Article 195 of the Treaty establishing the European Community and Article 107 d of the Treaty establishing the European Atomic Energy Community, cooperate with institutions and bodies of Member States in charge of the promotion and protection of fundamental rights.*

In conclusion, it is proposed that the Commission adopts the following draft opinion.

### **COMMISSION OPINION**

**on the Draft Decision of the European Parliament adopted on 22 April 2008 amending its Decision 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties**

The Commission,

Having regard to Article 195(4) of the Treaty establishing the European Community and Article 107d(4) of the Treaty establishing the European Atomic Energy Community;

#### **HEREBY DELIVERS THE FOLLOWING OPINION**

The citizens must have confidence in the Ombudsman's capacity to conduct thorough and impartial inquiries in alleged cases of maladministration. The Ombudsman needs clear, concise and efficient rules. The Commission therefore broadly shares the principles adopted by the European Parliament subject to the following comments:

The Commission shares Parliament's concern for enhancing the citizen's confidence in the capacity of the Ombudsman to conduct thorough and impartial inquiries in alleged cases of maladministration. With this aim in view, and considering the rules on public access to documents of the three Institutions and of security governing the treatment of classified information applicable to the Commission and the Council, a better definition is necessary of the conditions applicable for having access to classified information and to other information covered by the obligation of professional secrecy.

The Commission also shares Parliament's concern regarding the need for the Ombudsman and his staff to treat requests from third parties for access to documents obtained in the course of inquiries in accordance with the conditions and limits provided for in Regulation 1049/2001, in particular Article 4 thereof.

Therefore, the Commission can agree with the aim of the amendments on access to files and documents. However, the Commission considers that an alternative and more precise wording is required.

Moreover, the Commission also shares Parliament's views according to which the Statute should include the possibility for the Ombudsman to notify the European Anti-Fraud Office (OLAF) of any information falling within its remit. However, the Commission would be in favour of an alternative and more precise wording.

The Commission can not agree with the amendment concerning the cooperation in the field of fundamental rights in its current form, but it would be open to a wording, which would not create the impression of widening the competence of the Ombudsman as defined in the Treaties or impinging on the Commission's institutional prerogatives.

The Commission can agree to the aim of the amendment relating to testimonies that confirms the principle whereby officials do not speak on a personal basis but as officials.

Finally, the amendments relating to the European Coal and Steel Community are of purely formal nature and do not give rise to any comments.