



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.3.2002  
COM (2002) 133 final

**COMMISSION OPINION**

**on amendments to the regulations and general conditions governing the performance of  
the Ombudsman's duties**

## **EXPLANATORY MEMORANDUM**

1. The establishment of the Ombudsman under the Maastricht Treaty on European Union is an important element of European citizenship and greater democratic control. The essential principles applying to the Ombudsman are set out in Article 195 of the Treaty which stipulates that the regulations and general conditions governing the performance of the Ombudsman's duties are to be adopted by decision of the European Parliament, which occurred with a Decision of 9 March 1994.<sup>1</sup>

2. In a letter dated 13 December 1999, the European Parliament received a request from the European Ombudsman aimed at amending the provisions concerning the Ombudsman's access to documents and the hearing of witnesses.

3. The Ombudsman has suggested three amendments to Article 3(2):

- removing the possibility of refusing to communicate a dossier to the Ombudsman "*on duly substantiated grounds of secrecy*";
- removing the indication that when officials give evidence to the Ombudsman they "*speak on behalf of and in accordance with instructions from their administrations and continue to be bound by their duty of professional secrecy*";
- inclusion of the members of the institutions and bodies in the category of persons who have to give evidence to the Ombudsman when so requested.

The Ombudsman has indicated, in a note dated 14 May 2001 to Mrs Almeida-Garett, rapporteur for the European Parliament's Constitutional Affairs Committee, that he would withdraw the latter request.

4. At its plenary session of 6 September 2001, Parliament acted on the first and second of the Ombudsman's requests.

It proposed to lift the secrecy exception for access to dossiers and remove the words "*on behalf of and in accordance with instructions from their administrations*" as regards evidence by officials.

The words "*shall continue to be bound by their duty of professional secrecy*" have been deleted and replaced by "*shall give complete and truthful information*".

5. Departing from the Ombudsman's proposals, Parliament proposes that in all cases where documents are classified as secret or confidential the Ombudsman cannot divulge their content.

6. In addition, with regard to access to documents coming from the Member States, the European Parliament went further than the Ombudsman's requests. In the case of classified documents Member States would simply be informed, whereas hitherto their authorisation was requested for documents classified as secret by a law or a regulation and they were simply informed in the case of other documents.

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<sup>1</sup> Decision 94/262/ECSC, EC, Euratom, OJ L 113 of 4 May 1994, p. 15.

7. The Commission shares Parliament's concern for more democracy and agrees with the need to bring citizens closer to Community affairs, as set out in the White Paper on European governance. Undoubtedly, with this aim in view, greater openness is desirable in the administrative decision-making process.

8. Moreover, the Charter of Fundamental Rights has enshrined the right to good administration, and transparency of decision-making processes is one of the principles underlying the reforms in progress. It is in this new context that Parliament's proposal to clarify the European Ombudsman's investigative powers should be considered.

In a letter dated 16 October 2001, Parliament requested the Commission, in accordance with Article 195(4) of the EC Treaty to give its opinion on these amendments.

### **Access to documents**

9. With regard to lifting the secrecy exception for access to a dossier, it should be noted that the Commission has never used this exception. Consequently, consideration might be given, acting on Parliament's proposal, to align the law on the *de facto* situation, even if it is clear that achieving transparency in relations with the Ombudsman has been possible in the framework of the current European legislation.

In addition, the Commission has no objection of principle to allowing the Ombudsman to consult or take a copy of any document. However in the practical application of this principle, caution should be exercised with regard in particular to requirements concerning the protection of privacy and business secrecy and future institutional developments.

10. In this connection, it is essential that the new rules should cover certain existing gaps: treatment of secret/confidential information or documents coming from international organisations or third countries, arrangements for transmitting documents covered by business secrecy and personal data. The Commission therefore approves the fact that Parliament has proposed to include in the rules governing the Ombudsman the principle whereby in all cases where documents are classified as secret or confidential the Ombudsman cannot divulge their content. It would also like to be able to maintain the current practice of reserving certain information for the exclusive attention of the Ombudsman.

The services of the European Ombudsman should nevertheless apply strictly equivalent security rules to those set out in the rules of procedure of the Council and the Commission.<sup>2</sup>

In particular, in order to be able to have access to documents, e.g. in the framework of judicial and of police cooperation in criminal matters, Commission staff are subject to a prior authorisation procedure. A similar authorisation should therefore be envisaged for staff of the Ombudsman's office who need to consult or take a copy of such documents.

11. With regard to documents coming from the Member States, it is important to remain consistent with the principles set out in the new European Parliament and Council Regulation 1049/2001 of 30 May 2001 on public access to documents<sup>3</sup> and in the framework agreement between the Commission and Parliament. The amendment proposed by Parliament

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<sup>2</sup> Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001, OJ L 317 of 3 December 2002, p. 1; Council Decision 2001/264/EC of 19 March 2001, OJ L 101 of 11 April 2001, p. 1.

<sup>3</sup> OJ L 145 of 31 May 2001, p. 33.

should be treated with reserve. The principle of obtaining the prior authorisation of the Member State in question is provided for in Article 4(5) of Regulation 1049/2001 and in Article 3(2) of Annex III to the framework agreement. Lastly, declaration 35 annexed to the Final Act of the Amsterdam Treaty also points in the same direction, as do the security provisions mentioned at the end of point 10.

### **Hearing of witnesses**

12. With regard to the giving of evidence, it should be pointed out that the current wording of Article 3 of the rules governing the Ombudsman is in accordance with Article 3(3) subparagraph 2 of the Decision of the European Parliament, the Council and the Commission of 19 April 1995 laying down the detailed provisions governing the exercise of Parliament's right of enquiry.<sup>4</sup> Parliament, like the Ombudsman, is now seeking to render more explicit the obtaining of authentic and complete evidence and seems to regard the obligation to give evidence under instructions as restricting this principle. The Commission can accept deleting the words in question subject to the following.

13. It is important to maintain in some way the principle whereby officials do not speak on a personal basis but as officials and hence supply the elements and clarifications of a dossier for which they are responsible within the administration. In giving their evidence, they remain at all events bound by the obligations deriving from the Staff Regulations of officials of the European Communities and Article 287 of the EC Treaty.

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

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<sup>4</sup> Decision 95/167/EC, Euratom, ECSC, OJ L 113 of 19 May 1995, p. 2.

## **COMMISSION OPINION**

### **on amendments to 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;

Having regard to the resolution of the European Parliament of 6 September 2001 on the amendment of Article 3 of the rules governing the Ombudsman,

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

The Commission very broadly shares the principles adopted by the European Parliament subject to the following comments:

1. With regard to the amendment suggested by Parliament concerning the lifting of secrecy for access to a dossier, it is necessary to comply with requirements concerning the protection of privacy, industrial secrets and classified information, and future institutional developments.

In this connection, it is essential that the new Article 3 should provide that, in all cases where documents are classified, the Ombudsman cannot divulge their content. It should also be specified that certain documents may be transmitted to the Ombudsman on condition that they are not communicated to third parties, or even the complainant, where they are such as to be detrimental to the smooth functioning of the institution. In addition, classified information of the European Union transmitted to the Ombudsman should be treated by the latter according to rules equivalent to those in force at the Council and at the Commission and, in particular, along the lines of what is provided for with regard to the officials of those institutions, provision should be made for authorisation for the staff of the Ombudsman's office who need to consult or take copies of documents.

With regard to documents coming from the Member States, it is necessary to be consistent with the principles set out in the new Regulation 1049/2001 of the European Parliament and the Council on public access to documents and in the framework agreement between the Commission and Parliament. The principle of obtaining prior authorisation from the Member State in question should be maintained. Declaration 35 annexed to the Final Act of the Amsterdam Treaty points in the same direction.

2. With regard to the giving of evidence, the Commission can accept the removal of the obligation to give evidence under instructions. However, it is important to maintain the principle whereby officials do not speak on a personal basis but as officials and therefore supply the elements and clarifications of a dossier for which they are responsible. At all events, they remain bound by the obligations deriving from the Staff Regulations of officials of the European Communities and Article 287 of the EC Treaty.