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TEXTE E

COMMENT AMELIORER L'APPLICATION EFFICACE DES REGLES
CONCERNANT LES FONCTIONNAIRES QUI DENONCENT DES ACTES
REPREHENSIBLES OU DES DISFONCTIONNEMENTS GRAVES AU SEIN DES
SERVICES AINSI QUE LA PROTECTION DE CEUX-CI

Communication de M. KINNOCK

Cette question est inscrite à l'ordre du jour de la 1645ème réunion de la Commission les 9 et 10 février 2004.

Destinataires : Membres de la Commission
Directeurs Généraux et chefs de service

COMMUNICATION FROM VICE-PRESIDENT KINNOCK TO THE COMMISSION

How to enhance effective application of the Whistleblowing rules and protection of Whistleblowers

Following the adoption of the OLAF Regulations in 1999¹ and of an Interinstitutional Agreement of the same year², the Commission adopted a decision³, which provides for an obligation on all staff to report concerns about serious wrongdoings either within the Commission or directly to OLAF, the European Anti-Fraud Office. Officials who fulfil this obligation enjoy protection from adverse consequences of “blowing the whistle”.

Under the Reform, the existing legal framework is to be incorporated into the Staff Regulations. Accordingly, members of staff are obliged to inform immediately their Unit Head, their Director-General, the Secretary-General of the Commission or the European Anti-Fraud Office directly of any serious misconduct which they have uncovered.

One change in relation to the previous rules is that a possibility of external disclosure has been added. According to the provisions contained in a Commission decision of 4 April 2002⁴, if neither the Commission nor OLAF have taken appropriate action within a reasonable period, a member of staff who reported the misconduct may bring his/her concerns -to the extent that he/she honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true- to the attention of the Presidents of either the Council, the Parliament or the Court of Auditors, or to the Ombudsman, without prejudice to the protection afforded under the Whistleblowing regime.

Outstanding Issues

Experience within the Commission departments so far however shows that, despite the adoption of these rules, they are rarely followed in practice.

This could be the case because the Whistleblowing rules are relatively new, and they may not be necessarily well known by the staff.

Also, similar rules may not exist in the legal systems of all Member States.

Last but not least, staff may be reticent to make full use of the Whistleblowing procedure, because of a fear of negative repercussions on their career development from the hierarchy.

Therefore, existing rules have to be used more effectively. There are essentially two areas of intervention: first, the Commission needs to improve the level of knowledge of the

¹ Regulation (EC) No. 1073/1999 and (Euratom) No. 1074/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 136, 31.5.1999, p. 1

² Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union.

³ Commission decision 1999/396/EC, ECSC, Euratom of 2 June 1999, OJ L 149, 16.6.1999, p. 57-59.

⁴ Commission decision of 4 April 2002, C(2002)845.

Whistleblowing rules within its staff (I), secondly, the Commission needs to ensure a maximum level of protection to those staff, making use of the Whistleblowing provisions (II).

Proposal for Improvement

(I) Improve the knowledge of the rules

The Commission intends to take measures to increase the awareness of these new rules amongst staff. These measures include in particular:

- (1) Information of all new staff about the Whistleblowing rules, when they join the Institution
- (2) ensure that Whistleblowing provisions are clearly explained in the context of training courses
- (3) provide for adequate forms on internal publicity (internal newspapers, information by e-mail to all staff)
- (4) ensure that staff raising concerns are always directed to the Whistleblowing procedure.

(II) Ensure Maximum protection

In its measures to raise the profile of these rules, the Commission will highlight the protection offered to bona fide Whistleblowers. Naturally, in order for the Commission to be able to apply the following protective measures, the member of staff concerned will be expected to identify him- or herself as a whistleblower to the Institution, and to observe the procedures as outlined in the Whistleblowing rules.

In practice this protection means that the Commission, beyond giving serious attention to the substance of the concerns or evidence, will take further steps to assure staff that complying with their Whistleblowing obligations will not negatively affect a whistleblower's career. Information relating to the identity of the whistleblower will be treated in confidence.

The measures proposed would be applicable only and exclusively after a request of the member of staff concerned, in order to avoid any automatic detection of the identity of the member of staff concerned.

Two measures are proposed:

- (1) If the member of staff concerned **wishes to be moved** to another Commission department in order to safeguard him or her against potential hostile reactions from his or her immediate work environment, then the Commission will take reasonable steps to facilitate such a move.
 - In practice, those members of staff who would consider it necessary to move to a different DG or Service will be able to address themselves to the Central Career Guidance Service –SCOP– in DG ADMIN, who will provide them with counselling in order to identify the type of post which fits their profile and professional aspirations.

- The decision of transfer in application of Article 7.1 of the Staff Regulations will be taken by the Director General of DG ADMIN, and by the Secretary General of the Commission for members of staff working in DG ADMIN;
- (2) Particular care will be taken during **staff evaluation and promotion procedures** to ensure that the whistleblower suffers no adverse consequences in this context. The career guidance function, introduced under the administrative reform, will have a monitoring role in this respect. For cases where, following the use of the Whistleblowing procedure, the staff report of the member of staff concerned presents a marked drop in merit (one point or more), this member of staff will have the possibility to request the intervention of the Director General for Administration (or of the Secretary General in case the official works in DG ADMIN), who will be the appeals assessor for his/her report.
- The necessary modification to the General Implementing Rules of Article 43 of the Staff Regulations -illustrated in the Annex- will be proposed to the Commission for adoption together with the final proposal relating to the General Implementing Rules of Article 43 of the Staff Regulations.

Conclusion

In conclusion, the Commission is asked to

- (1) endorse the approach set out in this communication;
- (2) habilitate Mr Kinnock to adopt the necessary changes to the AIPN tables, to give effect to the first of the two proposed measures;
- (3) habilitate Mr Kinnock to inform the other Institutions accordingly.

Annex

Provision (in connection with “whistleblowing”) to be inserted in the general provisions for implementing Article 43 of the Staff Regulations

The following subparagraph should be added to Article 3(3) “Rank of the reporting officer, countersigning officer and appeal assessor”:

“For jobholders who have formally implemented the procedure provided for in the Commission Decision of 4 April 2002 on raising concerns about serious wrongdoings,⁵ and who, in the career development review report produced by the reporting officer and countersigning officer, have been awarded at least one fewer merit point, as referred to in Article 1(2), than in their preceding report, the appeal assessor shall be the Director-General for Personnel and Administration. Where the jobholder is employed in the Directorate-General for Personnel and Administration the appeal assessor shall be the Secretary-General of the Commission.”

Reasoning

The appeal assessor is called in at the last stage in the internal review procedures provided for in the general provisions for implementing Article 43. Those procedures are as follows:

- (1) Where the jobholder refuses to accept the report produced by the reporting officer and the countersigning officer, a second dialogue is held, this time between the jobholder and the countersigning officer. The countersigning officer then confirms or amends the report;
- (2) The Joint Evaluation Committee (JEC) is automatically consulted if the jobholder refuses to accept a report which has been confirmed or amended by the countersigning officer. The JEC then delivers an opinion, which is notified to the appeal assessor;
- (3) After the JEC has delivered its opinion the appeal assessor confirms or amends the report. If the appeal assessor departs from the opinion delivered by the JEC, he must give the grounds for his decision.

⁵ C/2002/845