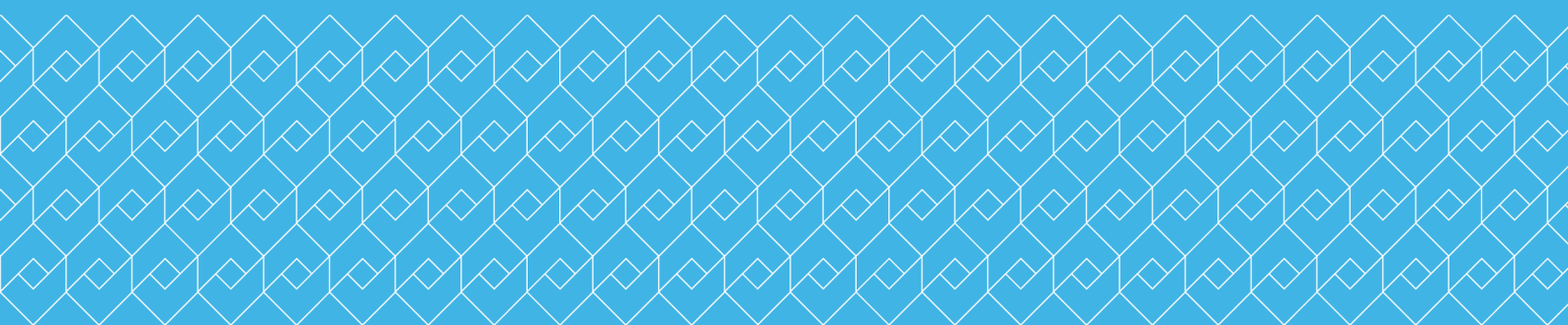


PROTECTING DIGITAL FREEDOM

# Response to Draft decision of the European Ombudsman on internal rules concerning whistle blowing

European Digital Rights (EDRi) is an association of 34 digital civil rights organisations from 19 European countries. We welcome the opportunity to provide our feedback to the European Ombudsman and welcome the her own initiative inquiry OI/1/2014/PMC concerning whistleblowing.<sup>1</sup> In its Recommendation CM/Rec(2014)7, the Council of Europe has recognised that individuals who report or disclose information on threats or harm to the public interest can contribute to strengthening transparency and democratic accountability. This is therefore a crucial step towards a more democratic European Union.

1 Draft decision of the EU Ombudsman on internal rules concerning whistleblowing  
<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54612/html.bookmark#h0>



# General observations

Given the great visibility of the European Ombudsman, not only within the institutions but across the Member States of the European Union, there is a great likelihood that the proposed internal rules will become a blueprint for other institutions, both at the European Union and the Member State level. This amplifies the great importance of this document and leads to a situation where relatively minor weaknesses could have a potentially wider impact than it might seem. EDRi feels that the current document is largely fit for its purpose as internal rules for the EU Ombudsman itself, but falls short of the higher bar set the political context in which it is being elaborated. As a whole, the rules would benefit from more certainty for whistleblowers.

# Specific observations per article

## **ARTICLE 1 - SCOPE**

This Article could be clarified by making an explicit reference to Article 16 of the draft, in order to ensure that the safeguards extend to external parties who wish to report misconduct in the context of their work-based relationship with the institutions.

## **ARTICLE 2 - DEFINITIONS**

The definition of “whistleblower” as a person reports facts on the basis of reasonable belief is very important and welcome. There are too many cases where people who in good faith have decided to step up and who are broadly accepted as whistleblowers but were denied that status by the public administrations involved. Less fortunate is the definition of “serious misconduct” which sets a very high and unclear barrier. The definition should be stronger which can be achieved through the inclusion of an explicit reference to democratic values and the rule of law. The restriction to “serious”, rather than, for example, “serious or extensive” misconduct should be reconsidered.

In addition, we strongly recommend to align this definition with Art. 22A of the Staff Regulations which obliges a staff member to blow the whistle as soon as he or she “in the course of or in connection with the performance of his duties” becomes aware of the illegalities mentioned therein, even if the misconduct happens in another EU institution or if it involves an activity outside the institutions (e.g. by retired officials that violate their duties) that is “detrimental to the interests of the Union”.

## **ARTICLE 3 - PROCEDURE**

While referencing to existing provisions in Staff Regulations may be useful, this also creates a loophole for later restrictions in a whistleblower's ability to receive protection under this decision. A more robust way of doing so would be to outline these conditions in this document while mentioning that the Staff Regulations may expand them further.

## Rights of whistleblowers

### **ARTICLE 4 - GUIDANCE AND SUPPORT**

This Article does not cover extreme cases in which a whistleblower may not be able to trust anyone inside the office of the EU Ombudsman. A provision covering such cases would be an improvement.

Furthermore, we recommend that the functions of the staff member who is receiving reports of serious misconduct and the staff member of that institution who is designated to offer support and guidance are sufficiently separate to permit that both functions are carried out effectively. Ideally, we would suggest the creation of an external body for all EU institutions providing guidance and support to potential whistleblowers.

### **ARTICLE 5 - INFORMATION GUARANTEES**

We welcome this Article.

### **ARTICLE 6 - PROTECTION OF WHISTLEBLOWERS**

Several cases of whistleblowing lead to little or no action, because evidence was unavailable, destroyed or could not be found. The preservation of evidence is an important step in the protection of a whistleblower against 'he said, she said'-defence, Article 6 could be improved by including evidence-preserving requirements for the EU Ombudsman.

### **ARTICLE 7 - CONFIDENTIALITY**

No comment.

### **ARTICLE 8 - MOBILITY**

No comment, we welcome this Article.

### **ARTICLE 9 - APPRAISAL AND PROMOTION**

This is a good proposal. However, we recommend the deletion of "when appropriate" for the sake of legal clarity.

## **ARTICLE 10 - PENALTIES FOR PERSONS TAKING RETALIATORY ACTION**

We welcome this Article. However, if retaliation takes place it would be logical that the whistleblower will receive compensation (in whatever form suitable) for the retaliatory actions.

## **ARTICLE 11 - REMEDIES**

The complaint procedure might be insufficient under certain circumstances. For instance, when the complaint procedure is part of targeted misconduct. There should be protection (also financial) for the staff to litigate.

## **ARTICLE 12**

From experience, we see that, in whistleblowing cases, the destruction of evidence can make allegations appear dishonest. To create a climate of trust, there should be safeguards ensuring that the investigation is carried out properly and as thoroughly as possible.

Moreover, it would be preferable to adapt this Article to the terminology used in Art. 22b of the Staff Regulations. An alternative phrasing could be: "A dishonest report which contains substantially false information the official knew about when filing the report does not constitute whistleblowing and may lead to disciplinary measures".

## **ARTICLE 13 - RIGHTS OF PERSONS IMPLICATED**

We recommend to extend some of the guarantees given to the whistleblower to the staff members implicated in reports. Staff members implicated in reports of serious misconduct should also have a right to be heard before the termination of the internal investigation.

## **ARTICLE 14 - TRAINING AND AWARENESS RAISING**

These activities should promote and facilitate disclosures of information where the public interest is at stake. Training should be repeated on a regular basis and include confidential advice free of charge as well as technical trainings for staff members (for example regarding the availability of anonymous communication tools).

## **ARTICLE 15 - REPORTING**

No comment.

## **ARTICLE 16 - EXTERNAL WHISTLEBLOWERS**

See our comments under Article 1. It is encouraging that external whistleblowers are included but there might be a need to be more explicit about the possible contexts, their duties and rights and also about the level of protection the Ombudsman can provide.

## **ARTICLE 17 - DATA PROTECTION**

This article should include a reference to relevant data protection safeguards.

## **ARTICLE 18 - REVIEW**

No comment, we welcome annual reviews.

## **ARTICLE 19 - ENTRY INTO FORCE**

No comment.