

SCHIEBLE Christoph (HR)

From: SLOOTJES Rene (HR)
Sent: Monday 12 November 2012 18:06
To: FEUGIER Jean-Luc (HR)
Cc: WILLIAMS Karen (HR); SCHIEBLE Christoph (HR)
Subject: Draft reply to TI.doc
Attachments: Draft reply to TI.doc

Importance: High

Jean-Luc,
Ci-joint le projet de réponse à TI pour tes commentaires.
Bonne soirée,
René

REPLY TO JANA MITTERMAIER – TI

Dear Ms Mittermaier,

First of all, my apologies for this belated reply to your message. Due to the fact that a lot of internal resources have been tied up in the revision procedure for the Staff Regulations, the adoption process for the whistleblowing guidelines has incurred some delay.

I enclose for your information the guidelines as they are about to be adopted by the Commission. As you will see, we have incorporated several of your suggestions directly into the text. Others will be introduced in the form of FAQs to be made available to all staff. There are some suggestions we were not able to take on board for the reasons given below.

Let me take this opportunity to provide you with feedback on your input.

We have taken on board many of your recommendations to improve the wording of the guidelines. When the original wording has been retained, this was driven more by the need to keep the document "lean", and not because we would disagree on substance with your suggestions.

For example, I understand your point that some terms may seem vague ('serious' wrongdoings, etc.). However, replacing these terms with other, equally open terms would not really solve this point. And while including concrete examples in the text may help to clarify some of these terms, it would at the same time risk of inflating the document and getting lost in specificities.

Nevertheless, several of your suggestions highlight the need to be more specific on a number of issues. That is why we intend to post the guidelines on an intranet site together with FAQ's that will give concrete examples to staff on different issues, e.g. the type of information that should be reported under these rules.

In the context of improved drafting, I would like specifically to mention your suggestion regarding the burden of proof that should be on the person taking adverse measures against a whistleblower. This suggestion has now been incorporated in the guidelines, as it is fully in line with the current legal framework and corresponds to the policy intentions of the Commission.

At the same time, we could not include suggestions that would have altered the existing legal framework as defined by the Staff Regulations and relevant case law¹.

For example, we refrained from wording that suggests creating a special legal status for whistleblowers (e.g. by giving absolute prevalence to the duty to blow the whistle over any other duty, by giving staff members an actionable right to follow up or by including specific financial or career-related incentives for whistleblowers).

¹ E.g. Strack/Commission, Order of the Court of First Instance of 22/3/2006 in case T-4/05; Nijs/Court of Auditors, judgment of the Civil Service Tribunal of 13/1/2011 in case F-77/09; Bermejo Garde/Economic and Social Committee, judgment of the Civil Service Tribunal of 25/9/2012 in case F-41/10.

Such a specific legal status is not provided for by the Staff Regulations, nor would it befit the specific context of the European public service. The EU whistleblowing rules have been conceived with the purpose of furthering the detection of fraud, corruption, illegal activities, and other, similarly serious professional wrongdoings that are relevant for the work of the European Anti-Fraud Office (OLAF). They were not primarily intended to protect staff members against unfair dismissal, as is the case in some national legal systems. In this context, one should not lose sight of the fact that the statute of an EU civil servant already provides a high level of protection to staff. This reduces the need for additional, specific provisions to protect staff against unfair dismissals and to provide for compensation in that specific scenario.

In this respect, we would not endorse a provision stipulating that the duty to report takes priority over other duties such as the duty of loyalty and the duty of discretion. In fact, there is no specific hierarchy between these duties², as good faith reporting will always be in line with the duty of loyalty, while the duty of discretion will guide the whistleblower to choose the appropriate form of disclosure and to let the facts speak for themselves.

In the same spirit, we have maintained the provision that frivolous information is not covered by the whistleblowing rules, as we have had to strike a delicate balance between the various cultures in the member states, some of which have had an unfortunate experience in the not too distant past with 'informants'. We are therefore keen to limit the scope of these guidelines to situations where there is an overriding interest for the service to have it reported.

I hope this information is useful for you.

On behalf of Vice-President Šefčovič, I would like to thank you sincerely for your kind cooperation and your valuable input during the preparation of this text.

Christian Linder

² See Nijs/Court of Auditors: "*L'application de l'article 22 bis, paragraphe 1, et de l'article 22 ter, paragraphe 1, du statut doit, en outre, se concilier avec les obligations d'objectivité et d'impartialité qui s'imposent aux fonctionnaires (article 11, premier alinéa, du statut), avec l'obligation de veiller à la dignité de leur fonction (article 12 du statut), ainsi qu'avec leur devoir de loyauté (article 21 du statut). ...*"