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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**PRELIMINARY
DRAFT REGULATION
ON THE OMBUDSMAN OF KOSOVO**

I. Nature of the institution

Section 1

The Ombudsman shall be an independent institution set up in order to protect the rights and freedoms of individuals and legal persons and to ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards, in particular the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights, as well as the rights and freedoms protected under the regulations issued by the Special Representative of the Secretary-General and the laws applicable in Kosovo. To this end the Ombudsman shall monitor the activity of the Interim Civil Administration and any emerging local institutions and any non-state actors claiming or exercising authority in Kosovo. He/she will endeavour to develop and consolidate a culture of good, equitable and accountable governance.

II. Composition, appointment and term of office

Section 2

(1) The Ombudsman shall be an eminent international figure of high moral standing who possesses a demonstrated commitment to human rights and the rights of members of national communities and who is not a citizen of the Federal Republic of Yugoslavia, of a state that belonged to the former Yugoslavia or of Albania.

(2) The Ombudsman shall have at least one international and two national deputies, who shall be persons of high moral standing possessing a demonstrated commitment to human rights and the rights of members of national communities.

(3) The Ombudsman shall designate one of his/her deputies to act on his/her behalf in the event that he/she is absent or unable to fulfil his/her functions.

Section 3

(1) The Ombudsman shall be appointed by the Special Representative of the Secretary-General upon proposals by the Deputy Special Representative of the Secretary-General in consultation with other international organisations.

(2) The Deputy Ombudsmen shall be appointed by the Special Representative of the Secretary-General upon proposal by the Ombudsman.

Section 4

(1) The Ombudsman shall be appointed for a period of three years and may be reappointed once only. If a new Ombudsman is appointed following the termination of the Ombudsman's duties during his/her term of office, he/she shall be appointed only for that part of the term of office remaining.

(2) The Ombudsman shall remain in office until his/her successor has taken office.

(3) The Deputy Ombudsmen shall remain in office until a new Ombudsman is appointed and shall continue to exercise their functions until new Deputy Ombudsmen have taken office.

Section 5

- (1) The Ombudsman's duties shall terminate for any of the reasons below:
 - (1) His/her resignation;
 - (2) Expiry of his/her term of office;
 - (3) His/her manifest inability to perform his/her duties;
 - (4) Failure to give up an incompatible position;
 - (5) His/her conviction of, and final sentencing for an intentional offence.
- (2) When the Ombudsman's post becomes vacant for whatever reason, it shall be declared vacant by the Special Representative of the Secretary-General and a new Ombudsman shall be appointed in accordance with the provisions of Sections 3 and 4 above.

III. Immunities and incompatibilities

Section 6

- (1) The Ombudsman shall act independently and shall be under no specific orders.
- (2) Without prejudice to the provisions of this regulation, the functioning of the Ombudsman may not be subject to any investigation, control or monitoring procedure.

Section 7

- (1) The Ombudsman shall not be prosecuted, subjected to investigation, arrested, detained or tried for the opinions expressed or for the decisions taken in the exercise of powers associated with his/her duties.
- (2) In all other circumstances and as long as he/she remains in office, an Ombudsman may not be arrested or detained, save in case of *flagrante delicto* relating to an offence punishable with imprisonment of more than five years.
- (3) Decisions to prosecute, detain or refer an Ombudsman to a court charged with a criminal offence cannot be taken unless the Special Representative of the Secretary-General has lifted the above immunity.
- (4) The Deputy Ombudsmen shall be entitled to the same immunities as the Ombudsman.
- (5) Persons holding any other office or appointment under the Ombudsman shall not be prosecuted, subjected to investigation, arrested, detained or tried for any action, opinion or decision taken while performing their duties. In all other circumstances, whenever persons holding an office under the Ombudsman are arrested, detained or tried, the prosecuting authorities shall duly and promptly inform the Ombudsman.

Section 8

- (1) The position of Ombudsman is incompatible with the holding of any representative office; with any political activity or office; with continued activity in government service; with membership of a political party or with the exercise of leadership of a political party, trade union, association, foundation, or religious organisation or with employment by any of these;

with performance of the duties of a judge; and with any activity in an occupation or profession, in commerce or in employment.

(2) The Ombudsman shall, upon his/her appointment, and before taking up his/her office, forgo any position of potential incompatibility, failing which he/she shall be regarded as having declined the appointment.

(3) Where an incompatibility arises after an Ombudsman has taken up his/her duties, it is understood that he/she shall resign, within the meaning of Section 5, on the date on which the incompatibility arises.

IV. Powers

Section 9

(1) The Ombudsman shall act either on receipt of a complaint by an individual or a legal entity or on his/her own initiative.

(2) The Ombudsman shall have the power to recommend the appropriate individual and/or general measures.

(3) The Ombudsman shall be competent to deal with all cases related to facts, acts, decisions or omissions, from the date of the establishment of the institution, as well as facts, acts, decisions or omissions which occurred prior to this date and which continue to produce effects after the establishment of the institution.

Section 10

(1) The Ombudsman shall have the power to admit, follow up and investigate cases involving violations of human rights and fundamental freedoms, the abuse of authority and maladministration committed by the Interim Civil Administration or any emerging local institutions or non-state actors claiming or exercising authority in Kosovo.

(2) The Ombudsman shall not have authority to deal with disputes between the international administration and its staff with respect to strictly contractual matters.

Section 11

(1) The Ombudsman's competencies shall include the power to admit, follow up and investigate all cases concerning violations of human rights and fundamental freedoms allegedly committed by the local military administration or by security services, including secret services, as well as all cases concerning detained persons whatever the reasons for their detention and irrespective of which of these authorities in Kosovo is responsible for the detention, and to recommend the appropriate individual and/or general measures.

(2) The Ombudsman may enter into an agreement with the international security presence in Kosovo regulating his/her competencies with regard to violations of human rights and fundamental freedoms allegedly committed by this presence as well as with regard to persons detained by it, at least for as long as it operates as a *de facto* police force.

Section 12

The Ombudsman may oversee the good functioning of the judicial authorities but shall not interfere with the judicial functions of courts and tribunals. The Ombudsman may make recommendations to an administrative agency which is a party to judicial proceedings. The Ombudsman may present his/her opinion as *amicus curiae*.

Section 13

In connection with the cases referred to him/her, at the request of the Special Representative of the Secretary-General or of a judicial authority or on his/her own initiative, the Ombudsman may make recommendations, giving reasons, concerning the compatibility of the legislation in force with the regulations issued by the Special Representative of the Secretary-General and concerning the compatibility of the legislation in force and the regulations issued by the Special Representative of the Secretary-General with the substantive provisions of internationally recognised human rights standards as contained, for example, in the list of texts attached to the Dayton accords. In connection with the cases referred to him/her, the Ombudsman may also state his/her opinion on the compatibility of any other regulations which may be applied by the authorities operating in Kosovo with international human rights standards.

V. Investigation Procedure

Section 14

(1) Any individual or legal entity affected by an act, decision or omission on the part of the Interim Civil Administration or any emerging local institution or any non-state actor claiming or exercising authority in Kosovo may apply to the Ombudsman without restriction. Nationality, citizenship, place of residence, gender, race, minority, ethnicity, religion, legal incapacity or any other criterion of distinction, imprisonment of any kind and, in general terms, a special relationship with or dependence on an administrative authority in Kosovo may not restrict the right to lodge a complaint with the Ombudsman.

(2) No application may be refused on the basis of the language in which it is submitted, in so far as it is submitted in a language that is in use in the region.

(3) Applying to the Ombudsman or the latter's intervention shall not entail for the applicant any criminal, disciplinary or other sanction or any disadvantage or discrimination.

(4) No administrative body or authority or public law legal entity may complain to the Ombudsman about matters within its competence.

Section 15

(1) Any complaint must be signed and submitted by the person concerned, who shall indicate his/her surname, first names and address, in a document stating his/her grounds, written on plain paper. A complaint presented in a less formal manner, including an oral complaint, may be accepted where the Ombudsman finds that circumstances so require.

(2) All the work of the Ombudsman is free of charge to the person concerned and does not require the assistance of counsel or a solicitor.

Section 16

- (1) No correspondence addressed to or by the Ombudsman may be the subject of any kind of interference whatsoever, including correspondence to or from places where individuals are held in detention, imprisonment or custody.
- (2) Conversations of the Ombudsman or people delegated by the Ombudsman and any of the persons listed in the previous subsection may never be monitored or interfered with.

Section 17

- (1) The Ombudsman shall register and acknowledge receipt of the complaints submitted, whether they are admissible or not. When the Ombudsman decides not to pursue a complaint, he/she shall do so in writing, explaining the grounds and informing the person concerned of the most appropriate means of taking action, if any exist, leaving it to the person concerned to use those which he/she considers most suitable.
- (2) The Ombudsman may refuse to pursue anonymous complaints and complaints which he/she considers to have been made in bad faith, which are ill founded, which include no claim, which entail damage to the legitimate rights of a third party, or which were lodged with the Ombudsman more than one year after the facts, events, decisions or omissions complained of.

Section 18

No appeal lies against any action or decision of the Ombudsman, including decisions to investigate or not to investigate a complaint.

Section 19

When the Ombudsman decides that a complaint or a matter considered *ex officio* offers sufficient grounds for investigation, he/she shall inform the body or administrative service concerned of the material part of the case, so that the person in charge can submit a written statement and any information or document requested by the Ombudsman within a time-period indicated by the Ombudsman. This time-limit may be extended when circumstances so require.

Section 20

Where, during the investigation, the Ombudsman finds that the execution of a decision of the administration can result in irreparable prejudice for the rights of the complainant, he/she can suggest that the competent authority suspend the execution of the challenged measure until the expiry of a period of no more than ten days. The authority concerned may refuse to comply with the suggestion, explaining, in a written document addressed to the Ombudsman, within three days from the receipt of the suggestion and in any case before the execution of the challenged measure, the reasons thereof failing which, the suggestion becomes mandatory for the authority.

VI. Obligation to co-operate with the Ombudsman

Section 21

- (1) All bodies and authorities subject to monitoring by the Ombudsman are obliged to provide the Ombudsman with preferential assistance in the Ombudsman's investigations and inspections.

(2) During the investigation, the Ombudsman or a person to whom the Ombudsman has entrusted investigation tasks may present himself/herself at any such authority, agency or service in order to check all the requisite information, conduct personal interviews or study the necessary files and documents.

(3) The Ombudsman may not be denied access to any file or administrative document or to any document relating to the activity or service under investigation, without prejudice to the provisions of Section 24 of this regulation.

Section 22

(1) When the case under investigation concerns the conduct of persons employed in the service of the administration and is connected with the duties they perform, the Ombudsman shall inform the person concerned and either his/her superior or the body to which he/she is attached.

(2) The official concerned shall reply in writing and submit all the documents and evidence which he/she considers relevant, within the time-limit indicated to him/her. Upon request, the time-limit may be extended.

(3) The Ombudsman may check the veracity of the elements submitted and propose a hearing of the official involved in order to obtain further information. Officials who refuse this hearing may be required by the Ombudsman to give a written explanation of the reasons for their refusal.

(4) The information provided through testimony by an official during an investigation is confidential, without prejudice to the provisions of the criminal legislation on the denunciation of acts that may be of a criminal nature or to Section 26 below.

Section 23

Superior officials or bodies that prevent officials subordinate to them or in their service from responding to a request from the Ombudsman or from being heard by the Ombudsman shall declare that they have done so in a written document, stating their grounds. This document shall be communicated to the official and the Ombudsman. The Ombudsman shall then address the said superior in respect of all the operations necessary to the investigation.

VII. Confidential and Secret Documents and Duty of Discretion

Section 24

(1) The Ombudsman may require the relevant authorities to hand over any documents he/she considers necessary to perform his/her duties, including those classified as confidential or secret in accordance with the law. In such cases, the Ombudsman shall apply the requisite discretion to these and shall not make them available to the public.

(2) Investigations conducted by the Ombudsman and the Ombudsman's staff, and procedural measures, shall be conducted with the greatest discretion, without prejudice to the considerations which the Ombudsman finds it appropriate to include in the reports. Special protective measures shall be taken in respect of documents classified as confidential or secret.

(3) Where the Ombudsman believes that a document classified as confidential or secret and not handed over by the relevant authority could be crucial to the proper conduct of the investigation, he/she shall advise the Special Representative of the Secretary-General of this fact.

VIII. Responsibilities of Authorities and Officials

Section 25

When the investigation reveals that an abuse, arbitrary procedure, discrimination, negligence, omission or error complained of was perpetrated by an official, the Ombudsman may communicate this finding to the official concerned. On the same date, he/she shall transmit his/her finding to the official's superior and set out the recommendation he/she considers pertinent.

Section 26

The Ombudsman may recommend that the competent authorities initiate disciplinary or criminal proceedings against any person whom he/she considers guilty of deliberate unlawful conduct. Such competent authorities may include international and national authorities outside the territory of Kosovo.

Section 27

(1) If a hostile attitude or an attitude impeding the investigation of the Ombudsman is maintained by a body, officials, holders of positions of responsibility or members of a public service, this may be the subject of a special report and shall be mentioned in the corresponding part of the annual report.

(2) Where an official impedes an investigation by refusing to send documents required by the Ombudsman, or through negligence in the sending such documents or by refusing the Ombudsman access to administrative files or documents necessary to the investigation, or otherwise displays a hostile attitude or impedes the investigation, the Ombudsman shall send the relevant file to his/her superior or to the competent international or national authorities for the appropriate disciplinary or penal action to be taken, in accordance with the law.

(3) The Ombudsman may recommend that the competent authorities initiate disciplinary or criminal proceedings against any person whom he/she considers has impeded the functioning of the Ombudsman institution. Such competent authorities may include international and national authorities outside the territory of Kosovo.

IX. Recommendations

Section 28

(1) The Ombudsman may make recommendations to administrative authorities and officials with a view to the adoption of new measures. In every case the authorities and officials are obliged to reply in writing and inform the Ombudsman of the effect given to the recommendations within a reasonable time-limit indicated by the Ombudsman.

(2) If, once recommendations have been made, the administrative authority concerned does not take appropriate measures within a reasonable time, or if it does not inform the Ombudsman of the reasons for not doing so, the Ombudsman may draw the attention of the highest authority

of the administration concerned to the course of the case and to the recommendations made. Should the Ombudsman, following this, obtain no satisfaction in a case where he/she considers that it would have been possible to find a positive solution, he/she shall include the matter in the annual or in a special report and may mention the names of the authorities or officials taking this attitude.

(3) The Ombudsman has no power to amend or annul administrative measures or orders, but may suggest the amendment of the criteria used in their execution.

(4) When, following the examination of a case, the Ombudsman finds that the manner in which a rule in question is implemented leads to inequitable results, he/she may address to the competent administrative body any recommendation capable of leading to a fair solution to the situation of the affected individual. The Ombudsman may suggest to the competent authority the measures likely to remedy the complainant's situation, including the payment of damages, and propose in the institution's annual or special report those amendments to laws and regulations that the Ombudsman finds appropriate.

(5) If the activities complained of have been carried out in the course of services provided by private persons under a contract of concession of public service, the Ombudsman may ask the competent administrative authorities to exercise their powers of inspection and punishment.

X. Notification and Communication

Section 29

(1) The Ombudsman shall inform the person concerned of the result of his/her investigations and activities and of the reply given to it by the authority or official concerned, unless the reply, by its nature, is to be considered as confidential or secret.

(2) The Ombudsman shall communicate the positive or negative findings of his/her investigations to the authority, official or administrative body concerned.

(3) The Ombudsman shall publish his/her recommendations concerning the compatibility of the legislation in force in Kosovo with the regulations issued by the Special Representative of the Secretary-General or with international human rights standards.

(4) The Ombudsman may decide to publish his/her other general recommendations.

(5) All other recommendations of the Ombudsman shall be accessible to the public, except in cases where they relate to matters which are confidential or secret, or where the complainant expressly requested that his/her name and the circumstances of the complaint should not be revealed.

XI. Reports

Section 30

(1) The Ombudsman shall submit a report within one year of taking office and at least once a year on the institution's activities to the Special Representative of the Secretary-General.

(2) A special report must be submitted whenever the Ombudsman deals with a compatibility question arising under Section 13 above. A special report on other matters may also be released whenever the Ombudsman deems it appropriate.

(3) Annual reports and any special reports shall be published.

Section 31

(1) In the annual report, the Ombudsman shall state the number and nature of the complaints received, indicate which were not pursued and the reasons thereof, and which were the subject of an investigation, and the findings of this; the Ombudsman shall also specify those suggestions or recommendations accepted by the authorities.

(2) The report shall contain no personal data enabling the persons involved in the investigation procedure to be publicly identified, without prejudice to the provisions of Section 28(2) above.

(3) The report shall also contain an appendix showing the expenditure of the institution's budget during the period covered.

XII. Rules of Procedure

Section 32

The rules governing the operation of the Ombudsman institution shall be laid down in compliance with the provisions of this regulation by the Ombudsman, in Rules of Procedure which shall be published by the Special Representative of the Secretary-General.

XIII. Staffing and Equipment

Section 33

(1) The Ombudsman may, within the budgetary limits, freely staff the institution's offices with national and international administrators and advisers, in accordance with the Rules of Procedure. The Ombudsman staff shall be appointed and dismissed by the Ombudsman.

(2) Members of the office shall be of high moral standing.

Section 34

Assistants and advisers to the Ombudsman shall be automatically dismissed when the new Ombudsman takes up duties. They may be re-appointed.

Section 35

Upon proposal by the Ombudsman, the financial appropriation necessary to the functioning of the institution shall be included in the Kosovo budget.

XIV. Transitional Provisions

Section 36

The Ombudsman shall function on the basis of this regulation until the responsibility for the institution's operation is transferred to authorities in Kosovo.