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'I' ITEM NOTE

From:	Working Party on General Affairs
To:	Permanent Representatives Committee (Part 2)
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 - Approval of a letter to the European Parliament

1. On 12 February 2019, the European Parliament adopted 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, which was transmitted to the Council by letter of 25 March 2019 (doc. 7955/19).
2. The draft Regulation aims at replacing the current Statute of the Ombudsman that was adopted in 1994 and lastly modified in 2008. It is based on Article 228(4) TFEU which provides that the European Parliament acting by means of regulations on its own initiative in accordance with a special legislative procedure shall, after seeking an opinion from the Commission and with the consent of the Council (acting by reinforced qualified majority under Article 238(2) TFEU), lay down the regulations and general conditions governing the performance of the Ombudsman's duties.

3. On 12 April 2019, the General Affairs Working Party (GAG) held a first preliminary exchange of views on the draft proposal and asked the Council Legal Service to provide a legal analysis of the draft Regulation. The Legal Service delivered its opinion on 16 September 2019.
4. The Working Party on General Affairs pursued its examination of the draft Regulation in its meetings on 3 October, 15 October and 5 November 2019, also taking into account the opinion of the Commission, which was delivered on 31 October 2019 in accordance with Article 228(4) TFEU (document 13700/19).
5. At its meeting on 20 November, the Working Party on General Affairs discussed and agreed the text of a draft letter to the European Parliament setting out preliminary views of the Council on a set of key issues as resulting from the examination in the Working Party.
6. It is therefore suggested that the Permanent Representatives Committee approves the above-mentioned letter to be sent by the Presidency to the Chair of the European Parliament's AFCCO Committee, as set out in the Annex to this Note, in accordance with Article 19(7)(k) of the Council's Rules of Procedure.

Mr Antonio Tajani
Chair of the Committee on Constitutional Affairs
European Parliament
Bât. Paul-Henri Spaak, 08B043
60, rue Wiertz / Wiertzstraat 60
B-1047 Bruxelles/Brussel

Brussels, xx November 2019

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

Dear President Tajani,

I am addressing to you this letter in order to inform you about the state of play of the ongoing discussions in the Council concerning the above-mentioned draft Regulation aiming at revising the Statute of the European Ombudsman. The proposal has been carefully examined by the Council's Working Party on General Affairs, with the assistance of the Council Legal Service. We also took note of the Commission opinion issued on 31 October 2019, and with which the Working Party's examination revealed substantial convergence on many aspects.

Let me first stress that delegations generally welcomed the initiative of the Parliament to update the Statute of the Ombudsman dating from 1994. In this respect, delegations appreciated a number of amendments introduced by the European Parliament with the purpose of ensuring coherence of the Statute of Ombudsman with the current legal framework established by the Treaties, as amended by the Lisbon Treaty and recent secondary legislation, which substantially improve the existing legislative act. Moreover, it resulted from the discussions at technical level that, in general terms, the AFCO report drafted by the Rapporteur Paulo Rangel and adopted by the AFCO Committee on 22 January 2019 was perceived by the delegations as a possible basis for further discussions.

Nevertheless, delegations considered that a number of issues required further reflection and redrafting to ensure, among other, the principle of institutional balance and the autonomy of the

institutions. You can find these issues in Annex. Please note that that these preliminary comments do not constitute a Council's mandate to negotiate and that further discussions - on these and other issues not explicitly mentioned - at technical and/or political level are necessary, before the Council may be in a position to give its overall consent on the draft Regulation. Let me assure you, however, that the Council is willing to engage, in a constructive spirit, in preliminary informal talks with the Parliament on this important dossier.

We would be pleased to meet with Mr Rangel and you at your convenience in order to explore possible areas of convergence.

Yours faithfully,

MARJA RISLAKKI

Chair of the

Permanent Representative Committee

Copy to:

Paulo Rangel, AFCO contact person to follow up on the interinstitutional developments related to the reform of the European Ombudsman's Statute

Frans Timmermans, First Vice-President for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights

Maroš Šefčovič, Vice-President-designate for Interinstitutional Relations and Foresight

MAIN ISSUES FOR FURTHER WORK EMERGING FROM THE TECHNICAL DISCUSSIONS WITHIN COUNCIL

- Delegations supported introducing a **definition of maladministration** in order to clarify the scope of the Ombudsman's role. This definition should not be overly restrictive in order to preserve the Ombudsman's autonomy and should stress that, in line with the applicable legal framework¹, the Ombudsman's mandate is to exercise an ex-post control of administrative activities of the institutions. This would ensure preserving the principle of the institutional balance and the autonomy of institutions.
- In a similar vein, while recognising the Treaty-based right of the Ombudsman to conduct **own-initiative inquiries**, delegations stressed that such inquiries should be an ex-post scrutiny based on concrete instances of maladministration, and should not become an instrument for permanent and systematic control of the institutions. In this light, the provisions on the promotion of best practices, proactively addressing structural issues of public interest and systematic analysis and assessment of the progress of the institutions were considered as going beyond the aim of addressing maladministration and again problematic under the angle of the principles of institutional balance and administrative autonomy of the institutions. Delegations also expressed doubts about the idea of a structured and regular dialogue.
- While recognising the importance of fighting all forms of **harassment** in the institutions, most delegations considered that the newly introduced provisions on this subject were not in line with the current legal framework², as they would allow the Ombudsman to intervene in individual harassment cases before the respective institutions' internal procedures have been completed. In particular, widespread concerns were raised about the exemption for sexual harassment which would allow the Ombudsman to intervene before the completion institutions' internal procedures. Conformity with the Staff Regulations and the principle of the institutions' administrative autonomy should be preserved.
- For essentially the same reasons as set out above in relation to harassment cases, delegations considered that the newly introduced Article 5 on **whistleblowing** is contrary to the applicable rules³. Delegations raised doubts in particular about the possibility for the Ombudsman to receive confidential and anonymous information directly from an official or other servant, with a possible waiver of applicable staff regulations regarding secrecy, which was not in line with the rules in the Staff Regulations. Moreover, a parallel involvement of the Ombudsman could lead to potential conflicting results with those resulting from the institution's own inquiries or from investigations led by OLAF provided for in the Staff Regulations.

¹ Article 228 TFEU and Articles 41 and 43 of the Charter of Fundamental Rights.

² In particular Articles 24, 86, 90 and 91 and Annex IX of the Staff Regulations.

³ In particular Articles 22a and 22b of the Staff Regulations.

- With regard **to conflicts of interest**, delegations raised concerns that a periodical examination of the institutions' actions to prevent such conflicts goes beyond the Ombudsman's mandate defined by Article 228 TFEU, as it would allow the Ombudsman to make recommendations without any concrete instance of maladministration. Compliance with the principle of institutional balance should be ensured.
- With regard to **the access by the Ombudsman to EU classified information**, delegations considered that the Ombudsman should adopt rules on the protection of EUCI which provide for an equivalent level of protection as those laid down in the institutions' rules. In particular, delegations asked for reintroducing the explicit reference to the principle of the originators' consent with regard to documents originating in Member States⁴. Delegations also regretted the disappearance of the reference to LIMITE documents (i.e. "other information covered by the obligation of professional secrecy")⁵. They furthermore raised doubts about the necessity of urgent transmission of EUCI and the obligation to provide a description of the document without any exception, signalling potential conflict with national and institutions' rules if the entire document is classified.
- Delegations questioned about the introduction of a so-called "fast track procedure" in cases concerning **requests for public access to documents**, which appears to be contrary to Article 228(1) TFEU. This new provision would considerably shorten the deadline of three months set by the Treaty for institutions to reply to the Ombudsman with regard to cases where the Ombudsman has established an instance of maladministration. They also considered the reference to legal remedies to be potentially misleading.
- With regard to **the cooperation of the Ombudsman with authorities of the Member States and the EU Agency for Fundamental Rights**, delegations considered that further justification of the goal and better definition of the scope of that cooperation were necessary, in line with the mandate laid down in Article 228 TFEU.
- Delegations considered that the references to **adequate budgetary resources** and staffing as well as their assessment in the Ombudsman's annual report interferes with the competences of the budgetary authority as laid down in Article 314 TFEU.
- With regard to **the election of the Ombudsman**, delegations raised concerns about the exclusion of persons who were members of national governments or Union institutions within the past three years, which would put candidates from public sector at a disadvantage. They also questioned the cumulative requirement of impartiality and the relevant experience and competence for the Ombudsman's office, which would give advantage to candidates having held the office of Ombudsman at national level.
- While being aware that the current Statute does not include such a condition, delegations considered that it would be appropriate to provide for a mandatory consultation of the European

⁴ Article 3(2), fourth subparagraph, of the current Statute

⁵ Article 3(2), third subparagraph, of the current Statute

Parliament, the Council and the Commission by the Ombudsman before the adoption of **the implementing provisions**. This would be in line with the roles of these institutions under Article 228 TFEU and ensure a certain degree of oversight on important implementing provisions.

- Delegations raised concerns with **Recital 5**, insofar as it would enable the Ombudsman to interpret rulings of the Court of Justice and make recommendations on their implementation in individual cases. This is not in line with Article 228(1) TFEU which exempts the Court of Justice of the European Union acting in its judicial role from inquiries of the Ombudsman.
