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“The Role of the European Ombudsman as a Protector of the Public Interest”

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Introduction

The paper discusses the European Ombudsman's role in whistleblowing arrangements for the European Union institutions and bodies. At the end, I also raise the question of what the Commission and the European Investment Bank might do as regards whistleblowing arrangements in external organisations with which they deal directly.

1 Whistleblowing, individual rights and the public interest

1.1 What is whistleblowing?

According to the British Standards Institute,

[w]histleblowing is the popular term used when someone who works in or for an organisation ... raises a concern about a possible fraud, crime, danger or other serious risk that could threaten customers, colleagues, shareholders, the public or the organisation's own reputation.¹

Most people who are described as "whistleblowers" by-pass the normal line of management reporting in the organisation they work for. The design of whistleblower arrangements should not, however, overlook the fact that the ordinary management processes of a well-functioning organisation should respond properly and effectively to the kinds of concern that whistleblowers report.

Internal whistleblowing takes place within an organisation. *External* whistleblowing involves going outside the organisation, to some official agency with supervisory authority, or to the media.

By definition, whistleblowers who contact the media act publicly. Some whistleblowers, however, may seek confidentiality: i.e. they identify themselves to the person or body whom they contact, but request that they not be named as the source of information they provide. Some whistleblower schemes also envisage the possibility of anonymous whistleblowing, in which the whistleblower does not identify him or herself, even to the person or body receiving the information. As we shall see, however, some key features of many whistleblowing schemes (such as protection of the whistleblower and providing information to the whistleblower on the follow up) may be largely irrelevant to genuinely anonymous whistleblowing.

1.2 The scope of activities subject to whistleblowing

Arrangements for whistleblowing vary in the scope of the activities that they cover. For example, the whistleblowing provisions of the Sarbanes-Oxley law of 2002 in the United States are focused on fraud committed in publicly traded companies². In contrast, the Public Interest Disclosure Act 1998 in the United Kingdom applies more broadly, to disclosures concerning

- criminal offences;
- failure to comply with a legal obligation;
- miscarriages of justice;
- danger to the health or safety of any individual;
- damage to the environment;
- deliberate concealment of the above³.

¹ British Standards Institute, PAS 1998: 2008: Whistleblowing Arrangements Code of Practice, British Standards Institute, July 2008. Available free on-line at <http://www.bsigroup.com/PAS1998>

² These provisions constitute the Corporate and Criminal Fraud Accountability Act, Public Law 107-204, July 30, 2002, 200218 USC Section 1514A: <http://www.osha.gov/dep/oia/whistleblower/acts/ccfa.html>

³ This is a paraphrase of section 43 (b) of the Employment Rights Act 1996, inserted by the PIDA 1998. The full text is available on-line at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980023_en_1

No matter how broadly the range of subjects is drawn, the idea of whistleblowing implies that the information disclosed by the whistleblower reveals something which is wrong and perhaps illegal. If we place “facts that clearly reveal wrongdoing” at one end of a continuum, we might put “disagreement on policy” at the other end. At some point along that continuum, the concept of whistleblowing ceases to be useful. Instead, the issue becomes, particularly as regards civil servants, one of balancing the freedom of speech with legitimate public interests⁴. In practice, the distinction may not always be obvious, since a disclosure may contain facts that reveal wrongdoing and disagreements on policy. Furthermore, protection against harassment may be necessary, whether or not the potential victim of the harassment is characterised as a whistleblower⁵.

From the perspective of organisation or management theory, whistleblowing arrangements can be seen as a mechanism of empowerment, with the potential to help maintain and enhance the quality of outputs and/or an organisational culture of transparency and ethical conduct. It needs to be recognised, however, that a two-stage process of transformation is involved in trying to turn such a vision into changes in actual behaviour. The first stage involves drafting legal provisions that define specific whistleblowing arrangements. That means using the limited repertoire of legal technology (claims, powers, liberties and immunities, together with correlative duties, liabilities, etc.) to create a pattern of incentives and disincentives. At the second stage, the legal provisions have to take effect within an existing organisational culture, which may re-interpret the incentives and disincentives in ways that the legislator did not anticipate.

1.3 The legal framework of whistleblowing

Legislation concerning whistleblowing is typically enacted in response to scandal or disaster. The provisions are usually those that the legislator believes would have prevented the scandal or disaster if they had been in force at the relevant time. Thus, for example, the whistleblowing provisions of the US Sarbanes-Oxley Act 2002 were adopted in the wake of the Enron scandal and associated events. The UK’s Public Interest Disclosure Act was strongly influenced by the results of inquiries into a series of disasters that had caused multiple deaths⁶. The inquiries revealed that employees had known of the problems, but they were reluctant or afraid to speak out, or their warnings were ignored. As will be explained in section 2 of the paper below, the legal rules applying to EU officials were also adopted in response to scandals.

Protecting the whistleblower

Whistleblowers are rarely popular in the organisations they work for. Even if the whistleblowing does not involve accusations of misconduct by identifiable individuals, it criticises, expressly or impliedly, those in the organisation whom the whistleblower has by-passed. Furthermore, the whistleblower’s action may be perceived as an implicit reproach by others who share the same knowledge, but who did not speak out. Legislation for whistleblowing, therefore usually provides for some form of protection of the whistleblower from potential adverse consequences. Such consequences might consist of formal action by the employer; for example, disciplinary action,

⁴ For the case law under the European Convention of Human Rights on this subject see, *Vogt v Germany*, Judgment of 26 September 1995, Series A no. 323; *Wille v Liechtenstein*, Judgment of 28 October 1999, application No 28396/95. As regards EU officials, see Case 274/99 P *Connolly v Commission*, [2001] ECR I-1611, paragraphs 37-64; Case T-82/99, *Cwik v Commission* [2000] ECR FP-I-A-155, II-713 (appealed unsuccessfully as Case C-340/00 P, [2001] ECR I-10269).

⁵ See e.g. Case T-203/95 R, *Connolly v Commission*, Order of the President of the Court of First Instance of 12 December 1995, [1995] ECR II-02919, IA-00279, II-00847. The Order reminded the Commission to “take all necessary measures to ensure that no information concerning the career, personality, opinions or health of the person concerned, likely directly or indirectly to harm his personal and professional reputation, is disclosed by its staff in contacts with the press or in any other manner.”

⁶ In particular, the rail crash at Clapham, the sinking of a ferry called *The Herald of Free Enterprise* and the explosion on an oil platform known as Piper Alpha.

dismissal, denial of promotion, down-grading etc. Whistleblowing arrangements can give the whistleblower a legal right to immunity from such action. The practical effectiveness of immunity provisions will depend to a significant degree on the procedural arrangements for enforcing the whistleblower's rights, the burden of proof, and the approach taken by those who are called on to interpret the provisions⁷. Whistleblowers may also suffer informal workplace sanctions, which may amount to harassment. Whistleblowing arrangements may therefore also need to impose obligations on employers to take action to prevent or deal with harassment.

Rewards for whistleblowers

In the United States, the so-called "qui tam"⁸ provisions of the False Claims Act provide a financial incentive to whistleblowing about fraud against the US government. The whistleblower brings legal proceedings for damages, often represented by a law firm working on a contingency fee basis. If the proceedings are successful, the whistleblower is entitled to a share of the proceeds. The False Claims Act was amended in 1986 to enhance both the incentives and the protection for whistleblowers. According to a consultation paper published by the United Kingdom government in 2007, there have been over 5,000 qui tam actions since 1986, leading to \$11bn being awarded in judgements, of which whistleblowers have received nearly \$1.8bn⁹.

Whistleblowers often have ethical motives such as a sense of duty, or a wish to promote the public interest. Arrangements to protect whistleblowers do not undermine that ethical dimension and can be consistent with the objective of an organisational culture of transparency and ethical conduct. Financial rewards for whistleblowers appeal to different motivations, which are rather more difficult to combine with an ethical vision. However, combining whistleblower protection with an obligation to give information does not pose the same risk of confusion.

Whistleblowing as an obligation

Furthermore, such an obligation is not unusual for civil servants. The Council of Europe's Recommendation on codes of conduct for public officials, for example, says both that public officials should report to the competent authorities if they become aware of breaches of the code by other public officials and that the public administration should ensure that no prejudice is caused to a public official who reports on reasonable grounds and in good faith¹⁰. One implication of this approach is that civil servants should not only report wrongdoing as such, but also failure by others to report the wrongdoing. This could risk provoking conflict between the whistleblower and those with whom he or she works. Perhaps for that reason, recommendations made by the OECD in 1998 and 2003 avoid expressly stating that reporting should be an obligation¹¹. The principles for managing ethics in the public service on which the 1998 recommendation was based say, for example, that public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility.

⁷ For an interesting account of developments in the US under the 2002 Sarbanes-Oxley Act, see Richard E. Moberly, "Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win" (February 6, 2007). *bepress Legal Series*. Working Paper 1987. <http://law.bepress.com/expresso/eps/1987>

⁸ *Qui tam pro domino rege quam pro se ipso in hac parte sequitur*: "he who brings a case on behalf of the King, as well as for himself".

⁹ *Asset Recovery Action Plan, A Consultation Document*, Home Office, May 2007.

¹⁰ No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials (Adopted by the Committee of Ministers at its 106th Session on 11 May 2000), Article 12.

¹¹ *Recommendation on Improving Ethical Conduct in the Public Service*, 23 April 1998, <http://www.oecd.org/dataoecd/60/13/1899138.pdf>
Recommendation on Guidelines for Managing Conflict of Interest in the Public Service, June 2003 <http://www.oecd.org/dataoecd/13/22/2957360.pdf>

Protection of the rights of accused persons

It is important to emphasise the necessity and importance of protecting not only the whistleblower, but also the rights of persons whom the whistleblower may accuse. Not all whistleblowing involves accusations, express or implied, against identifiable individuals. When such accusations are present, however, fundamental principles such as the presumption of innocence and the rights of defence must be respected. Furthermore, in legal systems which apply the concept of data protection, such as those of the European Union, the personal data of both whistleblowers and accused persons should be handled in accordance with data protection principles¹².

2 Whistleblowing in the European Union institutions¹³

2.1 The resignation of the European Commission in 1999

On 15 March 1999, a Committee of Independent Experts appointed by the European Parliament to investigate allegations regarding fraud, mismanagement and nepotism in the European Commission published its first report. It found instances where Commissioners, or the Commission as a whole, bore responsibility for instances of fraud, irregularities or mismanagement in their services or areas of special responsibility¹⁴. The Commission as a whole resigned.

These events were traumatic for the European Union and for the Commission as an Institution. Their effects continue to be felt today. The trigger was disclosure of information to a Member of the European Parliament by a Commission official, Mr Paul van Buitenen. He was suspended from his post and reprimanded for breaching the Staff Regulations¹⁵. Commenting on this treatment, the Committee of Independent Experts said:

The events leading up to the resignation of the former Commission demonstrated the value of officials whose conscience persuades them of the need to expose wrongdoings encountered in the course of their duties. They also showed how the reaction of superiors failed to live up to legitimate expectations. Instead of offering ethical guidance, the hierarchy put additional pressure upon one such official¹⁶.

The Committee of Independent Experts recommended greater clarity about the obligation of officials to report wrongdoing and the protection available to them in cases of exposing wrongdoing. A first step in defining these obligations and the protection available was taken rapidly, as part of the arrangements for setting up a new European Anti-Fraud Office (OLAF) in

¹² See the, Opinion 1/2006 of the Article 29 Data Protection Working Party on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime, 1 February 2006 http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf Cf. the decision of the EO in case 620/2004/PB that an alleged harasser has right to be heard before conclusions are drawn as to the accuracy of the alleged facts <http://www.ombudsman.europa.eu/decision/en/040620.htm>

¹³ For simplicity, I shall write “institutions”, rather than using the correct but cumbersome term “Institutions and bodies”. Similarly I use the term “official” in a generic sense to include also what are properly called “other servants”.

¹⁴ Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999, point 9.2.3. The Committee did not encounter cases where a Commissioner was directly and personally involved in fraudulent activities and found no proof that a Commissioner had gained financially from any fraud, irregularity or mismanagement. The report is available on-line, http://www.europarl.europa.eu/experts/report1_en.htm

¹⁵ His own account is in Paul van Buitenen: *Blowing the Whistle: Fraud in the European Commission*, Politico’s Publishing, 2000. Mr van Buitenen is now a Member of the European Parliament.

¹⁶ Second Report of the Committee of Independent Experts on Reform of the Commission Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud, 10 September 1999, Volume II, point 7.6.9 (http://www.europarl.europa.eu/experts/default_en.htm)

May 1999¹⁷. The Commission subsequently adopted a more developed set of whistleblowing arrangements for its staff¹⁸. Finally, when the Staff Regulations were amended in 2004 new provisions were introduced concerning whistleblowing.

2.2 The whistleblower provisions of the Staff Regulations

The relevant provisions (Articles 22a and 22b) of the Staff Regulations are drafted in a language and style which is not easy to understand. What follows is a personal interpretation of the main aspects. The text of the Articles is appended to this paper.

Article 22a imposes an obligation on officials who become aware of

- facts which give rise to a reasonable suspicion¹⁹ of illegal activity that is detrimental to the interests of the Communities, or of
- conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities.

Fraud and corruption are mentioned as examples of illegal activity, but the obligation is not limited to such cases.

The official's obligation is to inform one of the following:

- his or her immediate superior;
- the Director-General;
- the Secretary-General;
- the European Anti-Fraud Office (OLAF).

In the first three cases, the recipient of the information has an obligation to transmit to OLAF any evidence that may give rise to reasonable suspicion²⁰ of the irregularities referred to above. In other words, he or she must also act as what we might call a "secondary" whistleblower.

The institution concerned is not allowed to take action to the detriment²¹ of a whistleblower (either the original whistleblower or a "secondary" whistleblower) who has acted reasonably and honestly.

Article 22b extends the same immunity to an official who further discloses information to one or more of five office-holders, provided that both of the following conditions are met:

- (a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and
- (b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed sufficient time for appropriate action.

OLAF or the institution, as the case may be, must inform the official within 60 days of how long it will need to take appropriate action. The immunity does not apply if the further disclosure takes place before the expiry of that period, unless the official can demonstrate that the period is unreasonable having regard to all the circumstances of the case.

The five named office-holders to whom further disclosure may be made are:

- The President of the Commission
- The President of the Court of Auditors

¹⁷ See the model decision attached to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) 1999 OJ L 136 p. 15.

¹⁸ Commission decision on raising concerns about serious wrongdoings C (2002) 845, of 4 April 2002.

¹⁹ The actual text refers to facts which give rise to "a presumption of the existence of possible illegal activity".

²⁰ The actual text refers to evidence from which the existence of the irregularities "may be presumed".

²¹ The actual text refers to "prejudicial effects on the part of the institution".

- The President of the Council
- The President of the European Parliament,
- The European Ombudsman.

These arrangements make clear that there is an obligation to inform. The original whistleblower can choose whether to by-pass the normal hierarchy and go directly to the top management of the institution, or to OLAF. A “secondary” whistleblower must report to OLAF. Further disclosure is not an obligation, but attracts immunity under certain conditions.

Two aspects of these arrangements call for further explanation and comment:

- the role of OLAF;
- the relationship with other legal provisions that protect the rights of whistleblowers and accused persons.

2.3 The European Anti-Fraud Office (OLAF)

Setting up OLAF was part of the urgent political response to the Commission’s resignation in 1999. It was established by a decision of the Commission²², but its powers and duties also derive from Regulation 1073/1999 and from decisions of the other Community institutions and bodies²³. Although OLAF is part of the Commission, its investigations, both within the EU institutions and bodies (internal investigations) and outside (external investigations), are carried out independently²⁴.

Despite its name, OLAF does not only investigate fraud. However, as regards internal investigations, the legal texts do not define its role consistently. Regulation 1073/1999 provides for OLAF to fight, fraud, corruption and any other illegal activity affecting the financial interests of the European Community (*emphasis added*). Other texts, however, envisage OLAF carrying out internal investigations into any serious case which may lead to disciplinary proceedings, whether or not financial interests are involved. That is consistent with the role assigned to OLAF in the whistleblower arrangements discussed above. However, Article 86 of the Staff Regulations goes even further, by empowering OLAF to launch an investigation if it becomes aware of evidence of any failure by an official to comply with obligations under the Staff Regulations.

In reporting on its first years of operation, OLAF defined its own mission in line with Regulation 1073/1999, as being limited to cases with financial consequences. In the last two annual activity reports (for 2006 and 2007), however, the mission statement has been expanded to include protection of the reputation of the European Union Institutions and the reference to financial consequences has disappeared. With slight variations, a similarly broad mission statement appears in the latest version of OLAF’s Manual of Operational Procedures²⁵.

In light of the above, it cannot be excluded that confusion may sometimes arise as to the appropriate division of labour between OLAF and the institution concerned in dealing with whistleblower concerns that do not have a significant financial impact.

²² Commission Decision 99/352/EC of 28 April 1999 establishing the European Anti-Fraud Office (OLAF), 1999 OJ L 136 p. 20.

²³ Regulation 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) 1999 OJ L 136 p. 1; Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) 1999 OJ L 136 p. 15.

²⁴ Article 3 of Commission Decision 99/352/EC and Article 12 (3) of Regulation 1073/1999.

²⁵ For OLAF’s activity reports see: http://ec.europa.eu/anti_fraud/reports/olaf_en.html
The May 2007 version of the Manual of Operational Procedures is available on line at http://ec.europa.eu/dgs/olaf/legal/doc/manual_short.pdf

2.4 The rights of whistleblowers and accused persons

Whistleblower protection under Articles 22a and 22b of the Staff Regulations is expressed in terms of immunity from detrimental action by the institution concerned. This focus needs to be understood in light of other provisions of the Staff Regulations.

Several provisions of the Staff Regulations could be (and have been) invoked against whistleblowers. In particular, Articles 12 and 17, respectively, require officials to refrain from any

- - action or behaviour which might reflect adversely upon their position
- - unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public.

The immunity of the whistleblower under Articles 22a and 22b offers assurance that these provisions cannot be used against him or her.

Whistleblowers may also rely on other provisions of the Staff Regulations for protection against different kinds of possible retaliation. Psychological harassment is a specific disciplinary offence under the Staff Regulations (Article 12a) and the EU institutions have a general duty of care towards their staff. There are also procedures through which officials can request assistance from their institution (Articles 24) and challenge decisions concerning them, both internally and subsequently through judicial proceedings (Articles 90 and 91). Once the internal procedures have been exhausted, officials may also complain to the Ombudsman as an alternative to judicial proceedings. Whistleblowers could use these provisions to challenge, for example, decisions affecting their careers.

The Commission has also adopted internal arrangements allowing whistleblowers to move to a different service at their own request and providing for high-level intervention if they are disadvantaged in staff evaluation and promotion procedures²⁶.

Confidentiality

The Staff Regulations do not expressly guarantee whistleblowers confidentiality if they wish it. However, the general rules on data protection in the EU institutions and bodies are applicable to whistleblowing. The European Data Protection Supervisor has endorsed the following view:

Under no circumstances can the person accused in a whistleblower's report obtain information about the identity of the whistleblower from the scheme on the basis of the accused person's right of access, except where the whistleblower maliciously makes a false statement. Otherwise, the whistleblower's confidentiality should always be guaranteed²⁷.

Information about follow-up

The Staff Regulations do not explicitly guarantee that a whistleblower will be informed of what action is taken in response to the whistleblowing. However, the second condition for further disclosure contained in Article 22b implies that a whistleblower should normally receive such information, from his or her institution or from OLAF as the case may be. According to the OLAF Manual of Operational Procedures, all informants or whistle-blowers with an interest in the outcome of the case are advised of the outcome when the case is closed, unless this would be detrimental to any follow-up action²⁸.

²⁶ Communication from Vice-President Kinnock to the Commission, "How to enhance effective application of the Whistleblowing rules and protection of Whistleblowers", SEC(2004) 151/2, 6 February 2004.

²⁷ Opinion on a notification for prior checking received from the Data Protection Officer of the European Anti-Fraud Office (OLAF) on OLAF internal investigations, Brussels, 23 June 2006 (Case 2005-418) <http://ec.europa.eu/dgs/olaf/data/doc/interninvestig.pdf> quoting Opinion 1/2006 of the Article 29 Data Protection Working Party (see note 12 above).

²⁸ Point 3.2.1. (See note 25 above).

Rights of accused persons

The Staff Regulations have always contained a disciplinary procedure, guaranteeing procedural rights and the possibility for officials to challenge disciplinary decisions through legal proceedings. The 2004 amendments of the Staff Regulations introduced additional provisions (Article 86 (2) and Annex IX) that govern administrative investigations, carried out either by OLAF, or by the official's own institution, that may lead to disciplinary proceedings.

In dealing with a complaint against OLAF, the Ombudsman considered that a fair and effective investigation procedure involves informing the person concerned of the allegation against him and the facts on which it is based and giving him the opportunity to express his views and that testimony that has not been subject to challenge in this way normally lacks evidential value²⁹. In a different case, the Court of First Instance has recently found that OLAF acted unlawfully by transmitting a file to national judicial authorities containing conclusions concerning two officials, without having first informed and heard the officials concerned³⁰.

3 The role of the European Ombudsman

3.1 The Ombudsman's mandate

The European Ombudsman (EO) is established by Article 195 of the EC Treaty. The EO's main function is to inquire into and report on instances of maladministration in the activities of the EU institutions and bodies. Inquiries may be opened in response to complaints from citizens or residents of the Union, or on the EO's own initiative. The existence of the EO provides an alternative remedy through which citizens and residents may seek to protect their particular interests. At the same time, the EO may also identify and eliminate instances of maladministration on behalf of the public interest³¹.

Neither the Treaty nor the Statute of the Ombudsman³² (hereafter 'the Statute') defines 'maladministration'. The EO has consistently taken the view that it includes (but is not limited to) unlawful behaviour. This does not, however, imply that the EO inquires into every case of possible illegality in the EU institutions that comes to his attention. Three factors limit his role.

First, the EO is not entitled to conduct inquiries if the alleged facts are or have been the subject of legal proceedings.

Second, the EO avoids duplicating the work of institutions that have specialised mandates, such as OLAF which has responsibility for the fight against fraud.

Third, the EO has no power to supervise the actions of individuals³³.

The role of the EO is not, therefore, to investigate individual wrongdoing in the EU institutions, such as corruption, fraud or harassment³⁴. Rather, the EO can inquire into whether those who do have such responsibility (i.e. the institutions themselves and OLAF) have carried out their functions properly and whether the relevant administrative systems are fit for purpose.

²⁹ Case 781/2001/IJH <http://www.ombudsman.europa.eu/decision/en/010781olaf.htm>

³⁰ Case T-48/05, *Franchet and Byk v Commission*, judgment of the Court of First Instance of 8 July 2008 (not yet reported), paragraphs 126-156

³¹ Case C-331/05 *P Internationaler Hilfsfonds v Commission*, [2007] ECR I-05475 paragraph 26.

³² Decision of the European Parliament 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, 1994 OJ L 113 p. 15, as last amended by Decision of the European Parliament 2008/587/EC, Euratom of 18 June 2008, 2008 OJ L 189 p. 25.

³³ See Case T-412/05, *M v European Ombudsman*, judgment of the Court of First Instance of 24 September 2008 (not yet reported), paragraphs 124, 128.

³⁴ As regards harassment see Case 1015/2007/MHZ, <http://www.ombudsman.europa.eu/decision/en/071015.htm>

The above provides the necessary context for understanding the inclusion of the EO as one of the office-holders to whom officials can turn as whistleblowers under Article 22b of the Staff Regulations, if the institution concerned, or OLAF, does not take appropriate action in due time.

3.2 The Ombudsman's practice in responding to whistleblowers

Neither Article 22b of the Staff Regulations, nor any other provision, says what the EO (or the other office-holders) should do with information from a whistleblower. The EO has taken the view that the Article does not establish a new procedure, but merely clarifies the conditions under which officials may communicate to the EO information of the kind foreseen in the Article.

All written communications to the EO are registered either as complaints, or as ordinary correspondence, depending on what appears to be the author's intention. If that intention is not explicit, the correspondence is classified as a complaint if the author identifies a problem and asks the EO to take action. Applying these general principles, therefore, whistleblower communications are almost certain to be treated as complaints, unless the whistleblower states explicitly that he or she merely wishes to provide information to the EO.

As complainants, whistleblowers have procedural rights, including the right to see the EO's file on their complaint. If the EO conducts inquiries, the whistleblower has the opportunity to see and comment on the institution's responses.

Since the immunity under Article 22b only concerns the divulging of information to the EO, not to the public, whistleblower complaints are normally classified as confidential in the interests of the complainant, unless the complainant expressly requests public treatment. In the latter case, the EO may consider it appropriate to classify the case as confidential to protect the interests of identifiable third parties against whom the whistleblower makes allegations.

The Statute of the Ombudsman³⁵ requires that a complaint be preceded by the "appropriate administrative approaches" to the institution concerned. In dealing with a complaint from a whistleblower who worked for an EU Agency, the EO decided that, in whistleblower cases, this means complying with the condition laid down in Article 22b of the Staff Regulations that the official has previously disclosed the same information to OLAF or to his own institution and has allowed sufficient time for appropriate action. Failure to do so makes the complaint inadmissible³⁶.

However, the EO can also use the power to open an inquiry on his own initiative in order to take up matters brought to his attention by a whistleblower³⁷.

3.3 The Ombudsman's experience with whistleblower cases

The number of whistleblowing complaints to the EO is not large. Some cases were inadmissible because the complainant had not previously disclosed the same information to the institution or to OLAF, or had not allowed them sufficient time to take appropriate action. Some other cases had to be closed before completion of the inquiry because the complainant decided to bring judicial proceedings. Three cases are worth special comment.

The complainant in case 1625/2002/IJH³⁸ worked in the Commission's Directorate General for Research. She drew OLAF's attention to certain irregularities in the financing of a project. She subsequently complained to the EO that OLAF had failed (i) to carry out a proper inquiry and (ii) to inform her of the follow-up. As regards the first allegation, the EO said that principles of good administration require administrative investigations by OLAF to be carried out carefully, impartially and objectively. In the present case, there was nothing to suggest that OLAF's

³⁵ See note 32 above.

³⁶ See the EO's Annual Report for 2004, page 39.
http://www.ombudsman.europa.eu/report04/pdf/en/rap04_en.pdf

³⁷ As, for instance, in case OI/8/2004/GG <http://www.euro-ombudsman.eu.int/decision/en/04oi8.htm>

³⁸ <http://www.ombudsman.europa.eu/decision/en/021625.htm>

investigation had failed to comply with that standard. As regards the second allegation, OLAF took appropriate action to settle the matter during the EO's inquiry by providing a copy of the final case report.

The complainant in case 140/2004/PB³⁹ worked at the Office for Official Publications of the European Communities. He reported suspected illegalities to OLAF. He then complained to the EO that OLAF had not told him how long it would need to deal with the case. OLAF argued, in substance, that it was not required to specify a period because the complainant did not allege that he had suffered any adverse consequences from having disclosed the information outside the Commission or OLAF. The EO disagreed and said that the provision clearly imposed an obligation on OLAF to provide, in all cases, information as to the period of time within which it expects to conclude its investigation.

The third case is still on-going at the time of writing. A member of the staff of the Commission's Institute for Transuranium Elements in Karlsruhe, Germany, reported what he considered to be seriously deficient practices and serious concrete wrongdoings in respect to that Institute's handling of uranium, in particular, the dispatching of uranium to other institutes. OLAF passed the information on the German authorities, which produced a report and informed the Commission accordingly. Having examined this report, as well as the complainant's comments and the Commission's response, the EO found that the Commission had failed to carry out an examination of the complainant's allegations that was as proper and thorough as could be expected in the light of the seriousness of those allegations. The EO therefore made a draft recommendation to the effect that a more thorough examination should be carried out⁴⁰. The Commission responded by taking further steps to examine the issues involved. The on-going inquiry is assessing the adequacy of those steps.

3.4 Whistleblowing by staff of external organisations with which the European Commission and the European Investment Bank have dealings

So far, this paper has concerned only whistleblowing by EU officials about wrongdoing in their institutions. It is worth mentioning, however, that the EO is currently dealing with a complaint which raises the question of what responsibility the Commission may have as regards whistleblowing arrangements for staff of organisations with which it has a contractual relationship. The complaint arose out of an evaluation of a network established by various civil society organisations and supported by the EU. The evaluation was carried out by a consortium under contract with the Commission. The complainant was employed by the consortium as an evaluator. Part of the complaint is that the evaluation process set up by the Commission did not provide any whistleblower protection for evaluators who report misconduct and irregularities. The EO's inquiry into the complaint is on-going.

A similar question might arise in the future as regards the European Investment Bank (EIB). The EIB's Policy on preventing and deterring Corruption, Fraud, Collusion, Coercion, Money Laundering and the Financing of Terrorism in European Investment Bank activities⁴¹ expressly applies not only to the EIB itself, but also to:

- all borrowers, promoters, contractors, suppliers, beneficiaries and any other person or entity involved in EIB-financed activities, according to the terms of the applicable EIB finance contracts; and
- all counterparties and others through which the EIB deals in its borrowing or treasury activities.

³⁹ <http://www.euro-ombudsman.eu.int/decision/en/040140.htm> NB the case arose before Articles 22a and 22b of the Staff Regulations entered into force, so the relevant provision was Commission Decision C (2002) 845, of 4 April 2002.

⁴⁰ Case 101/2004/GG <http://www.ombudsman.europa.eu/recommen/en/040101.htm>

⁴¹ http://www.eib.org/attachments/strategies/anti_fraud_policy_20080408_en.pdf

Point 30 of the Policy says that the EIB will treat whistleblowing allegations as strictly confidential and that allegations may be made anonymously. The Policy does not, however, indicate whether the EIB also encourages or requires external organisations to put in place whistleblowing arrangements of their own that could be invoked by their employees who report prohibited activities under the terms of the EIB's Policy. The EIB is currently conducting a review of its approach to whistleblower protection, with a view to updating and republishing its Policy. The review process could provide an opportunity to consider and clarify this matter.

4 Recommendations

1 Be clear about the scope of whistleblower protection

Are the whistleblowing arrangements intended only for cases of fraud and corruption or do they cover a wider range of potential wrongdoings? Which organisations are covered? It is important to be as precise as possible about the answers to these questions

2 Take organisational culture into account

Whistleblowing arrangements take effect within an existing organisational culture. They are only likely to be effective if they work with the grain of that culture, even if the ultimate aim is cultural change.

3 Safeguard the rights of persons who are accused, as well as those of whistleblowers.

The protection of whistleblowers need not, and should not, prejudice the rights of persons who fall under suspicion as a result of the whistleblowing.

Appendix: Articles 22a and 22b of the Staff Regulations

Article 22a

1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.

Information mentioned in the first subparagraph shall be given in writing.

This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

4 Paragraphs 1 to 3 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

Article 22b

1. An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:

(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed the OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.

2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.

3. Paragraphs 1 and 2 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.