

DECISION No 9/2018

**OF THE ADMINISTRATIVE BOARD OF THE AGENCY FOR THE
COOPERATION OF ENERGY REGULATORS**

of 7 June 2018

**establishing the Guidelines on Whistleblowing and repealing Decision No 14/2014 of the
Administrative Board of the Agency for the Cooperation of Energy Regulators of 18
December 2014**

THE ADMINISTRATIVE BOARD OF THE AGENCY FOR THE COOPERATION OF
ENERGY REGULATORS,

HAS ADOPTED THIS DECISION:

1. INTRODUCTION

1.1. General

Having procedures for raising concerns about fraud, corruption or other serious wrongdoing is relevant for all responsible organisations and for 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 that such concerns are raised, 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 encourage staff to report concerns is to provide assurance of protection of their position. Clearly defined channels for internal reporting as well as safe and accepted routes through which staff may raise concerns outside the organisation as an option of last resort should be in place.

Viewed in this way, having whistleblowing procedures and whistleblower protection 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)¹ in 2004. They complement the general principle of loyalty to the European Union, the obligation to assist and tender advice to superiors (Article

¹ Articles 22a and 22b of the SR are applicable by analogy to temporary agents and contract agents, pursuant to Articles 11 and 81 of the CEOS.

21), as well as the rules on how to deal with orders which are considered to be irregular or likely to give rise to serious difficulties (Article 21a).

While these rules have already triggered a number of significant investigations by the European Anti-Fraud Office (OLAF), some staff may be reticent to make full use of the whistleblowing procedure, because of a fear of negative repercussions on their reputation or career. As part of the duty of the Agency for the Cooperation of Energy Regulators (hereafter referred to as the ‘Agency’) to have regard for the interests of staff members (*‘devoir de sollicitude’*), it is necessary to ensure that members of staff who report serious wrongdoings or concerns in good faith are afforded the utmost confidentiality and greatest degree of protection against any retaliation as a result of their whistleblowing.

As whistleblowing arrangements are widely recognised as an important tool to detect fraud, corruption and serious irregularities, it is important that staff fully understands 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 Agency’s overall ethics policy, which aims, *inter alia*, at clarifying the rules regarding professional ethics in the Agency².

Accordingly, the Agency issues the following guidelines, in agreement with OLAF.

1.2. 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 for whistleblowing, as determined under point 2. ‘Reporting procedures’. The principal channel is the normal chain of hierarchical command. If staff consider it to be safer to bypass the normal chain of hierarchical command, they must be able to do so. 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 under any circumstances be subject to retaliation for whistleblowing. They must be protected and their identity must remain confidential if they so desire.
- The Agency and/or OLAF must verify the reported facts in the appropriate manner and, if they are confirmed, the Agency will take all necessary steps to ensure the appropriate follow-up.
- The rights of defence of any person implicated by the reported incidents must be respected.
- Malicious or frivolous denunciations will not be tolerated.

² See Decision AB No 13/2014 of 18 December 2014 adopting the Anti-Fraud Strategy of the Agency for the Cooperation of Energy Regulators for the period of 2015-2017.

1.3. Scope of the policy

The Agency's whistleblowing rules and guidelines apply to all members of staff, irrespective of their administrative position³.

1.4. Definitions

For the purpose of these guidelines, a whistleblower is a member of staff, acting in good faith, who reports facts discovered in the course of or in connection with his or her duties which point to the existence of serious irregularities. The reporting should be done in writing and without delay, as determined under point 2. 'Reporting procedures'.⁴

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.

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 duties⁵.

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 under Article 90 of the Staff Regulations, applicable by analogy to temporary agents and contract agents, pursuant to Articles 46 and 117 of the CEOS⁶;

³ While the whistleblowing rules do not strictly speaking apply to seconded national experts, trainees, interim staff and local agents, these categories of staff are also encouraged to make use of the arrangements set out in this documents and the Agency undertakes to protect these categories of staff against retaliation if they do so in good faith.

⁴ Prior to reporting, a staff member may seek guidance and support as described in section 5. This does not have to be done in writing.

⁵ This is not to say that the Agency does not react to this information, but that the rules on whistleblowing do not apply in this case.

⁶ http://myintracomm.ec.europa.eu/hr_admin/en/appeals/Pages/index.aspx

- Harassment claims and personal disagreements or conflicts with colleagues or hierarchy. In appropriate cases, staff may wish to address themselves to the Human Resources Management Team, or to a confidential counsellor⁷, or to lodge a request for assistance under Article 24 of the Staff Regulations, applicable by analogy to temporary agents and contract agents, pursuant to Articles 11 and 81 of the CEOS⁸.

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

- Abusive disclosures (repeated disclosures of alleged facts aimed merely 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 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.

‘Retaliation’ is 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 appraisals 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 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 bad faith, particularly if it is based knowingly on false or misleading information, shall not be protected and shall normally be subject to disciplinary measures. The burden of proof in this context is on the Agency.

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 and in writing to either their immediate superior or to the Director.

Internal whistleblowing – second option

If there is a concern that this disclosure may lead to retaliation or that the intended recipient of the report is personally implicated in the serious irregularities, then the staff member may also

⁷ https://s-intranet/Pages/HR_HRM-Legal.aspx?RootFolder=/Drive/Public/Administration/HR/02.%20HRM%20Legal&Folder

⁸ <https://myintracomm.ec.testa.eu/staff/EN/staff-conduct/complaints-appeals/Pages/index.aspx>

bypass this direct means of internal reporting and address his or her report to the Chair of the Administrative Board or directly to OLAF⁹.

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 of 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 Agency 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 that 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 Agency, 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 Commission, 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 staff member concerned honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true and if he or she has allowed the Agency or OLAF a reasonable period of time to take the appropriate action.

The Agency is under the obligation to ensure the confidentiality of information received and Agency's staff members are therefore necessarily subjected to a duty of discretion.

External disclosure to other EU institutions, which are clearly able to hold the Agency to account because of their institutional role, but are also themselves subjected to the duty of discretion, 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 an Agency department which is not competent to deal with it, it is up to that department to transmit, in the strictest confidence, the relevant information and documents to the competent person, as indicated in point 2. under *Internal whistleblowing*, 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

⁹ https://ec.europa.eu/anti-fraud/olaf-and-you/report-fraud_en

of retaliation. Regarding burden of proof, it shall be up to the person taking any adverse measure against a whistleblower to establish that the measure was motivated by reasons other than the reporting.

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 honest concern turned out to be unfounded.

The protection continues to apply in cases of external disclosures to other EU institutions, 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 Agency 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 wrongdoings, or to any other person without a strict need to know, unless the whistleblower personally authorises the disclosure of his/her identity or this is a requirement in any subsequent criminal law proceedings. In all other cases, the Agency is committed to keeping the identity of the whistleblower confidential

In this respect the Court has ruled that disciplinary procedures that are opened on the basis of information of which the source is not revealed are regular, as long as it does not affect the possibility of the person who is subject to a subsequent disciplinary procedure to comment on the facts or documents transmitted, or on the conclusions that the Agency draws from them¹⁰. The disciplinary rules of the Agency allow it to keep the identity of the whistleblower confidential, while ensuring that the rights of defence of the person concerned are fully respected.

Mobility

If the member of staff concerned wishes to be moved to another department of the Agency in order to safeguard him- or herself against potential hostile reactions from his or her immediate work environment, then the Agency will take reasonable steps to facilitate such a move. In practice, those members of staff who consider it necessary to move to a different department may address themselves to the Human Resources Management Team, or to the Director, who will provide them with counseling in order to identify the type of post which fits their profile and professional aspirations.

¹⁰ Judgment of 15 May 1997, N v Commission (T-273/94, RecFP_p._II-289) (ECLI:EU:T:1997:71) (cf. point 81).

In urgent and duly justified cases, the protective measure of a transfer in application of Article 7(1) of the Staff Regulations will be taken by the Director, or the authority authorised to conclude contracts of employment.

Appraisal and reclassification

Particular care will be taken during staff appraisal and reclassification procedures to ensure that the whistleblower suffers no adverse consequences in this context. Accordingly, the appraisal system¹¹ provides for the possibility of the whistleblower to ask that the role of appeal assessor is taken on by the Commission representative on the Administrative Board who is the most senior in grade.

Anonymity

In order for the Agency to be able to apply protective measures, the staff member concerned should identify him- or herself as a whistleblower to the institutions¹², and to observe the procedures as outlined above.

The protection which is offered reduces the need and justification for anonymity. Anonymity deprives the investigative services of the possibility of asking the source for clarification or more information and enhances the risk of frivolous, malicious or unreliable information.

For these reasons, anonymous reporting is not encouraged¹³.

Penalties for those taking retaliatory action

No member of staff or manager of the Agency may use his/her 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 Agency under Article 24 of the Staff Regulations, applicable by analogy to temporary agents and contract agents, pursuant to Articles 11 and 81 of the CEOS, and to request that protective measures be adopted. Such requests should be addressed to the Director of the Agency or, in duly justified cases, to the Chair of the Administrative Board of the Agency.

Limits

¹¹ Article 3(2) of AB Decision 23/2015 of 17 December 2015 on general provisions for implementing Article 43 of the Staff Regulations and Article 3(2) of the AB Decision 22/2015 of 17 December 2015 on general provisions for implementing Article 87(1) of the CEOS.

¹² The word ‘institutions’ refers to the Agency or other institution(s) to which the whistleblower has reported the irregularity pursuant to point 2 of these Guidelines.

¹³ As potential whistleblowers may hesitate to come forward with their identity for fear of retaliatory action, the OLAF's relevant application on https://ec.europa.eu/anti-fraud/olaf-and-you/report-fraud_en offers the facility to enter into an initially anonymous dialogue with specialised staff before a person decides to come forward and make use of the whistleblowing procedures.

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 the protection may be lost if the staff member makes unwarranted or damaging allegations that he/she 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/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 a significant 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.

4. FEEDBACK TO THE WHISTLEBLOWER

According to Article 22b of the Staff Regulations, OLAF or the Agency must give the whistleblower an indication of the time needed to take appropriate action. If no action is taken within that 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 address his or her concerns to one of the other institutions referred to above.

It should be noted that the whistleblower is entitled to be informed within 60 days of the time needed to take appropriate action, but that it is up to OLAF and/or the Agency to determine the appropriate course of action.

5. GUIDANCE AND SUPPORT

While reporting serious irregularities is an obligation under the Staff Regulations, some staff may be reticent to come forward and report their concerns. In order to help staff who are unsure of whether or not certain facts should be reported, the Agency offers confidential and impartial guidance and support to (potential) whistleblowers.

Guidance to potential whistleblowers at an early stage also helps to avoid ill-advised reporting, which may cause frustration to the staff member concerned and may be detrimental to the interests and the reputation of the Agency. This guidance therefore lessens the risks of disclosure-related conflicts.

Experience suggests that this is best carried out by a point of contact not connected with the investigation function of OLAF, taking account of the fact that, in particular, support to whistleblowers and protection against retaliation are essentially the responsibility of the Agency as employer.

The Human Resources Management Team will provide confidential and impartial guidance on, for example, whether the information in question is covered by the whistleblowing rules, which reporting channel may best be used for the information concerned, and which alternative procedures are available if the information concerned does not qualify for whistleblowing ('signposting'). They will also be able to tender advice and guidance to staff members on protective measures that the staff member may wish to seek following the reporting.

Naturally, this guidance function is without prejudice to the possibility of staff members to consult their line manager.

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 wrongdoings 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 Agency and will be included in the material of the Agency'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, upon the Commission's agreement in accordance with provisions of Article 110(2) of the Staff Regulations.

9. FINAL PROVISIONS

Decision No 14/2014 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 18 December 2014 on the guidelines on whistleblowing in the Agency for the Cooperation of Energy Regulators is hereby repealed.

These guidelines shall enter into force on the date of its adoption.

Done at Ljubljana, 7 June 2018.

For the Administrative Board

The Chair

Dr. R. JORDAN

ANNEX 1

STAFF REGULATIONS – ARTICLES ON WHISTLEBLOWING ¹⁴

Article 22a

1. Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Union, 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 Union, 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. Information mentioned in the first subparagraph shall be given in writing. This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph 1 may be presumed.

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

4. Paragraphs 1 to 3 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

Article 22b

1. An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:

(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.

¹⁴ Articles 22a and 22b of the SR are applicable by analogy to temporary agents and contract agents, pursuant to Articles 11 and 81 of the CEOS.

- 2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.*
- 3. Paragraphs 1 and 2 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.*

ANNEX 2
 WHISTLEBLOWING REPORTING CHANNELS

