

## Overview of the remarks received in the context of the Ombudsman's invitation to comment on the draft internal rules on whistleblowing - OI/1/2014/PMC

Correspondence - 25/02/2015

**Case** OI/1/2014/PMC - **Opened on** 24/07/2014 - **Decision on** 26/02/2015 - **Institutions concerned** European Parliament ( No further inquiries justified ) | Council of the European Union ( No further inquiries justified ) | European Commission | Court of Justice of the European Union | European Court of Auditors | European Data Protection Supervisor ( No further inquiries justified ) | European Economic and Social Committee ( No further inquiries justified ) | European Committee of the Regions | European External Action Service ( No further inquiries justified ) |

### Background

The revised version of the Staff Regulations for officials of the European Union ('SR') that entered into force on 1 January 2014, obliges all EU institutions, bodies, agencies and offices to adopt internal rules covering, in particular, the protection of whistleblowers. During the first half of 2014, the Ombudsman drew up a draft for such internal rules, following a consultation with her staff.

In order to be as transparent as possible, and also with a view to drawing on the experience and knowledge of other persons in this area, on 24 July 2014, the Ombudsman invited comments from interested third parties on the draft rules. The deadline to submit such comments was 30 September 2014.

### Overview of the responses

The Ombudsman received nine responses to the invitation to comment.

These responses originate from NGOs active in the area of furthering transparency (such as Transparency International, Public Concern at Work, and Blueprint for Free Speech), specialised whistleblower protection associations (for example, Whistleblower-Netzwerk e.V.), persons with experience as whistleblowers, as well as from the French High Authority for transparency in public life.



Most comments received underline the importance of the Ombudsman's internal rules as a future model for other EU institutions to adopt. They thus stress the crucial importance of drawing up the best possible rules.

## Summary and assessment of the comments received

### Introductory remarks

In the following, the comments that were received will be summarised. Some of the suggestions made by third parties were not taken up in the final version of the Ombudsman's internal rules, either because the Ombudsman did not agree with them or because she considers that there is no need to address these issues in her internal rules on whistleblowing. As regards those suggestions that were not taken up in the internal rules, the reasons for doing so will be explained below.

In order to make it easier to follow the analysis, the full text of the draft internal rules is quoted in the text below.

The final version of the Ombudsman's internal rules, which was adopted on 20 February 2015, is available on the Ombudsman's website.

Article 18 of the internal rules provides that these rules will be reviewed within one year of their adoption. This review will provide an opportunity to decide whether further changes are needed.

### General comments received

It was stated that whistleblowing policies and arrangements aim to resolve the situation before it breaks down into a legal dispute. Hence, the Ombudsman was invited to draft her internal rules, which are intended for the use of her staff members, in the simplest language possible.

Many contributors stated that while it is true that, according to Article 22 SR, there is a *legal obligation* for EU staff to report serious irregularities, referring instead to an *expectation or invitation* might be more appropriate. In short, the focus should be shifted from the *legal* obligation to blow the whistle to a *moral* duty for staff.

#### **Ombudsman's position**

The Ombudsman's internal rules on whistleblowing are based on the relevant provisions of the Staff Regulations. Given that the Staff Regulations refer to whistleblowing as a legal obligation, we have to follow the same logic.



## The specific provisions of the draft internal rules

### Article 1 - Scope

The rules apply to everyone working in the Ombudsman's office, irrespective of their administrative position or status, including seconded national officials and trainees.

#### Comments:

This article should be clarified by further specifying to what extent the internal rules apply to external parties.

Moreover, it should be expressly stated in this section that the whistleblowing rules are not applicable to matters concerning general administrative staff complaints or grievances, such as the contesting of an annual appraisal report.

#### Ombudsman's position

As regards the first comment, the present rules constitute internal rules, that is to say, rules directed at the Ombudsman and her staff. The issue of whistleblowing by third parties is addressed in Article 17, which we believe is sufficiently clear. See also recital j) of the final version of the internal rules.

Concerning the second comment, it should be noted that it is clear from Article 2 that whistleblowing refers to (actual or perceived) 'serious misconduct'. The further clarifications provided in Article 2 as regards this central term make it abundantly clear that disputes about issues that do not concern serious misconduct, such as issues concerning an official's staff report, are not covered by this concept.

### Article 2 - Definitions

For the purpose of these rules, a *whistleblower* is a person who, in good faith, reports facts which he or she honestly and reasonably believes suggest the existence of serious misconduct in the Ombudsman's Office.

*Serious misconduct* includes, for example, fraud, corruption, theft, serious violation of rules on public procurement, and serious violation of professional obligations.

Disclosure is made *in good faith* if the whistleblower honestly and reasonably believes that the information disclosed, and any allegation contained in it, is substantially true. Good faith is presumed unless and until proven otherwise.



*Manager* means a head of unit, director, or the secretary general of the Ombudsman's Office.

#### **Comments:**

The definition of a *whistleblower* should be simplified and become less legalistic. Many contributors provided their own wording in this respect.

The definition of *serious misconduct* allegedly sets a very high and unclear bar. The definition should thus be modified by, for example, including an explicit reference to democratic values and the rule of law.

The list of examples should be extended, to provide as much clarity as possible.

Moreover, the reference that is made to the existence of serious misconduct or wrongdoing *in the Ombudsman's Office* is said to be misleading and not in line with Article 22 SR, as staff members must report irregularities *of which they become aware during the performance of their duties*, and thus even if the illegalities concern another EU institution.

Many comments demand that the reference to making a report in *good faith* be deleted, as motives should not play any role in this regard. What matters is instead that the person reporting any potential irregularity honestly believes that the information reported is true and accurate.

#### **Ombudsman's position**

The current definitions are based on the Staff Regulations and take account of the case-law of the Court of Justice as regards whistleblowers. We have tried to make them as clear as possible. In our view, they are easily understandable also to non-lawyers. The list of examples is sufficient in our view. It is difficult to see how a reference to democratic values and the rule of law could add further clarity.

We take the view that the concept of whistleblowing concerns serious misconduct within the institution for which the whistleblower works. Article 22b of the Staff Regulations is clearly based on the premise that the institution to which the whistleblower turns can take 'appropriate action'. However, it is difficult to see what action (apart from informing OLAF), say, the European Medicines Agency could take if one of its staff were to make a report to it of serious misconduct within the European Ombudsman's Office. Moreover, it is not easy to see what the 'prejudicial effects on the part of the institution to which he belongs' could be, against which a whistleblower is to be protected under Article 22b of the Staff Regulations. The Ombudsman, who is mentioned in Article 22b of the Staff Regulations, will obviously examine any reports about (actual or perceived) serious misconduct in other EU institutions, bodies, agencies and offices with utmost attention and take whatever action is possible to address the issues raised.

The term 'good faith' is defined in Article 2. Using this short expression makes it possible to avoid having to quote the lengthy and rather legalistic definition for which it stands each time the issue arises. We think that this adds to the clarity and reader-friendliness of these rules.



## **Article 3 - Procedure**

In accordance with Article 22a of the Staff Regulations, members of the Ombudsman's staff have the obligation to report, in writing, suspicions of serious misconduct.

Such reports may be made to a manager, or to the Ombudsman.

Article 22a of the Staff Regulations also provides for the possibility to report to the European Anti-Fraud Office (OLAF).

Article 22b of the Staff Regulations provides for the additional possibility to report to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, if certain conditions are met.

### **Comments:**

Instead of referring to the Staff Regulations, many comments requested that this article set out the specific steps for blowing the whistle and thus provide for a clear and to some degree pre-defined procedure for investigating the underlying matter in this respect. As part of this procedure, whistleblowers as well as persons implicated should have a right to be heard before a final decision as regards the report is taken.

It was underlined that, in bigger organisations, the persons tasked with investigating irregularities are usually attached to the higher management. It may thus be reasonable and appropriate to entrust this to a member of the Ombudsman's Private Office.

It was also observed that the Ombudsman should explicitly state that no person in a conflict of interest shall contribute to the investigation of the report made by the whistleblower.

Some comments ask that whistleblowers not only be allowed to report to a manager and to the Ombudsman, as well as the other institutions referred to in Article 22, but also to third parties, such as the media or a member of parliament, under certain conditions.

Moreover, it was mentioned that the contact details of OLAF should be provided.

One contribution referred to the fact that the EU courts have found that a whistleblower has no legal standing to ask the court to verify if a correct investigation of a disclosure has been made. The argument here was that this investigation is done in the public interest and is not a legally enforceable right of the whistleblower. The Ombudsman should thus explicitly provide for such a right.

### **Ombudsman's position**



As regards the procedure to be followed, two aspects need to be distinguished - the way in which the whistleblower submits his or her report on the one hand and the examination of this report on the other hand. We believe that the present rules provide sufficient guidance as to what a whistleblower could or should do. The rules on the internal inquiry to be conducted on the basis of the whistleblowers' report are laid down in the Ombudsman's rules of 4 November 2004, a summary of which is now annexed to the final version of the internal rules.

In so far as the person to carry out the inquiry is concerned, it is not advisable to lay down too precise a rule. For instance, adopting a rule that the inquiry is to be entrusted to a member of the Ombudsman's Cabinet (that is to say, her Private Office) is bound to cause problems if the allegations of serious misconduct concern a member of that Cabinet.

It is obvious that the Ombudsman will never entrust the inquiry to a person who would find himself or herself in an actual, potential or apparent conflict of interest. The same applies as regards persons assisting in such an inquiry.

As regards the possibility to report serious misconduct also to third parties, like the media or politicians, it should be recalled that Article 22b of the Staff Regulations provides for the possibility of turning to the Presidents of certain EU institutions, including the President of the European Parliament, who is an MEP. It is thus fair to assume that the legislator chose not to provide for the possibility for whistleblowers to turn to other persons or institutions. The Ombudsman has to respect this choice. In any event, the fact that the Staff Regulations (and thus the present rules) do not provide for the possibility of a whistleblower turning to third parties like MEPs or the press does not mean that this possibility is completely excluded. It simply means that a member of staff wishing to do so cannot rely on the Staff Regulations and the Ombudsman's internal rules.

OLAF's contact details are available on the Internet. There is therefore no need to repeat them in a set of internal rules, in particular in view of the fact that these rules are addressed to staff working for an EU body.

The Ombudsman strives to ensure that citizens are properly treated by the institutions, bodies, agencies and offices of the EU and that the latter comply with the principles of good administration. This also applies as regards whistleblowers reporting actual or perceived serious misconduct in her own Office. However, what the Ombudsman is unable to do is to grant citizens legal rights that are not provided for in EU law, as interpreted by the Court of Justice. In a union based on the rule of law such as the EU, only the legislator can grant such rights.

## **Article 4 - Guidance and support**

Potential whistleblowers may approach a designated staff member to seek guidance and support.

The Ombudsman acknowledges the important role played by the Staff Committee and may



request that it propose one of its members, or another staff member of its choice, to fulfil this role. Where the Staff Committee is not in a position to comply with such a request, the Ombudsman shall designate such a staff member.

Potential whistleblowers may also approach a manager, normally their immediate superior, for guidance and support.

To the maximum extent permitted by the Staff Regulations, guidance and support to potential whistleblowers shall be provided in confidence.

Where a report of serious misconduct has been made, the whistleblower may request guidance and support, which shall be provided to the maximum extent possible in the circumstances.

#### **Comments:**

It was noted that this article does not cover extreme cases in which a whistleblower may not be able to trust anyone inside the Ombudsman's Office.

In view of the above, the creation of an *external* guidance and support body for all EU institutions was considered to be appropriate by several contributors, so that truly *independent* advice can be provided.

The lack thereof may also put managers in a difficult situation if they are expected not only to investigate reports made, but also to advise potential whistleblowers. It was thus deemed to be appropriate to delete managers as a source of advice.

Contributors also stated that external guidance and support free of charge should also be offered.

One contribution calls on the Ombudsman to consider that, when seeking guidance, a whistleblower should be provided with a personal risk assessment related to his or her report by the relevant advisor. Information about remedies should be provided at this stage.

#### **Ombudsman's position**

As regards the creation of an external guidance and support body, it should be recalled that OLAF already provides independent advice free of charge, including potential whistleblowers who approach it anonymously.

All the Ombudsman's managers share the Ombudsman's view that whistleblowers contemplating making a report about serious misconduct in the Ombudsman's Office should be encouraged to do so. It is therefore difficult to see why they should have difficulties in advising potential whistleblowers. The Ombudsman's internal rules make it clear that whistleblowers will be protected against any acts of retaliation or reprisal. It is therefore not easy to see what purpose a 'risk assessment' could have. As regards possible remedies, these are laid down in



the present rules.

## **Article 5 - Information guarantees**

A whistleblower who reports to a manager or to the Ombudsman has the following information rights:

- (i) to be provided with an acknowledgement as rapidly as possible and, in any event, within five working days;
- (ii) to be told which staff member is responsible for dealing with the matter;
- (iii) to be told, as soon as possible and, in any event, no later than 60 days following receipt of the report, of the time it will take the Ombudsman's Office to take appropriate action;
- (iv) to be informed of any major steps taken in the course of any internal investigation based on the whistleblower's report, including the result of this investigation and any referral to OLAF. This information shall be provided within 30 working days.

### **Comments:**

This article was widely welcomed.

It was added, however, that the Ombudsman could also pro-actively inform a whistleblower of the remedies available to him or her should he or she suffer from retaliation in the future.

### **Ombudsman's position**

Informing a whistleblower of available remedies constitutes good administration. However, and as already indicated above, the present rules already make it clear that whistleblowers will be protected against any acts of retaliation or reprisal. The rules also make it clear what remedies a member of staff has in a situation where he or she believes that there has nevertheless been retaliation or reprisal.

## **Article 6 - Protection of whistleblowers**

The Ombudsman shall protect a whistleblower against any acts of retaliation or reprisal.

When an individual who is involved in serious misconduct subsequently decides to blow the whistle, the fact of having reported the matter shall be taken into account, in his or her favour, in any disciplinary procedure.

### **Comments:**





The protection should be extended to persons falsely accused of being whistleblowers, as well as to those supporting whistleblowers, for example by providing evidence for their allegations or by protecting them against retaliation.

It was further stated that this provision could be improved by including evidence-preserving requirements for the Ombudsman, since often no action is taken as a result of the lack of information.

Where a whistleblower believes he or she was treated badly after having reported serious irregularities, the burden of proof should explicitly lie on the Ombudsman to prove that the measures negatively affecting the whistleblower are not related to his or her reporting, but are related to, for example, inadequate professional performance etc.

### **Ombudsman's position**

The Ombudsman encourages whistleblowing. There can therefore be no question of any member of staff being 'accused' of whistleblowing, regardless of whether that person has blown the whistle or not. Moreover, any member of staff who feels that he or she is treated unjustly can make a request for assistance under Article 24 of the Staff Regulations.

Concerning the suggestion to introduce evidence-preserving requirements for the Ombudsman, this is a procedural issue that should be left to the person(s) entrusted by the Ombudsman with carrying out the inquiry into the whistleblower's report.

As regards the question of the burden of proof, it should be noted that this issue was already addressed, in the interest of the whistleblower, in Article 2 (see the definition of 'good faith') and Article 10 (as regards the nature of any measure taken with regard to a whistleblower).

## **Article 7 - Confidentiality**

The Ombudsman shall protect the identity of a whistleblower and the confidentiality of the report received to the greatest extent possible. The name of a whistleblower shall not be disclosed to any person potentially implicated in the reported misconduct or to any other person, except where absolutely necessary, for example, where procedural fairness requires identification of the source of the information.

Where a manager or the Ombudsman refers the matter to OLAF, the identity of the whistleblower shall not normally be disclosed to OLAF.

Whistleblowers who consider that the Ombudsman has not adequately protected their confidentiality and their related personal data may complain to the European Data Protection Supervisor.



#### **Comments:**

There was wide agreement between contributors that it should be possible to make a report *anonymously*, albeit with an indication of the resulting limitations that this places on whistleblowers' protection, the investigation of complaints, and the protection of the rights of individuals implicated.

Moreover, it was explicitly mentioned that confidentiality should be guaranteed unless the identity of the whistleblower is required to be disclosed *by law* or is disclosed with *the whistleblower's express agreement*. Additionally, staff members who breach confidentiality should be subject to disciplinary measures in order to guarantee the highest possible protection of whistleblowers.

#### **Ombudsman's position**

Given that the Staff Regulations are based on the premise that whistleblowing is an obligation, anonymous whistleblowing does not need to be considered in the present rules. However, the Ombudsman will obviously carefully examine any report on serious misconduct in her Office that was submitted to her anonymously.

Disclosing the identity of a whistleblower without proper justification would be a serious violation of the duties and obligations to be respected by members of the Ombudsman's staff, which would expose the person concerned to the risk of disciplinary measures. However, there is no need to deal with this issue in the present rules.

### **Article 8 - Mobility**

Where, as a protection against any possible retaliation, a whistleblower wishes to be moved to another unit within the Office (including moving from Strasbourg to Brussels or vice versa), the Ombudsman will endeavour to facilitate this request.

Where, for the same reasons, a whistleblower seeks a transfer to another EU body, the Ombudsman will support and assist with this request as much as possible.

#### **Comments:**

This provision was considered to be very positive, and no substantive comments were received.

### **Article 9 - Appraisal and promotion**

Managers shall ensure that, when appropriate, whistleblowing is favourably recognized in staff appraisal and promotion procedures.



They shall ensure that whistleblowers suffer no adverse consequences in this context.

Whistleblowing shall only be mentioned in the whistleblower's staff report, if he or she explicitly requests or agrees that such a reference should be included.

**Comments:**

This article was widely welcomed, too.

For the sake of legal clarity, the deletion of 'when appropriate' was however recommended. The term 'favourably recognised' leaves a lot of margin in any event.

## **Article 10 - Penalties for persons taking retaliatory action**

Any form of retaliation against a whistleblower is prohibited. It shall be up to the person taking any adverse measure against a whistleblower to establish that the measure was motivated by reasons other than the reporting.

If such retaliation occurs, the Ombudsman will take appropriate action, including, if necessary, disciplinary measures, against any member of staff concerned.

**Comments:**

It is a widely shared view that, if retaliation takes place, it would be appropriate to offer some sort of compensation, including financial.

The statement "if such retaliation occurs, the Ombudsman will take appropriate action, including, if necessary, disciplinary measures against any member of staff concerned." was considered weak, especially in the light of some whistleblower protection legislation in certain countries imposing prison sentences and considerable fines.

### **Ombudsman's position**

The internal rules make it clear that no retaliation against whistleblowers will be tolerated. Where such retaliation nevertheless takes place, appropriate redress will be offered to the whistleblower. This may include compensation of a financial nature.

The Ombudsman is not in a position to impose prison sentences or fines. However, any member of staff who takes retaliatory action against a whistleblower exposes himself or herself to disciplinary measures. The Ombudsman will penalise any such action vigorously.

## **Article 11 - Remedies**



Members of the Ombudsman's staff who blow the whistle and who consider that they have not received adequate support and protection may request assistance in accordance with Article 24 of the Staff Regulations.

An express decision, including reasons, shall be given to the whistleblower as rapidly as possible and in any event no later than two months after he or she submitted the request.

Where the whistleblower regards the decision as unsatisfactory, he or she may make a complaint, within three months, under Article 90(2) of the Staff Regulations.

If the whistleblower so requests, the Ombudsman shall offer the opportunity to present the complaint orally. The whistleblower has the right to be accompanied by a member of the Staff Committee and/or any other person at a meeting for this purpose.

In dealing with Article 90(2) complaints the Ombudsman may, with the whistleblower's agreement, consult a person or persons from outside the Ombudsman's Office in order to ensure that the procedure is as fair and equitable as possible.

Unless a longer period is justified in the circumstances, the Ombudsman's express decision on the complaint shall be given to the whistleblower no later than two months after he or she submitted the complaint.

#### **Comments:**

One contributor noted that it should be clarified that this provision only applies to staff members in the sense of the Staff Regulations.

As the complaint procedure might be considered to be insufficient, there should also be protection or compensation, including financial compensation, for example to enable the whistleblower to go to court.

Whistleblowers should be able to request a review of the decision of the Ombudsman as regards the whistleblowing report.

Where the whistleblower presents a complaint orally to the appropriate hierarchy, minutes should be made. The whistleblower should also have the right to make comments on their content.

#### **Ombudsman's position**

Article 24 of the Staff Regulations applies, directly or indirectly, to all members of the Ombudsman's staff (officials, temporary agents and contract staff). Given that the internal rules are directed at the staff of an EU body that can be expected to know the rules applicable to EU staff, there is no need to clarify the above fact in the internal rules.



As regards the alleged inappropriateness of the complaint procedure, a whistleblower who is not satisfied with the response given to his or her report by the Ombudsman is always at liberty to turn either to OLAF or to any of the heads of institutions listed in Article 22b of the Staff Regulations.

To the extent that the comment made concerns the result of an internal complaint (based on Article 90(2) of the Staff Regulations, it should be taken into account that there are only two possible alternatives. First, if the Ombudsman considers that the complaint is well-founded, she will do all she can to undo the mistake that was made and to assist the whistleblower. Second, if the Ombudsman considers that the complaint is unfounded, there is no possible basis on which she could provide financial assistance to a member of staff who wishes to bring an action against the Ombudsman's decision. However, the member of staff concerned is entitled to ask the Court of Justice for legal aid in order to bring a case before the court.

Where the whistleblower presents a complaint orally, it is obvious that minutes of the meetings will be prepared and that the whistleblower will be invited to make comments. However, this appears to be common sense and does not need to be included explicitly in the rules.

## **Article 12**

A malicious or frivolous report does not constitute whistleblowing and may lead to disciplinary measures, particularly if false accusations are made.

### **Comments:**

It was pointed out that this article does not use the phrasing of Article 22(b) SR.

Moreover, it was underlined that there are fundamental problems with the possibility to discipline a whistleblower if the concerns he or she raises are 'malicious' or 'frivolous', as it may be far too easy for those involved in wrongdoing to use the question of motive as a means to attack the whistleblower. Therefore, more caution should be used in considering the circumstances in which an individual can be disciplined for having questioned malpractice. It was suggested that a whistleblower should be subject to disciplinary measures only where the information provided was false and the staff member was aware of this at the time the concern was raised. The burden of proof in this case should lie with the institution.

The Ombudsman should extend her support to those members of her staff who suffered from knowingly false information reported.

Finally, it was suggested that as this article in the draft internal rules does not currently have a title, it could be titled 'Misuse'.

### **Ombudsman's position**



The only comment that needs to be addressed here (as all the others are reflected in the final version of the internal rules) is the second one. The Ombudsman will obviously take appropriate action to protect members of her staff who have been accused of serious wrongdoing even though the person making these accusations knew that they were wrong. However, there is no need to address this issue in the internal rules.

## **Article 13 - Rights of persons implicated**

Staff members implicated in reports of serious misconduct shall be informed in good time of the allegations made against them. Where there is a substantial risk that such notification would jeopardise the ability of the Ombudsman to effectively investigate the allegation or gather the necessary evidence, notification may be deferred as long as such risk exists.

Upon termination of any internal investigation, the staff members concerned shall be informed as rapidly as possible of the results of the investigation.

These obligations apply where the whistleblower reports to a manager or to the Ombudsman. Where a whistleblower reports to OLAF, it is for the latter to decide how to proceed.

### **Comments:**

Some of the guarantees given to whistleblowers should also be extended to persons implicated in reports. For example, these latter should have a right to be heard.

Persons implicated should not suffer any detrimental effects as long as the irregularities which they are accused of having committed have not been confirmed in the context of a proper investigation.

Data protection should also apply to persons implicated.

### **Ombudsman's position**

The only comment that needs to be addressed here (as all the others are reflected in the final version of the internal rules) is the second one. The Ombudsman will respect the presumption of innocence also as regards inquiries into reports submitted by whistleblowers. However, adequate measures that are necessary to protect the interests of all persons involved (for example, asking a person accused of harassment temporarily to move to another unit) must remain possible even before the investigation has produced definitive results.

## **Article 14 - Training and awareness-raising**

These rules and the relevant procedures shall be drawn to the attention of persons when they join the Ombudsman's staff and not less than once a year thereafter.



Training sessions shall be organised with the aim of ensuring that all members of the Ombudsman's staff understand that readiness to blow the whistle on serious misconduct plays an essential role in maintaining a culture of integrity in the Office.

Training sessions shall be organised for managers on how to deal with whistleblower reports.

**Comments:**

This article was well received.

It was mentioned that training should be repeated regularly.

Specific training should also be organised for managers on how to deal with whistleblowers' reports and on how adequately to protect whistleblowers.

It was also observed that it may be appropriate if staff members are regularly informed about relevant case-law and key developments affecting whistleblowers.

**Ombudsman's position**

The Ombudsman is grateful for the specific suggestions that have been made and which she will take up when her services provide training sessions to staff, either in general or with a specific focus. However, she does not consider it necessary to include such details in her internal rules. It may be useful to add that a first training session on whistleblowing for all staff was held on 15 January 2015

## **Article 15 - Reporting**

The annual activity report to the budgetary authority shall include a section on whistleblowing by members of the Ombudsman's staff. It shall also give details of the activities mentioned under Article 14 above.

**Comments:**

This section was widely welcomed.

It should specify however what should be reported, for example the number of disclosures, types, numbers resolved, reasons for not investigating etc.

## **Article 16 - External whistleblowing**

Every person who enters into a contract with the Ombudsman's Office shall be informed (i) that



it is possible to raise suspicions of suspected serious irregularities either with the Ombudsman or with OLAF and (ii) that making use of this possibility in good faith will not result in any retaliation, reprisal or other negative action on the part of the Ombudsman's Office.

The Ombudsman's Office shall also, whenever appropriate, consider encouraging contractors to adopt whistleblower rules of their own.

#### **Comments:**

In the view of many contributors, this article could be more specific. There appears to be a need to be more explicit about the possible context, the external whistleblowers' duties and rights and also about the level of protection that the Ombudsman can offer to these persons. Of course, if the scope of the definition of a whistleblower is extended to include external whistleblowers, then this section becomes redundant.

Clarifications should also be provided about the distinction between external whistleblowers under Article 22(b) SR and persons reporting serious irregularities to the Ombudsman in the context of a complaint.

#### **Ombudsman's position**

The Ombudsman has reviewed the wording of the relevant article. However, given the fact that the internal rules are based on the Staff Regulations, which do not apply to persons not belonging to the staff of the EU, it is not possible to extend the scope of these rules to third parties. To cite but one important issue, such third parties are under no obligation to blow the whistle.

The relationship between external whistleblowers and persons reporting serious irregularities to the Ombudsman in the context of a complaint is clear enough. The submissions of external whistleblowers who allege serious misconduct on the part of other EU institutions, bodies, agencies and offices are considered as complaints and handled as such. This is not the case where a third party alleges the existence of serious misconduct within the Ombudsman's own Office, given that the Ombudsman cannot examine complaints against herself or her staff. However, such submissions will be carefully examined by the Ombudsman and remedial action will be taken, wherever necessary. In such cases, the Ombudsman will endeavour also to extend the whistleblowing provisions to external informants, in particular by safeguarding their identity and by providing the same information guarantees as those granted to whistleblowers who are subject to the Staff Regulations.

## **Article 17 - Data protection**

Any processing of personal data in application of these rules is subject to Regulation (EC) N° 45/2001 [\[3\]](#) [\[Link\]](#) and shall be carried out in accordance with the Ombudsman's notification on whistleblowing. Staff members shall be informed of their data protection rights in this area





through the privacy statement prepared as part of that notification.

**Comments:**

Managers should also be informed about their duties in this regard and a violation of these duties by anyone should be subject to disciplinary measures.

Moreover, it was pointed out that the personal data of persons implicated in a whistleblower's report should also explicitly be protected.

**Ombudsman's position**

All the Ombudsman's staff (including managers) are and continue to be properly informed about the need to comply with data protection rules. This concerns personal data of each and every member of staff. The Ombudsman's Data Protection Officer plays a vital role in this context.

A violation of these obligations is likely to expose the person concerned to the risk of disciplinary measures. However, there is no need to address this issue in the present rules.

## **Article 18 - Review**

These rules shall be reviewed within one year of their adoption, with a view to deciding whether they need to be supplemented or revised.

Before deciding on any changes to these rules, the Ombudsman shall consult the Staff Committee.

**Comments:**

Annual reviews were welcomed.

It was also mentioned that the results of each review should be made public.

**Ombudsman's position**

The results of the reviews will be made available to the public.

## **Article 19 - Entry into force**

The rules shall enter into force on the day of their adoption.

No substantive comments were received as regards this provision.