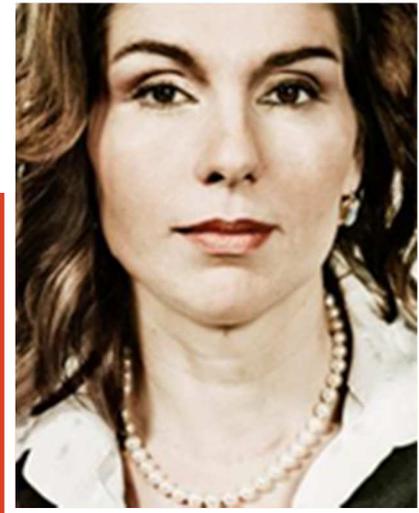


Whistleblower systems: the role of the ombudsperson

Dr. Stefanie Lejeune

The appointment of an external anti-corruption ombudsperson is an increasingly important organisational measure both for government agencies and for private sector businesses. Confidential Informants (CI) or whistleblowers, both inside and outside agencies, should, in principle, be given the opportunity to share discreetly and effectively what they know about illegal activities with an ombudsperson. This allows corruption to be detected and sanctioned rapidly and effectively. The prosecuting authorities and agencies concerned are equally reliant on information provided by whistleblowers, since the perpetrators of corruption offences are extremely proficient at cover-ups, evasion and deception and are responsible for global losses of billions of euros to the public purse.



The ombudsperson

In Europe/Sweden, the ombudsman tradition dates back more than 200 years. Their role was to act as independent advocates for citizens in matters concerning the State. In Europe, the so-called European Citizens' Commissioner is entitled to receive information from and ask questions of government bodies and should be in a position to require the State to act appropriately in the interests of citizens who believe that they are no longer able to properly defend themselves against the superior might of the State. The key principle behind this system is to promote compliance with the law by providing citizens with a person to defend them.

However, the ombudspersons (ombudsmen and ombudswomen) described in this article in the context of corruption prevention provide a form of legal protection which is sui generis. They do not mediate between the legal interests of the government agency that contracts them and the confidential informant. Instead, they act as a "special envoy" insofar as they receive and evaluate tip-offs about corruption and have the power to initiate internal agency investigations. They serve the interests of the organisation that contracts them and the law in general. This article describes the role played by ombudspersons in corruption prevention and the general conditions under which they operate.

Whistleblower systems

Whistleblower systems are important tools of corruption prevention policies as they establish an accessible reporting channel. They allow potential whistleblowers to share any knowledge they may have about fraudulent action within government agencies – especially incidents that might be connected to corruption – with controllers, supervisory bodies and trusted counsellors. They offer an important means of gathering infor-

mation, since corruption offences are essentially “victimless crimes”. The offenders, possibly on the contracting authority’s side and the beneficiaries thereof on the contractor’s side work together so closely that it may be a long time before their victims – often the employers themselves – even realise that they are victims of, for example, overcharging.

Agencies hope that when they introduce whistleblower systems, especially anonymous reporting tools, it will become somewhat easier to unearth shady dealings. People who are suspicious of corrupt activity should, in principle, be able to report it confidentially without fear of potential reprisals.

Person-to-person vs. electronic whistleblowing systems

One example of a person-to-person whistleblowing system is the appointment of an external anti-corruption ombudsperson. The confidential informant knows the particular person to whom they are providing the lead and is able to decide how they provide it and whether or not they wish to remain anonymous. Another type of person-to-person whistleblowing system involves making an in-house contact person or anti-corruption officer available to receive tip-offs about irregular or illegal activities. As a rule, the in-house contact person will also be expected to perform a variety of reporting, assessment, organisational and training duties. Many agencies choose to appoint both an in-house contact person and an external ombudsperson, since the two can usefully complement each other.

Electronic whistleblowing systems use electronic means to gather information which is subsequently assessed in terms of its relevance and reliability. They range from telephone hotlines and voicemail systems to Web-based reporting systems. The advantage of electronic systems is that they can be accessed at any time from any place. However, because whistleblowers can speak out without inhibition and remain anonymous, they can be tempted to make false allegations.

The ombudsperson’s role

Anti-corruption ombudspersons not only receive leads, they also investigate their credibility. They evaluate them both from a legal point of view and in terms of their factual accuracy and ensure that any tip-off received is fully documented. Information irrelevant to corruption offences is consequently filtered out. Allegations deemed relevant to corruption are passed on to the contact person within the agency with a recommendation on how to proceed. Should the agency wish to ask the confidential informant any further questions during the course of its internal investigation, the entire communication process is carried out via the ombudsperson. The ombudsperson thus performs a filtering, intermediary and support function.

It should be possible to access the ombudsperson via a variety of communication channels including letters, telephone, face-to-face contact and e-mail. The ombudsperson should of course be personally available during normal office hours and cover should be provided when they are ill or on holiday.

The first time that the whistleblower contacts the ombudsperson, it is essential to know whether he or she wants their information to be treated confidentially, i.e. whether or not they wish to remain anonymous as far as the agency is concerned. Although an agency may also undertake to protect the anonymity of potential whistleblowers through in-house contact persons, this protection ceases to apply if a criminal investigation is launched. As soon as this happens, the whistleblower’s identity has to be disclosed. However, a whistleblower should remain anonymous when information is passed on to a lawyer appointed as an ombudsperson – even if the case is under investigation by the public prosecutor’s office. There is, as yet, no legal precedent for whether the lawyer-client privilege actually covers the whistleblower’s identity in an investigation of this type, based on the right to refuse testimony on professional grounds as defined in Section 53 paragraph 1 number 3 of the German Code of Criminal Procedure (StPO). However, most lawyers acting as ombudspersons operate on the assumption that it does.

During contact with the confidential informant, the ombudsperson must not lose sight of any potential consequences of their actions. Any information they receive could indeed trigger an internal investigation with the risk that such an investigation could broaden its scope to include other individuals, and thereby put the whistleblower at risk of reprisals. Even when an internal investigation is conducted discreetly and swiftly, it is always possible for unfounded allegations to jeopardise the reputation of individuals. Accordingly, ombudspersons not only have a duty to accept leads and related information, they also have a responsibility both towards the organisation that contracts them and to the whistleblower him- or herself. The ombudsperson is lawyer for the agency, not for the whistleblower, and is not therefore permitted to give the whistleblower legal advice. Nonetheless, there is a requirement for the whistleblower to be informed of any risks identified by the ombudsperson.

Although the ombudsperson may be involved in the subsequent internal investigation, this is not mandatory. Ombudspersons, to preserve their own independence and avoid jeopardising the confidence of potential whistleblowers in the ombudsperson's institution, should not advise an agency on other legal cases or act as its representative before other (investigating) authorities.

Employee profile of ombudspersons

If ombudspersons are to carry out a legal assessment of the information provided to them, they should have a knowledge of the law, in particular criminal law – at least the criminal law provisions pertaining to corruption offences and associated crimes (Sections 298 et seq., 331 et seqq., 263, 266 of the German Criminal Code, StGB) – as well as relevant case law and the key regulations of civil service, budgetary, public procurement and administrative law. If a government agency or other organisation under public law is the competent authority for a specific field of activity such as science and research, foreign trade, the media, the environment, defence, etc., ombudspersons should also possess knowledge of substantive law in these areas.

It is also essential to have a basic understanding of the agency's organisational structures, processes and core principles, as well as experience of practical corruption and corruption prevention issues. An ombudsperson must also have a good understanding of how to facilitate dialogue, have experience of forensic procedures such as interviewing witnesses and be able to gain people's trust.

The appointment of an ombudsperson

A contract of mandate is concluded between the ombudsperson and the agency. More specifically, this involves a service "contract for the management of the affairs of another" as defined under Article 675 of the German Civil Code (BGB). This regulates the scope of the ombudsperson's role as regards people (employees alone or including external parties) and topics (matters relating only to corruption or to any type of offence). It also regulates the ombudsperson's effective duties (evaluation, reporting and documentation, availability, data protection requirements and measures protecting the whistleblower's anonymity). It further enshrines the agency's duties towards the ombudsperson, ensuring that potential whistleblowers are made aware of their existence and that the ombudspersons are duly remunerated for their work.

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