

Lotta alla corruzione e diritti umani

Teorie, buone prassi e normative
a carattere internazionale e regionale

a cura di

R. Cadin, L. Manca, A. Piga, V. Zambrano



Giappichelli

Lotta alla corruzione e diritti umani

Teorie, buone prassi e normative
a carattere internazionale e regionale



IUSTITIAM COLIMUS

Lotta alla corruzione e diritti umani

Teorie, buone prassi e normative
a carattere internazionale e regionale

a cura di

R. Cadin, L. Manca, A. Piga, V. Zambrano



Giappichelli

© Copyright 2022 – G. GIAPPICHELLI EDITORE - TORINO

VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100

<http://www.giappichelli.it>

ISBN/EAN 978-88-921-2272-7

*Volume pubblicato con il contributo della Sapienza Università di Roma,
Dipartimento di Scienze politiche.*



G. Giappichelli Editore



Questo libro è stato stampato su
carta certificata, riciclabile al 100%



Stampa: Stampatre s.r.l. - Torino

Le fotocopie per uso personale del lettore possono essere effettuate nei limiti del 15% di ciascun volume/
fascicolo di periodico dietro pagamento alla SIAE del compenso previsto dall'art. 68, commi 4 e 5, della legge
22 aprile 1941, n. 633.

Le fotocopie effettuate per finalità di carattere professionale, economico o commerciale o comunque per
uso diverso da quello personale possono essere effettuate a seguito di specifica autorizzazione rilasciata
da CLEARedi, Centro Licenze e Autorizzazioni per le Riproduzioni Editoriali, Corso di Porta Romana 108, 20122
Milano, e-mail autorizzazioni@clearedi.org e sito web www.clearedi.org.

INDICE

pag.

RAFFAELE CADIN

Introduzione: Paesi e diritti umani “lost in corruption” XI

ADRIANA PIGA

Strategie plurali di contrasto alla corruzione nell’Africa a sud del Sahara. Il protagonismo delle associazioni della società civile

1. Una introduzione socio-antropologica 1
2. Incidenza della corruzione transfrontaliera nell’Africa Occidentale 6
3. Uno sguardo ai dati di *Transparency International* 8
4. L’eccezione del Botswana 9
5. Malversazioni e impunità nella Nigeria contemporanea 11
6. Associazioni della società civile e contrasto alla corruzione nel Sahel 12
7. I murales del *Set-Setal* nella città di Dakar 13
8. L’Associazione nigerina di lotta contro la corruzione nel Niger contemporaneo 15
9. L’“Affaire Zongo” nel Burkina Faso 15
10. Dal *Balai Citoyen* al *Ren Lac* 19
11. Conclusioni 20

FÉLIX VACAS FERNÁNDEZ

The European Public Prosecutor’s Office

1. Previous Considerations 25
2. Legal Basis and Development of the Process to Establish a European Public Prosecutor’s Office 27
 - 2.1. The Long Road to Article 86 TFUE, Legal Basis to Create a European Public Prosecutor’s Office 27

	<i>pag.</i>
2.2. The Negotiating Process to Establish a European Public Prosecutor's Office through Enhanced Cooperation	29
3. Contents of Council Regulation 2017/1939, of 12 October, that Establishes the European Public Prosecutor's Office	32
3.1. General Principles	32
3.2. Structure	34
3.3. Competences	37
3.4. Powers of Research and Prosecution	41
3.5. The European Public Prosecutor's Office External Relations	42
3.6. The European Public Prosecutor's Office, Human Rights and Legal Guarantees	43
4. Future Developments of the European Public Prosecutor's Office: Possible Enlargement of its Competencies	45

RÉKA FRIEDERY

Serving Citizens in the Fight against Corruption at Supranational Level with the EU Ombudsman

1. Introduction	49
2. Hard Law, Soft Law and in-between: The EU Ombudsman Office	50
3. Serving European Citizens: Ombudsman Office at Supranational Level	52
4. Promoting Transparency: Hard Law and Soft Law, the Code and the Charter	53
5. Corruption and the Procedure of the EU Ombudsman in practice	56
6. Conclusion	61

LUIGINO MANCA

Il meccanismo di follow-up della Convenzione interamericana sul contrasto alla corruzione

1. Considerazioni preliminari sul carattere multilivello della disciplina giuridica internazionale in materia di lotta alla corruzione e piano dell'indagine	63
2. Breve richiamo del contenuto della Convenzione interamericana sul contrasto della corruzione. Le principali caratteristiche del regime normativo e, in particolare, la rilevanza dell'approccio preventivo e repressivo al fenomeno	68

pag.

- | | | |
|----|--|----|
| 3. | Il sistema di controllo sull'adempimento degli obblighi pattizi: la creazione del MESICIC. Profili generali e prassi applicativa. In particolare, il fondamentale contributo della società civile | 70 |
| 4. | Note conclusive. L'influsso esercitato della Convenzione interamericana sulla successiva produzione normativa, a livello internazionale, in tema di corruzione e le recenti iniziative dell'OSA tese a rafforzare la cooperazione con gli Stati nell'attività di contrasto | 77 |

LUIGI ZUCCARI

La lotta alla corruzione nel Continente africano. Strumenti giuridici regionali e iniziative sub-regionali

- | | | |
|----|--|-----|
| 1. | Le conseguenze economiche, sociali e politiche della corruzione nel Continente africano | 81 |
| 2. | Gli strumenti di contrasto alla corruzione adottati dall'Unione africana | 87 |
| 3. | Le iniziative anticorruzione intraprese a livello sub-regionale: il Protocollo dell'ECOWAS per combattere la corruzione e il Protocollo della <i>Southern African Development Community</i> (SADC) per contrastare il fenomeno | 100 |
| 4. | Considerazioni conclusive | 108 |

VALENTINA ZAMBRANO

L'imposizione di sanzioni individuali in risposta ad atti di corruzione e di violazione del diritto internazionale dei diritti umani

- | | | |
|----|---|-----|
| 1. | La corruzione da pratica ammessa a elemento di distorsione nei rapporti internazionali e nella fruizione dei diritti individuali | 113 |
| 2. | I "Magnitsky Acts" statunitensi: dalle sanzioni "mirate" alle sanzioni "globali" | 117 |
| 3. | Il rapporto tra corruzione e violazione dei diritti umani nella "giurisprudenza" degli organi internazionali a tutela dei diritti umani e nei regimi sanzionatori "Magnitsky" | 126 |

GAIA TASCIONI

La corruzione nell'Agenda 2030 per lo sviluppo sostenibile: riflessioni sul caso spagnolo e le sue connessioni con il commercio di armi

1. Premessa	135
2. L'entrata in scena internazionale del discorso sulla corruzione	137
3. La corruzione come violazione dei diritti umani tra problematiche dottrinarie e prassi internazionale	141
4. La lotta contro la corruzione nell'Agenda 2030. Obiettivi, indicatori e criticità	147
5. Corruzione internazionale e commercio di armi nell'ordinamento spagnolo: diagnosi di un binomio	150
6. Conclusioni	157
Riferimenti bibliografici	159
<i>Note biografiche degli Autori</i>	161

Réka Friedery

SERVING CITIZENS IN THE FIGHT AGAINST CORRUPTION AT SUPRANATIONAL LEVEL WITH THE EU OMBUDSMAN

Content: 1. Introduction. – 2. Hard Law, Soft Law and in-between: The EU Ombudsman Office. – 3. Serving European Citizens: Ombudsman Office at Supranational Level. – 4. Promoting Transparency: Hard Law and Soft Law, the Code and the Charter. – 5. Corruption and the Procedure of the EU Ombudsman in practice. – 6. Conclusion.

1. Introduction

The former Secretary-General of the United Nations, Kofi Annan approached broadly the issue of good governance, when he pointed out that good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights where human rights also come to be seen as an integral element of good governance.¹ The Treaty on European Union, which came into force in 1993, was seen a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Article 2 of TEU lists EU values as democracy, equality, the rule of law and respect for human rights, with further emphasis on values as transparency and openness of Union decision-making procedures stated as well in Articles 10(3) and 11(2) TEU and later on in Articles 15, 297 and 298 TFEU.

According to the European Commission, corruption is the abuse of power for private gain which can be seen in many forms, such as bribery, trading in influence, abuse of functions. Moreover, it can also hide behind nepotism, conflicts of interest, or revolving doors, the latter being between the public and the private

¹ *Annual Report of the Secretary-General on the Work of the Organization* (1997). UN Doc. A/52/1 parr. 22 and 27.

sectors. Its effects are serious and widespread.² But most importantly, corruption can seriously harm the economy and society as a whole and, in extreme cases, can undermine the trust of citizens in democratic institutions and processes.³

The European Union's determination to tackle corruption in any forms achieved several important developments either in hard law or soft law forms. But there is another actor whose role and work adds to this fight, namely, the European Ombudsman, as this office is monitoring, supervising the European institutional life and we put emphasise on to this widespread role from different aspects in the following.

2. Hard Law, Soft Law and in-between: The EU Ombudsman Office

Where is the place of the Office of the European Ombudsman in the map of fight-against corruption? We shall look into the legislation of the EU. Regarding primary EU legislation, first the Treaty on European Union listed among the provisions on police and judicial cooperation in criminal matters the prevention and combating of corruption, organised or otherwise, as one objective enabling the creation and safeguarding of a European area of freedom, security and justice.⁴ This was strengthened by the Lisbon Treaty, where the Treaty on the Functioning of the European Union categorized it as a "euro-crime", a particularly serious crime with a cross-border dimension.⁵

As for secondary EU legislation, the EU has adopted two important instruments against corruption. The Convention on Protection of the European Communities' Financial Interests⁶ entered into force in 2002. According to Art. 1, fraud also covers the corrupt act of embezzling EU funds. We shall emphasize that EU funds are managed by the European Investment Bank, that belongs among others under the supervision of the EU Ombudsman. The convention also calls on Member States to take the necessary and appropriate measures to transpose this definition into their national criminal law and render it a criminal offence. The 1996 Protocol to the Convention⁷ deals specifically with corruption, involving national and EU officials, that damages, or is likely to damage, the EU's financial interests.⁸

² https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption_en.

³ See *Report from the Commission to the Council and the European Parliament – EU Anti-Corruption Report*, Brussels, 3.2.2014, COM(2014) 38 final.

⁴ Art. 29, Treaty on European Union, OJ C 325/5, 24 December 2002.

⁵ Art. 83.1.

⁶ Council of the EU, 1995a.

⁷ Council of the EU, 1996a.

⁸ In May 1997, a Second Protocol to the Convention on the Protection of the European Communities' Financial Interests was introduced, entered into force in 2009.

A very important step regarding the anti-corruption measures was the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union.⁹ Indeed, very important because it differentiates between active and passive corruption. The first variant requires parties to criminalise the request from or receipt by a public official of any advantage or benefit in exchange for the official's action or omission in the exercise of his/her functions,¹⁰ and the second variant the promise or giving of any such advantage or benefit to a public official.¹¹ In serious cases, criminal charges could include penalties involving deprivation of liberty, which can give rise to extradition.¹² In addition, according to the Explanatory Report adopted by the Council that serves as a detailed commentary on the Convention, Member States must take the necessary measures to allow heads of businesses, or any persons having power to take decisions or exercise control within a business, to be declared criminally liable in cases of active corruption by a person under their authority, or by a person acting on behalf of the business.¹³

In 2003, the EU institutions defined principles for improving the fight against corruption in acceding, candidate and other third countries. They also called on Member States to render active and passive corruption in the private sector criminal offences, for which legal persons could be held liable. In its Resolution on Aid Effectiveness and Corruption in Developing Countries, the European Parliament called on the European Commission, when designing its development programmes, to focus more specifically on issues of accountability and transparency, since weak accountability mechanisms tend to facilitate corruption. It also called for more transparency in programmes for budget aid granted by the EU, including the requirement to publish relevant information about the aid spent in the recipient country and involve parliaments and inform civil players in this process.

In 2011, in its Communication on Fighting Corruption in the EU the European Commission set up a new mechanism, the so-called Anti-Corruption Report.¹⁴ As

⁹ Council of the EU, 1997c, entered into force in 2005.

¹⁰ Art. 2.

¹¹ Art. 3.

¹² Art. 5.

¹³ Art. 6.

¹⁴ Establishing an EU Anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report") Commission Decision, Brussels, 6 June 2011 C(2011) 3673 final https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e_library/docs/pdf/com_decision_c%282011%29_3673_final_en_en.pdf.

The first Anti-Corruption Report paid particular attention to lingering problems in public procurement, and highlighted incidences of corruption in the healthcare system, in party financing, and at the level of local government. See *Report from the commission to the council and the european parliament EU anti-corruption report*, Brussels, 3 February 2014, COM(2014) 38 final, 2014, p. 14.

https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

the paper highlights, the European public backed more steps in the fight against corruption: the public consultation conducted by the Commission in preparation for this Decision revealed extensive support for action to be taken at EU level, including setting up an EU anti-corruption evaluation mechanism. In the 2008 Commission's public consultation in preparation for the Stockholm Programme, 88% of respondents considered that the EU should do more about corruption.¹⁵ The Anti-Corruption Report aims to monitor and assess Member States' efforts against corruption, and consequently encourage more political engagement. Published every two years the report seeks to: provide a fair reflection of the achievements, vulnerabilities and commitments of all Member States; identify trends and weaknesses that need to be addressed; and stimulate peer learning and exchange of best practices.¹⁶

In the same year when the first Report has been published, an Eurobarometer survey indicated that three quarters (76%) of Europeans think that corruption is widespread and more than half (56%) think that the level of corruption in their country has increased over the past three years. And going back to our subject, after the first Anti-Corruption Report had been published, the European Ombudsman called on the Commission to include performance of EU administration in the next Anti-Corruption Report, and to add a chapter on the performance of the EU administration to the next report.¹⁷ To understand why the EU Ombudsman got involved in this issue, we shall explain the work of the European Ombudsman, starting with its mandate.

3. Serving European Citizens: Ombudsman Office at Supranational Level

The Office of the EU Ombudsman was established to investigate and report on complaints about maladministration within the EU institutions, bodies, agencies and offices. The main goal was to create a more effective, accountable, transparent and ethical administration. Nevertheless, this office has no mandate to deal with complaints against the national authorities of Member States. The provisions concerning the European Ombudsman cover only generally maladministration. It had been only referred to in the Maastricht Treaty and the Office's Statute to the extent that the Ombudsman examines instances of maladministration. Yet, it is established that maladministration occurs, when an EU institution does not act in accordance with the Community law, or neglects or fails to take account the principles and rules created by the Court of Justice of the European Union. The lack

¹⁵ *Ibid.* 2.

¹⁶ https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_68.

¹⁷ <https://www.ombudsman.europa.eu/hu/press-release/en/53452>.

of exact definition inspired the European Ombudsman to interpret the term, stating that administrative irregularities, administrative omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay and the lack or refusal of information may also belong under the frame of maladministration.¹⁸ In 1997, there was another attempt to clarify it, stating that ‘maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it’ and this definition was strengthened by the adoption of a European Parliament decision in 1998. Here we shall point out that the opinion of the Court of First Instance offered another clarification, namely, that the principle of sound administration, does not, in itself, confer rights upon individuals except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of Fundamental Rights of the European Union.¹⁹

4. Promoting Transparency: Hard Law and Soft Law, the Code and the Charter

In the Maastricht Treaty, the establishment of the European Ombudsman was an element of European citizenship. European citizenship was needed to introduce because the early period of European integration gave no role to citizens and for the deepening of integration a sort of identification and means of demonstrating a European ‘added value’ were required.²⁰ Also citizenship offered a direct connection between the Union and the citizen because any European citizen or any natural or legal person residing or having registered office in a Member State of the Union may, directly or through a Member of the European Parliament, refer a complaint to the Ombudsman in respect of an instance of maladministration in the activities of EU institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.²¹ The EU Ombudsman’s work is based on maladministration which can be regarded as a complex of procedural obligations emerging from the interaction between the administration and the public, and these procedural obligations can gradually increase. The defi-

¹⁸ First in the annual reports of 1995 and 1997.

¹⁹ Case T-193/04 Hans-Martin Tillack v. Council, Judgement of 4 October 2006, para. 127.

²⁰ A. WARLEIGH, *Purposeful Opportunists? EU Institutions and the Struggle over European Citizenship*, in R. BELLAMY-A. WARLEIGH (eds.), *Citizenship and Governance in the European Union*, Continuum, London, 2001, p. 22.

²¹ Art. 2 section (2) of the Statute of the European ombudsman. <https://www.ombudsman.europa.eu/hu/legal-basis/statute/hu>.

nition of good administrative practices (good administrative behaviour) as an opposite to maladministration has been used by the European law since the 1960s, and is unwrapped through the activities of the European Court of Justice.²²

According to the European ombudsman in order to prevent an instance of maladministration the practice of good administration shall be followed. After he conducted an own initiative inquiry in November 1998, whose subject was the correct procedure determining the relation between the public officials of Community bodies and institutions and to clarify the good administrative procedure, the European ombudsman prepared the European Code of Good Administrative Behaviour. The ombudsman has initiated the investigation because of complaints made where the offences could have been avoided with a clear and public record of obligations of the Community officials. Also, the ombudsman took into account that the office was set up at the supranational level in connection with the Union's commitment to a democratic, transparent and accountable administration.

Thus, in order to clarify the right to good administration the European Ombudsman draw up the European Code of Good Administrative Behaviour containing guiding principles for the relationship between citizens and civil servants. In addition, the principle of good administration requires from the Community institutions and bodies the compliance with their obligations, the service-minded attitude and it ensures citizens the appropriate treatment, and good administration can be found under Article 41 and Article 43 of the Charter of Fundamental Rights as well. The code gives the opportunity to the official, who follows the principles laid down to avoid an instance of maladministration.²³ And citizen who is familiar with the principles can require the basic principles of good administrative behaviour. The Code represents a preliminary attempt to codify general rules on Community administrative procedure, albeit in a soft law form. Therefore, one can claim that, gradually, the Ombudsman has taken on both the role of controller of "maladministration" and of codifier of good administration.²⁴

The fundamental right to good administration includes the right to an open and accessible EU administration. The right to good administrative procedure embodied in the above-mentioned code has been formulated into the Charter of Funda-

²² The principle of good administration has been already enshrined in Court of Justice judgement of 31 March 1992 in Case-255/90 P, *Burban* [1992] ECR I-2253 and Court of First Instance judgements of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403.

See Council of the EU, *Charter of Fundamental Rights of the EU. Explanations relating to the complete text of the Charter*, Office for Official Publications of the European Communities, 2001, p. 58.

²³ THE EUROPEAN OMBUDSMAN, *What can the European Ombudsman do for you? A guide for citizen*, Office for Official Publications of the European Communities, Luxembourg, 2002, p. 13.

²⁴ S. CADEDU, *The Proceedings of the European Ombudsman, Law and Contemporary Problems*, Vol. 68, no. 1, *The Administrative Law of the European Union*, 2004, pp. 161-180.

mental Rights of the European Union as a right enjoyed by the European citizens: the right to good administration in Article 41²⁵ and the right to refer to the European Ombudsman in Article 43.²⁶ It confirms the importance of the Charter of Fundamental Rights that it has been incorporated into the draft European Constitution with the active involvement of the ombudsman the Charter and the now it is part of the Lisbon treaty. In the preliminary draft constitutional treaty an article on citizenship of the Union was included. Among the new rights was the right to complain to the ombudsman as a new forum for legal redress. It followed the idea that this new forum would contribute to the achievement of an open, reliable and service oriented government.

With the creation of the Charter of Fundamental Rights, the Union sought to strengthen its commitment to fundamental (human) rights. The Charter outlined the general human rights policy in 50 articles, among which the two mentioned articles in connection with the ombudsman.

The ombudsman is involved in strengthening citizens' rights within the Community and participates to make the institutions take seriously the Charter of Fundamental Rights.

The ombudsman promotes the Charter through his procedure: takes into account its principles and rules when investigates instances of maladministration. The institutions and their officials are obliged to respect the principles of good administrative conduct in their public relations laid down in the code.²⁷ The ombudsman conducted many own-initiative inquiries regarding the rights of the Charter and his office uses the Charter regarding the complaints. The own-ini-

²⁵ «[...] Article 41:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

– the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language».

²⁶ «[...] Article 43:

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role».

²⁷ Article 1, in THE EUROPEAN OMBUDSMAN, *Code of Good Administrative Behaviour*, Office for Official Publications of the European Communities, Luxembourg, 2005.

tiative inquiries prove that he is not only reactive but also proactive, thus contributes to more general issues involving the rights of citizens.

5. Corruption and the Procedure of the EU Ombudsman in practice

Promoting greater openness and transparency, accountability in the EU administration are main targets set for the EU Ombudsman. The office receives many complaints about the EU institutions themselves, for example about lack of transparency, alleged conflicts of interest, “revolving doors”, and other ethical concerns. In 2018, the main issue of inquires concerned transparency/accountability, with 24,6% of all inquires.²⁸

Procedural norms regarding EU administrative law are found in the Treaty, the Charter, EU legislation, the case law of EU courts and the decisions of the EU Ombudsman.²⁹ One of the main activity to promote transparency concerns the investigation of the Ombudsman regarding *access of documents*. TFEU clearly states that the objective to promote good governance and ensure the participation of civil society thus citizens have right of access to documents of the Union institutions, bodies, offices and agencies, and the latter have the obligation to offer access to their documents with listed exceptions.³⁰ Also, the Charter of Fundamental Rights declares fundamental individual right of access to documents, that is to say, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.³¹ Institutions and bodies of the EU have an obligation to guarantee the ‘widest possible’ access to documents. While legislative documents, as the general rule, should always be available, this does not in any way imply that administrative or executive matters, in contrast, are to be conducted in secrecy.³² The European Ombudsman also takes part in the so-called whistleblow-process, where complainant will be the whistleblower, an official or other servant of the EU accordingly to the Staff Regulation. This person who is aware of a possible illegal activity, including fraud or corruption, detrimental to the Union’s interests, can make a complaint to the Ombudsman throughout, or in connection with the person’s performance. Moreover, the official can be aware of another conduct relating to the discharge of professional duties which may consti-

²⁸ Annual Report 2018, <https://www.ombudsman.europa.eu/hu/multimedia/infographics/en/79>.

²⁹ See more P. CRAIG, *UK, EU and Global Administrative Law: Foundations and Challenges*, Cambridge University Press, 2015.

³⁰ Art. 15 TFEU.

³¹ Art. 42 of the Charter.

³² H. HOFFMANN-P. LEINO-SANDBERG, *An agenda for transparency in the EU*, 23 October 2019 https://europeanlawblog.eu/2019/10/23/an-agenda-for-transparency-in-the-eu/#_ftn1.

tute a serious failure to comply with the obligations of EU officials. A prerequisite of the complaint procedure, the person concerned must have informed either the immediate superior or Director-General or, if it considered useful, the Secretary-General, or persons in equivalent positions, or the European Anti-Fraud Office directly.³³ According to the Staff Regulations, individuals who turn to the Ombudsman, shall not suffer any prejudicial effects on the part of the institution concerned. As the complaint procedure is confidential, this type of complaints were treated confidentially, too.

The role that so-called *whistleblowers* play in exposing corruption is emphasised in the fact, that one of the first strategic inquiries³⁴ launched by the EU Ombudsman concerned EU institutions obliged to introduce internal whistleblowing rules covering the protection of whistleblowers, the provision of information to them, and the procedure for handling complaints made by whistleblowers. As part of the inquiry, nine EU institutions³⁵ were asked about their steps taken but only two of the nine institutions and bodies contacted have adopted internal rules as required by the Staff Regulation, namely, the Commission and the Court of Auditors. The Ombudsman closed the inquiry with guidelines for further improvement, thus to finalise their discussions about implementing the necessary amendments.³⁶ It is worth to mention that the EU Ombudsman led the way and prepared the office's own internal whistleblowing rules with interested parties invited to comment it.³⁷

The rules and procedures of the Commission are clearly detailed to prevent conflicts of interest regarding current Commissioners and ex-Commissioners. In case a Commissioner leaves the EU institutions for the private sector or vice versa, it can lead to conflict of interest. This so-called *revolving doors* issue has the possibility with potential future jobs or with the use of inside information and networks to benefit the private interests of a new employer. The ombudsman conducted an inquiry about a paid position held by an ex-Commissioner with the conclusion that the Commission had failed adequately to deal with the ex-Commissioner's breach of the Code of Conduct despite concerns by the Ad

³³ Art. 22a of the Staff Regulations.

³⁴ These own-initiative inquiries aim to draw attention to matters of public interest and look into wider systemic issues affecting the EU institutions and the democratic decision-making process. See more <https://www.ombudsman.europa.eu/en/strategic-issues/strategic-inquiries>.

³⁵ The European Parliament, the European Commission, the Council of the European Union, the Court of Justice of the European Union, the European Court of Auditors, the European External Action Service, the European Economic and Social Committee, the Committee of the Regions, and the European Data Protection Supervisor.

³⁶ Decision of the European Ombudsman closing her own-initiative inquiry OI/1/2014/PMC concerning whistleblowing, <https://www.ombudsman.europa.eu/en/decision/en/59114>.

³⁷ Draft decision of the European Ombudsman on internal rules concerning whistleblowing, <https://www.ombudsman.europa.eu/en/correspondence/en/54612>.

Hoc Ethical Committee. The EU Ombudsman proposed that the Commission revise the Commissioners' Code of Conduct to include sanctions for any breach of obligations by a serving or former Commissioner. We shall mention a well-known example for revolving doors concerning the appointment of the Commission President Barroso's to Goldman Sachs. Because of the citizens' interest, the ombudsman made inquiries about the measures the Commission had taken to check whether Barroso's actions met the ethics obligations. As a result of the inquiry, the Commission announced plans for a much more detailed Code of Conduct for Commissioners even with some suggestions accepted from the EU Ombudsman.³⁸ Recently, in case 2168/ 2019/KR, the ombudsman opened an inquiry based on a complaint from the organisation Change Finance, into the decision by the European Banking Authority (EBA) to approve its Executive Director's request to become CEO of an association representing the finance industry, where the complainant, the organization Change Finance argued that the move will create conflicts of interest.³⁹

The EU Ombudsman investigates and reports on complaints about maladministration within the EU institutions, bodies, agencies and offices and citizens mainly complain about transparency and corruption issues concerning the activities of the EU Commission, the European Anti-Fraud Office and the European Investment Bank.

According to the statistics, nearly 60% of the ombudsman's inquiries concerned the European Commission,⁴⁰ which can be explained by the fact that the Commission is the main European institution which has mostly direct links with European citizens. The Commission's alleged maladministration in corruption cases lead to several inquiries. Case 1262/2016/PL concerned a complaint about the European Commission's failure to reply to correspondence and investigate the complainant's allegations of an instance of corruption in Romania. The Ombudsman found that the Commission's reasons not to investigate the matter, namely that it was not competent to do so, were reasonable and correct. It was therefore concluded that there was no maladministration by the Commission as regards this aspect of the complaint and the case was closed.⁴¹ Failure to reply is a very common ground to turn to the Ombudsman Office for example in connection with infringement complaint concerning alleged corruption and discrimination⁴² or con-

³⁸ Annual Report 2018, <https://www.ombudsman.europa.eu/en/annual/en/113728>.

³⁹ Case 2168/2019/KR., <https://www.ombudsman.europa.eu/hu/case/en/56050>.

⁴⁰ Annual Report 2018.

⁴¹ Decision in case 1262/2016/PL on the European Commission's failure to reply to correspondence and undertake investigations concerning an instance of corruption in Romania, <https://www.ombudsman.europa.eu/en/decision/en/76522>.

⁴² Case 1921/2019JN, <https://www.ombudsman.europa.eu/en/opening-summary/en/121148>.

cerning alleged corruption practices and lack of independence of the judiciary in Bulgaria.⁴³

Many complaints concern the issue of transparency with complaints from companies and other legal entities concerning anti-trust investigations and other cases related to the Commission's competition policy. That was in a case when the Commission had an electronic copy of an internal e-mail of a competitor that it claimed was crucial evidence but did not release the e-mail until just over a month before fining the cartel, and yet it had had the e-mail for six months. The Commission's explanation about the delay did not convince the Ombudsman, and the Commission's conduct had been criticized.⁴⁴ However, the Commission does acknowledge in many cases that a procedure has not been totally transparent and negotiates with the complainant with a view to resolve the issue amicably.⁴⁵

Hence, the area of institutional or policy matters with alleged procedural errors made by the Commission during an anti-trust investigation are grounds for many complaints e.g. when the Commission failed to take minutes of a meeting despite the fact that the meeting directly concerned the subject-matter of the Commission's investigation. In another case the complaint was made in connection the European Commission's refusal to grant access to documents concerning the envisaged second EU Anti-Corruption report and the study regarding corruption within the EU institutions.⁴⁶ The Commission refused to disclose these documents on the ground that their disclosure could undermine the internal decision-making process. Here, the ombudsman concluded that the Commission was fully justified in withholding their content there was no maladministration.⁴⁷

Another institution being in the focus of the European Ombudsman, the European Investment Bank belongs under the supervision of the ombudsman office. Regarding the Bank's activity, 3,3% of the inquires concerned issues such as

⁴³ Case 641/2019/TM, <https://www.ombudsman.europa.eu/en/opening-summary/en/113435>.

⁴⁴ The German company Infineon made one such complaint. The Commission was investigating it in the 'smart card chips' cartel inquiry, along with Philips, Samsung, and Renesas, and eventually fined them for belonging to the cartel, Annual report, 2014, 15.

⁴⁵ A case about tender procedure for a supply contract, the Commission acknowledged that the procedure was not totally transparent. It indicated that, at the time of drafting its opinion on this case, it was negotiating with the complainant with a view to resolving the issue amicably. The Ombudsman appreciated the fact that the Commission had taken responsibility for the mistake and that it was negotiating a solution with the complainant, Annual report 2006, 46.

⁴⁶ The complainant requested access to the documents under Regulation 1049/2001. The Commission identified six draft country analyses, drawn up by its staff as part of the follow-up to the 2014 EU Anti-Corruption Report. These contained internal, preliminary opinions on corruption issues in some Member States.

⁴⁷ Decision in case 1099/2017/JAP concerning the European Commission's refusal to disclose six draft country analyses prepared in the context of the envisaged second EU Anti-Corruption Report, <https://www.ombudsman.europa.eu/en/decision/en/89252>.

transparency or failure to respond.⁴⁸ The transparency policy of the EIB was a ground of an ombudsman investigation, with international and EU standards applicable to access to information. Although the EU Ombudsman did not find maladministration, the ombudsman highlighted two key areas where the EIB should make further improvements in transparency, namely, to start disclosing more information about its internal inspections, investigations and audits on fraud and corruption cases so that to strengthen transparency. Furthermore, the Ombudsman made several recommendations to improve the policy, for example to remove from its transparency policy the presumption of non-disclosure related to information and documents collected and generated during inspections, investigations and audits on fraud and corruption, including once these have been closed. This is in connection with corruption cases about enormous amount of funds lent to companies, States and national. Case 146/2017/DR was an example how a project financed by the EIB raised environmental, health and independency questions regarding its monitoring. The complaint concerned a project financed in Madagascar for nickel-cobalt mining and processing and the time taken to deal with the complaint and the concerns about monitoring in terms of respect for environmental, health and safety requirements in an independent manner were questioned. There was a clear maladministration as the bank's investigation took six years regarding the complainant's concerns. As a result of the ombudsman's inquiry, the EIB's Complaints Mechanism was upgraded. The Ombudsman made corresponding recommendation how the EIB monitors projects and made recommendation about avoidable problematic issues.⁴⁹

Another example concerned the EIB's failure to reply to a complainant about a case of alleged fraud and corruption related to an EIB investment project. After the Ombudsman Office contacted the Bank about the complaint, the relevant Bank division sent the reply to the complainant, and ensured that it had taken all appropriate measures to ensure that EIB loans are used for the purposes intended and that all activities are free from prohibited conducts.⁵⁰

In 2018, 2, 8% of all ombudsman inquires concerned the activity of the European Anti-Fraud Office⁵¹ that was established to investigate fraud against the EU budget, corruption and serious misconduct within the European institutions and the discharge of professional duties by members and staff of the EU institutions and bodies that could result in disciplinary or criminal proceedings.

⁴⁸ Annual Report 2018.

⁴⁹ Recommendation of the European Ombudsman in case 146/2017/DR on how the European Investment Bank handled a complaint about breaches of environmental, health and safety requirements in a project it financed., <https://www.ombudsman.europa.eu/en/recommendation/en/107214>.

⁵⁰ Decision in case 1174/2017/CEC on the European Investment Bank (EIB)'s failure to answer correspondence concerning a case of alleged fraud and corruption related to an EIB investment project. Case 1174/2017/CEC, <https://www.ombudsman.europa.eu/en/opening-summary/en/82215>.

⁵¹ Annual Report 2018.

The complainants, two citizens living in Germany, turned to the European Anti-Fraud Office (OLAF) about alleged misuse by Bulgarian public authorities of EU funds for reinforcing a water ditch. OLAF explained that it would not investigate the matter mainly because the alleged construction defects did not raise sufficient suspicion of fraud or corruption. Not being satisfied with OLAF's reply, the complainants turned to the Ombudsman. The Ombudsman inquired into the issue from the perspective that, as part of the challenge to build citizens' trust in the EU, it is important that those citizens reporting concerns to OLAF also feel that these concerns are taken seriously. In this regard, the Ombudsman found OLAF's position, as communicated to the complainants, to be entirely coherent and reasonable. OLAF had thus not committed maladministration in its handling of the complainants' concerns.⁵²

OLAF investigates corruption allegations and makes decisions based on facts, and can not go beyond what is proportional to the purpose pursued by its action. Thus, when OLAF made allegations of bribery without a factual basis that is both sufficient and available for public scrutiny constituted an instance of maladministration according to the EU Ombudsman.⁵³ However, the case did not stop here. OLAF refused a draft recommendation from the Ombudsman that it should acknowledge that it made incorrect and misleading statements in its submissions to the Ombudsman. The Ombudsman therefore considered that the matter should be put before the European Parliament. The ground for this was that the Ombudsman considered that the present case raises an important issue of principle, affecting the trust of citizens in the EU institutions and bodies. Citizens should be able to have confidence in the accuracy and completeness of the Ombudsman's inquiries. If an institution or body has provided inaccurate and misleading information to the Ombudsman, therefore, it should be prepared publicly to acknowledge the fact in order to set the record straight.⁵⁴

6. Conclusion

The role played by the ombudsman in the EU's fight against corruption in multidimensional.

First of all, the ombudsman helped to form hard law (the Charter) and soft law

⁵² Decision in case 1068/2017/PMC on the European Anti-Fraud Office's handling of concerns about the use of EU funds in Bulgaria., <https://www.ombudsman.europa.eu/en/decision/en/83335>.

⁵³ Decision of the European Ombudsman on complaint 1840/2002/GG against the European Anti-Fraud Office, <https://www.ombudsman.europa.eu/en/press-release/en/122>.

⁵⁴ Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Anti-Fraud Office in complaint 2485/2004/GG. <https://www.ombudsman.europa.eu/en/special-report/en/406>.

(the Code) documents which improve the transparency direction of the EU – transparency is an important mean against corruption. Secondly, the ombudsman’s mandate concern complaints whose subject are transparency, accountability and access to documents. Thirdly, the mandate covers the investigation of those institutions which are in the middle of corruption cases: the EIB, the Commission and OLAF itself. Quite interesting that OLAF is the main EU body in the fight against corruption but because the EU Ombudsman is the supervisor of OLAF’s activity regarding maladministration, the Ombudsman’s procedure strengthen the fight against corruption.

The activities of the European Ombudsman are largely determined by the expressed critique regarding the lack of transparency in the EU institutional system, cases involving the lack of transparency make up the largest group since the forum’s establishment, and a number of resolutions have been issued in connection with this. It is important to mention the Ombudsman himself is to ensure transparency during the complaint procedure so that people could follow their cases and understand the proceedings that propagates good example.