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'I' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)
No. prev. doc.:	13107/20
Subject:	Draft regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom - Mandate for negotiations with the European Parliament

1. On the 25 November 2020, COREPER endorsed a partial mandate for informal consultations with the European Parliament on a significant part of the latter's February 2019 proposal for a draft Regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom (doc. ST 7955/19).
2. On this basis, the Presidency resumed informal consultations with the European Parliament, in order to find solutions for a possible compromise text on which the Council would be in a position to give its consent in accordance with the special legislative procedure as laid down in Art. 228 (4) TFEU.
3. On 1 and 4 December 2020, the Working Party on General Affairs discussed the remaining part of the text (marked in the Annex to the "I" Note (doc. ST 13107/20) endorsed by

COREPER in 25 November 2020 as "under discussion") and reached an agreement on the remaining provisions.

4. It should be recalled that this way of proceeding is without prejudice to the approach which the Council might follow on other files which are subject to a special legislative procedure.

III. CONCLUSION

5. In order to bring the dossier forward, the Permanent Representatives Committee is invited to endorse the continuation of informal consultations with the European Parliament with regard to the proposed Regulation on the basis of the text in the Annex to this note.

Draft regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom

THE EUROPEAN PARLIAMENT,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 228(4) thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a(1) thereof,

After transmission of the draft legislative act to the national parliaments,

Having regard to the consent of the Council,

Having regard to the opinion of the Commission,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) *deleted*
- (2) *moved down to (3a)*
- (3) Decision 94/262/ECSC, EC, Euratom of the European Parliament¹ was lastly amended in 2008. Following the entry into force of the Treaty of Lisbon on 1 December 2009, Decision 94/262/ECSC, EC, Euratom, should be repealed and replaced by a Regulation adopted on the basis of Article 228(4) TFEU.

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

- (3a) Article 41 of the Charter of the Fundamental Rights of the European Union recognises the right to good administration as a fundamental right of European citizens. Article 43 of the Charter recognises the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices and agencies of the Union. In order for those rights to be effective and in order to enhance the capacity of the Ombudsman to conduct thorough and impartial inquiries, the Ombudsman should be provided with all the tools that are necessary to successfully perform the duties referred to in the Treaties and in this Regulation.
- (4) The establishment of the conditions under which a complaint may be referred to the Ombudsman should comply with the principle of full, free and easy access, with due regard to the specific restrictions induced by legal and administrative proceedings.
- (5) *deleted*
- (6) It is necessary to lay down the procedures to be followed where the Ombudsman's inquiries reveal cases of maladministration. A provision should also be made for the submission of a comprehensive report by the Ombudsman to the European Parliament at the end of each annual session.
- (7) In order to strengthen the Ombudsman's role and to promote best administrative practices within the Union institutions, bodies, offices and agencies, it is desirable to allow the Ombudsman, without prejudice to his primary duty, which is to handle complaints, to conduct, in line with the current practice, own-initiative inquiries whenever there are signs indicating the existence of repeated or particularly serious instances of maladministration.
- (8) The Ombudsman should be entitled, on his own initiative or following a complaint, to conduct inquiries following up previous inquiries so as to ascertain whether and to what extent the institution, body, office or agency concerned has complied with the recommendations put forward. The Ombudsman should also be entitled to include, in the his annual report to the European Parliament, an assessment of the rate of compliance with recommendations made.
- (9) The Ombudsman should have access to all elements required for the performance of his duties. To that end, Union institutions, bodies, offices and agencies should be obliged to supply the Ombudsman with any information that the Ombudsman requests of them. In this respect, it is necessary to lay down the conditions for access by the Ombudsman and his staff to EU classified information.

- (10) It should be provided that the Ombudsman and his staff are obliged to treat in confidence any information which they have acquired in the course of their duties, without prejudice to the Ombudsman's obligation to inform the competent authorities of facts which might relate to criminal law and have come to his attention in the course of an inquiry. The Ombudsman should also be able to inform the Union institution, body, office or agency concerned of the facts calling into question the conduct of a member of their staff.
- (11) Account should be taken of the establishment of the European Public Prosecutor's Office by Council Regulation (EU) 2017/1939², so as to allow the Ombudsman to notify it of any information falling within the latter's remit.
- (12) Where necessary for the effective exercise of his duties, the Ombudsman should be given the possibility to cooperate and exchange information with authorities in the Member States, in compliance with the applicable national, and Union law, and with EU Agencies and bodies in compliance with the applicable Union law.
- (13) The Ombudsman should be appointed by the European Parliament at the beginning of the parliamentary term and for the duration thereof. Conditions should also be laid down for the cessation of the Ombudsman's duties as well as for the replacement of the Ombudsman.
- (14) In order to guarantee the Ombudsman's independence in the performance of his duties, it should be provided that the Ombudsman is chosen from among persons who are Union citizens and who offer every requisite guarantee of independence and competence and that he gives a solemn undertaking before the Court of Justice when taking office. In that context, the incompatibilities, the remuneration, the privileges and the immunities of the Ombudsman should be laid down.
- (15) It should be specified that the seat of the Ombudsman and of his Secretariat should be that of the European Parliament as determined by letter (a) of Protocol (No 6) on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union.
- (15a) The Ombudsman should aim to achieve gender parity within the composition his secretariat.
- (16) It is for the Ombudsman to adopt the implementing provisions for this Regulation. In order to guarantee legal certainty and the highest standards in performing the Ombudsman's duties, the minimum content of the implementing provisions to be adopted should be established in this Regulation,

² Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ L 283, 31.10.2017, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter and principles

1. This Regulation lays down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman).
2. The Ombudsman shall be completely independent in the performance of his duties.
- 2a. In accordance with the principle of institutional balance reflected in Article 13(2) TEU and taking into account the administrative autonomy of the institutions, the Ombudsman shall exercise his duties with due regard for the powers and tasks of the institutions, bodies, offices or agencies which are subject to his inquiries.
3. In the performance of his duties, the Ombudsman may not bring an action before the Court of Justice in cases before courts nor question the soundness of a court's ruling or a court's competence to issue a ruling.

Article 1a

Scope of the Ombudsman's mandate

1. The Ombudsman shall help to uncover instances of maladministration in the activities of the Union institutions, bodies, offices and agencies.
2. "Instance of maladministration" shall mean any administrative decision or action taken, or failure to take such a decision or action, by a Union institution, body, office or agency, which violates the rights and the general principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, the codes of good administrative behaviour adopted by the Union institutions, bodies, offices or agencies, or the right of access to documents according to Article 15 (3) TFEU.
3. The Ombudsman's mandate shall not extend to:
 - political choices made by the Union institutions and bodies, in particular in the exercise of their legislative powers and in the organisation of the legislative process;
 - instances in which a Union institution, body, office or agency has not yet taken a final decision or adopted a final position, except in cases where there is a manifestly unreasonable delay to answer to a citizen's request or where a mandatory deadline set by Union law has not been respected and-without prejudice to the verification of interim measures adopted by the

competent authority of the institution, body, office or agency as provided by Article 2(5).

4. *deleted*

Article 2

Complaints

1. Any citizen of the Union or any natural or legal person residing or having its registered office in a Member State may, directly or through a Member of the European Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration falling within the Ombudsman's mandate as defined in Article 1a.
2. The complaint shall make clear reference to its object and to the identity of the complainant. The complainant may request that the complaint, or parts thereof, remain confidential.
3. A complaint shall be lodged within two years of the date on which the facts on which it is based came to the attention of the complainant and shall be preceded by the appropriate administrative approaches to the institutions, bodies, offices and agencies concerned.
4. The Ombudsman shall dismiss a complaint as inadmissible if it is outside his mandate, or if the procedural requirements laid down in paragraphs 2 and 3 are not fulfilled. Where a complaint is outside the Ombudsman's mandate, he may advise the complainant to address the complaint to another authority.
- 4a. If the Ombudsman finds that the complaint is manifestly unfounded, he shall close the file and inform the complainant and the institution, body, office or agency concerned thereof.
5. Complaints concerning employment relations between the Union institutions, bodies, offices and agencies and their staff shall be admissible only if the person concerned has exhausted all internal administrative procedures, in particular those referred to in Article 90 of the Staff Regulations³ and the competent authority of the institution, body, office or agency concerned has taken a decision or the time-limits for its reply have expired. The Ombudsman shall also be entitled to verify whether the interim measures adopted by the competent authority of the institution, body, office or agency concerned ensure adequate protection of alleged victims of harassment, after the alleged victim has exhausted the internal administrative procedures in relation to the interim measures.
6. The Ombudsman shall inform the institution, body, office or agency concerned as soon as a complaint registered by him has been declared admissible and the Ombudsman has decided to

³ Staff Regulations of Officials of the European Union, laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 (OJ L 56, 4.3.1968, p.1)

open an inquiry.

7. Complaints submitted to the Ombudsman shall not affect time-limits for appeals in administrative or judicial proceedings.
8. When the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any inquiries the Ombudsman has carried out up to that point shall be filed definitively.
9. The Ombudsman shall inform as soon as possible the complainant of the action taken on the complaint and, as far as possible, seek a solution with the institution, body, office or agency concerned to eliminate the instance of maladministration. The Ombudsman shall inform the complainant of the solution proposed along with the comments, if any, of the institution, body, office or agency concerned. The complainant may submit comments or provide, at any stage, additional information that was not known at the time of submission of the complaint. Where a solution accepted by the complainant and the institution, body, office or agency concerned has been found, the Ombudsman may close the file without pursuing the procedure provided for in Article 6.

Article 3

Inquiries

1. The Ombudsman may, on his own initiative based on signs indicating the existence of an instance of maladministration or following a complaint, conduct inquiries of instances of maladministration falling within his mandate as defined in Article 1a. These inquiries shall pursue one or several of the following purposes:
 - clarify any suspected instances of maladministration in the activities of Union institutions, bodies, offices and agencies;
 - examine, within a reasonable timeframe not exceeding one year, the measures taken by the institution, body, office or agency concerned to address an instance of maladministration which was established in a previous inquiry;
 - identify repeated or particularly serious instances of maladministration.
- 1a. The Ombudsman shall inform the institution, body, office or agency concerned in without undue delay of such inquiries. The institution, body, office or agency concerned may, on its own initiative or upon the Ombudsman's request, submit any useful comment or evidence.
2. *deleted*

3. *deleted*

Article 4

Access by the Ombudsman to information and documents

1. Subject to the conditions laid down in this Article, the Union institutions, bodies, offices and agencies shall supply the Ombudsman with any information he has requested and provide him with access to the files concerned.
2. Access by the Ombudsman and his staff to EU classified information shall be subject to compliance with the standards laid down in Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information.
3. The institution, body, office or agency concerned shall determine in advance the conditions under which it may share EU classified information held by it with the Ombudsman. Any arrangement concluded to this effect shall ensure that EU classified information may be shared with the Ombudsman if:
 - a) there is a justified need to know this information for the Ombudsman and his staff;
 - b) the originator has given its consent to share the EU classified information;
 - c) *deleted*
 - d) the Ombudsman has effectively put in place its internal security rules for protecting EU classified information, as well as physical and procedural measures which have been determined to be equivalent to those laid down in Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information.
4. *deleted*
5. In compliance with the conditions under the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union (2011/C 202/05), the competent authorities of the Member States may, at the request of the Ombudsman or on their own initiative, make accessible without undue delay to the Ombudsman EU classified information that may help to clarify instances of maladministration by Union institutions, bodies, offices or agencies.

- 5a. At the request of the Ombudsman or on their own initiative, and in so far as their national law allows, the competent authorities of the Member States may make accessible to the Ombudsman information or documents which may help to clarify instances of maladministration by Union institutions, bodies, offices or agencies and which are not EUCI but are covered by their national law on the protection of confidential information or by national provisions preventing their communication, provided that the Ombudsman undertakes to handle this information or document under the conditions set out by originating authority.
6. When a Union institution, body, office or agency or a Member State provides unclassified information or documents to the Ombudsman, it shall clearly identify any information it considers to be covered by the obligation of professional secrecy. The Ombudsman shall ensure adequate protection of such information and documents and shall not disclose any such information or document to the complainant or to the public without the prior agreement of the Union institution, body, office or agency or the Member State concerned. The Ombudsman shall retain possession of such information or documents only for so long as the inquiry is ongoing.
7. If the assistance requested by the Ombudsman is not forthcoming, the Ombudsman may inform the European Parliament, which may make appropriate representations.

Article 5

Hearing of officials and other servants

Officials and other servants of Union institutions, bodies, offices and agencies shall be heard, at the request of the Ombudsman, with regard to facts which relate to an ongoing inquiry by the Ombudsman. Article 17 and Article 19, first paragraph, of the Staff Regulations shall apply by analogy.

Article 6

Interaction between the Ombudsman and the institutions

1. Where, following an inquiry, the Ombudsman finds that there is reason to assume instance of maladministration, he shall inform, without undue delay, the institution, body, office or agency concerned of his findings and, where appropriate, make recommendations.

2. The institution, body, office or agency concerned shall send the Ombudsman a detailed opinion within three months. The Ombudsman may, upon a reasoned request of the institution, body, office or agency concerned, grant an extension of that deadline, which shall not exceed two months. When no opinion is delivered by the institution, body, office or agency concerned within the three month deadline or within the extended deadline, the Ombudsman may close the inquiry without such an opinion.
3. The Ombudsman shall then forward a report to the institution, body, office or agency concerned and, notably where the nature or the scale of the instance of maladministration uncovered so requires, to the European Parliament. The Ombudsman may make recommendations in the report. The complainant shall be informed by the Ombudsman of the outcome of the inquiry, of the opinion expressed by the institution, body, office or agency concerned and of any recommendations made in the report by the Ombudsman.
4. Where appropriate in relation to an inquiry into the activities of a Union institution, body, office or agency, the Ombudsman can be heard before the appropriate entity of the European Parliament, on the Ombudsman's own initiative or at the request of the European Parliament.
5. At the end of each annual session the Ombudsman shall submit to the European Parliament a report on the outcome of the inquiries that the Ombudsman carried out.

Article 7

Professional secrecy

1. The Ombudsman and his staff shall not divulge information or documents which they obtain in the course of their inquiries. Without prejudice to paragraph 2, they shall, in particular, not divulge any EU classified information or internal documents of the institutions supplied to the Ombudsman or documents falling within the scope of Union law regarding the protection of personal data, nor any information which could harm the rights of the complainant or any other person involved.
2. If the facts learnt in the course of an Ombudsman inquiry might constitute or relate to a criminal offence, the Ombudsman shall report to the competent national authorities and, in so far as the case falls within their respective competences, the European Anti-Fraud Office in accordance with Article 8 of Regulation 883/2013 and the European Public Prosecutor's Office, in accordance with Article 24 of Regulation 2017/1939.
3. The Ombudsman shall also notify the Union institution, body, office or agency concerned of the facts calling into question the conduct of a member of their staff.

Article 8

Cooperation and Communication with Member States' authorities, EU agencies and bodies

1. Where necessary for the effective performance of his duties, the Ombudsman may cooperate and, subject to Article 4, exchange information with authorities in the Member States, in compliance with the applicable national and Union law, and with EU Agencies and bodies in compliance with the applicable Union law.
2. Communication addressed to the national authorities of the Member States for the purposes of applying this Regulation shall be made through their Permanent Representations to the Union, except where the Permanent Representation concerned agrees that the Ombudsman's secretariat may directly contact the competent authorities of that Member State.

Article 9

Appointment of the Ombudsman

1. The Ombudsman shall be elected, and eligible for reappointment, in accordance with Article 228(2) of the TFEU and following a transparent and objective selection procedure.
2. Following a public vacancy announcement, the Ombudsman shall be chosen from among persons who:
 - are Union citizens,
 - have full civil and political rights,
 - offer every guarantee of independence and
 - meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledged competence and qualifications to undertake the duties of the Ombudsman, and
 - have not been members of national governments or members of Union's institutions within the past two years; persons who do not fulfil this condition are nevertheless eligible if it is established beyond any doubt in the selection procedure that they offer every guarantee of independence and that there is no risk of a conflict of interests.

Article 10

Cessation of the Ombudsman's duties

1. The Ombudsman shall cease to exercise the duties referred to in the Treaties and in this Regulation either at the end the term of office or upon resignation or dismissal.
2. Save in the event of dismissal, the Ombudsman shall remain in office until a new Ombudsman has been elected.
3. In the event of early cessation of duties, a new Ombudsman shall be appointed within three months of the office's falling vacant for the remainder of the term of office of the European Parliament. Until such time as a new Ombudsman has been elected, the principal officer referred to in Article 13(2) shall be responsible for urgent matters falling within the Ombudsman's remit.

Article 11

Dismissal

Where the European Parliament intends to request the dismissal of the Ombudsman in accordance with Article 228(2) of the TFEU, it shall hear the Ombudsman before making such a request.

Article 12

Exercise of the Ombudsman's duties

1. In the performance of the duties referred to in the Treaties and in this Regulation, the Ombudsman shall act in accordance with Article 228(3) TFEU. The Ombudsman shall refrain from any act incompatible with the nature of the said duties
2. When taking up office, the Ombudsman shall give a solemn undertaking before the Court of Justice [sitting as a full Court] that he will perform the duties referred to in the Treaties and in this Regulation with complete independence and impartiality and that he will respect the obligations arising therefrom during and after his term of office. The solemn undertaking shall in particular include the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits after the end of the term of office.
3. During the Ombudsman's term of office, the Ombudsman may not engage in any other political or administrative duties, or any other occupation, whether gainful or not.

Article 13

Remuneration, privileges and immunities

1. The Ombudsman shall have the same rank in terms of remuneration, allowances and pension as a judge at the Court of Justice.
2. Articles 11 to 14 and Article 17 of Protocol No 7 shall apply to the Ombudsman and to the officials and other servants of the Ombudsman's secretariat.

Article 14

Secretariat of the Ombudsman

1. *deleted*
2. The Ombudsman shall be assisted by a secretariat located at his seat.
3. *deleted*
4. The officials and other servants of the Ombudsman's secretariat shall be subject to the Staff Regulations and the Conditions of Employment of other servants of the European Union. Their number shall be adopted each year as part of the budgetary procedure.
5. Where officials and other servants of the Union are seconded to the Ombudsman's secretariat, this secondment shall be considered as a secondment in the interests of the service in accordance with Article 37, first paragraph, letter (a), and Article 38 of the Staff Regulations.
6. *deleted*

Article 15

Seat of the Ombudsman

The seat of the Ombudsman shall be that of the European Parliament as determined by letter (a) of Protocol (No 6) on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union.

Article 16

Communication with Member States' authorities

deleted due to the merge with Article 8

Article 17

Implementing provisions

The Ombudsman shall adopt the implementing provisions for this Regulation, after consultation of the European Parliament, the Council and the Commission. These shall be in accordance with this Regulation and include at least provisions on:

- (a) procedural rights of the complainant and the institution, body, office or agency concerned ;
- (b) *deleted*
- (c) receipt, processing and closure of a complaint;
- (d) own-initiative inquiries;
- (e) follow-up inquiries; and
- (f) actions of information and communication.

Article 18

Final provisions

1. Decision 94/262/ECSC, EC, Euratom is repealed.
2. This Regulation shall enter into force on the first day of the month following that of its publication in the *Official Journal of the European Union*.
3. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at ...

*For the European Parliament
The President*