

Open Briefing to Member States – 8 May 2017

(check against delivery)

I am going to give you a brief update on the status of cases before the Ombudsperson before discussing a few substantive issues. The first substantive issue I will discuss is on the relevance of the Ombudsperson's mechanism as seen from the practice of the General Court of the European Union. I will then discuss the last developments with respect to my main concern in terms of the fairness of the process, the issue of reasons letters. Finally I will update you on progress made in terms of informal arrangements aimed at guaranteeing the independence of the Office.

1. Case update:

To date the Ombudsperson has been seized in 79 cases, that is, four more cases than when I last briefed you on 22 November 2016. During this period, I have submitted six comprehensive reports. I am in the process of drafting or finalizing the drafting of comprehensive reports in four more cases pending in their dialogue phase, while two other cases are in the information gathering stage. For those of you who are not familiar with the operation of the Office it may not be telling, but I assure you that my very small team and I have been very busy since the last open briefing.

To give you a little more perspective on the proportion of delisting versus retentions, I wish to stress that since I took up my functions in July 2015, the names of seven individuals have been delisted and the name of four individuals have been retained on the Sanctions List by the Committee following my recommendations in 11 delisting requests disposed of by the Committee.

Since the outset, of the 69 delisting requests fully completed through the Ombudsperson process since the Office was established, only 14 delisting requests have been denied. As a result of the 55 petitions which have been granted, 50 individuals and 28 entities have been delisted.

My next point is about the relevance of the Ombudsperson's mechanism as seen from the practice of the General Court of the European Union.

2. Relevance of the Ombudsperson

Resolution 2253 strongly urges Member States and relevant international organizations to encourage individuals and entities that consider challenging - or are already in the process of challenging - their listing through national and regional courts to first submit delisting petitions to the Office of the Ombudsperson. As discussed in my last report to the Security Council, the General Court of the EU issued on 13 December 2016 a judgement in the case of Mohammed Al-Ghabra v. the Commission. This judgement may incite individuals or entities that wish to be delisted to exhaust the Ombudsperson remedy prior to challenging their listing through the Courts of the European Union. In the case in question, when dismissing Mr. Al-Ghabra's request for annulment, the General Court gave due consideration to the fact that, although he claimed to have arguments to support the removal of his name from the Sanctions List, he did not seek delisting through the Ombudsperson.

I move to the last developments on the issue of reasons letters provided to petitioners.

3. Reasons letters

In November 2016, I alerted you to a recent set-back in relation the content of reasons letters provided to petitioners. It remains an issue of utmost concern. In principle, in cases where the Committee follows the Ombudsperson's recommendation, the reasons provided to the Petitioner are not the reasons of the Committee but rather a summary of the Ombudsperson's analysis contained in her comprehensive report. This is what is stated in the Committee's letter, which I am to transmit to petitioners. As you know recommendation 2253 (2015) requires me to treat the content of these reports as confidential even though they contain no classified information. In the current legal framework, only a summary of my analysis can be disclosed to the Petitioner. The summary must be approved by the Committee. Such an approval requires the consensus of the 15 members of the Committee. I have always approached the delicate discussion of these reasons with an open mind so as to find solutions to specific concerns expressed by states in relation to security issues related to a case. However, what I am now facing is of a different nature. The practice has been for the Ombudsperson, who has the best understanding of the reasons contained in her own analysis, to assist the Committee with the preparation of its reasons letter. At the beginning of my term, the draft reasons I proposed to the Committee followed closely the analysis contained in my Comprehensive Report. However, after about a year in the post, I was asked to instead summarise the analysis, which I did. In a recent retention case for which my proposed summary was already reduced to half the length of the analysis contained in my comprehensive report, I was asked to perform further cuts before obtaining the approval to disclose it to the Petitioner. The process of cutting for the sake of cutting such summaries is in my view contrary to the need for transparency which is at the core of the concept of fairness applied to sanctions. This is even more the case in retention cases. In the best case scenario, such a process is unnecessarily time consuming. In the worst case scenario, it leads to omitting responses to key arguments of the Petitioner, or affecting the logical sequence of reasoning underlying my recommendation. In such cases, the imposition of a page-limit encroaches on my independence as Ombudsperson. The only considerations that in my view warrant possible redactions to the summary of the analysis are those related to specific security concerns in relation to a particular case.

I move very briefly to my last issue concerning informal arrangements aimed at guaranteeing the independence of the Office of the Ombudsperson.

4. Informal arrangements to guarantee the independence of the Office

In November 2016, the then Chair of the Committee informed you of the fact that the Committee had invited the Secretariat to explore such informal arrangements. In my last report to the Security Council, I identified the four informal measures now in place to address issues having been of concern in the past. These measures concern performance appraisals of the staff supporting the Office to reflect the Ombudsperson's input; the involvement of the Ombudsperson in recruitment processes and the fact that her views shall be taken into account; access by the Ombudsperson to all materials relevant to the work of the Office; and full editorial control of the Ombudsperson on the website of the Office. The informal measures have proven effective and I am satisfied with the current state of affairs with respect to these issues. There is one remaining issue to be addressed by

way of informal arrangement. It is far from the least important as it concerns the requirement of output evaluation embedded in consultancy contracts. Such requirement covers both performance and attendance, and the former is considered fundamentally inconsistent with the independent role and functions of the Ombudsperson. I am pleased to inform you that that significant progress has been made in relation to this last issue. If required, the output evaluation will only be submitted after the Ombudsperson has concluded her period of assignment and will make clear that such evaluation contains no substantive assessment of the Ombudsperson's work. I understand that DPA is also considering the possibility of an additional step, which, if implemented, would remove any possible remaining concern regarding the 'appearance' of independence of the Ombudsperson.

Conclusion

I will conclude by emphasizing that the heavy workload we have faced the last six months is a great motivation for our Office. It confirms that petitioners place their trust in the Ombudsperson's process and turn to it as a relevant and effective remedy in their situation. Provided that substantive reasons are shared with them, even unsuccessful petitioners get a clearer idea as to what their situation is and an incentive to change their conduct, which is at the core of the sanctions against ISIL and Al-Qaida.