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From: [REDACTED]
Sent: 30 September 2014 13:23
To: Euro-Ombudsman
Subject: [EOWEB] Consultation on the draft internal rules on whistleblowing
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Language you would like to receive an answer in en - English

Part 2 - Data

Subject Consultation on the draft internal rules on whistleblowing

Content Dear Ms Emily O' Reilly, please find annexed my contributions.

30 September 2014

To the attention of Ms Emily O' Reilly
European Ombudsman

Dear Ms O' Reilly,

Following your invitation for comments regarding the Ombudsman's draft internal rules on whistleblowing, please find hereafter my contributions.

However, prior my comments I have five preliminary remarks.

Preliminary remarks

Firstly, my comments are personal and I am formally requesting that my inputs are fully anonymised at any time. This includes if my comments are uploaded on your web site or forwarded to any third parties, including other institutions, bodies or agencies. The disclosure of my identity, or any references permitting to identify me, can only be done after my prior written approval.

Secondly, whistleblowers are often seen as being hostile to their colleagues, their teams and their institutions. In reality, whistleblowers are the civil servants who often care most for their institutions and who put their career, their health and their family situations at risk to protect their institution.

Thirdly, I would like to state that the obligation to have internal rules covering, in particular the protection of whistleblowers, is evidently too late for a vast number of ethical European civil servants who, irrespective of the existence or inexistence of such internal rules, did blow the whistle in the interest of the Communities. The mere fact that such internal rules are now required does indicate the problematic and negative exposures faced by these whistleblowers within EU institutions up until today.

Fourthly, the consultation of the European Ombudsman on its draft internal rules is welcome as it permits stakeholders to provide valuable input, which in my own view is needed.

Lastly, I am available to provide further inputs and to support any real initiatives which would contribute to take the issues of whistleblowing and the conditions of whistleblowers seriously.

Contributions

The draft internal rules are a good start. However, in my opinion, it requires some adaptations.

In some parts it has important limitations as it merely repeats or links to the Staff Regulations. In some other parts it misconstrued the Staff Regulations. More importantly, I tested these draft rules to a situation I know very well. Sadly and regrettably, they would not have helped.

The parts where the internal rules repeats or links to the Staff Regulations are easily identifiable in the 19 articles composing the rules.

On the other hand, I will briefly contribute in raising some parts where the draft internal rules misconstrued the Staff Regulations.

Within **Article 2 – definitions and Article 3 – Procedures** of the draft internal rules, it states that *‘In accordance with Article 22a of the Staff Regulations, members of the Ombudsman’s staff have the obligation to report, in writing, suspicions of serious misconduct.’*

These articles of the internal rules need to be adjusted as the Article 22a of the Staff Regulations states something else, and in essence that *‘Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which gives rise to a **presumption of the existence of possible illegal activity, including fraud or corruption**, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.’*

Therefore, according to Article 22a of the Staff Regulations, the obligation to inform does start at the stage of *‘presumption of the existence of possible illegal activity, including fraud or corruption’*, which is at another stage than when *‘suspecting of serious misconduct’* as foreseen in your draft internal rules.

Secondly, **Article 6– Protection of whistleblowers** defines a whistleblower as *‘an individual who is **involved** in serious misconducts subsequently decides to blow the whistle’* (...). The internal rules, here again, misconstrued the Staff Regulations as a whistleblower is not necessarily, or limited to, someone *‘involved in serious misconducts’*. In the contrary, a whistleblower can be *‘**Any official** who, in the course of or in connection with the performance of his duties, **becomes aware** of facts which gives rise to’* (...).

I have further comments on the draft internal rules which refers under **Article 4 to the guidance and support** to whistleblower. It vaguely indicates that such guidance and support *‘shall be provided to the maximum extent possible in the circumstances’*. In my view, this provides little guidance, if any. I also believe that the Staff Committee should not be involved, as it is not its purpose or mandate.

Also, **Article 9 – Appraisal and promotion** provides a favourable recognition in staff appraisal and promotion procedures. This is a first step which is positive. To be serious, it should be set retroactively to any staffers or ex-staff who blew the whistle, within the rules, and which actions triggered an OLAF investigation. Secondly, it has to be underlined that whistleblowers may suffer from a catalogue of retributions other than non-promotion such as non-renewal of employment contracts, end of employment contracts due to a structural re-organisation of the department or institution, work overload or under-load, difficulties in taking holidays or having trainings compared to other colleagues, as well as isolation, insults etc.

Recommendations

In parallel of the contributions provided above, please find hereafter some recommendations:

1. The creation of a **Whistleblower Support Office**, which would be an inter-institutional office comprising of professionals to support staff members who wishes to, or have blown the whistle. This office will also include a network of passed whistleblowers who with their experiences could provide valuable guidance and support.
2. The creation of a **Whistleblower family and health support services**, which would, in parallel of the support given to the whistleblower, aim exclusively in supporting the whistleblower's family. Indeed, the retributions made against whistleblowers can be so destructive that it impacts and metastasises to the entire family of the whistleblower.
3. Renaming the **term 'whistleblower'** which has a pejorative meaning. Suggestions for further inputs could be *'Ethical regulator'*, *'Ethical agent'*, or *'Compulsory ethical checker'*.
4. Provide **legal and financial assistance** to whistleblowers that are placed in a situation requiring legal assistance. Such assistance should be financed by the Whistleblower Support Office. In case of litigations and if the case is admissible by an internal structure or by the Civil Service Tribunal or by the European Ombudsman, the institution employing the whistleblowers at the time of his/her reporting of the presumption of the existence of possible illegal activity should be obliged to reimburse the legal costs to the Whistleblower Support Office.
5. Provide an **automatic promotion to whistleblowers** whose cases have been declared admissible by an internal structure or the Civil Service Tribunal or by the European Ombudsman. This promotion shall happen the year of the admissibility (if admissibility happens at the latest on 30 April of the given year) or the year after.

Conclusions

This consultation is highly welcome as it shows that whistleblowers do need protection. It also shows that whistleblowers are a valuable asset.

However, the internal rules on whistleblowing need to be re-written, stress-tested to real whistleblowing situation and needs to be accompanied by structures such as the 'Whistleblower Support Office' and the 'Whistleblower family and health support services' before being implemented.

Finally, when optimised, tested and finalised these internal rules should be specifically referred to in each employment contract, current or future ones. It should also be specially referred to in formal decisions setting up selection committees in recruitment and evaluation committees in public procurement, as well as any other circumstances.

(signed)

Yours sincerely,

