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From: [REDACTED]
Sent: 25 July 2014 12:48
To: Euro-Ombudsman
Subject: [EOWEB] comment on ombudsman's draft internal rules on whistleblowing
Attachments: european ombudsman draft rules 25th july.doc

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Part 2 - Data

Subject comment on ombudsman's draft internal rules on whistleblowing
Content please see the comments on the attached document

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- **Case: OI/1/2014/PMC**
Opened on **24 Jul 2014**

- Field(s) of law: **General, financial and institutional matters**
- Types of maladministration alleged – (i) breach of, or (ii) breach of duties relating to: **Duty of care ,Other rights and duties resulting from the Staff Regulations and not covered by this list**
- Subject matter(s): **Award of tenders or grants,Execution of contracts,Administration and Staff Regulations,Institutional and policy matters**

The European Ombudsman has adopted internal rules about whistleblowing by members of her staff. The rules aim to safeguard the rights and interests of whistleblowers and provide adequate remedies if they are not treated correctly and fairly in relation to their whistleblowing.

The rules meet the requirements of the Staff Regulations of Officials of the European Union, in particular Article 22(c), as well as the Conditions of Employment of Other Servants of the European Union^[1]. They also take into account the published views of the European Data Protection Supervisor in relation to data protection aspects of whistleblowing^[2].

The rules are based on the following considerations:

1. Integrity is an essential principle of the European civil service. Members of staff of the EU institutions, bodies, offices and agencies must behave with integrity. They must also "blow the whistle" by reporting any reasonable suspicion of wrongdoing by others. Their legal obligations in this respect are laid down by Article 22a of the Staff Regulations.

2. Whistleblowing has an important role to play in helping the EU institutions, bodies, offices and agencies, including the Ombudsman, to deter breaches of the principle of integrity and to detect any that may occur.

3. The Staff Regulations provide, under defined conditions, for whistleblowers to have immunity from negative action by the institution for which they work. Whistleblowers may suffer in other ways, however; for example by retaliation from colleagues. Not only is this unfair to the whistleblower, it may also discourage whistleblowing and thereby weaken it as a mechanism for ensuring integrity.

4. Confidential advice and support should be available to guide and support potential whistleblowers.

5. If the whistleblower so desires, his or her identity must, to the extent possible, remain confidential.

6. In accordance with principles of good administration, whistleblowers may reasonably expect that their reporting will lead to appropriate action, of which they will be informed.

7. The rights of any person implicated by a whistleblower's report must be fully respected.

8. The above considerations also apply, in principle, to whistleblowers who are not members of staff of an EU institution, such as external contractors, sub-contractors and their employees. Within the limits of their legal and practical possibilities to do so, the EU institutions should also seek to safeguard the rights and interests of such whistleblowers.

The Ombudsman adopted the following 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.

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.

Article 3 – Procedure

Comment [DL1]: This term is unnecessary and could be omitted. Honest and reasonable belief is enough in the light of Article 12 below. The definition of good faith creates uncertainty and research shows that uncertainty about protection inhibits potential whistleblowers.

Comment [DL2]: What is the difference between something being “true” and something being “substantially true”?

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.

Rights of whistleblowers

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.

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.

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.

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.

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.

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.

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.

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.

Article 12

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

Other provisions

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.

Comment [DL3]: Again the focus should NOT be on the motive (if it can be accurately determined) of the whistleblower. The test should be that people who "knowingly supply false information" should be unprotected and punished.

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.

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.

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.

Article 16 - External whistleblowers

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.

Article 17 - Data protection

Any processing of personal data in application of these rules is subject to Regulation (EC) N° 45/2001^[3] 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.

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.

Article 19 - Entry into force

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

Emily O'Reilly

(Date)

[1] Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, OJ 2013 L 287, p. 15, both as last amended on 22 October 2013.

[2] EDPS Opinion on a notification for Prior Checking received from the Data Protection Officer of the Trans-European Transport Network Executive Agency (TEN-T EA) on Whistleblowing Procedures, Brussels, 28 October 2013 (Case 2013-0916).

[3] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1)..