[redacted]

From: [redacted] behalf of Whistleblower-Netzwerk e.V.
[redacted]

Sent: 30 September 2014 17:08
Subject: Reply to your consultation about the "Draft decision of the European Ombudsman on internal rules concerning whistleblowing"
Attachments: WBNW_Reply_OMB_WB_Policy_final.pdf

Dear Mrs. O'Reilly,

please find attached our reply to your consultation about the "Draft decision of the European Ombudsman on internal rules concerning whistleblowing".

We would be grateful to receive a confirmation of reception.

Best regards,

Guido Strack

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Reply to your consultation about the "Draft decision of the European Ombudsman on internal rules concerning whistleblowing"

Dear Madam Ombudsman O'Reilly,

Whistleblower Netzwerk e.V. is a non-profit association from Germany working to support and protect whistleblowers and to facilitate whistleblowing. Part of our work is to contribute to better national and international whistleblowing legislation and policies, e.g. by collecting best practice examples and commenting on bills and drafts for internal policies. Working internationally of course international organizations are also in our focus.

We therefore very much welcome your own initiative inquiry OI/1/2014/PMC concerning whistleblowing and your invitation to comment on your draft internal rules on whistleblowing and hereby submit our comments. To adapt to the language of your draft and to ease your usage of our contribution we provide our comments in English. Please accept our apologies for any mistakes arising from the fact that we are not native speakers.

If you have any questions or if you would like us to clarify some of the issues raised in the following document please feal free to contact us.

Best regards,

[redacted]
Guido Strack
- chairman -

Annex:
Recommendations of Whistleblower-Netzwerk e.V. in relation to the "Draft decision of the European Ombudsman on internal rules concerning whistleblowing"

Recommendations of Whistleblower-Netzwerk e.V. in relation to the "Draft decision of the European Ombudsman on internal rules concerning whistleblowing"[1]

1. The Setting

It is obvious that the EU lawmaker by introducing Article 22c into the Staff Regulation and the conditions of other servants of the EU (SR) recognized the importance of whistleblowing and the need for well-structured procedures to avoid retaliation against whistleblowers and to allow for best practice treatment and follow-up of the information they provide. Now each institution is tasked to develop and implement its own rules that of course will need to respect the conditions set up in Article 22c but also all other legal requirements (e.g. data-protection rules and human rights).

In our view the Ombudsman should strive to set up internal rules that within that given frame allow for a maximum of transparency and accountability and provide a model for other institutions to follow. These rules should inter alia use an "in doubt report" approach, motivate whistleblowers to come forward, honor those who do, provide them with enforceable rights in relation to sufficient information throughout the process and a timely thorough and fair treatment of their disclosure as well as efficiently protect them against any form of retaliation by assuring that they are not left alone in the rain with unfulfillable burdens of proof.

At the same time the internal rules should set up internal structures and procedures that assure that disclosures are treated correctly and that those who deal with them are sufficiently trained and equipped to assure this. Finally the rules must also assure that those accused of being responsible for a possible wrongdoing are treated fairly and in line with legal requirements and profit from an assumption of innocence until the contrary is proven. In this context it is important to assure that when a whistleblower honestly provides information which he or she assumes to be correct and pointing to a wrongdoing of somebody but which after a proper investigation turns out not to be related to any wrongdoing this in the end does not lead to any negative consequences for the whistleblower and/or for the person accused. It is in the public interest that in such a case the report is made and investigated and that future could be whistleblowers are not deterred. It is also important that people do not fear to become victims of false accusations while they at the same time need to understand the legitimacy of concerns being raised. Thus it is the institutions obligation to avoid or at least to compensate any negative consequences arising from that public service for the whistleblower as well as for the wrongly accused.

Looking at the legal setting the draft of the Ombudsman gives the impression that the main concern lies on the implementation of Articles 22a-b SR. However it has already been shown

[1] http://www.ombudsman.europa.eu/en/cases/correspondence faces/en/54613/html.bookmark

in the first study of the European Parliament on whistleblowing[2] that these norms are not very clear. The second study[3] and experts views during the hearing of the European Parliaments Budget Control Committee on whistleblowing on 25.05.2011[4] provided further insides into the weaknesses of this legal setting and its application within the EU until then. As proposals for major revisions of these norms[5] have not been accepted during the reform of the Staff Regulation these norms are still in force and need to be respected. On the other hand now they are accompanied by Art. 22c which also refers to Art. 24 and 90 SR and thus clearly goes beyond the limited area of application of Art. 22a-b SR. In addition to that any institution has – within the framework of the Staff Regulation and other norms – a right to organize itself.

Thus in our opinion there is a lot of room for internal rules of the institutions to deal with whistleblowing in other areas about other subjects, by other senders or to other recipients than those covered in Art. 22a-b SR. Using this opportunity the concerned institution – and here as well the Ombudsman should in our view take a leading role – could for example allow for other and even external recipients of (at least as a second level) whistleblowing disclosures and thus gain much more trust by potential whistleblowers who might fear that a purely internal or EU-institutions-only treatment of their concerns might lead to biased results as the recipients lack sufficient independence and neutrality.

The need for realy external and even public control is something which is clearly part of international best practice of whistleblowing laws and policies[6] and also recognized e.g. by the recent Recommendation of the Council of Europe[7]. While these are not binding for the EU Institutions the European Convention on Human Rights (ECHR) and especially its Art. 10 is. The European Court of Human Rights in Strasbourg has made clear in several judgments that whistleblowing is protected under Art. 10 and that thus any limitation to external whistleblowing needs to be tested in general and in each individual case on its necessity in a democratic society[8]. Therefore it would constitute a violation of Art. 10 ECHR and thus of Art. 6 of the Lisbon Treaty to interpret Art. 22a and b SR as an absolute ban for outside EU and public disclosures. It should also be taken into account that each institution and its Appointing Authority (here the Ombudsman) are the owners/counterparts of the loyalty and secrecy obligations put onto staff by e.g. Art. 11, 12, 16, 17 and 17a SR. Thus the Appointing Authority has the right to lift these obligations and to allow staff even external disclosures

[2] http://www.europarl.europa.eu/document/activities/cont/200907/20090728ATT59162/20090728ATT59162EN.pdf practical failures of the EU institutions dealing with whistleblowing have also been shown in another study prepared for ADIE available via http://www.anstageslicht.de/fileadmin/user_upload/Bilder/AT_GS_20081231.pdf.
[3] Corruption and conflict of interest in the European Institutions: The effectiveness of whistleblowers (available via http://goo.gl/cBylJY)
[4] Available via http://www.europarl.europa.eu/thinktank/de/pastevents html?page=61
[5] E.g. the ones of Martin Ehrenhauser, Monica Luisa Macovei and Eva Lichtenberger (see http://aneverclosерunion.eu/dossiers/1869/amendments and http://aneverclosерunion.eu/dossiers/1869/amendments?p=2)
[6] For example the „G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers“ (available via: http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf) in principle No. 4 explicitly mentions: „Allowing reporting to external channels, including to media, civil society organisations, etc.“; see also principle 17 of the „International Principles for Whistleblower Legislation“ of Transparency International (http://goo.gl/Fc3Jps) or as an example for legal implementation No. 10 of the Irish Protected Disclosures Act 2014 (http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0014.pdf).
[7] „Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers“ (available via http://goo.gl/7ZfzQb and it’s Explanatory Memorandum available via http://goo.gl/vA5M6h)
[8] E.g.: ECHR, Guja v. Moldova [GC], no. 14277/04, Heinisch v. Germany, no. 28274/08 and Bucur and Toma v. Romania, no. 40238/02.

(see e.g. Art. 17(2) SR). The institutions could and should thus make a generalized use of this right through corresponding clear statements and rules in their internal whistleblowing rules, thus making it easier and less stressful (compared to needing to analyze the jurisdictions of different courts and hoping that they will not shift) for staff to know when and to which external recipients whistleblowing is permitted. For example the Ombudsman could include an article in its rules that it will not make use of any available negative sanctions against whistleblowers under his/her responsibility (i.e. staff of the Ombudsman) who in cases where there is an assumption that EU Institutions might be biased or not able or willing to correct the wrongdoing or are likely to retaliate blows the whistle not via the channels foreseen in Art. 22a-b SR but in a proportionate way to outside recipients (e.g. national authorities of the member states or even the media).

A similar legal logic applies for other current weaknesses of the whistleblowing regime of the EU. The EU courts for example have found that a whistleblower has no legal standing to let the court verify if a correct investigation of a disclosure has been made[9]. The argument here was that this investigation is only done in the public interest and not a legally enforceable right of the whistleblower. By a clear and explicit statement in its internal whistleblowing rules any institution now has the possibility to make clear that it provides such a legal right to the whistleblowers within its institution and under its authority.

The same fits for another weakness shown by another decision of the EU Courts in which they obliged a whistleblower whose application for a job (and the same would fit in a promotion exercise) was turned down by the superiors against whom he blew the whistle to prove that this was motivated by them being biased[10]. Internal whistleblowing rules should now take consequences from that decision and in line with recognized international best practice contain a rule stating that if a whistleblower is able to show that s/he suffered negative consequences – like a bad notation – after her/his whistleblowing that might be related to the whistleblowing – as e.g. because of involvement of those accused – it will be the burden of the institution to show that the treatment of the whistleblower was fair and lawful[11]. Any institution having such statements in its whistleblowing rules will thus bind itself and its long established practice of the EU courts that they honor such self-binding declarations in internal rules[12], which in future cases would lead to the desired shift of the burden of proof before the courts.

In the following chapters we will try to comment on the current proposal and to reflect on some issues that in our view are lacking in the current proposal and the – in our view – too limited general approach chosen until now. Some of those issues should already have become obvious from the paragraphs above. Please keep in mind that without having dedicated resources we are not able to undertake a very detailed review of the current draft or even a full

[9] See T-4/05 and C-237/06P.
[10] See F-44/05 §§ 127 et seq..
[11] See e.g. Nr. 3 in the G20 Compendium stating: „Clear indication that, upon a prima facie showing of whistleblower retaliation, the employer has the burden of proving that measures taken to the detriment of the whistleblower were motivated by reasons other than the disclosure;“ and Nr. 8 of the TI-Principles stating: „Burden of proof on the employer – in order to avoid sanctions or penalties, an employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblowers disclosure.“
[12] See e.g. T-281/01 §63.

redrafting of the internal whistleblowing rules for the European Ombudsman how they in our opinion should be. We would be able and willing to do that if necessary financial resources and a consultancy contract would be provided to us.

2. The current draft

2.1. Introduction

Already the first paragraph of the introduction should not only focus on the own staff whistleblowers but also make clear that the rules aim for:

- the proper (well equipped, efficient, transparent, legally correct and accountable) organization of the recipients and the follow-up of disclosures;
- the protection of the rights of those (properly wrongly) accused;
- the proper handling of second level disclosures received by the Ombudsman under Art. 22b SR;
- the similar handling of whistleblowing disclosures by non-EU-staff;

The second paragraph should include a reference to the human rights dimension explained above. The same fits for the following numbered paragraphs.

In §1 the focus should be shifted from the legal obligation and duty to blow the whistle under Art. 22a SR (which still will need to be mentioned and explained) to a moral duty of staff or preference of the institution for staff to reflect about blowing the whistle as a better alternative to silence in all areas in which whistleblowing could serve the public interest, the interests and integrity of the EU or the institution, human rights or health of the environment. Thus as already mentioned in the introduction while respecting the obligations formulated in Art. 22a-b SR already here it should be made clear that without extending that obligation the institution's rules provide an additional offer to possible whistleblowers to use the tool of whistleblowing in areas that go beyond the limitations and requirements of Art. 22a. It should be explained that the Ombudsman is aiming to ease and enhance whistleblowing by applying a policy of "in doubt report" on a multitude of wrongdoings, legally or ethically problematic activities. The rules should be understood as a commitment of the Ombudsman to guarantee best quality and treatment standards in dealing with all these different whistleblowing cases while in no way extending (non-management's) staffs obligations beyond Art. 22a SR.

§1 in its current form speaking about a "must" to blow the whistle on "any reasonable suspicion of wrongdoing by others" is to say the least dangerous as it might be understood as – illegally – extending staffs obligations to report even beyond Art. 22a SR using a totally different and much wider wording than that of article 22a SR. On the contrary there might even be need to limit the obligation of at least some Ombudsman staff's responsibility due to its special role dealing with external complaints to the Ombudsman. Those also could contain "facts" in the sense of Art. 22a SR. Will Art. 22a SR apply on these issues, or is it sufficient

to treat the external complains in their foreseen procedure and thus leaving it a decision of the Ombudsman to inform OLAF and others? It would surely be helpful if the rules would contain some statement how to deal with such a situation.

In §3, apart from the issue that Art. 22a SR is in itself not clear the word "immunity" which will tend to be understood as very wide gives a false impression compared to the very limited protection and the difficult burden of proof situation under Art. 22a SR. It might also be worth to reflect on which acts fall under the protection: is it only the whistleblowing itself or also (normally illegal) actions taken to enable oneself to blow the whistle effectively, e.g. copying of classified documents or taping of oral statements that prove corrupt activities (what's about national laws affected?). Also here some clarifications of how to understand Art. 22a SR would surely be helpful.

While §4 is a good idea it should be clarified who will provide this advice, how independent this person is, if that person also falls under the obligation of Art. 22a SR, if advice also be requested under full anonymity and if it is possible to ask for advice and then still to decide not to blow the whistle.

In §5 the wording "to the extent possible" should be clarified. It should be made clear that the Ombudsman and the recipients entrusted by her/him will not be allowed to lift the confidentiality without being ordered by a court to do so and will face severe disciplinary consequences for violating that obligation. It should also be made clear that whenever information about a case is given out by the recipient s/he will have an obligation to assure that the information does not by accident identify the whistleblower and that any such information will only be released or forwarded to other institutions with the informed consent of the whistleblower.

In §6 it might make sense to add "a proper investigation and" after "lead to". As mentioned above it is essential that the terms "may reasonably expect" are replaced by a terminology (e.g. "are legally and enforceable guaranteed") that assures that all activities mentioned thereafter become legal obligations of the institution to the whistleblower who should have the right to challenge the EU institution at the EU courts if the institution does not adhere to said obligations. Without such an enforceable guarantee the whole policy risks to be seen by potential whistleblowers as some useless political window dressing that gives them only duties but no rights.

§8 is positive in the sense that it recognizes that the policy can well go beyond the limits of Art. 22a SR. However this "beyond Art. 22a SR area" needs to be explained in far more details, especially as in that area contrary to Art. 22a SR there is no room for any "obligation" to blow the whistle (at least as this has not been explicitly constructed elsewhere like for example in a contract with a service provider foreseeing his obligation to enable his staff to blow the whistle to the EU institution).

2.2. Article 1 - Scope

As just mentioned before it is difficult to see how an obligation to blow the whistle in the legal sense of Art. 22a SR could be extended to "everyone" – especially if these persons are

currently not falling under the regime of the SR like e.g. trainees. We also think that apart from purely legal questions it is for policy reasons not desirable to create additional duties to blow the whistle and go beyond Art. 22a SR. These duties are hardly enforceable anyhow, at least we are not aware of a single case where someone within any of the EU institution has been accused of or negatively sanctioned for not blowing the whistle. In our view it's a far better approach to say that whistleblowing is useful, that the institution wants to hear what you have to say and will react properly and to ask people to act with integrity and conscience instead of putting legal burdens on them.

Apart from this duty-question it is of course desirable to apply the rules to everyone working in the Ombudsman's office. In addition to that it might also be useful to state that some parts of the rules create rights and possibilities even for people outside the ombudsman office (e.g. external whistleblowers from contractors of the Ombudsman or Art. 22b SR whistleblowers who turn to the Ombudsman).

2.3. Article 2 -Definitions

Here as well a clear distinction should be made between Art. 22a and/or 22b SR whistleblowers and whistleblowing, and other whistleblowers and whistleblowing. As far as Art. 22a/b SR is concerned the language of that article and its interpretation by the courts should be used and the introduction of new terminology should be avoided.

This is especially true for the term "good faith" that does not appear in Art. 22a-c SR and should be avoided as it might give the impression that motives play any role. Motives in our view should not be of any importances as long as the whistleblower acted honestly, i.e. believed that the information provided by him/her is essentially true. Honesty and reasonableness of a disclosure both should indeed be presumed unless and until proven otherwise.

As far as the term "serious" is concerned it indeed appears in Art. 22a (but not the term "misconduct") but it is dangerous in two respects. On the one hand it might hinder someone from blowing the whistle as s/he might think: "oh this isn't that serious I can't inform anybody", on the other hand it might put pressure on staff thinking "oh now this affair turns out to be more serious than I initially thought so someone might accuse me that I should have blown the whistle earlier. I better keep my mouth shut not to risk to be accused myself for not having respected Art. 22a SR right from the beginning". The rules should address both issues. The first by making clear that in addition to Art. 22a SR staff may also disclose information (or at least use the offer to get counselling) if they are not sure if there is really an issue or if the issue is serious. The second should be addressed by making clear that the Ombudsman is aware that finding the right moment to blow the whistle is a difficult issue and that therefore whistleblowing should be done better late than never (which might even be true for those involved in wrongdoing – for them as mentioned in Art. 6 indeed the fact that they blew the whistle should also be positively taken into account when considering the negative sanctions of their wrongdoing).

Another problem might arise from the wording "misconduct in the Ombudsman's Office" which also differs from the one used by Art. 22a SR. In our view Art. 22a SR obliges a staff member to blow the whistle as soon as s/he "in the course of or in connection with the performance of his duties" becomes aware of the illegalities mentioned therein, even if the misconduct happens in another EU-institution than his/her own or if it an activity outside the institutions (e.g. by retired officials that violate their duties) that is "detrimental to the interests of the Union".

2.4. Article 3 -Procedure

Here again there is another terminology as in Art. 22a by using the word "suspicions" which seems to be less than the terminology of Art. 22a SR "becomes aware of facts which give rise to a presumption of the existence of possible illegal activity". As mentioned already several times Art. 22a SR should be treated as it stands and there should be an indication that "suspicions about wrongdoing" (even non-serious ones) that do not reach the higher Art. 22a SR threshold can (but do not obligatory need to) be reported.

Paragraphs 1, 3 and 4 of this article in a way only (and partly wrongly) describe what is laid down in Art. 22a and 22b SR. It might make more sense just to quote these articles in the rules (so users have all information they need available in one document) and give some reliable interpretation of the SR rules as far as it is available.

The key point of rules under the heading "Procedure" however should be a description of how whistleblowers can use the rules and whom they may address. Here best practice has shown that it makes sense to offer whistleblowers several possible addressees to choose, provided that all of these addressees are well trained in dealing with whistleblowers (which should include knowledge about the psychological hardships and conflicts whistleblowers face) and their disclosures. The statement in §2 thus seems useful especially as it is accompanied by the guarantee in Art. 14, that all managers receive such training.

However in addition to this "any manager approach" there should also be a dedicated recipient whom any staff (or even outsiders) might contact through specific channels. This is best practice used in many organizations especially to enable anonymous and confidential contacts (e.g. through specific web interfaces like the one used by OLAF). Sometimes even external lawyers (bound to report back only to the organization) are used as dedicated first recipients to have a legal assurance that they cannot disclose the name of the whistleblower and to use their skills for counseling the whistleblower in how to most effectively providing and presenting his/her information without including information that allows to detect his/her identity.

What seems to be underdeveloped in the draft rules is the question what (apart from the information guarantees in Art. 5) happens after the disclosure in relation to its content. Here in our opinion it would make sense to distinguish between minor events that can immediately be handled and solved by the addressed manager (who should inform the whistleblower accordingly) and other events that need investigation, involvement of other managers and or more formal follow-up. At least for the later information should be collected at a dedicated

office. In bigger organizations these offices are typically attached to top management or to compliance and cooperate with other departments depending on the issue. For the Ombudsman office it might make sense to charge one person in the cabinet with this coordinative and investigative task, which would also enable to collect all cases at a central position, to gain experience with this special task, to make statistics and reports and to have a good overview of what is going on. In any case the whistleblower should know in advance who will deal with his/her disclosure and should also have the possibility to ask for a specific person not to be involved in the treatment of his/her disclosure due to suspicions of involvement into the wrongdoing or assumed lack of independence. Independence of the investigator and fairness of the investigation are key issues to establish trust with (potential) whistleblowers. As far as procedure is concerned it would also make sense to define standard and maximum delays and responsibilities, e.g. that a transfer of a file to OLAF will be decided by the Ombudsman but that any staff member also has the right to disclose to OLAF possible misconduct by the Ombudsman in not referring a dossier to OLAF without being penalized for doing this.

2.5. Article 4 - Guidance and support

It has already been stated above that a clear enforceable and sanctioned assurance of confidentiality is a key issue. It also has been mentioned that the Ombudsman should (following the example of OLAF) reflect about using IT-tools that allow anonymous 2-way-communication with whistleblowers. These tools should also be made available for requesting guidance and support.

As far as guidance and support are concerned there are some questions not addressed in the current draft. In an ideal situation potential whistleblowers should have a possibility to (confidentially/anonymously) ask for guidance and then still be free in their decision to blow the whistle or not. Implementing such a possibility for whistleblowers who do not fall under the obligation of Art. 22a SR seems not too big of a problem but for those who fall under Art. 22a SR there are two problems. They might face the risk to violate Art. 22a SR and the one who provides the guidance might him-/herself become obliged to blow the whistle. The proposal to offer free of charge access to guidance by an external lawyer or an NGO falling under the same legal privileges instead of only in-house guidance could help to solve this issues.

In addition to providing guidance for potential whistleblowers, it would also be desirable that the recipient of a whistleblowing automatically offers the whistleblower a personal risk assessment to evaluate the risks that might be related to his/her whistleblowing (e.g. strategies to limit the risk of accidentally lifting the identity, risks of harassment, notations and other career decisions by those accused …) and to discuss possible pro-active strategies of risk limitation (e.g. transfer to another unit or even institution) which of course should only be undertaken with the full consent of the whistleblower. Some aspects of this are already included in Art. 8 and 9 of the current draft but in our view it would be helpful to be more explicit and to make the risk assessment offer a standard procedure.

2.6. Article 5 –Information guarantees

This is one of the most precise and a very good article. It may make sense to include rights like the one for an individual risk assessment just mentioned and to assure that especially when the dossier is transferred to other parties like OLAF or when a final decision about closing the case is to be taken (which of course should always be done with a formal decision stating reasons) the whistleblower has a chance to comment before these decisions become final (and not only to be informed when everything is already done). As already mentioned in addition to the right to be heard and informed there should also be legally enforceable guarantees to the whistleblower in relation to a proper and fair investigation and follow-up of his disclosure.

2.7. Article 6 –Protection of whistleblowers

This would be the place to add a shift of burden of proof rule as otherwise the whistleblower will be left alone in the rain with a promise that s/he can't enforce. This could be done by including a sentence like: "When a whistleblower is able to give a prima facie indication that his/her whistleblowing might have led to negative consequences that might involve the responsibility of the Ombudsman's office, it will be for the Ombudsman's office to prove that this is not the case or that negative consequence were not at all related to the whistleblowing but justified by other reasons." Currently something similar is already contained in Art. 10 but in the phrasing used there it seems to be only usable in relation to individual staff wrongdoing and not in relation to institutional wrongdoing under the responsibility of the Appointing Authority. Both constellations should be covered.

The need for a pro-active risk assessment has also already been mentioned.

There should also be a clear statement here or in Art. 10 that the Ombudsman will use not only disciplinary means but also Art. 24 SR and all other available means (e.g. agreement to lifting immunities, providing information to national and international courts) to support a whistleblower who suffered retaliation from other staff or third parties in achieving justice and compensation.

2.8. Article 7 – Confidentiality

As mentioned above the usage of technical means and external lawyers as recipients should be envisaged to make confidential and also anonymous 2-way-contacts possible for guidance, disclosure and the following communications.

As also already mentioned above it must be made crystal clear that confidentiality will only be lifted if required by a court or with the consent of the whistleblower.

It should also be clearly stated that an unauthorized lifting of confidentiality or anonymity or even the attempt to do that constitute a wrongdoing and a reprisal against the whistleblower.

2.9. Article 8 – Mobility

This is a very concrete and positive article and approach.

2.10. Article 9 – Appraisal and promotion

This also is a positive article and approach. However it should either be clarified what "when appropriate" relates to (e.g. when the facts provided by the whistleblower enabled the institution to become aware of weaknesses in organization or staff behavior, maybe also to compensate for suffering) or this part of the phrase should be dropped (the term "favourably recognized" anyway leaves a lot of discretion how to do that).

There should be a clear and enforceable right of the whistleblower to request that those accused by him may not take decisions influencing his/her career.

2.11. Article 10 – Penalties for persons taking retaliatory action

The issues mentioned elsewhere, especially in our comments to Ar. 6 and 7 should also be taken into account here.

2.12. Article 11 – Remedies

We are not fully sure if this article correctly fits into the structure of Art. 24 and Art. 90 et seq. SR.

It should be made clear that all these issues concern only staff members in the sense of the SR. There might be need for specific rules for mistreated external whistleblowers.

In relation to Art. 24 SR it should be made clear that the whistleblower in his/her risk-assessment dialogue and at any other stage of the procedure where application of this article might be possible will be pro-actively informed about his possibility to request assistance under Art. 24 SR. The Ombudsman should also declare his/her willingness to compensate damage encountered by whistleblowers and those wrongly accused by making use of Art. 24(2) SR.

The whistleblower and the wrongly accused should also be advised that according to long standing jurisdiction of the EU courts Art. 24 may not be used against the institutions and the Appointing Authority itself but that here s/he would need to make a formal request for compensation and damages under Art. 90(1) SR.

The whistleblower and the wrongly accused should further be advised that whenever a request under Art. 24 or 90(1) SR has not been accepted they will need to launch an official complaint under Art. 90(2) SR within three months before being able to go to the EU courts.

The rules (and also any individual information/notification of a final decision to a whistleblower) should contain a clear statement that a final decision in a whistleblower case might constitute a violation of the rights of the whistleblower to have a fair and correct investigation and follow-up against which the whistleblower within three months after notification might direct a complaint under Art. 90(2) SR. The currently proposed §§ 2 and 3 are pointing into that direction but might not be strong and clear enough for the EU courts to accept that. Instead it should be crystal clear that any decision about his/her disclosure constitutes an "act affecting" the whistleblower in the sense of Art. 90(2) SR and that this "affecting him/her" should be considered to be "adversely" in the sense of Art. 90(2) SR if the

guarantees of correctness, lawfulness and respect of procedure given to the whistleblower in other (including new) parts of the rules have been violated.

The Ombudsman should also make a clear statement that when s/he assumes that a complaint under Art. 90(2) SR is premature as it should have been preceded by a request under Art. 90(1) SR s/he will inform the complainant within one month after reception of the complaint and accept full liability for any procedural problems arising from such information being late, lacking or false. Without such a declaration whistleblowers risk that it is only the court that explains them later that their request under Art. 90(2) SR was premature.

§ 4 might be useful in some cases but is dangerous as it might lead to problems of proving what has been said. This paragraph should thus at least be accompanied by a duty of the Ombudsman on request by the whistleblower to make minutes of such a meeting and to allow comments on the minutes by the whistleblower. This same right might be useful in any other case where there is oral communication with the whistleblower.

In §5 it should be clarified that the whistleblower can ask for such a person to be involved or perhaps even a fully-fledged external mediation to take place. It might also be useful to create a list of such persons involving the Staff Committee.

§6 in principle is a positive commitment of the Ombudsman to try to speed up the procedure however it might result in problems for the compliant if at the end of the two months there is no explicit decision or even no reply at all. S/he might then be tempted to go to court while - as §6 cannot modify Art. 90, 91 SR - this would in such a case only be possible if there is an explicit reply or the four month period of Art. 90(2) SR is over.

2.13. Article 12

This seems to be the only article without a header which could be “Misuse”. Here again it would be preferable to use the terminology of Art. 22a SR. It is also not understandable why non-false accusations should lead to disciplinary measures. An alternative phrasing could be: “A dishonest report which contains substantially false facts and accusations the reporting person knew about when reporting does not constitute whistleblowing and may lead to disciplinary and other measures”. Here or in Art. 13 it should also be stated that the Ombudsman will make use of its possibilities under Art. 24 SR to support those who suffered from knowingly false accusations.

2.14. Article 13 - Rights of persons implicated

As mentioned above it might make sense to extend some of the guarantees given to the whistleblower as well to the implicated or accused persons. They for example should also have a right to be heard before an investigation is closed (at least if it is not closed without follow-up).

Special guarantees should be given that there should be no retaliation against those accused as long as the accusations have not been found to be justified in a correct procedure. This should however not exclude provisional measures that are necessary for reasons to protect the

interests of the Union, provided that the allegations would be true. Any negative consequences steaming from such provisional measures or any other negative consequences falling under the responsibility of the Ombudsman should be compensated if the allegations turn out to be unjustified. Falsely accused persons should also be able to benefit from measures under Art. 24 SR.

It might also make sense to explicitly refer to the duty to treat any information in relation to allegations in line with data protection legislation which includes that only people who need to know to enable investigations and follow up will have access to the information which they need to have to fulfil their tasks.

2.15. Article 14 - Training and awareness raising

All foreseen activities are useful but they might not be sufficient. Other activities which should be included here are for example:

- regular anonymous staff survey evaluating attitudes/prejudices about whistleblowing and testing knowledge about and attitude towards implementation of whistleblowing rules at the Ombudsman's office;
- regular (depersonalised) information to all staff about the handling of whistleblowing cases at the Ombudsman's office;
- evaluation of the effectiveness and appropriateness of the whistleblowing mechanisms keeping them in line with (evolving) international best practice;
- inform staff about decision of EU and international courts that might influence these rules and their interpretation.

It is very important that all potential future whistleblowers learn what will happen whenever they blow the whistle. They should be able to see from deeds that the rules are followed in practice and that whistleblowing is a powerful instrument to achieve change of wrongdoings and malfunctions and to hold those responsible to account without leading to the suffering of whistleblowers.

2.16. Article 15 - Reporting

As in staff training here as well benefits of whistleblowing should be made clear but critical issues and deficits should also be addressed openly as any whitewashing would sooner or later become visible and would make it impossible to establish the trust which is necessary for any whistleblower system to be used and to become successful.

2.17. Article 16 - External whistleblowers

It is encouraging that external whistleblowers are included but there might be a need to be more explicit about the possible contexts, their duties and rights and also about the level of protection the Ombudsman can implement in those cases. There might also be a need to

distinguish two groups of external whistleblowers according to the fact if they fall under the regime of Art. 22a-b SR (i.e. being staff of other EU institutions) or not.

Art. 22b SR most certainly will need a specific treatment (i.e. perhaps OLAF should not be specifically mentioned in relation to external whistleblowers but only in relation to Art. 22b SR procedures) and it might also be important to make clear what distinguishes external whistleblowers from someone making a normal complaint to the Ombudsman under Art. 228 of the Treaty on the Functioning of the European Union (TFEU). In any case for each of these groups of externals the rules applicable to them should be fully made available to any potential group-member.

The Ombudsman should make clear that s/he will use all available means to protect those who use their right to blow the whistle or to complain to the Ombudsman to protect them against any form of retaliation. S/he should extend these available means by foreseeing an explicit right to blow the whistle to the Ombudsman about non-compliance with laws or contractual clauses of anyone working in the context of a contractual relation with the Ombudsman's office in any such contracts and hold her contractual partners accountable for any violation of this right.

2.18. Article 17 - Data protection

Management should also be informed about their duties in relation to data protection when handling whistleblower disclosures.

2.19. Article 18 - Review

While it makes sense to review the rules within one year this should not be the only review. Each annual report should raise the questions of necessary adaptions of the rules due to deficits encountered or further developments of international best practice or jurisdiction.

2.20. Article 19 - Entry into force

It is important that the system established by the rules is available as from day one as already at the very beginning of its implementation whistleblowers might feel motivated to come up with disclosures in relation to issues of the past. Thus management and all those dealing with disclosures should be ready and well trained from day one.

3. Missing issues

We strongly recommend to once again check the next draft of the rules to assure that it is in line with international law and international best practice standards for whistleblowing policies and laws[13]. Based on the current draft within the limited time available to us we identified the following issues that are missing and/or should be improved.

[13] On http://www.whistleblower-net.de/was-wir-wollen/regelungen-in-organisationen/ we provide a lot more information about and links to the standards and criteria internal whistleblowing policies in organizations should respect. We also invite you to make use of the experiences of the Ombudsman of New South Wales who published very detailed Public Interest

3.1. Whistleblowing to external recipients

As mentioned above the key deficit of the draft rules is that they are completely silent about the possibility of blowing the whistle to anybody outside of the Ombudsman's office or OLAF or even to the public. In our view this risks to be seen as a violation of Art. 10 ECHR or at least as an attempt to hinder whistleblowers to make full use of this human right. We recommend to include an article about whistleblowing to external recipients which should extend the guarantees of the rules (especially those related to non-retaliation and to the shift of the burden of proof) to those whistleblowers and make clear that:

(a) within the area of application of Art. 22a-b SR there is of course the possibility to address oneself to one or several of the recipients mentioned in Article 22b SR provided its conditions have been met;

(b) the Ombudsman respects the right to complain in Art. 43 of the Charter of Fundamental Rights of the EU and encourages whistleblowers to make use of it (those, especially EU-staff using it, should as far as possible enjoy similar protections as internal Ombudsman whistleblowers);

(c) the Ombudsman respects the right to petition in Art. 44 of the Charter of Fundamental Rights of the EU and encourages whistleblowers to make use of it;

(d) the Ombudsman respects the national legal systems and will not hold a whistleblower responsible who honestly provides information to national prosecutors or other competent authorities of the member states (in that case the Ombudsman should also declare his readiness to to lift his and the immunity of his staff and fully cooperate with national authorities);

(e) the Ombudsman respects the fundamental right of free speech as guaranteed by Art. 11 of the Charter of Fundamental Rights of the EU and Art. 10 ECHR and will not hold a whistleblower responsible who, acting reasonably (which should be assumed if there has been maladministration in the internal handling of his request, if Art. 22a/b has been used without success or in cases of urgency or violation of democratic transparency needs), honestly discloses information to the public.

The Ombudsman might also think about using the members of the Network of European Ombudsmen as secondary (maybe even as primary if the disclosure is about possible wrongdoing of the EU Ombudsman him/herself) recipients of whistleblowing disclosures.

3.2. Non-mandatory whistleblowing beyond the restrictions of Art. 22a SR

The rules should beyond the restrictions of Art. 22a SR allow (not oblige!) whistleblowing about any other suspected (even not specifically serious) wrongdoing, violation of ethical standards or maladministration related to the work of the Ombudsman or its staff or its

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Disclosure Guidelines (available via: http://goo.gl/XvOrh4) which were developed in close cooperation with leading scientists in the field. As for scientific literature we recommend the brand new „International Handbook on Whistleblowing Research" and especially it's chapters 8, 18 and 19 and the recommendations for whistleblowing policies given therein.

contractual partners and extend its rules and guarantees to these cases thus applying an "in doubt report" approach.

3.3. Extension of protection to those wrongly assumed to be whistleblowers

The rules should also protect those who are retaliated against because someone falsely assumed them to be whistleblowers.

3.4. Extension of protection to those supporting whistleblowers

The rules should also protect those who support whistleblowers, e.g. by providing evidence for their allegations or by protecting them against retaliations.

3.5. Integration with related activities

As already mentioned at some places there are other activities like normal complaints to the Ombudsman under Art. 228 TFEU, complaints under Art. 90 et seq. SR or petitions to the European Parliament which might have some similarities with whistleblowing, especially if they are done by staff of the Ombudsman and relate to assumed wrongdoing by the Ombudsman or its staff. Also a remonstration activity under Art. 21a SR or even a pure advice to superiours under Art. 21 SR might show such similarities. We recommend that the Ombudsman in his rules mentions these related activities, assures that all staff is properly trained about them, distinguishes them and the special procedures foreseen from whistleblowing but still extends the guarantees given to whistleblowers (as far as appropriate but at least the guarantees related to non-retaliation) as well to those other activities.

3.6. The Ombudsman as recipient under Art. 22b SR

One specific issue that in our view should get a specific prominent attention in the proposed rules is the Ombudsman's role as recipient of secondary disclosures/complaints of whistleblowers under Art. 22b SR. Here the Ombudsman should make clear that s/he welcomes these disclosures and guarantees those whistleblowers good counseling and a fair and thorough investigation in relation to all three issues typically involved in such a context, i.e.:

(a) the issues raised in their initial first level whistleblowing (i.e. if there has been a wrongdoing by someone else);

(b) the question if the investigation and procedural treatment of their whistleblowing by the previous recipients including OLAF was fair and lawful;

(c) the development of their career and possible retaliations.

Good counseling in that case would at a first stage involve a test if the conditions of Art. 22b SR have been met and offering the whistleblower a feedback and the possibility to take back or delay his secondary whistleblowing if the conditions have not yet been met (thus allowing him/her to avoid accusations of wrong usage of Art. 22b SR and disciplinary consequences). If the conditions of Art. 22b SR are met the Ombudsman should in those cases in general not

just push the dossier back to OLAF or the first recipient asking for their position but him/herself undertake a full-fledged investigation of all related aspects and consult all original documents involved thus allowing him/her to come to own conclusions which are not biased by the views already taken by previous recipients. The depth of the investigation should also not be limited by the willingness of the concerned institutions to co-operate or to follow the recommendations of the Ombudsman (as this to our best knowledge happened in the past[14]). In general the Ombudsman should take the position that if the whistleblower followed the requirements of Art. 22a-b SR it is the burden of the institution to prove that it acted correctly. If wrongdoing or maladministration is found or cannot be excluded the Ombudsman should apply a zero-tolerance policy and on request of the whistleblower use any appropriate means including information of the European Parliament or even the public to support the whistleblower to stop these illegal activities and to hold those responsible to account. If retaliation is possibly involved the Ombudsman should on request of the whistleblower also use all available means to support him (including legal support and compensation by applying Art. 24 SR in analogy) and to find practical solutions including mobility to other institutions or even the Ombudsman's office.

[14] See: http://www.anstageslicht.de/fileadmin/user_upload/Bilder/AT_GS_20110609.pdf