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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION OPINION on 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

Delegations will find attached document COM(2019) 533 final.

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COMMISSION OPINION

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On 25 March 2019 and in accordance with Article 228(4) of the Treaty on the Functioning of the European Union (TFEU), the European Parliament sent a letter to the European Commission seeking its opinion on a draft Regulation of the European Parliament, adopted at its plenary session on 12 February 2019, 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 Commission welcomes the draft regulation, which reviews the Ombudsman's Statute for the first time since the entry into force of the Lisbon Treaty. Many of the proposed amendments consolidate current practice or introduce improvements. However, the Commission does not agree with some of the amendments and/or wishes to comment on certain aspects (see below).

RECITAL 5 - RECOMMENDATIONS ON THE APPLICATION OF COURT RULINGS

Recital 5 of the draft Regulation states that the Ombudsman 'has the right to make recommendations where the Ombudsman finds that a Union institution, body, office or agency is not properly applying a court ruling'.

The Commission does <u>not</u> agree with this proposal for the following reasons:

(1) There is no legal basis in the EU Treaties for the Ombudsman to assess the application of a court ruling. The Treaties contain a comprehensive system of legal remedies to ensure that the institutions apply court rulings properly. More specifically, Article 266 TFEU provides that 'the institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgement of the Court of Justice of the European Union'. The institutions make every effort to comply with this obligation, which is a cornerstone of the Union's judicial system. The Commission recalls that, should the concerned party not be satisfied with the measures taken, it can bring proceedings under Article 263 TFEU, and should the institution fail to act, the concerned party could, under certain conditions, act under Article 265 TFEU. In addition, that party can lodge an action to ask for compensation for damages under Article 340 TFEU. Therefore, while the Ombudsman can take account of a judgement of the Court of Justice when assessing the activities of an institution in the course of an inquiry, the assessment of the application of Court rulings as such goes beyond its mandate.

(2) The recital is not compatible with the second subparagraph of Article 228(1) TFEU, which provides for the Ombudsman to conduct inquiries 'except where the alleged facts are or have been the subject of legal proceedings'. As the Court has stated, in the institution of the Ombudsman, the Treaty has given citizens an alternative remedy to that of an action before a Union court in order to protect their interests and it is clear

that the two remedies cannot be pursued at the same time.[1] This situation is reflected in Article 1(3) of the current Statute, which clearly states that 'the Ombudsman may not intervene in cases before Courts or question the soundness of a Court's ruling', and is retained, with a more precise formulation, in the proposed Statute, with the addition that the Ombudsman may not question a court's competence to issue a ruling. In order to make recommendations to the institutions with regard to the follow-up of a specific ruling, the Ombudsman would have to interpret the ruling. However, this is the competence of the Court. If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein (Article 43 of Protocol No 3 on the Statute of the Court of Justice of the European Union).

(3) Under Article 228(1) TFEU, the Ombudsman is not empowered to conduct inquiries concerning instances of maladministration relating to the Court of Justice 'in its judicial role'. The proposed recital would, in a sense, circumvent this prohibition *ex post* by enabling the Ombudsman to interpret rulings and comment on their implementation, while this is the exclusive competence of the courts.

ARTICLE 2(2) - COMPLIANCE WITH DATA PROTECTION RULES

Article 2(2) requires the Ombudsman to inform Union institutions, bodies, offices or agencies of complaints, while respecting the EU personal data protection provisions.

The Commission agrees with this proposal, as it emphasises correctly that the Ombudsman is also bound by the EU data protection rules.

ARTICLE 2(4) - EXTENSION OF THE DEADLINE LODGING OF A COMPLAINT

Article 2(4) provides that '[a] complaint shall be made within three 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.'

The Commission does <u>not</u> agree with this proposal for the following reason:

The current 2-year period does not seem to have raised any problems and there is no concrete justification for extending this period with another year. In addition, the more time elapses, the more difficult it is for the administration to address the issue raised. The proposal is therefore neither in the administrations' nor in the citizens' interest.

ARTICLE 3(8) - EXTENSION OF THE DEADLINE FOR THE COMMISSION OPINION

Article 3(8) provides that: '[w]here instances of maladministration have been found following an inquiry, the Ombudsman shall inform the institution, body, office or agency concerned, where appropriate making recommendations. The institution, body, office or agency so informed 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.'

[1] Case T-209/00 *Lamberts v. European Ombudsman*, EU:T:2002:94, paragraphs 65 and 66 as confirmed by the ECJ on appeal in case C-234/02 P, EU:C:2004:174.

The Commission agrees with this proposal, as it reflects existing practice:

– The current rule is that, where the Ombudsman issues recommendations in the context of a decision of maladministration, the Commission has to reply within 3 months. In theory, no extension can be granted, but in practice, two 1-month extensions can usually be obtained at the Commission's request. The proposed text reflects this practice.

– The provision that an extension of the deadline must be based on a reasoned request and that if no opinion is delivered the Ombudsman may close the inquiry without such an opinion also reflects existing practice.

NEW PROVISIONS ON HARASSMENT CASES (MORAL AND SEXUAL)

- Article 14, first paragraph, provides that: '[t]he Ombudsman shall assess the procedures in place to prevent harassment of any kind and nature within the Union institutions, bodies, offices and agencies, as well as the mechanisms to penalise those responsible of harassment. The Ombudsman shall draw up appropriate conclusions as to whether those procedures are consistent with the principles of proportionality, adequacy and energetic action, and whether they provide victims with effective protection and support';
- Article 14, second paragraph, provides that: '[t]he Ombudsman shall examine in a timely manner whether the Union institutions, bodies, offices and agencies adequately handle harassment cases of any kind and nature by correctly applying the procedures provided for in connection with complaints in that field. The Ombudsman shall draw up appropriate conclusions on the subject';
- Article 14, third paragraph, provides that: '[t]he Ombudsman shall within the secretariat appoint a person or structure with expertise in the field of harassment able to assess in a timely manner whether harassment cases of any kind and nature, including sexual harassment, are handled adequately within the Union institutions, bodies, offices and agencies and, where appropriate, to provide advice to their officials and other servants.'

The Commission does <u>not</u> agree with these proposals for the following reasons:

(1) The Ombudsman already has some of the envisaged powers:

– The Ombudsman can already conduct inquiries on the basis of complaints or on its own initiative. This is sufficient to deal with cases of maladministration in relation to any field, including harassment. There is thus no need to introduce explicit provisions on harassment in the Ombudsman's Statute. Moreover, there is no legal basis to introduce specific provisions on harassment in the Ombudsman's Statute, since neither Article 228 TFEU nor the EU Staff Regulations (Article 12a) provide for a specific power of the Ombudsman in this regard. Had the legislator wished to give such powers to the Ombudsman, it would have included them in the Staff Regulations.

(2) Provisions on harassment and its consequences already exist in the Staff Regulations, and both the Staff Regulations and the relevant case-law defining the concept must be taken into account:

– The text envisages assessment of the 'mechanisms to penalise those responsible for harassment'. Pursuant to Article 86 of the Staff Regulations, those matters are dealt with by means of disciplinary

proceedings conducted in accordance with Annex IX to the Staff Regulations. Since institutions are bound to follow the procedures in the Staff Regulations, it is not clear what the Ombudsman's assessment would focus on. Even if the Ombudsman concluded that the mechanisms were inadequate, this would not constitute maladministration, as the institutions would merely be complying with a legislative act.

– The proposal does not take account of the legal issues linked with Article 12 of the Staff Regulations, in particular the abundant case-law on the definition of harassment. Findings of harassment have significant consequences for the complainant and the alleged harasser. They must be embodied in a decision that is subject to judicial review; a recommendation cannot be subject to legal review and is not legally enforceable.

(3) Given the existing provisions, there is a risk of duplication and side effects:

– In the Commission, provided there is a *prima facie* evidence (*'beginning of proof'*), the Investigations and Disciplinary Office of the Commission (IDOC) can launch an administrative inquiry into the allegations of harassment. The other institutions have similar procedures. As it currently stands, the provision does not rule out duplication of work, especially as the proposed Article 2(8) does not require that a request or complaint be made under the Staff Regulations. The proposal would thus lead to duplication of existing structures in the institutions (see, in particular, the Commission's manual of procedures and the role of *'confidential counsellors'*). The Executive Agencies also refer, through a Service-Level Agreement between them and the Directorate-General for Human Resources any harassment case to the IDOC.

– In addition, the proposed amendment could have a negative side effect by cutting staff members' access to legal remedies under the Staff Regulations. If they opted for a complaint to the Ombudsman, they would not be able to go to the Court pursuant to Article 91(2) of the Staff Regulations. Indeed, Article 270 TFEU provides that 'the Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union'.

(4) Some of these provisions do not fall within the Ombudsman's remit:

– Article 228(1) TFEU provides that the Ombudsman's mandate is to investigate possible 'instances of maladministration in the activities of the Union institutions, bodies, offices or agencies'. If an institution has acted (or failed to act) in violation of applicable administrative rules, this may constitute maladministration and hence fall within the Ombudsman's mandate. However, this is the case only if the alleged facts are imputable to an institution, either because it has acted in such a way that caused those circumstances to come about or because it failed to act on the matter. This corresponds to the current Article 2(4) of the Ombudsman's Statute, the text of which remains the same on that aspect in the proposal and provides that, before turning to the Ombudsman, citizens must have contacted the institutions on the same issue and have either received a

reply with which they disagree or not received any reply within a reasonable time-period.

– The Ombudsman's mandate does not include a permanent assessment of policies and procedures in general. The Ombudsman is not a body for permanent scrutiny or oversight of a specific activity of the institutions. The Ombudsman has horizontal competences across all fields where instances of maladministration are identified.

– The Ombudsman's mandate and role as laid down in Article 228(1) TFEU, which is a general mandate and not a mandate specific to certain areas of law like harassment, is to investigate instances of maladministration and hence to examine complaints and conduct inquiries, not to provide advice to staff members of other institutions. Providing advice on a specific case would hamper the Ombudsman's impartiality and capacity to maintain an unbiased view of the situation: if the Ombudsman had given advice to a staff member in a case that is subsequently referred to the Ombudsman by means of a complaint, the Ombudsman could be faced with a conflict of interest.

– The proposal would raise expectations that the Ombudsman would not be able to fulfil, since effective action can be taken only by the institution within the procedures established by the Staff Regulations providing for the rights and obligations of staff members.

(5) There is an overall problem of method and process:

– It is difficult to see how the Ombudsman could be aware of all harassment cases if they are not brought to the Ombudsman's attention via a complaint. As it currently stands, the provision seems to imply that the Ombudsman should review (possibly on its own initiative) all harassment cases (i.e. not just sexual harassment cases) handled by any EU institution, in a *'timely manner'*.

– The Ombudsman should always make recommendations on the basis of inquiries after having given the institution the opportunity to submit observations. Recommendations or conclusions outside those procedures would neglect the right of the institution to make its views known and would be based on incomplete information.

(6) Some other provisions are unclear:

– does Article 14, second paragraph, refer to all cases or only to those handled by the institutions?

– what is meant by *'conclusions'* (Article 14, first paragraph)?

– what is meant by the principles of *'adequacy'* and, especially, of *'energetic action'* (Article 14, first paragraph)?

NEW PROVISIONS ON SEXUAL HARASSMENT CASES

- Article 2(8) provides that '[w]ith the exception of complaints relating to sexual harassment cases, no complaint may be made to the Ombudsman that concerns work relationships between the Union institutions, bodies, offices and agencies and their officials and other servants unless all the possibilities for the submission of internal

administrative requests and complaints, in particular the procedures referred to in Article 90 of the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the Union, laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68[2] ('the Staff Regulations'), have been exhausted by the person concerned and the time-limits for replies by the institution, body, office or agency concerned have expired.'

- As indicated above, Article 14, third paragraph, provides that '[t]he Ombudsman shall within the secretariat appoint a person or designate a structure with expertise in the field of harassment able to assess in a timely manner whether harassment cases of any kind and nature, including sexual harassment, are handled adequately within the Union institutions, bodies, offices and agencies and, where appropriate, to provide advice to their officials and other servants.'

The Commission does <u>not</u> agree with these proposals and recommends the deletion of 'with the exception of complaints relating to sexual harassment cases' from Article 2(8) for the reasons listed below:

Whilst the above comments related to harassment cases also apply to sexual harassment, the Commission has specific concerns about distinguishing that form of harassment as proposed in the draft Regulation:

(1) The proposed Regulation (in particular Article 2(8)) attempts to extend the Ombudsman's mandate beyond the remit enshrined in the Treaties. In sexual harassment cases, were these new provisions to be adopted, staff members would no longer need to make a request under Article 24 or 90(1) of the Staff Regulations, or lodge a complaint pursuant to Article 90(2), before turning to the Ombudsman, which is the current procedure. However, it is obvious that, should the complainant not first have to exhaust the internal procedures, the relevant institution could not be held responsible for failing to adopt appropriate measures, as it would not have had a chance to address the situation. Until the institution has been made aware of the situation and failed to address it, sexual harassment is attributable only to the staff member in question. The institution cannot be responsible for failing to act unless it has been informed of the situation and given the opportunity to address it.

(2) In the context of a sexual harassment complaint, as in all other cases referred to in draft Article 2(8), the institution should have the opportunity to assess the case before any potential referral to the Ombudsman. As reflected in recital 2 and Article 2(1) of the proposal, the Ombudsman's role is to help uncover maladministration in the activities of the Union institutions, bodies, offices and agencies. Accordingly, the institutions should be able to assess and deal with the case, including a sexual harassment case, before the Ombudsman examines whether it has dealt with it appropriately and whether there is maladministration.

(3) The proposal does not take into account the existence of a wide range of tools in the Staff Regulations and of other measures adopted by the institutions in this framework, e.g. actions by the Commission's Directorate-General for Human Resources to combat sexual harassment (for example, Commission Decision C(2006)1624/3 of 26 April 2006).

[2] OJ L 56, 4.3.1968, p. 1.

(4) While the differences between moral and sexual harassment are obvious, it is not appropriate to distinguish between them in this context. Article 12 of the Staff Regulations does not provide for such distinction with regard to the rights and obligations of staff since both forms of harassment can be extremely harmful.

(5) The points on harassment cases (previous section) also apply to sexual harassment cases, particularly as regards:

(1) the need to reflect the abundant case-law on the definition of harassment (point 2);

(2) duplication of existing structures (point 3);

(3) advice to staff members (point 4, second indent);

(4) raising expectations (point 4, third indent).

- Article 17 provides that: 'the Ombudsman shall adopt the implementing provisions for this Regulation. 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) ensuring the protection of officials or other servants reporting cases of sexual harassment and of breaches of Union law within the institutions, bodies, offices or agencies of the Union, in accordance with Article 22a of the Staff Regulations ('whistleblowing'); [..].'

The Commission does <u>not</u> agree with this proposal for the following reasons:

(1) Subparagraph b) should be deleted since the Ombudsman has no specific competence on sexual harassment and the administrative procedures should be exhausted beforehand.

(2) As regards the additional procedural safeguards in the context of sexual harassment complaints, the Staff Regulations do not distinguish between different types of harassment. Therefore, the same safeguards should be afforded to staff members making allegations of any type of harassment, and not just sexual harassment.

NEW PROVISIONS ON WHISTLEBLOWING

- Article 5, first <u>paragraph</u>, first sentence, provides that: '[t]he Ombudsman shall conduct regular assessments of the policies and reviews of the procedures in place in the relevant Union institutions, bodies and agencies in accordance with Article 22 of the Staff Regulations ('whistleblowing') and shall, where appropriate, make concrete recommendations for improvement with a view to ensuring full protection for officials and other servants reporting facts in accordance with Article 22a of the Staff Regulations.'

The Commission does <u>not</u> agree with this proposal for the following reason:

The Ombudsman is not a body for permanent and regular scrutiny or oversight of specific activities of other institutions. The Ombudsman may deal with these issues on the basis of complaints or on the basis of its powers to launch own-initiative inquiries, but only in the context of possible instances of maladministration. The Ombudsman's mandate does not include the assessment of policies and procedures in general.

- Article 5, first paragraph second sentence, of the draft Regulation provides that: '[t]he Ombudsman may, upon request, provide in confidence information, impartial advice and expert guidance to officials or other servants on the proper conduct to take in the presence of facts referred to in Article 22a of the Staff Regulations, including on the scope of the relevant provisions of Union's law';

  and Article 5, second indent, provides that '[t]he Ombudsman may also open **inquiries** based on the information provided by officials or other servants reporting facts in accordance with Article 22a of the Staff Regulations, who may report in confidence and anonymously, where the facts described could constitute maladministration in a Union institution, body, office and agency. In order to enable this purpose, applicable staff regulations regarding secrecy may be waived.'

  The Commission does not agree with these proposals for the following reasons:

  (1) The Ombudsman's mandate is to investigate instances of maladministration, not to provide advice to staff members of the institutions, let alone in a confidential way. Providing advice on a specific case will hamper the Ombudsman's impartiality and capacity to maintain an unbiased view of the situation: if the Ombudsman has given advice to a staff member on a matter that later becomes the subject of an inquiry by the Ombudsman, it could be faced with a conflict of interest.

  (2) The reference made to Article 22a of the Staff Regulations is not in line with the Treaties. The Staff Regulations set out a comprehensive system for whistleblowing and officials' duty to inform their institution or OLAF. The Ombudsman's Statute is based on Article 228 TFEU and cannot change rights and obligations of staff, which are established through a different legislative procedure based on Article 336 TFEU. Article 22b of the Staff Regulations provides that a staff member may inform the Ombudsman only after having informed one of the persons or bodies listed in Article 22a. Thus, in order to maintain consistency and legal certainty, reference should be made only to Article 22b, so that staff members can be in no doubt as to the procedure to be followed.

  (3) The reference to the waiving of professional secrecy should be deleted. If a staff member turns to the Ombudsman pursuant to Article 22b of the Staff Regulations, there is no need to ask for his/her duty of professional secrecy to be waived. With regard to other staff members, an inquiry launched on the basis of a complaint by a staff member pursuant to Article 22b of the Staff Regulations should follow the same rules and procedures as any other Ombudsman's inquiry. There is no need for a specific provision.

  As mentioned above, the Commission does not agree with Article 17 (a) and (b) of the draft Regulation insofar as it also encompasses whistleblowing (see reasons above).

EXPLICIT REFERENCE TO STRATEGIC INQUIRIES

Article 3(2) provides that '[w]ithout prejudice to the primary duty of the Ombudsman, which is to handle complaints, the Ombudsman may conduct own-initiative inquiries of a more strategic nature in order to identify repeated or particularly serious instances of maladministration, to promote best administrative practices within the Union institutions, bodies, offices and agencies and to proactively address structural issues of public interest falling within the Ombudsman's remit' (see also recital 7)

The Commission agrees with these proposals as long as the Ombudsman acts within the limits of its mandate, i.e. maladministration.

STRUCTURED DIALOGUE AND PUBLIC CONSULTATIONS

Article 3(3) provides that '[t]he Ombudsman may engage in structured and regular dialogue with the Union institutions, bodies, offices and agencies and organise public consultations before providing recommendations or at any stage thereafter. The Ombudsman may as well systematically analyse and assess the progress of the institution body, office or agency concerned, and issue further recommendations'.'

The Commission agrees in part with this proposal:

(1) On the 'structured and regular dialogue', the Commission agrees on the principle, bearing in mind that this already takes place. The Ombudsman stressed in her 2018 annual report that she was 'grateful to the EU institutions, agencies and bodies for their cooperation in [this] work'[3] and regularly welcomed the Commission's responses. In 2017, the Commission complied with 76% of the Ombudsman's solution proposals, recommendations, and suggestions. That said, the dialogue would have to take place within a commonly agreed and workable framework.

(2) On the matter of the Ombudsman organising public consultations 'before providing recommendations or at any stage thereafter', the Commission can partly agree. It has no objection on the principle. The Ombudsman may be able to organise public consultations and has the flexibility to do so where relevant, as is already the case. That said, the Ombudsman is not a decision-maker, so the role of such consultations 'before providing recommendations' and even 'at any stage thereafter' is unclear and might raise public expectations as to the Ombudsman's capacity to initiate new policies or modify existing ones. In preparing its recommendations, the Ombudsman has full autonomy to assess whether EU institutions and bodies act according to the principles of good administration. It may be useful to draw up specific criteria for cases where public consultations are expected and for what purpose. In addition, it must be clear that public consultations should be strictly excluded in the context of individual cases, particularly for reasons of data protection.

(3) The Commission suggests that the word 'systematically' be deleted. The term 'may' already gives the Ombudsman the necessary flexibility to assess progress where it so wishes.

NEW PROVISIONS ON ACCESS TO DOCUMENTS

- Article 3(4) provides that '[t]he Union institutions, bodies, offices and agencies shall supply the Ombudsman with any information the Ombudsman has requested from them and provide the Ombudsman with access to the files concerned. Access to classified information or documents shall be subject to compliance with the rules on the processing of confidential information by the Union institution, body, office or agency concerned.

  The institutions, bodies, offices or agencies supplying classified information or documents in accordance with the first subparagraph shall inform the Ombudsman of such classification in advance.

[3] https://www.ombudsman.europa.eu/en/annual/en/113728

For the implementation of the rules provided for in the first subparagraph, the Ombudsman shall have agreed in advance with the institution, body, office or agency concerned the conditions for treatment of classified information or documents.

The institutions, bodies, offices or agencies concerned shall give access to documents originating in a Member State and classified as secret by law only after the Ombudsman's services have put in place appropriate measures and safeguards for handling the documents that ensure an equivalent level of confidentiality, in line with Article 9 of Regulation (EC) No 1049/2001 and in compliance with the rules on security of the Union institution, body, office or agency concerned.' (See also recital 9)

The Commission does <u>not</u> agree with this proposal for the following reasons:

First, the (new) last paragraph of this provision is unclear and only refers to some parts of Article 9 of Regulation (EC) No 1049/2001. Indeed, although this new paragraph refers to *'*access to documents originating in a Member State and classified as secret', it seems to omit several parts of Article 9, which provides that: '[s]ensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters'.

Second, such measures should apply to the handling of all classified documents. It is thus not clear why this provision refers to arrangements to be put in place only for secret documents. Article 9(3) of Regulation (EC) No 1049/2001 provides that '[s]ensitive documents shall be recorded in the register or released only with the consent of the originator'. It is not clear why only the Member States are mentioned and other originators, e.g. non-EU countries and international organisations, are excluded.

Finally, it is not clear if the provision refers to public access to such documents or to their transmission to the Ombudsman.

The Commission proposes the following alternative text to the first paragraph of Article 3(4):

'The institutions, bodies, offices or agencies concerned shall transmit to the Ombudsman classified documents originating from them or from Member States, third countries or international organisations only after the Ombudsman's services have put in place appropriate measures and safeguards for handling classified documents, in line with Article 9 of Regulation (EC) No 1049/2001 and in compliance with the rules on security of the Union institution, body, office or agency concerned.'

- Furthermore, the Commission suggests integrating the current Article 4(8) of the Ombudsman's Implementing Provisions directly into the text of the Statute at the end of the second paragraph of Article 3(4), in order to ensure proper identification and handling of confidential information.

The Commission proposes the following text:

'When an institution or a Member State provides information or documents to the Ombudsman, they shall clearly identify any information they consider to be

confidential. The Ombudsman will not disclose any such confidential information, either to the complainant or to the public, without the prior agreement of the institution or the Member State concerned.'

- Article 4 provides that '[t]he Ombudsman and the Ombudsman's staff shall deal with requests for public access to documents, other than those referred to in Article 6(1), in accordance with the conditions and limits provided for in Regulation (EC) No 1049/2001.

  With regard to complaints on the right of public access to official documents drawn up or received by a Union institution, body, office or agency, the Ombudsman shall, after due analysis and all necessary consideration, issue a recommendation concerning the access to those documents. The institution, body, office or agency concerned shall respond within the timeframes provided by Regulation (EC) No 1049/2001. If the institution, body, office or agency concerned does not follow a recommendation from the Ombudsman to give access to documents, it shall duly state the reasons for its refusal. In such a case, the Ombudsman shall inform the complainant about the legal remedies available, including the procedures available to refer the case to the Court of Justice of the European Union.'

The Commission does <u>not</u> agree with this proposal for the following reasons:

(1) As regards the procedure:

- the institution concerned would have to respond to the Ombudsman's recommendation. However, an Ombudsman's recommendation is not and cannot be equivalent to, or treated as, a new request for access;

- in addition, it appears that, if the institution refuses to follow the recommendation, it would be obliged to adopt a decision, which could give the applicant a new opportunity to bring a case before the EU courts. This is not compatible with the second paragraph of Article 228(1) TFEU ('Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries'). It is also not in line with Article 2(6) of the Ombudsman's Statute, under which a complaint submitted to the Ombudsman does not affect the time limits for appeals in judicial proceedings.

(2) As regards the substance:

- the proposal provides that 'with regard to complaints on the right of public access to official documents drawn up or received by a Union institution [..], the Ombudsman shall, after due analysis and all necessary consideration, issue a recommendation concerning the access to those documents'. It is unclear whether this means that:

- where the Commission is not unable to process a request within the legal deadlines, the Ombudsman is to issue a recommendation on that procedural irregularity exclusively; or

– the Ombudsman will be allowed to make its own assessment on the merits of the request for access while the Commission is still assessing the confirmatory application.

  Interpretation (b) would not be acceptable – until a confirmatory decision has been adopted, there can be no maladministration on the substance;

– the proposal provides for the Ombudsman to inform the complainant about the 'legal remedies, including court actions' where the institution 'does not follow a recommendation'. This would render recommendations compulsory and generate new deadlines for introducing court actions, which is not possible given that, as indicated above, the Ombudsman gives the citizen an alternative remedy to that of a Union court, and both remedies cannot be pursued at the same time.

The Commission proposes the following alternative text to Article 4:

'The Ombudsman and the Ombudsman's staff shall deal with requests for public access to documents, other than those referred to in Article 6(1), in accordance with the conditions and limits provided for in Regulation (EC) No 1049/2001, as complemented by Regulation (EC) No 1367/2006 as far as access to environmental information is concerned.[4]

With regard to complaints on the right of public access to official documents drawn up or received by a Union institution, body, office or agency, the Ombudsman shall, after due analysis and all necessary consideration, conclude if there is reason to assume an instance of maladministration or not. In case no such reason exists, it shall close the file and inform the institution, body, office or agency accordingly. In case of reason to assume an instance of maladministration, it shall inform the institution, body, office or agency concerned of the findings supporting a suspicion of maladministration, giving the institution the possibility to comment on them. If, after taking into consideration any comments of the institution, body, office or agency concerned the Ombudsman finds that there has been maladministration, it shall inform the institution, body, office or agency concerned, and where appropriate, issue a recommendation. The institution, body, office or agency so informed shall send the Ombudsman a detailed opinion in three months.'

The reasoning behind this alternative proposal is that the Ombudsman should not conclude that there is maladministration without giving the institution the opportunity to comment on its findings.

The sentence '[t]he institution, body, office or agency concerned shall respond within the timeframes provided by Regulation (EC) No 1049/2001' should be deleted. Those timeframes apply only regarding the replies to the applicant. There is no legal basis for extending them to the institution's reply to the Ombudsman. In addition, they appear to be disproportionate and unbalanced. Before replying to the Ombudsman, following its recommendation, the institution has to analyse it. The Ombudsman, by contrast, would not be bound by any timeframe and would issue a recommendation only 'after due analysis and all necessary consideration'.

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[4] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Environmental Information, Public Participation in Decision-making and Access to justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13).

It is important to add requests for access to environmental information envisaged in the first pillar of the Aarhus Convention and introduced into EU legal order through Regulation (EC) No 1367/2006. The notion of environmental information is laid down in Article 2.1 (d). Even if in its Article 3 Regulation No 1367/2006 establishes that Regulation (EC) No 1049/2001 apply to any request for environmental information, rules are not totally identical due to inter alia Article 6. Therefore, it is necessary to add it to the reference of Regulation No. 1049/2001.

- Lastly, the Commission suggests integrating the current Article 9(4) of the Ombudsman's Implementing Provisions directly into the text of the Statute at the end of the fourth paragraph of Article 3(4), in order to specify the process linked to the retention of information by the Ombudsman.

  The Commission proposes the following text:

  'The Ombudsman shall retain possession of documents obtained from an institution, body, office or agency, or a Member State during an inquiry, and declared to be confidential by that institution or Member State, only for so long as the inquiry is ongoing. The Ombudsman may request an institution, body, office or agency, or Member State to retain such documents for a period of at least five years following a notification to them that the Ombudsman no longer retains the documents.'

EXTENSION OF THE SCOPE OF TESTIMONIES OF EU OFFICIALS AND OTHER SERVANTS

Article 3(4) last paragraph, provides that '[o]fficials and other servants of Union institutions, bodies, offices and agencies shall, at the request of the Ombudsman, testify to facts which relate to an ongoing inquiry by the Ombudsman. They shall speak on behalf of their institution, body, office or agency. They shall continue to be bound by the obligations arising from the rules to which they are subject. When they are bound by a duty of professional secrecy, this shall not be interpreted as covering information relevant for complaints or inquiries on harassment or maladministration.'

The Commission does <u>not</u> agree with this proposal for the following reasons:

(1) **The legal framework to disclosure of information by staff members to the Ombudsman needs to be clarified:**

The proposed provision refers to 'testimony' to be given by staff members of Union institutions, bodies, offices or agencies to the Ombudsman. In that regard, it is important to recall that Article 19 of the Staff Regulations, which provides that staff members may give evidence subject to the prior formal authorisation of their appointing authority, concerns only disclosures during judicial proceedings. Since an Ombudsman inquiry is not a legal proceeding, Article 19 cannot apply to a testimony given to the Ombudsman.

Accordingly, the 'testimony' to which the proposed provision refers should be labeled 'disclosure of information', which falls within the scope of Article 17(1) of the Staff Regulations. In accordance with the latter, '[a]n official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public'. Hence, before disclosing information, including as a testimony to the Ombudsman, staff members must have the agreement of their hierarchical superiors.

(2) The fact that staff members cannot be called to testify in individual capacity needs to be clarified:

By referring to the staff members' obligation to 'testify to facts which relate to an ongoing inquiry', the current wording of the proposed provision gives the impression that staff members can be obliged to testify before the Ombudsman in their individual capacity, providing the Ombudsman with their version of events. However, it goes beyond the mandate of the Ombudsman to ask for individual testimonies. In fact, the Ombudsman deals with maladministration by institutions and has no power to do individual fact-finding, especially in cases of harassment. Only the institution responsible and, if necessary, the CJEU are tasked with hearing witnesses and determining the facts.

The second sentence of the proposed provision already states that staff members would 'speak on behalf of their institution, body, office or agency'. To avoid any ambiguity, any reference to 'testimony to the facts' by a staff member should be deleted.

(3) The duty of professional secrecy should always apply:

The last sentence of the proposed provision suggests that the duty of professional secrecy laid down in Article 17(1) of the Staff Regulations does not apply to instances in which staff members are heard by the Ombudsman within the context of an inquiry. This sentence should be deleted, since Article 17(1) of the Staff Regulations applies to all circumstances, including when staff members disclose information during an Ombudsman inquiry. In fact, the only exceptions laid down in the Staff Regulations concern instances in which staff members disclose information during legal proceedings (Article 19) or as a whistle-blower (Articles 22a and 22b).

NEW PROVISION ON CONFLICTS OF INTEREST

Article 3(5) provides that '[t]he Ombudsman shall periodically examine the procedures linked to the administrative action of Union institutions, bodies, offices and agencies and shall assess whether they are able effectively to prevent conflicts of interest, to guarantee impartiality and to ensure full respect for the right to good administration. The Ombudsman may identify and assess possible instances of conflicts of interest at all levels which could constitute a source of maladministration, in which case the Ombudsman shall draw up specific conclusions and inform the European Parliament of the findings on the subject.'

The Commission does <u>not</u> agree with this proposal for the following reasons:

(1) The Ombudsman is not a body for permanent scrutiny or oversight of specific activities or areas of activities of other institutions. The Ombudsman may deal with these issues on the basis of its powers to investigate complaints or to launch own-initiative inquiries, but only in the context of possible instances of maladministration. The mandate of the Ombudsman does not cover assessment of policies and procedures in general.

(2) The Commission considers the word *'conclusions'* to be unclear. It seems to give the Ombudsman the power to draw conclusions other than in the context of an inquiry, meaning for example that the institution would not be able to submit its views. This is not compatible with the second indent of Article 228(1) TFEU.

SPECIAL REPORTS TO THE EUROPEAN PARLIAMENT

Article 3(9) provides that '[t]he Ombudsman shall then send 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.'

The Commission agrees with this proposal for the following reasons:

The Ombudsman always had the right to submit 'special reports' to the European Parliament, in addition to annual reports on its activities. It issues special reports only in very exceptional and sensitive cases, where the Ombudsman finds that the scale of maladministration is particularly serious. On average, the Ombudsman has submitted one special report a year. The last one concerning the Commission was in 2012 and concerned the expansion of the Vienna airport. The proposed wording is better than the current text, notably as it provides for examples where the sending of special reports are necessary and thus makes this provision more likely to be respected.

EXTENSION OF POSSIBILITIES TO APPEAR BEFORE THE EUROPEAN PARLIAMENT

Article 3(10) provides that '[w]here appropriate in relation to an inquiry into the activities of a Union institution, body, office or agency, the Ombudsman may appear before the European Parliament, on the Ombudsman's own initiative or at the request of the European Parliament, at the most appropriate level'.

The Commission has no objection to this proposal, and would point out that it is for the European Parliament to address how and when the Ombudsman can appear before it.

NEW PROCEDURE FOR PROPOSING SOLUTION

Article 3(11) provides that '[a]s far as possible, the Ombudsman shall seek a solution with the institution, body, office or agency concerned to eliminate the instance of maladministration and satisfy the complaint. The Ombudsman shall inform the complainant of the solution proposed along with the comments, if any, of the institution, body, office or agency concerned. If the complainant so wishes, the complainant shall be entitled to submit comments, or additional information that was not known at the time of submission of the complaint, to the Ombudsman, at any stage.'

The Commission agrees with this proposal for the following reasons:

It is already possible to propose solutions to address instances of maladministration, instead of adopting formal decisions, in particular following the entry into force in 2016 of the new Implementing Provisions of the Ombudsman's Statute. This is in the interest of all concerned.

CONTENT OF THE OMBUDSMAN'S ANNUAL REPORT

Article 3(12) provides that '[a]t 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. The report shall include an assessment of the compliance with the Ombudsman's recommendations and an assessment of the adequacy of the resources available to perform the Ombudsman's duties. These assessments may also be the subject of separate reports' (see also recital 6).

The Commission has no objection to this proposal, and would point out that this is a matter for the European Parliament.

The Ombudsman's annual report to the European Parliament already covers compliance rates and available resources. The Ombudsman publishes each year a second report with updated figures ('Putting it Right').

REFERRAL TO THE EUROPEAN ANTI-FRAUD OFFICE AND THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Article 6(2), first paragraph, provides that '[i]f the Ombudsman considers that facts learnt in the course of an inquiry might relate to criminal law, the Ombudsman shall notify the competent national authorities and, in so far as the case falls within their powers, the European Anti-Fraud Office and the European Public Prosecutor's Office. If appropriate, the Ombudsman shall also notify the Union institution, body, office or agency with authority over the official or servant concerned, which may apply the second paragraph of Article 17 of Protocol No 7 on the Privileges and Immunities of the European Union' (see also Recitals 10 and 11).

The Commission partly agrees with this proposal, as it considers it can be useful for the Ombudsman to notify the competent national authorities, the European Anti-Fraud Office and the European Public Prosecutor's Office when facts learnt in the course of an inquiry might relate to criminal law.

However, the Commission also considers that the text should be amended to cover a wider set of actions (see below).

(1) The above wording is incorrect, as the institutions waive immunity upon request from or in cooperation with law enforcement authorities, but not on their own initiative.

(2) The current wording of the first part of the first sentence ('*If the Ombudsman considers that facts learnt in the course of an inquiry might relate to criminal law*…') gives a certain margin of appreciation to the Ombudsman as to whether (or not) to report such facts, and when. Both Article 8(1) of Regulation 883/2013 and Article 24(1) of Regulation 2017/1939 do not leave such margin of appreciation to the institutions, bodies, offices and agencies, but provide for a reporting obligation to either OLAF or the European Public Prosecutor's Office, subject to no condition and *'without (undue) delay*'.

(3) The current wording of the last sentence could allow the Ombudsman - after having reported to OLAF or to the European Public Prosecutor's Office facts falling within their respective competences - to notify the institution, body, office or agency with authority over the official or servant concerned, while OLAF or the European Public Prosecutor's Office may wish, on the contrary, to defer the provision of such information.

Article 4(8) of Regulation 883/2013 gives OLAF some margin of manoeuver, as it provides that *'Where, before a decision has been taken whether or not to open an internal investigation, the Office handles information which suggests that there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union, it* ***may*** *inform the institution, body, office or agency concerned'*. (Emphasis added)

Moreover, if, following information received from the Ombudsman, OLAF opens an internal investigation concerning an official, other servant, member of an institution or body, head of office or agency, or staff member, OLAF has the obligation to inform the institution, body, office or agency to which that person belongs (Article 4(6) first paragraph of Regulation 883/2013). However, OLAF may also choose to defer the provision of such information (Article 4(6) last paragraph of Regulation 883/2013). Therefore, notification by the Ombudsman of the institution, body, office or agency with authority over the official or servant concerned without first consulting OLAF could have the side effect of jeopardising OLAF's decisions concerning the follow-up it would give to the information received (for instance, if it decides whether to open or not an investigation, and when to inform the institution, body, office or agency concerned of the opening of an internal investigation).

The same considerations (need to protect the confidentiality of future investigations) apply as far as the European Public Prosecutor's Office is concerned.

The Commission proposes the following text:

'If 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 and the European Public Prosecutor's Office, in accordance with Article 24 of Regulation 2017/1939. This is without prejudice to the general reporting obligation of all the institutions, bodies, offices and agencies to the European Anti-fraud Office, in accordance with Article 8 of Regulation 883/2013. If appropriate, and after consulting OLAF or the European Public Prosecutor's Office, the Ombudsman shall also notify the Union institution, body, office or agency with authority over the official or servant concerned, which may initiate the appropriate procedures.'

NOTIFICATION BY THE OMBUDSMAN TO THE PERSON CONCERNED AND TO THE COMPLAINANT OF THE TRANSMISSION OF INFORMATION TO THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Recital 11 indicates that: 'Account should be taken of the recent changes concerning the protection of the Union's financial interests against criminal offences, notably the establishment of the European Public Prosecutor's Office by Council Regulation (EU) 2017/1939, so as to allow the Ombudsman to notify it of any information falling within the latter's remit. Likewise, in order to fully respect the presumption of innocence and the rights of the defence enshrined in Article 48 of the Charter of the Fundamental Rights of the European Union, it is desirable that, where the Ombudsman notifies the European Public Prosecutor's Office of information falling within the latter's remit, the Ombudsman reports that notification to the person concerned and to the complainant.'

The Commission partly agrees with this proposal, as the obligation to report to the European Public Prosecutor's Office is laid down in Regulation 2017/1939.

However, the Commission considers that the last sentence should be deleted. If the Ombudsman reports to the European Public Prosecutor's Office any information falling within the latter's remit, but also to the person concerned and the complainant, this may interfere with any potential or future investigative activity by the European Public Prosecutor's Office. In addition, at the stage of the transmission of the information to the European Public Prosecutor's Office, no criminal investigation is ongoing yet and "no charges" to any concerned person have been made. Therefore, the respect of Article 48 of the EU Charter of Fundamental Rights is not

yet "activated". At that stage, there is the need to preserve the confidentiality of any future criminal investigation. The European Public Prosecutor's office is bound to respect the EU Charter of Fundamental Rights and the procedural rights (see Articles 5 and 41 of the Council Regulation 2019/1939) during its investigations.

COOPERATION WITH THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Article 7(2) provides that: *'[w]ithin the scope of the Ombudsman's duties, the Ombudsman shall cooperate with the European Union Agency for Fundamental Rights and with other institutions and bodies, while avoiding any duplication with their activities'* (see also recital 12).

The Commission agrees with the principle that the Ombudsman should cooperate with the European Union Agency for Fundamental Rights within the scope of its duties. However, it considers that the text should be clarified for the following reasons:

The Ombudsman has no general competence in the field of human rights as such and may only deal with cases of maladministration and cooperate with the Agency on Fundamental Rights in that area. Wider cooperation with *'other institutions and bodies'* is not appropriate unless the proposal clarifies which other institutions and bodies are meant (which area of competence? EU institutions/bodies or the Member States bodies?).

The Commission proposes the following wording:

'Within the scope of his or her duties as laid down in Article 228 TFEU, the Ombudsman shall cooperate with the European Union Agency for Fundamental Rights, while avoiding any duplication with its activities, as well as with institutions and bodies of Member States in charge of the promotion and protection of fundamental rights.'

RESTRICTIONS ON THE POSSIBLE OMBUDSMAN'S CANDIDATES

Article 8(2) provides that '[t]he Ombudsman shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, have not been Members of national governments or Members of Union's institutions within the past three years, meet conditions of impartiality equivalent to those required for a judicial office in their country and have the acknowledged competence and experience to undertake the duties of the Ombudsman.'

The Commission does <u>not</u> agree with this proposal for the following reasons:

(1) The obligation for the Ombudsman to be independent and not to seek or take instructions from any government, institution, body, office or entity does not justify excluding individuals who have held political office in the past 3 years in a national government or EU institution. An equivalent prohibition does not apply for the judges and advocates-general of the Court of Justice (see Article 253 TFUE).

(2) The Commission questions the proportionality of excluding all public office holders, including former judges of the Court of Justice, Members of the European Court of Auditors and Members of the European Parliament, irrespective of their personal merits and despite similarities with other categories of people who would not be excluded. If the purpose is to avoid conflicts of interest, there are more proportionate ways of achieving it.

(3) The current Statute provides '(…) and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledged competence and experience to undertake the duties of Ombudsman.' There are no explanations for this change and transformation of the first alternative requirement. The direct consequence of the proposed change will be to favour candidates having held the office of Ombudsman over those having held national judicial offices.

IMPLEMENTING PROVISIONS

- Article 17 introduces the minimum content (six items) that these provisions should include and the need for an adoption 'in accordance with this Regulation'. The Commission suggests that the relevant institutions, such as the European Parliament, the Council and the Commission are consulted when adopting these implementing provisions, as it is the common practice for other institutions.

MISCELLANEOUS AMENDMENTS

- Article 9(3) provides that '[i]n 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'.

  The Commission agrees with this proposal, as it clarifies that the 'principal officer' (the Ombudsman's secretariat referred to in Article 13) is in charge of ensuring business continuity when the Ombudsman's duties cease prematurely.

- Article 10 provides that '[w]here 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.'

  The Commission agrees with this proposal, as it is fair that the European Parliament should hear the Ombudsman when it intends to request its dismissal.

- Article 13(1) provides that '[t]he Ombudsman shall be awarded an adequate budget, sufficient to ensure the Ombudsman's independence and to provide for the performance of the duties referred to in the Treaties and in this Regulation'.

  The Commission agrees with this proposal, as it spells out the obvious need for the Ombudsman to be given adequate financial resources to fulfil its duties.

- Article 13(3) provides that '[t]he Ombudsman should aim to achieve gender parity within the composition of the Ombudsman's secretariat.

  The Commission agrees with this proposal, as it aims to ensure gender parity of in the Ombudsman's secretariat. ***However, the Commission proposes the following addition***: '(…) in line with Article 1d(2) of the Staff Regulations'.