

# PUBLIC HEARING

COMMITTEE ON LEGAL AFFAIRS (JURI)  
COMMITTEE OF INQUIRY INTO MONEY  
LAUNDERING, TAX AVOIDANCE  
AND TAX EVASION (PANA)



Wednesday 21.06.2017 – **09:00-11:00**  
PAUL-HENRI SPAAK BUILDING (BRUSSELS) – ROOM **1A002**

## *The EU-wide protection of whistleblowers*



Chaired by *Pavel Svoboda (JURI)* and *Dr. Werner Langen (PANA)*

The hearing will be webstreamed on: [www.europarl.europa.eu/ep-live](http://www.europarl.europa.eu/ep-live)



*Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion  
Committee on Legal Affairs*

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## **JOINT PUBLIC HEARING**

### **“THE EU-WIDE PROTECTION OF WHISTLEBLOWERS”**

**21 JUNE 2017**

09.00 - 11.00

Room: PHS 1A002

## **DRAFT PROGRAMME**

09:00 - 09:05 Welcome by the JURI and PANA Chairs

09:05 - 09:40 Presentations by speakers

- Vigjilenca Abazi, Assistant professor, Maastricht university (Theme: current whistleblower rules in MS)
- Cathy James, Chief executive, Public concerns at work (Theme: whistleblowing in practical life)
- Frédérique Berrod, Professor, College of Europe (Theme: legal basis for a better protection at EU level)
- Rosita Hickey, Head of Strategic Inquiries, EU Ombudsman (Theme: Outcome of the inquiry on the Rules on whistleblowing rules within the EU Institutions)
- Charlotte Grass, Head of Competition and Conformity, Group Vallourec (Theme: Whistleblowing from an industry point of view)

09:40 - 10.55 Discussion with JURI and PANA Members

10:55 - 11:00 Conclusions by the JURI and PANA Chairs



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## **JOINT PUBLIC HEARING**

**“THE EU-WIDE PROTECTION OF WHISTLEBLOWERS”**

**WEDNESDAY, 21 JUNE 2017**

09.00 - 11.00

Room: Paul Henri Spaak (PHS) 1A002  
Brussels

**CVs OF THE SPEAKERS**

**Dr. Vigjilence Abazi**

Research focus on whistleblower protection, democratic accountability, government secrecy, freedom of information, privacy and data protection.

**ACADEMIC APPOINTMENTS**

January 2017 – ongoing  
June 2015 – December 2016  
September 2011 – May 2015

ASSISTANT PROFESSOR – Maastricht University  
POSTDOCTORAL RESEARCHER – Maastricht University  
PHD RESEARCHER – University of Amsterdam

**EDUCATION**

December 2015  
June 2011  
June 2010

DOCTOR OF LAW University of Amsterdam  
(Rewarded for completion before Faculty average)

MASTER OF LAW University of Amsterdam  
(Top 5%)

BACHELOR OF LAW - University Ss. Cyril and Methodius of Skopje  
(Summa Cum Laude)

**RESEARCH VISIT**

January – December 2014  
February – May 2016

FULBRIGHT VISITING SCHOLAR Columbia Law School  
One academic year, Fulbright Scholarship

VISITING RESEARCHER European University Institute  
One academic semester, Young Researcher Grant

**EDITORIAL BOARD**

2017 January-ongoing  
2016 January-ongoing  
2013 September-December

European Journal of Risk Regulation  
Journal of European Integration  
European Constitutional Law Review

**PUBLICATIONS**

**BOOK**

V. Abazi, *Secrecy and Oversight in the European Union: Law and Practices of Classified Information* (Oxford University Press, forthcoming).

**(SELECTED)**

**PEER REVIEWED ARTICLES**

V. Abazi, European Parliamentary Oversight Behind Closed Doors (2016) *Cambridge Journal of International and Comparative Law* Vol. 5(1) 31

V. Abazi, Trade Secrets and Whistleblower Protection in the European Union (2016) *European Papers - A Journal on Law and Integration* 1-8

V. Abazi, How Confidential Negotiations of the TTIP Affect Public Trust (2016) *European Journal of Risk Regulation* Vol. 7(2) 247

V. Abazi & M. Hillebrandt, The Legal Limits to Confidential Negotiations: Recent case law developments to Council transparency: Access Info Europe and In't Veld (2015) *Common Market Law Review* 52(3) 825

V. Abazi & E. Tauschinsky, Reasons of Control and Trust: Grounding the Public Need for Transparency in the European Union (2015) *Utrecht Law Review* Vol. 11(2) 78

## **Cathy James, OBE, Chief Executive, Public Concern at Work**

Public Concern at Work (PCaW) is the leading authority on whistleblowing law and practice in the UK. As an independent whistleblowing charity and legal advice centre, PCaW provides confidential advice to individuals wanting to raise a concern about wrongdoing, risk or malpractice in the workplace and acts as a reporting service for organisations who promote



the Advice Line to their staff. Advising over 2000 individuals annually and providing expert support to business on strengthening their whistleblowing arrangements - including training, monitoring and evaluation - PCaW's expertise is recognised worldwide.

Cathy James, PCaW's Chief Executive, leads the charity's public policy and campaign work, working with regulators, employers and opinion leaders to safeguard the public interest by improving protection for whistleblowers in law and raising public awareness. PCaW supported the work of the independent Whistleblowing Commission, which made recommendations for improving the legal framework for whistleblowing in the UK including a Code of Practice for employers and is running the First100 Campaign. Cathy is a UK qualified solicitor and before working at Public Concern at Work was a litigation partner in a large London law firm. Cathy was awarded an OBE in June 2015, for services to employment rights. She has been involved in many international projects looking at anti-corruption best practice and whistleblower protection including by the OECD, UNODC and the Council of Europe and the Open Society Foundation.

## Frédérique Berrod



Frédérique Berrod est professeure de droit public et enseigne à l'Institut d'Etudes Politiques de Strasbourg. Elle est Professeure invitée au Collège d'Europe de Bruges. Elle travaille sur les enjeux juridiques du marché intérieur et leurs implications sur les frontières européennes. Ses champs de recherche couvrent l'espace européen de l'énergie, l'Europe des produits de santé et la RSE. Elle dirige la Fédération de recherche L'Europe en mutation.

### **Sélection des publications les plus récentes**

#### *Ouvrages individuels et collectifs :*

Avec A. Ullestad : **La mutation des frontières dans l'espace européen de l'énergie**, Larcier, janvier 2016

Avec B. Wassenberg, **Les relations entre le Conseil de l'Europe et l'Union européenne**, Editions du Conseil de l'Europe, à paraître en 2018

Co-rédaction de trois chapitres dans l'ouvrage **La RSE saisie par le droit**, K. Chenut-Martin et R. De Quenaudon, Pedone, 2016

#### *Articles dans des ouvrages ou des revues (sélection)*

« *Plaidoyer pour une Union de droit dans la diversité des systèmes judiciaires nationaux* », Chemins d'Europe, Mélanges Jacqué, Dalloz, 2010, p. 81

« *Good law or not good law. Les avatars de la jurisprudence Keck et Mithouard* », in I. Govaere et D. Hanf (eds), Les dimensions internes et externes du droit européen à l'épreuve, *Liber Amicorum* Paul Demaret, PIE Peter Lang, Cahiers de Collège d'Europe n° 17, 2013, p. 281

« *Ethique et marché intérieur du médicament* », in Les valeurs communes dans l'Union européenne, L. Potvin-Solis (dir.), Onzièmes journées du Pôle européen Jean Monnet, Université de Metz, *Bruylant*, 2014, p. 321

« *Le droit de l'Union européenne et le service public : de la défiance à la compréhension mutuelle* », in Le service public, sous la direction de G. Eckert, actes du colloque annuel de l'AFDA, Dalloz, 2014, p. 107

« *L'autonomie de l'Union européenne est-elle soluble dans les droits de l'Homme ? Quelques propos(im)pertinents sur l'identité constitutionnelle au travers du prisme de l'adhésion de l'UE à la CEDH* », in Europe(s), droit(s) européen(s), Une passion d'universitaire, *Liber Amicorum* en l'honneur du professeur Vlad Constantinesco, sous la coordination de F. Berrod, J. Gerkrath, R. Kovar, C. Mestre, V. Michel, S. Pierré Caps, D. Rittleng et D. Simon, *Bruylant* 2014, p. 53.

« *L'utilisation de la soft law comme méthode de conception du droit européen de la concurrence* », *Revue de l'Union européenne*, mai 2015, p. 283

« *Politique de santé : quelles responsabilités ?* », in Développement durable : métamorphoses et mutations de la responsabilité ? Sous la dir. de K. Martin-Chenut et R. De Quenaudon, L'Harmatan, 2016

Avec A. Ullestad, « *Le rôle du commerce dans la dévaluation des frontières nationales* », *Actes du colloque Le commerce et la paix, Strasbourg, 18 et 19 juin 2015, à paraître dans les annales de la Faculté de droit de Strasbourg en 2017*

## Europass curriculum vitae



### Personal information

Surname(s) / First name(s) Hickey / Rosita

### Work experience

Dates 7/6/2001 - present

Occupation or position held Head of Strategic Inquiries Unit, previously Head of MECS Unit, Head of Communications Sector, Legal Officer, Press Officer

Name and address of employer European Ombudsman

Dates 16/4/2000 - 30/4/2001

Occupation or position held Press Officer

Name and address of employer European Commission (DG Agriculture)

Dates 15/9/1998 - 15/4/2000

Occupation or position held Deputy-Editor and Special Correspondent

Name and address of employer Agra Facts and Agra Focus.

### Education and training

Dates 10/2006 - 5/2008

Title of qualification awarded Master of Arts in EU law, First Class Honors

Name and type of organisation providing organisation and training King's College London, UK

Dates 9/1997 - 6/1998

Title of qualification awarded Master of Arts in European Political and Administrative Studies, Excellent

Name and type of organisation providing organisation and training College of Europe, Bruges, Belgium

Dates 9/1993 - 6/1997

Title of qualification awarded Bachelor of Commerce (International) Degree - First Class Honours

Name and type of organisation providing organisation and training University College Dublin, Ireland

## **Charlotte Grass – Group Legal Counsel- Head of Antitrust and Compliance**

### **Vallourec group**

Charlotte Grass holds an advanced graduate diploma in Corporate, International and European Law from the Sorbonne University in Paris and a Master Degree in European Law from the Faculté Jean Monnet at the University Paris Sud. She is admitted to the Paris bar.

Before Vallourec, she worked at the European Commission (internship within the cabinet of the Directorate General for Internal Market) and practiced as an attorney specialized in competition law for a French and an English firm in Paris for 6 years. In 2009 she joined the Vallourec group, as senior legal counsel in charge of competition and trade topics. Since 2015, Charlotte Grass is also responsible for all compliance matters for the group.





*Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion  
Committee on Legal Affairs*

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## **JOINT PUBLIC HEARING**

**“THE EU-WIDE PROTECTION OF WHISTLEBLOWERS”**

**WEDNESDAY, 21 JUNE 2017**

09.00 - 11.00

Room: Paul Henri Spaak (PHS) 1A002  
Brussels

## **CONTRIBUTIONS**

# Current Whistleblower Rules in Member States

Dr Vigjilenca Abazi  
Assistant Professor of European Law

# Fragmentation of Whistleblower Protection

- (Dedicated) Legal Protection
  - However, recent expansion of whistleblower protection (e.g. France 2016, Sweden 2017) or establishing protection (e.g. Slovakia 2015).
- Scope
  - Public disclosure
  - Sector and Field
    - The UK's Public Interest Disclosure Act

# Channels for Reporting

- Clear channels for reporting (Council of Europe recommendations)
- Obligations for Internal Reporting
- Tiers of Reporting
- Best practice: Ireland's Public Disclosure Act 2014

## Other Relevant Legal Features

- Confidentiality and Protection of Retaliation
- Access to Independent (confidential) Advice (e.g. The Netherlands)
- Monitoring, Review, Evaluation

### Law in Practice

- Implementation of Rules and Regulations (e.g. Romania)

# Thank You!

Written comments welcome at  
**[v.abazi@maastrichtuniversity.nl](mailto:v.abazi@maastrichtuniversity.nl)**



## European Ombudsman

### Strategic Inquiries Unit

#### Joint Public Hearing: The EU-wide protection of whistleblowers, European Parliament, 21 June 2017

#### Introductory statement by Rosita Hickey, Head of Strategic Inquiries Unit

#### 'European Ombudsman: Inquiry on internal rules on Whistleblowing'

Thank you for inviting the Ombudsman Office here today to explain the work we have done in this area.

I would like to start by explaining our role and mandate. The European Parliament of course elects the Ombudsman and in 2013 elected Emily O'Reilly. We investigate maladministration in EU institutions, bodies, offices and agencies, on the basis of complaints lodged by citizens, businesses and organisations and can open strategic inquiries on our own initiative. The Ombudsman's inquiry teams have powers to inspect all documents held by any EU institution or agency, and to call EU officials to give testimony if needed. We use our powers to inspect documents regularly, for example documents of the Commission or Council, and very much welcome the good co-operation of the entire EU administration which, on a daily basis, facilitates this important part of our investigative work. Over 90% of our inquiries are based on complaints submitted to us, and of course, that option is also open to Members of parliament if, for example, they are seeking public access to EU documents. The institutions comply with around 85-90% of the Ombudsman's recommendations.

On the topic we are here to discuss today, I will talk about our experience in drawing up rules on whistleblowing, the Ombudsman's strategic inquiry covering 9 EU institutions and bodies, as well as our complaint-handling experience in this area.

One of Emily O'Reilly's first strategic or own-initiative inquiries, after taking up office in 2013, covered whistleblowing. The context, in part, was the EU's first ever **Anti-Corruption Report** which noted that *"[...] whistleblowing faces difficulties given the general reluctance to report such acts within one's own organisation, and fear of retaliation. In this regard, building an integrity culture within each organisation, raising awareness, and creating effective protection mechanisms that would give confidence to potential whistleblowers are key [...]."*

The context was also shaped by new provisions in the EU Staff Regulations that entered into force in January 2014. These new provisions covered (i) the need to provide information to officials on the handling of matters reported by them; (ii) the protection of the legitimate interests of those officials and of their privacy; (iii) the procedure for handling of complaints by officials concerning the way they were



treated.

I think that the importance of these particular provisions is evidenced by the Ombudsman's experience in dealing with complaints from whistleblowers. Most cases dealt with by our office in this area come from individuals who allege that they have not been taken seriously enough, that their administration has not adequately followed up on their reports, that they have not been kept informed of any follow up action (in other words, they have no feedback as to whether they were right to blow the whistle in the first place or not) and that they have faced retaliation.

It was therefore particularly important for the Ombudsman's Office to take the lead in giving effect to these new provisions in the Staff Regulations. In devising internal rules, the Ombudsman was guided by the following:

An effective whistleblowing policy should deter and detect wrongdoing before it is too late.

It should demonstrate that senior management wants to hear about concerns early and will respond appropriately.

It should signal to staff the appropriate way to raise concerns.

It should reassure staff that they will be protected if they raise concerns.

It should indicate that there are safe external routes to raise concerns (e.g. OLAF).

And it should reduce the risk of wider public disclosures.

The Ombudsman worked closely with staff in drawing up the rules. The Staff Committee consulted all staff to help them feel ownership of the rules, so that staff understand them and feel confident in the protection they provide. We sought the advice of our internal Data Protection Officer and of the European Data Protection Supervisor. The Ombudsman then published the draft rules for public comment. After the public comments were reviewed, a staff meeting was held and the Staff Committee was informed again. The final version was adopted in February 2015.

The rules define the most important terms like whistleblower, serious misconduct and good faith. They set out, in detail, the procedure for whistleblowers to follow. They describe the rights a whistleblower enjoys, namely guidance and support, information guarantees, protection, confidentiality, mobility, appraisal and promotion and remedies. They mention penalties for individuals who retaliate against whistleblowers. Lastly, the Ombudsman's rules contain articles on the abuse of the whistleblowing process, the rights of persons implicated, training and reporting, data protection and external whistleblowers.

After launching the process to complete our own rules, the Ombudsman conducted an own-initiative investigation to see if nine EU institutions, including Parliament, the Commission, Council and the External Action Service, had taken similar action. The Ombudsman noted that only the European Commission and the European Court of Auditors had adopted the necessary rules; when the Ombudsman closed the inquiry in February 2015, the other institutions were still in the process of





preparing rules. In the meantime, the other 7 EU institutions introduced or updated the relevant rules.

With the rules and policies on whistleblowing now in place, we are now reflecting on the next steps, and therefore today's event is most welcome. For example, one possibility could be to find out more about institutions' experience implementing the rules.

This is a difficult issue for any public administration and we wish to be as helpful as possible.

Thank you.

# European Ombudsman

## Inquiry on internal rules on Whistleblowing

Joint Public Hearing: EU-wide protection of  
whistleblowers, European Parliament, 21 June 2017



European Ombudsman

# European Ombudsman: mandate

- Elected by EP
- Independent
- Investigate maladministration in EU institutions
- Complaints & strategic inquiries
- ~85/90% of recommendations followed
- **Powers:**
  - inspect all EU documents
  - call EU officials to testify



European Ombudsman

# Whistleblowing: EU context

- EU's first ever **Anti-Corruption Report** highlighted whistleblowing.
- However, "[...] *whistleblowing faces difficulties given the general reluctance to report such acts within one's own organisation, and fear of retaliation. In this regard, building an integrity culture within each organisation, raising awareness, and creating effective protection mechanisms that would give confidence to potential whistleblowers are key [...].*"



European Ombudsman

# EU context

- January 2014 obligation in the new Staff Regulations.
- Article 22(c) refers to internal rules on:
  - ✓ The provision of information to officials on the handling of matters reported by them
  - ✓ The protection of the legitimate interests of those officials and of their privacy
  - ✓ The procedure for the handling of complaints by officials concerning the way they were treated



European Ombudsman



# An effective whistleblowing policy should...

- Deter and detect wrongdoing before it is too late.
- Demonstrate that senior management wants to hear about concerns early and will respond appropriately.
- Signal to staff the appropriate way to raise concerns.
- Reassure staff that they will be protected if they raise concerns.
- Indicate that there are safe external routes to raise concerns (e.g. OLAF, Ombudsman).
- Reduce the risk of wider public disclosures.



European Ombudsman

# EO's procedure for adopting the rules

- Staff Committee consulted – all staff  
*“Given the obligation on staff to report serious irregularities, it is important that staff feel ownership of the rules, that they understand them and feel confident in the protection they provide.”*
- DPO advice sought
- Draft published on EO website for public comment
- EDPS notified about procedures
- Staff meeting held and Staff Committee informed again
- Final version adopted in February 2015



European Ombudsman

## Main elements of EO rules

- Definitions: whistleblower, serious misconduct, good faith
- Procedure: report suspicions in writing, to a manager, possibility to report to OLAF and additional possibility to report to the President of the Commission/Court of Auditors/Council/Parliament



European Ombudsman



## Main elements of EO rules

- Rights of WB: guidance and support, information guarantees, protection, confidentiality, mobility, appraisal and promotion, penalties for persons who retaliate, remedies
- Abuse of process
- Rights of persons implicated
- Training, reporting
- Data protection
- External whistleblowers



European Ombudsman

# Strategic inquiry (own-initiative)

- Launched July 2014 (9 institutions)
- Opinions received +/- 31 October 2014
- European Commission and European Court of Auditors
- Other institutions, for most part, were in process of preparing/updating rules
- EO decision in February 2015



European Ombudsman

## Developments since then

- Since then, all institutions covered by EO inquiry adopted/updated internal rules
- Next steps?



European Ombudsman

[www.ombudsman.europa.eu](http://www.ombudsman.europa.eu)  
@EUOmbudsman



European Ombudsman





*Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion*  
*Committee on Legal Affairs*

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## **JOINT PUBLIC HEARING**

**“THE EU-WIDE PROTECTION OF WHISTLEBLOWERS”**

**WEDNESDAY, 21 JUNE 2017**

09.00 - 11.00

Room: Paul Henri Spaak (PHS) 1A002  
Brussels

**REPLIES TO THE WRITTEN QUESTIONS**

16 June 2017

Responses for  
Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion  
Committee on Legal Affairs

On the occasion of the  
Joint Public Hearing ‘The EU-wide Protection of Whistleblowers’ 21 June 2017 09.00 – 11.00

Dr Vigjilenca Abazi  
Maastricht University, Centre for European Research in Maastricht (CERiM)  
[v.abazi@maastrichtuniversity.nl](mailto:v.abazi@maastrichtuniversity.nl)

**The EU-WIDE PROTECTION OF WHISTLEBLOWERS**

1. How would you define a whistleblower? What elements should be part of a whistleblower definition? Do you see a distinction between denunciation and whistleblowing?

The academic literature and different legal systems do not provide for a single definition on the notion of whistleblower. There are also legislative acts such as the Irish Protected Disclosure Act 2014 that do not make a reference to ‘whistleblower’ although the act is intended to protect those individuals.<sup>1</sup> Nevertheless, there are important elements that constitute this definition and for these elements there is a general consensus. These elements increasingly also become clear in the case law of the European Court of Human Rights (ECtHR) since there are have been several cases pertaining to whistleblowing. The first relevant element is that disclosure is made in the *public interest*. Secondly, some laws require that the individual disclosing the information does so in the *reasonable belief* that the information disclosed shows one or more relevant wrongdoings.

2. Should whistleblowers be protected when they report not only on illegal activities but also on wrongdoing and any information that is in the public interest? Should they be protected no matter whether they report internally within the workplace or externally first? Shall protection be ensure no matter their choice of reporting channel?

The definition of ‘protected disclosure’ should indeed be wide as the relevance of whistleblowing is linked to the public interest. Furthermore, disclosure of information may pertain not only to information about an already committed abuse of power, corruption, wrongdoing, etc., but also related

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<sup>1</sup> See Irish Protected Disclosure Act 2014 <  
<http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/print>>

to a threat or prejudice to the public interest. The emerging international best standards show that protection should not be limited for the whistleblower only if the latter has first reported internally, but rather has to be available also if external channels of reporting are used. The main reason for this is not to block whistleblowing internally and potentially the information not reaching the public or providing space internally for delays of accountability processes as well as possible pressures for the whistleblower. However, it should be noted that the jurisprudence of the ECtHR thus far has made a distinction and afforded protection only once the whistleblower has made internal attempts for disclosure before bringing the information to external channels. In sum, since practice shows that if whistleblowing is conditioned to reporting first through internal channels may lead to increased pressure and lack of protection for the whistleblower, arguably, any EU legal framework should not make it conditional that protection would only be afforded to the whistleblower if he/she has first utilised internal reporting.

3. Whistleblowers usually act at high personal and professional risk and have to pay the costs for it. Do you think that an adequate protection of whistleblower should entail measures for the alleviation of those costs, financial compensation and/or mentally and psychological assistance? Should there be a European fund created to ensure whistleblowers are protected from the financial negative consequences of blowing the whistle (e.g. losing their job)?

Although such a measure and fund would be highly welcomed especially since whistleblowers ensure financial costs due to their revelations, it may be a significant challenge in practice to establish this fund since many member states still lack legal protection for whistleblowers and its relevance is not fully and equally grasped in all member states.

4. What are your views on the burden of proof regarding whistleblowing? Should it be on the whistleblowers to explain that they fall within the scope of the definition of a whistle blower or on the other party in court to explain why they shouldn't be considered as whistleblowers?

In accordance with best international standards, the burden of proof that the disclosure made is not of public interest or does not fulfil other aspects of whistleblowing protection, should fall with the other party (most likely the employer as whistleblowing is generally related to a work based relationship).

5. Whistleblowers protection at EU level already exist in some sectoral legislations (mainly in the financial area for instance in the market abuse Directive or the anti-money laundering Directive). Do you think that there is a stronger benefit to ensure cross-sectoral (horizontal) protection for whistleblower in legislation (rather than a sector-by-sector approach)?

The added value of EU legislation, and in this regard fulfilling the criterion of subsidiarity in enacting EU legislation, is that the EU contributes toward legal certainty by reducing the current legal fragmentation. The latter provides for a legal matrix where individuals are yet not fully aware whether indeed they would be legally protected or which field is covered by rules for whistleblower



protection. Importantly, whistleblowing is a core reflection of the right to freedom of expression, which is a fundamental right in the EU in light of the EU Charter of Fundamental Rights. EU rules should not protect and ensure the realisation of this right in a fragmented manner.

6. The person who want to blow the whistle is often not aware of how to do it. Some have launched the idea of creating or using an existing independent body at EU level which could help a potential whistleblower to use the right channels to disclose his/her information while protecting his/her confidentiality and offering needed support and advice. Another idea could be to create or use an existing body to collect and ensure a confidential follow-up of the whistle. What are your views on these?

A dedicated body for the proper information and guidance of whistleblowers in the EU would be of great benefit towards ensuring a correct implementation of laws. However, it should also be kept in mind that whistleblowers may come from various sectors and many small entities (whether public or private), which could make communication through a more centralised independent body more challenging. Furthermore, it should be considered carefully what kind of advice this body could offer and the necessary institutional capacities towards that goal. Lastly, creating a body that could follow-up would be positive to ensure that the disclosed information is taken seriously and directed toward necessary actions in that regard, however it is questionable to what extent that would be effective if the body has no repercussions powers.

7. The public perception as regards whistleblowers is not always positive. The public does not always recognise a civic engagement in the actions of whistleblowers. Do you see the need more awareness-raising, learning, educational and training efforts? If so how would this look like?

The need for awareness-raising instruments and educational efforts is significant as data shows that in many member states even the notion of ‘whistleblower’ carries negative connotations. For example, In its comprehensive and in-depth country report, Transparency International showed that in most member states whistleblowers are ‘burdened with negative stereotypes and derogatory labels such as “informer” and “snitch” that prevent them from being recognised for taking personal risks to help the common good’.<sup>2</sup> Furthermore, it is not always clear for the public what is the difference between ‘leakers’ of documents and when actions of public disclosure of documents should be protected as whistleblowing and currently the benefits of whistleblowers are mostly known merely among pundits. Therefore, public campaigns for raising awareness could be useful that could showcase through facts and data the benefits of whistleblower protection in the EU.

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<sup>2</sup> Transparency International, Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU, 5 November 2013, page 7.



## European Ombudsman

### Strategic Inquiries Unit

#### **Joint Public Hearing: The EU-wide protection of whistleblowers, European Parliament, 21 June 2017**

#### **Questions sent by the EP in advance**

The answers that follow are largely drawn from the European Ombudsman's internal rules on whistleblowing by members of her staff concerning serious misconduct or wrongdoing affecting the Ombudsman's Office.

These rules are intended to enable whistleblowers to fulfil their duty to speak up if they become aware of serious misconduct or wrongdoing within the Ombudsman's Office, thus serving the public interest, by fostering integrity, transparency, accountability, and ultimately legitimacy in and of the Ombudsman's Office.

The rules are based on the following considerations:

- (a) Integrity is an essential principle of the European civil service. The public expects members of staff of the EU institutions, bodies, offices and agencies to behave with the highest degree of integrity. Therefore, it is not only desirable, but essential that staff should report any reasonable suspicion of serious misconduct or wrongdoing within the Ombudsman's Office.
- (b) Whistleblowers play an essential role in helping the EU institutions, bodies, offices and agencies, including the Ombudsman, to deter breaches of the principle of integrity as well as to detect any breaches that may occur.
- (c) Deciding whether it is necessary to blow the whistle can be a difficult issue. Members of the Ombudsman's staff should therefore know that the Ombudsman welcomes whistleblowing and encourages whistleblowers to step forward in cases where they are uncertain whether they should report possibly serious misconduct or wrongdoing affecting the Ombudsman's Office.
- (d) Whistleblowers should disclose their identity when reporting information suggesting the existence of serious misconduct or wrongdoing in the Ombudsman's Office. However, the Ombudsman will also examine any such reports that are submitted anonymously though such cases are not covered by the present rules.
- (e) The Staff Regulations provide for whistleblowers to be protected against negative action by the institution for which they work. Whistleblowers may suffer in other ways, however; for example, by retaliation from colleagues. Not only is this unfair to the whistleblower, it may also discourage whistleblowing and thereby weaken it as a mechanism for ensuring integrity, accountability and transparency.
- (f) Confidential advice and support should be available to guide and support potential whistleblowers.
- (g) If the whistleblower so desires, his or her identity must, to the greatest extent possible, remain confidential.



(h) Whistleblowers need the assurance that, in accordance with principles of good administration, their reporting will lead to a proper investigation and that they will be informed of the outcome.

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

(j) The above considerations also apply, in principle, to whistleblowers who are not members of the Ombudsman's staff, such as external contractors, sub-contractors and their employees. Within the limits of their legal and operational capacity to do so, the EU institutions, bodies, offices and agencies should thus seek to safeguard also the rights and interests of such external whistleblowers.

(k) The Staff Regulations require members of staff of the Ombudsman's Office, who are aware of serious misconduct or wrongdoing in an EU institution other than the Ombudsman's Office, to report that matter. If the Ombudsman receives such a report from members of her staff, this report will be forwarded to OLAF as rapidly as possible. Reports of this kind are not, however, covered by these present rules.

**1. How would you define a whistleblower? What elements should be part of a whistleblower definition? Do you see a distinction between denunciation and whistleblowing?**

For the purpose of the Ombudsman's internal rules concerning disclosure in the public interest ('whistleblowing'), a *whistleblower* is a person who, in good faith, reports information suggesting the existence of serious misconduct or wrongdoing in the Ombudsman's Office.

*Serious misconduct or wrongdoing* includes, for example, fraud, corruption, theft, and other criminal offences, serious violations of rules on public procurement and serious violations of professional obligations.

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

**2. Should whistleblowers be protected when they report not only on illegal activities but also on wrongdoing and any information that is in the public interest? Should they be protected no matter whether they report internally within the workplace or externally first? Shall protection be ensure no matter their choice of reporting channel?**

Article 22a of the EU Staff Regulations refers to the reporting 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.” As mentioned under (c ) above, deciding whether it is necessary to blow the whistle can be a difficult issue. This is why the Ombudsman encourages whistleblowers to step forward in cases where they are uncertain whether they should report possibly serious misconduct or wrongdoing affecting the Ombudsman's Office.

In accordance with Article 22a of the Staff Regulations, members of the Ombudsman's staff are obliged to report suspicions of serious misconduct or wrongdoing affecting the Ombudsman's Office. Such reports should be made in writing and may be made either internally within the Ombudsman's Office or externally to OLAF.

In accordance with Article 22b of the Staff Regulations, a whistleblower may also disclose information to the President of the Commission, the President of the Court of Auditors, the President of the Council or the President of the European Parliament. If a whistleblower decides to send his or her report to one of the persons mentioned in Article 22b, protection is granted if the whistleblower has previously disclosed the same information to OLAF or the Ombudsman and has allowed OLAF or the Ombudsman the period of time that OLAF or the Ombudsman consider to be necessary for taking appropriate action, unless that period is unreasonable, having regard to the circumstances of the case.

- 3. Whistleblowers usually act at high personal and professional risk and have to pay the costs for it. Do you think that an adequate protection of whistleblower should entail measures for the alleviation of those costs, financial compensation and/or mentally and psychological assistance? Should there be a European fund created to ensure whistleblowers are protected from the financial negative consequences of blowing the whistle (e.g. losing their job)?**

These aspects are, to the extent possible, covered in Articles 5, 7, 11 and 12 of the Ombudsman's internal rules, as follows:

#### **Article 5 - Guidance and support**

Potential whistleblowers may approach a designated staff member to seek guidance on whether concerns they have require to be reported to the Ombudsman's Office in accordance with these rules and Article 22a of the Staff Regulations.

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

Potential whistleblowers may also approach a manager for guidance and support. They may further consider contacting OLAF, which provides anonymous guidance



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

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

#### **Article 7 - Protection of whistleblowers**

The Ombudsman shall, to the greatest extent possible, protect a whistleblower against any acts of retaliation or reprisal, disadvantage or discrimination at the workplace linked to or resulting from whistleblowing. The same protection is granted to members of staff who have supported a whistleblower.

If a whistleblower decides to send his or her report to one of the persons mentioned in Article 22b of the Staff Regulations, this protection is granted if the whistleblower has previously disclosed the same information to OLAF or the Ombudsman and has allowed OLAF or the Ombudsman the period of time that OLAF or the Ombudsman consider to be necessary for taking appropriate action, unless that period is unreasonable, having regard to the circumstances of the case.

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

#### **Article 11 - Penalties for persons taking retaliatory action**

Any form of retaliation against a whistleblower is prohibited.

A whistleblower, who believes that an action affecting him or her adversely was taken at the workplace in retaliation for having made a report under these rules, should notify the Secretary-General or the Ombudsman, who will investigate the matter. It shall be up to the person who has taken the action in question to establish that it was motivated by reasons other than the reporting.

If such retaliation is found to have occurred, the Ombudsman shall take appropriate action, including, if necessary, disciplinary measures against any member of staff concerned.

#### **Article 12 - Remedies**

Members of the Ombudsman's staff who have made a report under these rules and who consider that they have not received adequate support and protection, or have been affected adversely by the making of a report, may request assistance (including compensation) in accordance with Article 24 of the Staff Regulations. A reasoned decision on an Article 24 request shall be provided to the whistleblower as rapidly as possible, and in any event no later than two months after he or she submitted the request. Where the staff member regards the decision as unsatisfactory, he or she may make a complaint, within three months, under Article 90(2) of the Staff Regulations.



If the whistleblower so requests, he or she shall have the opportunity to present the complaint orally and may be accompanied at a meeting for this purpose by a member of the Staff Committee and/or any other person. In dealing with Article 90(2) complaints, the Ombudsman's Office may consult or involve a person or persons from outside the Ombudsman's Office in order to ensure that the procedure is as fair and equitable as possible.

The decision on the complaint shall be given to the whistleblower no later than two months after he or she has submitted the complaint.

**4. What is your views on the burden of proof regarding whistleblowing? Should it be on the whistleblowers to explain that they fall within the scope of the definition of a whistle blower or on the other party in court to explain why they shouldn't be considered as whistleblowers?**

This matter is partly covered in Article 13 of the Ombudsman's internal rules, where we refer to individuals who are alleged to have abused the whistleblowing process.

**Article 13 - Abuse of Process** 

If a member of staff knowingly reports false information, he or she may be subject to disciplinary measures.

The burden of proof in this respect shall lie with the Ombudsman's Office.

**5. Whistleblowers protection at EU level already exist in some sectoral legislations (mainly in the financial area for instance in the market abuse Directive or the anti-money laundering Directive). Do you think that there is a stronger benefit to ensure cross-sectoral (horizontal) protection for whistleblower in legislation (rather than a sector-by-sector approach)?**

As this is a legislative matter, it is rather for Parliament to address than for the Ombudsman.

**6. The person who want to blow the whistle is often not aware of how to do it. Some have launched the idea of creating or using an existing independent body at EU level which could help a potential whistleblower to use the right channels to disclose his/her information while protecting his/her confidentiality and offering needed support and advice. Another idea could be to create or use an existing body to collect and ensure a confidential follow-up of the whistle. What are your views on these?**



In her letter to the EU institutions opening her strategic inquiry on whistleblowing, the Ombudsman quoted the following from the EU's first Anti-Corruption Report: "[...] *whistleblowing faces difficulties given the general reluctance to report such acts within one's own organisation, and fear of retaliation. In this regard, **building an integrity culture within each organisation, raising awareness, and creating effective protection mechanisms that would give confidence to potential whistleblowers are key** [...].*" (emphasis added)

In terms of 'independent bodies', OLAF is already mentioned in Article 22a of the Staff Regulations as the body to whom officials can turn outside their own institution. In a second instance, the Ombudsman is the independent body mentioned among the range of individuals and bodies an official can turn to, under Article 22b.

In our internal rules on whistleblowing, we included an article on External whistleblowers to ensure that third parties who interact with our Office know about this important possibility. It reads as follows:

#### **Article 17 - External whistleblowers**

Every person who enters into a contract with the Ombudsman's Office shall be informed (i) that it is possible to report serious misconduct or wrongdoing affecting the Ombudsman's Office either to the Ombudsman or to OLAF and (ii) that making use of this possibility will not result in any retaliation, reprisal or other negative action on the part of the Ombudsman's Office, provided that he, she or it reasonably believes the information reported to be true.

- 7. The public perception as regards whistleblowers is not always positive. The public does not always recognise a civic engagement in the actions of whistleblowers. Do you see the need more awareness-raising, learning, educational and training efforts? If so how would this look like?**

The importance of improving the perception of whistleblowing as an activity carried out in the public interest was one of the reasons that the Ombudsman chose this topic as one of the first ones on which to launch a strategic initiative after taking up office in 2013. One concrete manner in which we addressed the need to ensure that whistleblowers are looked upon favourably was through Article 10 of our rules, as follows:

#### **Article 10 - Appraisal and promotion**

(...) To the extent that this may be possible, the fact of having made a report under these rules will be looked upon favourably for the purposes of appraisal reports or promotion.

## 21 June: The EU-WIDE PROTECTION OF WHISTLEBLOWERS

Observations préliminaires:

- **Dés lors que les lois relatives aux lanceurs d’alerte se développent dans les Etats membres, nous sommes favorables à la mise en place, au niveau européen, d’un instrument législatif horizontal « trans-sectoriel » concernant la protection des lanceurs d’alerte.**
  - Un texte européen présenterait en effet **plusieurs avantages** : **(i)** Inciter les Etats membres à adopter des législations « *trans sectorielles* » relatives à la protection des lanceurs d’alerte, ce qui n’est pas le cas dans la plupart des Etats membres aujourd’hui, la France étant précurseur en la matière avec l’adoption, fin 2016, de la loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite Loi Sapin II, **(ii)** harmoniser les régimes applicables dans les différents Etats membres, ce qui est particulièrement important pour les entreprises de taille européenne ayant des salariés dans plusieurs pays de l’UE et devant mettre en place des procédures de signalement conformes aux différentes législations nationales et **(iii)** permettre une meilleure opposabilité des lois européennes, vis-à-vis de pays comme les Etats-Unis, afin que ces derniers ne puissent s’estimer légitimes à se positionner comme gendarme de pratiques qu’ils estimeraient contraires à leur système.
  - **Il est toutefois capital que les conditions d’octroi de la protection soient clairement définies et que le régime de protection soit susceptible d’être mis en œuvre, en pratique, par les entreprises.**
  - En tant qu’entreprise française, nous soulignons que la France, avec l’adoption de la Loi Sapin II, vient de créer un statut de lanceur d’alerte « trans-sectoriel » et un régime de protection qui nous semble équilibré et que, sous certaines réserves, ce régime pourrait servir de base pour un instrument de dimension européenne.
1. How would you define a whistleblower? What elements should be part of a whistleblower definition? Do you see a distinction between denunciation and whistleblowing?
    - Selon nous, la définition du lanceur d’alerte doit être enserrée dans des conditions strictes : **(i)** Il doit s’agir d’une personne physique ayant une relation de travail avec l’entreprise (éviter des notions peu claires telle que « *collaborateurs extérieurs et occasionnels* » existant dans la Loi Sapin II) **(ii)** de bonne foi et désintéressée et **(iii)** qui a eu une connaissance personnelle des faits.
  2. Should whistleblowers be protected when they report not only on illegal activities but also on wrongdoing and any information that is in the public interest? Should they be protected no matter whether they report internally within the workplace or externally first? Shall protection be ensure no matter their choice of reporting channel?
    - Nous pensons que la protection doit être limitée aux alertes relatives à la violation grave d’un texte légal (national ou international) et concernant ainsi, notamment, des domaines tels que : la concurrence, la lutte contre la corruption, la finance, la comptabilité, les relations de travail ou encore la protection de l’environnement .



- Il convient de prévoir que cette protection ne vise que les cas où le lanceur d'alerte respecte une procédure graduée et sécurisée en s'adressant d'abord à l'entreprise, tout en imposant à ces dernières des diligences en matière de traitement (i.e. recevabilité du signalement). Si ces mesures de diligence ne sont pas respectées, le lanceur d'alerte doit pouvoir s'adresser, dans un second temps, aux autorités administrative et judiciaire. En dernier recours, à défaut de traitement, le signalement peut être rendu public. Sur ce point, la Loi Sapin II fournit un bon exemple.
3. Whistleblowers usually act at high personal and professional risk and have to pay the costs for it. Do you think that an adequate protection of whistleblower should entail measures for the alleviation of those costs, financial compensation and/or mentally and psychological assistance? Should there be a European fund created to ensure whistleblowers are protected from the financial negative consequences of blowing the whistle (e.g. losing their job)?
    - Nous ne sommes pas favorables à la rémunération du lanceur d'alerte qui doit agir sans contrepartie et sans incitation financière dans le cadre d'une démarche désintéressée.
    - La création d'un fond européen ne nous paraît pas une solution adéquate, même pour un éventuel soutien psychologique du lanceur d'alerte.
  4. What is your views on the burden of proof regarding whistleblowing? Should it be on the whistleblowers to explain that they fall within the scope of the definition of a whistle blower or on the other party in court to explain why they shouldn't be considered as whistleblowers?
    - La recevabilité correspond à une analyse formelle de l'alerte qui doit être faite par l'entreprise sur la base des conditions attendues à la définition du lanceur d'alerte d'où l'intérêt d'avoir une définition précise.
    - En cas de désaccord nous considérons que c'est au lanceur d'alerte de démontrer qu'il remplit les conditions d'octroi du statut, conformément au droit commun de la charge de la preuve (en droit français).
  5. Whistleblowers protection at EU level already exist in some sectoral legislations (mainly in the financial area for instance in the market abuse Directive or the anti-money laundering Directive). Do you think that there is a stronger benefit to ensure cross-sectoral (horizontal) protection for whistleblower in legislation (rather than a sector-by-sector approach)?
    - Nous sommes favorables à une approche trans sectorielle dans un souci d'efficacité de la mise en œuvre des mesures de protection du lanceur d'alerte car certaines entreprises pourraient être concernées par plusieurs législations sectorielles disparates.
  6. The person who want to blow the whistle is often not aware of how to do it. Some have launched the idea of creating or using an existing independent body at EU level which could help a potential whistleblower to use the right channels to disclose his/her information while protecting his/her confidentiality and offering needed support and advice. Another idea could be to create or use an existing body to collect and ensure a confidential follow-up of the whistle. What are your views on these?
    - Les entreprises susceptibles d'être concernées par la mise en œuvre des mesures sont différentes par leur taille, leur implantation géographique, leur secteur d'activité. Il convient de laisser aux entreprises suffisamment de marge de manœuvre pour mettre en place les mesures internes appropriées notamment concernant le canal de l'alerte et les garanties de confidentialité. Certains outils sont coûteux et les moyens financiers ne sont pas les mêmes au sein de toutes les entreprises.

- C'est aux entreprises de s'assurer de la bonne communication auprès de leurs salariés (sur le canal de l'alerte mis à disposition par l'entreprise et le traitement qui y est donné) par les moyens qui leurs semblent les plus efficaces.
  - L'intervention d'une entité au niveau européen ne nous semble donc pas adéquate du fait des mesures de garantie de confidentialité qui doit être mises en place. Toutefois, si une telle institution devait exister, l'un des éléments qui nous paraît clef, serait la capacité de cette entité à développer des liens de proximité avec les lanceurs d'alerte des différents Etats membre.
  - Nous rappelons qu'il existe en France la possibilité pour le lanceur d'alerte de s'adresser au Défenseur des droits (autorité administrative indépendante) afin d'être orienté vers les autorités compétentes ou, en cas de représailles, de bénéficier de la protection de cette autorité.
7. The public perception as regards whistleblowers is not always positive. The public does not always recognise a civic engagement in the actions of whistleblowers. Do you see the need more awareness-raising, learning, educational and training efforts? If so how would this look like?
- Lancer une alerte doit rester un droit et non une obligation. Il serait effectivement nécessaire de sensibiliser le public à l'intérêt d'informer l'entreprise de violations graves de la loi qui peuvent avoir des conséquences dommageables importantes (par exemple en matière d'environnement). Il nous semble important de mettre en avant les conditions de bonne foi et le caractère désintéressé du lanceur d'alerte.

#### Deux remarques finales :

1/Les mécanismes de signalement des alertes vont certainement donner lieu à de plus en plus d'enquêtes internes au sein des entreprises : il est donc primordial que les juristes d'entreprises puissent bénéficier du *legal privilege*, ce qui n'est pas le cas aujourd'hui en France.

2/ Ne faudrait-il pas limiter le champ d'application de l'obligation de mettre en place un régime de protection du lanceur d'alerte à certains types d'entreprises, en France, cette obligation est limitée aux entreprises ayant plus de 50 salariés (Loi Sapin II).



*Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion  
Committee on Legal Affairs*

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## **JOINT PUBLIC HEARING**

**“THE EU-WIDE PROTECTION OF WHISTLEBLOWERS”**

**WEDNESDAY, 21 JUNE 2017**

09.00 - 11.00

Room: Paul Henri Spaak (PHS) 1A002  
Brussels

**BACKGROUND DOCUMENTS**

## **BACKGROUND DOCUMENTS**

The [Whistleblowing Commission](#) report, which reviewed the UK legislation that protects whistleblowers and explains some of the key reasons for the need for strong whistleblower protection for all workers in all sectors (provided by Ms Cathy James):

<http://www.pcaw.co.uk/content/4-law-policy/2-whistleblowing-commission/2-whistleblowing-commission-report/wbc-report-final.pdf>

**Public concern at work, whistleblowing charity** - published in summer last year, which explains their work and some of their recent campaigns.

[http://www.pcaw.org.uk/content/6-campaigns/2-time-for-change-review/pcaw\\_5yr-review\\_final.pdf?1480418791](http://www.pcaw.org.uk/content/6-campaigns/2-time-for-change-review/pcaw_5yr-review_final.pdf?1480418791)