

Brussels, 10 September 2002

Our ref TR:ks 1740



Mr Jacob Söderman
The European Ombudsman
BP 403
1, avenue du Président Robert Schuman
F-67001 Strasbourg Cedex

Dear Jacob,

Thank you for your letter dated 10 July 2002.

You raise two fundamental points which focus on important questions – proposed changes in Article 17 of the Staff Regulation and the Code of Good Administrative Behaviour - which have already been the subject of detailed study and consequent action by the Commission.

1. You ask me – that is, the Commission - to act to suppress the obligation provided for in Article 17 of the Staff Regulations which requires an official to ask the appointing authority for authorisation before publishing a text which is connected to the activity of the Communities.

As you will know, the Court has interpreted this provision (cf. the judgement of the Court of First Instance of 14 July 2000 in Case T-82/99, Cwik v Commission [2000] ECR I-A-155, II-713) as “the expression of the idea of a permanent need to balance the guarantee of the exercise of a basic right and the protection of a legitimate aim of general interest”.

You will also be aware that the Court considered that this latter objective could justify a restriction on the exercise of such a right only if the objective circumstances require it and to a degree that is necessary. Thus the official is subject to the obligation to seek authorisation to publish an article if the article is linked to the activity of the Communities, and the authorisation can be refused only “where the proposed publication is liable to prejudice the interests of the Communities”.

As you would expect, in the course of the prolonged work on drafting amendments to the Staff Regulations done in the course of Reform efforts, Article 17 was the subject of thorough discussions and a draft amendment of this article was submitted to the other institutions, which approved it.

./.

The text of new Article 17a is included in the proposal for the draft Regulation that was approved by the Commission on 24 April 2002. It is more permissive than the provision currently in force and it states that:

"Without prejudice to Articles 12 and 17, an official who intends to publish or cause to be published, whether alone or with others, any matter dealing with the work of the Communities shall notify the Appointing Authority in writing in advance. The Appointing Authority may refuse permission only where it is able to demonstrate with full reasons that the matter is liable seriously to prejudice the interests of the Communities. The Appointing Authority shall notify the official of its decision within 30 working days. If no decision is notified within the specified period, authorisation shall be deemed to have been granted."

You invite me to take an initiative to dispense with any provision requiring authorisation which you characterise as "censorship". However, the Commission's approval of the draft Reform provisions of the Staff Regulations was recent and these have been forwarded as a proposal to the Council and Parliament. It is relevant to draw your attention to the fact that the final proposal was compiled only after extensive consultation with staff and staff representatives in the Commission and the other Institutions. The Council, obviously including the Member States which you mention, is clearly qualified to decide whether to approve, to reject, or to amend the proposals, and Parliament is equally entitled to offer its considered Opinion on the issue. I will certainly send your letter to them, so that it can be taken into account in the deliberations in both Institutions.

Meanwhile, I have to say that the requirement of prior authorisation which remains in the proposed Article 17a does not manifest "mistrust" of "skilled and dedicated personnel", neither does it owe anything to an "authoritarian" attitude as your letter infers. The requirement is a safeguard of responsibility and it provides an official who wishes to publish with a dependable means of knowing that he or she can publish with security. I emphasise, of course that the judgement of the Court on proportionality of a decision to refuse authorisation will continue to be respected, as it is now.

I must say that your references to "censorship" and "authoritarianism" do spur me to more detailed personal response.

You say that "an official who writes negative articles that are not based on the truth and real intentions of the administration (in EU Institutions) must, of course, face his or her responsibilities". That, obviously, is true. It does, however, justify observations:

First, I have respect for what I call "the Keynes approach": When J.M. Keynes attended the Peace of Versailles Conference as a civil servant he formed very critical views and wished to publish them. Before commencing what turned out to be his remarkable historic booklet "The Economic Consequences of the Peace", however, he resigned from the civil service. That was 83 years ago but the principle of honour remains valid. Keynes was not censored in any oppressive sense, but he was bound by his obligations and he recognised that he had to choose between his public

opinions and his public service. He acted honestly on the basis that he could publish and be damned (which he was, by fools) but he could not publish and stay in his job.

Second, if an article published by an official contains untruths or misrepresentation and, directly or by inference, wrongly attacks the competence or integrity of other officials the freedom of those other officials is unjustly invaded and their personal reputation is defamed. The official who published the attacks may well get widespread coverage, both at the time and (certainly if the views of the official match populist sentiments) in prolonged attention to, say, any disciplinary procedure. By contrast, rebuttals usually get very sparse coverage, if any. Redress for damage – if any – will only be gained months or, more likely, years later.

Rather than have a system – particularly in international and multinational administrations – that takes such possible risks with the reputation of people who are unfairly attacked, surely it is better to use a system which advises personnel that they must seek authorisation: If they believe that authorisation is unreasonably denied (and “unreasonable” means in the terms of the Court of Justice decision as well as those of Article 17) they have a procedure for redress. If, after that, they are still denied authorisation because the proposed article would “prejudice the interests of the Communities” they must make the choice that you suggest with your reference to “facing responsibilities”.

2. The Commission has already given its opinion on the advisability, at the present stage, of taking a legislative initiative on a Code of Good Administrative Behaviour for officials and other agents of the Communities. Following the action taken by the Commission – after staff consultations - on 17 October 2000, all the Institutions have recently adopted their respective Codes of Good Administrative Behaviour for their personnel, and they are to evaluate the impact of these provisions both internally and in their relationship with the public.

Moreover, the Institutions adopted Codes of Good Administrative Behaviour which necessarily differ in their structure according to the primary activities of each organisation. There are Codes which concentrate on the relations with the public (for example, those of the Council and of the Commission) or codes that also take account of the obligations already envisaged by the Staff Regulations (such as for example Parliament's Code). As already outlined in my letter of 28 May 2002 and in the Commission's communications of 14 June 2001 and of 29 November 2001 regarding your own initiative inquiry on the freedom of expression of officials, the Commission will provide its staff with an “Administrative Guide” to explain the application and interpretation of the rules in the Staff Regulations. The Guide will be finalised in the coming weeks and will contain *inter alia* chapters on “independence, loyalty and responsibility”, “dealing with finances – freedom from conflict of interest”, “freedom of expression versus discretion” and “rights of staff members”.

./.

I think that the choice of the Institutions - each of which provides the same guarantees to the public - should be recognised, and the effectiveness of the Codes and our Administrative Guide should be assessed on the basis of some experience of operation. On that basis I do not consider that it would be appropriate for the Commission to take an initiative to draw up a proposal for a law to establish an inter-institutional Code of Good Administrative Behaviour.

Yours sincerely,
Neil

Neil Kinnock