Draft guidelines on Whistleblowing, 3 May

I. INTRODUCTION

1.1. General

The existence of procedures for raising concerns about fraud, corruption or other serious wrongdoing is relevant for all responsible organisations and to the people who work there. While good internal control systems can reduce the probability of something going seriously wrong, this risk can never be reduced to zero. Where this risk materialises, the first people to realise or suspect the problem will often be those who work in or with the organisation. Yet unless the culture is one where employees believe that it is safe and accepted to raise such a concern, the risk is that people will stay silent. This denies the organisation an important opportunity to detect and investigate the concern, to take any appropriate action and to protect its assets, integrity and reputation.

The most effective way to persuade staff to report concerns internally is to provide clearly defined reporting channels as well as safe and accepted routes through which staff may raise concerns outside the organisation as an option of last resort.

Viewed in this way, having whistleblowing procedures in place is simply a question of good management and a means of putting into practice the principle of accountability. They contribute to improving the diligence, integrity and responsibility of an organisation.

It is against this background that rules on whistleblowing were adopted and included in the Staff Regulations (articles 22a and 22b) in 2004.

While these rules have already triggered a number of significant investigations by the European Anti-Fraud Office (OLAF), the Commission is aware that staff may be reticent to make full use of the whistleblowing procedure, because of a fear of negative repercussions on their reputation or career. The Commission therefore considers it necessary to ensure that members of staff who report serious/wrongdoing in good faith are afforded the utmost confidentiality and greatest degree of protection against any retaliation or reprisals as a result of their whistleblowing.

Furthermore, as whistleblowing arrangements are widely recognised as an important tool to detect fraud, corruption and serious irregularities, it is important that staff fully understand the types of situations where the obligation to "blow the whistle" applies, and to whom they should address their concerns. Providing guidance on this issue is part of the Commission's overall ethics policy, which aims inter alia at clarifying the rules regarding professional ethics in the Commission.

Accordingly, the Commission has issued the following guidelines, in agreement with OLAF.

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1 See Communication from Vice-President Kallas to the Commission on enhancing the environment for professional ethics in the Commission, SEC(2008)301 final, and the Practical Guide to Staff Ethics and Conduct.
12. Basic principles

- Members of staff have a duty to report serious irregularities.

  - For this purpose, members of staff must have a choice between a number of reporting channels or whistleblowing. If they choose to bypass the normal chain of hierarchical command, they must be able to do so in a safe manner. Under certain conditions, staff may address their concerns to another EU institution as an option of last resort.

- Members of staff who report serious irregularities in good faith must not be subject to retaliation. They must be protected and their identity must remain confidential.

13. Scope of the policy

The Commission's whistleblowing rules and guidelines apply to all members of staff, irrespective of their administrative position.

14. Definitions

For the purpose of these guidelines, a whistleblower is a member of staff, acting in good faith, who reports facts discovered in the line of duty which point to the existence of serious irregularities. The reporting should be done in writing and without delay.

Under the whistleblowing rules, staff are obliged to report serious irregularities. In the present context, serious irregularities are illegal activities, including fraud and corruption, and serious professional wrongdoings. As the whistleblowing arrangements are essentially a detection mechanism to bring cases to the attention of OLAF, the duty to report concerns only serious professional wrongdoings and particularly those that may be detrimental to the financial interests of the European Union.

2. While the whistleblowing rules do not strictly apply to seconded national experts, interns, interim staff and local agents, these categories of staff are also encouraged to make use of the arrangements set out in this document and will be protected against retaliation if they do so in good faith.
Accordingly, not every disclosure of any type of information qualifies as whistleblowing in the sense of these rules. For example, the rules are not intended to apply to the reporting of the following types of information:

- Information already in the public domain (for example: newspaper articles, publicly available audits);
- Unsubstantiated rumours and hearsay;
- Matters of a trivial nature;
- Disagreements over legitimate policy;
- Information not linked to the performance of one's duties;
- Information discovered a long time before the date of disclosure.

Neither do the rules apply to information for which specific procedures are available to staff:

- Personnel issues where staff have a personal interest in the outcome. In these cases, staff may wish to exercise their statutory rights, for example by lodging a request or complaint with DG HR under Article 90 of the Staff Regulations;
- Harassment claims and personal disagreements or conflicts with colleagues or hierarchy. In appropriate cases, staff may wish to address themselves to their Human Resources Unit, to the Mediation Service, to HR.B.5 (Equal opportunities and working conditions) or to a confidential counsellor, or to lodge a request for assistance with DG HR under Article 24 of the Staff Regulations.

Nor do the rules apply to disclosures that cannot be considered as reasonable or honest, such as:

- Abusive disclosures (repeated disclosures aimed at paralysing a service);
- Malicious, frivolous or potentially defamatory disclosures (i.e. false or unverifiable accusations with the aim of harming another person's integrity or reputation).

"Good faith" can be taken to mean the unequivocal belief in the veracity of the reported facts, i.e. the fact that the member of staff reasonably and honestly believes the transmitted information to be true. Good faith is presumed unless and until proven otherwise.

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Retaliation and reprisals are defined as any direct or indirect action or threat of action which is unjustly detrimental to the whistleblower and resulting from the whistleblowing, including, but not limited to, harassment, discrimination, negative appraisal and acts of vindictiveness.

Confidentiality of identity means that the identity of the whistleblower is known to the recipient of the information, but is kept confidential as to vis-à-vis the person(s) potentially implicated in the serious irregularity reported and used on a strict need-to-know basis. Anonymity refers to the situation whereby the identity of the source of the information is not known to the recipient.

Staff members who make a report in good faith, particularly if it is based knowing on false or misleading information, shall not be protected and shall normally be subject to disciplinary measures. The burden of proof in this context lies on the Commission.

2. Reporting Procedures

Internal whistleblowing – first option

Staff members who, in the course of, or in connection with their duties, discover that serious irregularities may have occurred or may be occurring, are obliged to report this discovery forthwith in writing to either their immediate superior or to their Director-General or Director or Personal Representative or Head of Service.

If there is a concern that this disclosure may lead to reprisals or that the intended recipient of the report is personally implicated in the serious irregularities, then the report may also be submitted directly to OLAf.

If the report is directly to OLAf, OLAF may also be notified through the Fraud Notification System?

In any case, the recipient of the information is in turn obliged to transmit the information thus received without delay to OLAf. Therefore, while the staff member concerned has a choice between the reporting channels, the information should ultimately reach OLAf in a short period of time.

External whistleblowing – option of last resort

Upon receipt of the information reported internally, OLAf or the Commission must give the whistleblower within 60 days of receipt of the information an indication of the period of time that it considers reasonable and necessary to take appropriate action.

If no action is taken within such period of time, or if the whistleblower can demonstrate that the period of time set is unreasonable in light of all the circumstances of the case, he or she may make use of the possibility of external whistleblowing as provided for in Article 22b of the Staff Regulations.
Under this Article, if neither the Commission nor OLAF has taken appropriate action within a reasonable period, the staff member who reported the wrongdoing has the right to bring his or her concerns to the attention of the President of either the Council, the Parliament or the Court of Auditors, or to the Ombudsman. In this case, the whistleblower protection continues to apply.

However, the duties of discretion and of loyalty imply that this is an option of last resort, justifiable only if the official concerned honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true and if s/he has allowed the Commission or OLAF a reasonable period of time to take the appropriate action.

The Commission generally receives and handles large quantities of confidential information, much of it highly sensitive and some of it of great commercial value. The Commission is under the obligation to ensure that this confidentiality is maintained and Commission staff members are therefore necessarily subjected to a duty of discretion.

Under the present rules and arrangements, the possibility of external disclosure is therefore limited to other EU institutions, which are clearly able to hold the Commission to account because of their institutional role, but are also themselves subjected to the duty of discretion. This means of external disclosure therefore strikes an effective balance between the public interests of confidentiality and loyalty and those of transparency and accountability.

It is up to the staff member to choose the most appropriate channel for reporting the serious irregularities that they must disclose. However, if a matter is reported to a Commission service that is not competent to deal with it, it is up to that service to transmit, in the strictest confidence, the relevant information and documents to the competent service and to inform the member of staff accordingly.

3. Protection for Whistleblowers

Any staff member who reports a serious irregularity, provided that this is done in good faith and in compliance with the provisions of these guidelines, shall be protected against any acts of retaliation.

It should be noted that staff members will not be expected to prove that the wrongdoing is occurring, nor will they lose protection simply because their concern turned out to be unfounded, provided that they could not have been expected to realise that.

The protection continues to apply in cases of external disclosures, provided that the staff member honestly and reasonably believes that the information and any allegation in it are substantially true. In this context, account will be taken of any information the staff member has had from the Commission and from OLAF following the initial internal reporting.

The following specific protective measures apply:

Confidentiality of identity

The protection of a person reporting a serious irregularity in good faith shall be guaranteed first of all by the fact that their identity will be treated in confidence. This means that their name will not be revealed to the person(s) potentially implicated in the alleged wrongdoing, or to any other person without a strict need to know, unless the whistleblower personally
By offering protection to those who have acted responsibly and openly, these arrangements reduce the need and justification for summary. Experience shows that anonymous procedures as outlined above:

- observe the procedures as outlined above.
- number concerned should identify him or herself at a whistlestopover to the institution, and to
- Naturally in order for the Commission to be able to apply protective measures, the staff

Anonymous

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Application

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Mobility

are duly respected.

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The disciplinary rules of the Commission apply to all the Commission, the Commission to take

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In this respect the Court has ruled that disciplinary procedures that are opened on the basis of

The identity of the whistleblower confidential. To this end, the Commission has adopted OLA, not to include

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authorizes the disclosure of his/her identity or this is a requirement in any subsequent criminal
information is more often frivolous, malicious and unreliable than information coming from known sources, and anonymity deprives the investigative services from the possibility of asking the source for clarification or more information.

For these reasons, anonymous reporting is not encouraged.\textsuperscript{11}

\textit{Penalties for those taking retaliatory action}

No members of staff or managers of the Commission may use their position to prevent other members of staff from complying with their obligation to report serious irregularities.

Any form of retaliation undertaken by a staff member against any person for reporting a serious irregularity in good faith is prohibited. In such cases, disciplinary measures will normally be taken.

Where members of staff consider that they have been the victim of retaliation as a result of the disclosure of a serious irregularity, they shall be entitled to ask for assistance from the Commission under Article 24 of the Staff Regulations and to request that protective measures be adopted. Such requests should be addressed to DG HR.

\textit{Limits}

As explained above, the whistleblowing provisions are concerned with disclosure of information pointing to fraud, corruption and other comparable serious wrongdoings. They are not intended to be used as substitutes for grievance procedures where staff have some personal interest in - or seek to dictate - the outcome. They are also inappropriate for dealing with disagreements over legitimate policies. Their purpose is to allow the staff member to raise a concern about wrongdoings so that those in charge may look into it.

It should be noted that, even if there is substance to the information itself, the protection may be lost if the staff member makes unwarranted or damaging allegations that s/he cannot show to be honest or reasonable. The effect of this is that wherever a staff member is contemplating a disclosure in the sense of these guidelines, it is advisable to let the facts speak for themselves.

Similarly, if the staff member makes the disclosure for purposes of private gain – for instance by selling the information to external parties – he or she will forfeit this protection as that would not be a legitimate disclosure in the sense of the whistleblowing rules.

Finally, if the staff member is him- or herself implicated in the serious irregularities and decides to come forward and report these irregularities, this fact may constitute an attenuating circumstance in any ensuing disciplinary proceedings, but it is not a qualifying disclosure in the sense of this policy and does not provide him or her with full protection against disciplinary consequences on the basis of the whistleblowing rules.

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\textsuperscript{11} As potential whistleblowers may hesitate to come forward with their identity for fear of retaliatory action, the OLAF Fraud Notification System offers the facility to enter into an initial dialogue with specialised staff before a person decides to come forward and make use of the whistleblowing procedures.
Consult either the manager of a special service, or a special service itself.

Naturally, the guidance function is without prejudice to the possibility of other members to take appropriate action. However, the guidance function does not operate in OLAF, but only as a means to ensure that the information available is timely and accurate.

Wherever the information in question is covered by the whistle-blowing rules, which require the provision of a full and impartial report, the audit or investigation may result in disciplinary action being taken against the recipient. Where such action is taken, the recipient of the information must take appropriate action to ensure that the recipient is notified of the action taken, and that the recipient is informed of the rights available to them.

The guidance of whistle-blowers is inconsistent with OLAF, the European Anti-Fraud Office (OLAF) or the European Commission, and is therefore not considered to be appropriate. The guidance of whistle-blowers in OLAF, the European Anti-Fraud Office (OLAF) or the European Commission, is therefore not considered to be appropriate.

Guidance and support of whistle-blowers in OLAF, the European Anti-Fraud Office (OLAF) or the European Commission, is therefore not considered to be appropriate.
In addition, the web-based Fraud Notification System of OLAF gives potential whistleblowers who hesitate to come forward the opportunity to enter into a dialogue with OLAF investigators, which allow these staff members to verify whether the information in their possession fall within the remit of OLAF.

In case of doubt, staff are encouraged to seek the guidance offered to them when contemplating a disclosure under the whistleblowing rules.

6. **ROLE OF MANAGEMENT**

The duty on managers to notify OLAF of information received on the basis of the whistleblowing rules does not of itself discharge them from their own responsibilities to tackle the wrongdoing.

Managers will therefore have to reflect on whether the evidence provided reveals shortcomings that could be redressed or requires other measures in addition to the transmission of the information to OLAF. In particular, if following such information it occurs that a procedural or organisational change could prevent the risk of serious professional wrongdoing in the future, such measures should be considered and, where appropriate, taken as soon as possible. Care should be taken that any such measure does not harm any future OLAF investigation into the reported facts. In case of doubt, managers are therefore advised to consult OLAF before taking any such measures.

7. **COMMUNICATION AND AWARENESS-RAISING**

In order to increase the awareness of the whistleblowing arrangements amongst staff, these guidelines will be given adequate publicity through the internal communication channels in the Commission and will be included in the course material of the Commission's courses and trainings on ethics and integrity.

8. **REVISION**

The practical application and effectiveness of these whistleblowing guidelines will be evaluated at the end of a period of three years following their adoption. In light of the results of this evaluation, these guidelines may be revised as appropriate.
Article 22b

of proceedings in legal cases, where the proceedings are closed.

Article 22

Secretary-General or the person in an equivalent position of the European Audiovisual Office.

may be suspended.

to the Office of the European Audiovisual Office.