

Statewatch

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Dear Mr Diamandouros,

Thank you for your letter of 18 August 2008 with the Commission's response to the Ombudsman's Recommendation.

I would wish to make the following points:

1. The Commission response is very disappointing.
2. Its response adds little to the views it had already expressed prior to the Ombudsman's Recommendation. For example, it still contests the definition of a "document" as set out in Article 3.a and further that this Article extends to Article 11 as well.
3. It expresses the view that documents held under the current "Adonis" information system cannot be put on the Commission's public register as they would have to:

"be vetted, and possibly edited, by a person who is familiar with the subject matter."

This is said to be due to "the lack of security levels" in Adonis.

It goes on to state that the Commission will:

"start transferring records into a public register once the new internal single registration system (Ares) has become operational."

This implies that the new "Ares" system does have built into it "security levels" and that only certain documents - which have been "vetted" or "edited" or otherwise cleared - will be placed on the public register.

If this is the case it would appear that the Commission is actually constructing a registration system (over the period 2008-2010) designed to ignore the Regulation and Articles 3.a and 11 in particular. This is a matter on which the Ombudsman might wish to seek further information/clarification either now or at a later stage.

4. Since its first response to our complaint the Commission has questioned the definition of a "document" in Article 3.a of the Regulation (see their response on 22 May 2007).

However, it should be recalled that the current definition of a “document” has, in effect, been in place since 1993 - for some 15 years. It is the same as that which had been in force since 20 December 1993 under the Code of access to EU documents adopted by the Council of the European Union and the European Commission. The 1993 Code said:

“Document” means any written text, whatever its medium, which contains existing data and is held by the Commission and the Council.”

When the Commission launched its public consultation on the Regulation in April 2007 it might have been thought that one of the questions would have concerned the definition in Article 3.a. but it did not. A question was asked about extending the definition of a “document” to include those held on databases - a move widely backed in the consultation and included in the Commission proposal.

The Commission's report on the consultation process, published in January 2008, noted that:

“The concept of “document””: As regards the concept of “document”, the general feeling is that the current wide definition should be maintained.”

It was on 7 April 2008 that the European Ombudsman made the draft Recommendation to the Commission.

The first indication that the Commission intended to propose changes to the definition of a document in Article 3.a was in drafts circulated prior to the Commission meeting on 30 April 2008 (which were obtained by us on 25 April 2008). Moreover, the final wording adopted by the Commission out of its meeting on 30 April was even more restrictive as you noted in your “Open Letter” to Commissioner Wallstrom, namely that “documents” had to be “**formally** transmitted to one or more recipients” (my emphasis)” in *European Voice*.

It is thus not unreasonable to ask: Could there be any connection between the new “Ares” registration system being under construction from 2008 (which appears to presume the “vetting” and “editing” of documents to be made public), the Ombudsman’s Recommendation on 7 April 2008 and the change to the definition of a “document” agreed by the Commission on 30 April?

5. A second general point is related to the point above. The Commission’s rejection of the Ombudsman’s Recommendation on the content of its public register and of the definition of a “document” in Articles 3.a (and also in Article 11) comes at a time when the Commission is seeking to change this very definition.

At the hearing held in the European Parliament on the Commission’s proposals on 2 June 2008 it will be recalled that the Ombudsman, NGOs (including Statewatch) and others were critical of its proposed change to the definition of a “document” - Professor Steve Peers observed in relation to this Statewatch complaint that:

“it seems that the Commission has proposed changes to the rules in order to avoid complying with a pending ruling of the Ombudsman against them.”

The process of considering changes to the Regulation, following on from the Commission proposals, has only just started in the European Parliament and the Council. Given the European Parliament elections in June 2009, the process of

amending the Regulation is not expected to be completed until the Swedish Council Presidency in the second half of 2010 - thus leaving plenty of time for the questions raised here to be pursued.

6. Finally, the Commission's response to this complaint has not changed since its first response and might be described as a case of institutional intransigence.

As previously observed we cannot have a situation where an EU institution chooses to ignore a binding Regulation and for which, in addition, it has the responsibility of enforcing. To allow such a situation to continue would set a very dangerous precedent for the other institutions and agencies in the EU to follow.

7. In light of the above it is to be hoped that the Ombudsman will consider exercising his powers to issue a Special Report and bring the matter to the attention of the European Parliament.

Yours sincerely,

Tony Bunyan