



DECISION OF THE EUROPEAN DATA PROTECTION SUPERVISOR ON INTERNAL RULES CONCERNING WHISTLEBLOWING

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union (CEOS) laid down by Council Regulation (EEC, Euratom, ECSC) No 259/68¹.

Having regard the EDPS decision of 2 April 2019² on application of restrictions following Article 25 of Regulation 1725/2018³.

Whereas:

- (1) As provided for in Article 22.c) of the Staff Regulations, the EDPS has to adopt internal rules regarding whistleblowing by members of its staff;
- (2) These rules aim to safeguard the rights and interests of whistleblowers and provide adequate remedies if they are not treated correctly and fairly in relation to their whistleblowing, hence embodying the institution's commitment to provide a safe environment for reporting and addressing suspecting misconduct;
- (3) Staff members have the obligation to report serious irregularities, misconduct or negligence they discover in the course of the performance of their duties;
- (4) The appointing authority shall lay down the procedures to be followed for reporting such serious irregularities, including the protection of the legitimate interests and the privacy of those staff members and of alleged wrongdoers, as well as a procedure for the handling of their complaints. Confidentiality is extremely important in the whistleblowing procedure, and the EDPS is committed to providing a safe environment for reporting and addressing suspected misconduct;

¹ OJ L 56, 4.3.1968, p.1.

² [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019Q0410\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019Q0410(01))

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2018:295:FULL&from=EN>



(5) With the entry into force of EU Regulation 2016/679⁴ and of its Art. 75, as of 25 May 2018 an EDPB Secretariat has been established and the decision should be adapted to this new institutional setting up;

(6) Art. 21 of the EDPS Decision on internal rules concerning whistleblowing of 14.06.2016 states that within two years of its adoption the decision shall be reviewed in order to decide whether it needs to be supplemented or revised.

Having consulted the Staff Committee of the EDPS:

HAS DECIDED AS FOLLOWS:

Article 1 - Scope

The rules apply to every staff member working in the EDPS, including the EDPB Secretariat, irrespective of their administrative position or status.

Article 2 - Definitions

For the purpose of these rules, a *whistleblower* is a person who, in good faith, reports facts, which he or she honestly and reasonably believes, suggest the existence of serious irregularities in the EDPS.

Disclosure is made *in good faith* if the whistleblower honestly and reasonably believes that the information disclosed, and any allegation contained in it, is substantially true. Good faith is presumed unless and until proven otherwise.

Article 3 – Which irregularities to report

A staff member, who acting in good faith, in the course of or in connection with his or her duties discovers facts, which point to the existence of serious irregularities, shall report this. The reporting should be made in writing, without delay and contain relevant evidence of which the staff member is aware of.

Fraud, corruption, theft, serious violation of rules on public procurement and serious violation of professional obligations that may be detrimental to the interests of the Union are to be considered, in particular, serious irregularities. Serious professional misconduct, which may constitute serious failures to comply with the obligations of staff members, either intentionally or by negligence, may also constitute a serious irregularity.

⁴ OJ L 119, 4.5.2016, p. 1–88 and OJ L 127, 23.5.2018, p. 2–5



Article 4 – What does not constitute serious irregularities

Some types of information do not qualify as serious irregularities that need to be reported within the meaning of these internal rules, such as:

- Information already in the public domain;
- Unsubstantiated rumours;
- Information relating to a person's private life, which is not relevant to his or her duties.

For some situations, other procedures are established and should be followed, for example:

- Claims of harassment or personal disagreement between colleagues⁵;
- Personal issues where staff have a personal interest in the outcome⁶ or matters relating to a staff member's legal position for which he or she may have recourse to appeal under the Staff Regulations/Conditions of Employment of Other Servants^{7 8}.

Article 5 – Reporting procedures

Without prejudice to Article 22.a which provides for the possibility for the whistleblower to address his or her report directly to the European Anti-Fraud Office (OLAF) and without prejudice to Article 22.b which provides for the additional possibility to report to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament or of the Ombudsman, if certain conditions are met, members of the EDPS staff shall report, in writing, suspicions of serious irregularities.

Such reports should be made to the Director, or exceptionally to the Supervisor or the Chair of the EDPB where appropriate if the Director is involved in the subject matter of the report, or if the serious irregularity or professional misconduct is of such nature or importance that informing personally the Supervisor or the Chair of the EDPB is considered necessary by the whistleblower.

⁵ Staff members can lodge a complaint under Article 90 of the Staff Regulations and there is an EDPS policy adopted to that effect.

³ Staff members can lodge a complaint under Article 90 of the Staff Regulations and there is an EDPS policy adopted to that effect.

⁴ Staff members can lodge a complaint under Article 90 of the Staff Regulations and there is an EDPS policy adopted to that effect.

⁸ http://ec.europa.eu/anti_fraud/investigations/eu-staff/index_en.htm



Article 6 - Guidance and support

Potential whistleblowers may approach the Ethics Officer (of the EDPS) to seek guidance and support.

To the maximum extent permitted by the Staff Regulations, guidance and support to potential whistleblowers shall be provided in confidence.

Where a report of serious irregularities has been made, the whistleblower may request guidance and support, which shall be provided to the maximum extent possible in the circumstances.

Article 7 - Information guarantees

A whistleblower who reports to the Director has the following information rights:

- (i) to be provided with an acknowledgement of receipt as rapidly as possible and, in any event, within five working days;
- (ii) to be told which staff member is responsible for dealing with the matter;
- (iii) to be told, as soon as possible and, in any event, no later than 60 days following receipt of the report, of the time it will take the EDPS to take appropriate action;

Article 8 - Protection of whistleblowers and alleged wrongdoers - Confidentiality and security measures

Staff members play a critical role in raising concerns, which help the EDPS better identify, address, and ultimately deter irregularities and misconduct. Therefore, the EDPS shall protect a whistleblower against any acts of retaliation or reprisal.

When an individual who is involved in serious irregularities subsequently decides to blow the whistle, the fact of having reported the matter shall be taken into account, in his or her favour, in any disciplinary procedure.

The EDPS shall protect the identity of a whistleblower and the confidentiality of the report received to the greatest extent possible. Their identity should never be revealed to the alleged wrong-doers except in certain exceptional circumstances if the whistleblower authorises such a disclosure, if this is required by any subsequent criminal law proceedings, or if the whistleblower maliciously makes a false statement. This shall be done after the consultation of the DPO.

Inadequate protection of the whistleblowing files might bring severe prejudice to the whistleblower as well as the alleged wrongdoer. The EDPS shall identify and assess relevant



risks and put in place adequate technical and organisational countermeasure to protect the confidentiality of the identity of the involved staff and the security of relevant information. The risk management process and relevant countermeasures shall be documented. Specific advice on what procedures and tools should be used by the whistleblower and any other staff involved in the process shall be also documented. The risk assessment concerning this procedure as well as resulting mitigating measures shall be contained in an Annex that is independently revised every year and as necessary by the relevant units, without having to revise the whole decision. The current risk assessment method in force in the EDPS will be used.

Where the Director refers the matter to OLAF, the identity of the whistleblower shall not normally be disclosed to OLAF.

The information and circulation of the file will be disclosed on a strict need to know basis, limiting the access of it only to the Director's office, the Ethics Officer, only one authorised member of the HRBA team and the Supervisor if requested and the Chair of the EDPB where appropriate.

Whistleblowers who consider that the EDPS has not adequately protected their confidentiality and their related personal data may complain to any of the Supervisors or the EDPS DPO.

In case a disciplinary action or an anti-harassment procedure is launched, both procedures will have to follow the relevant Decisions adopted by the EDPS.

Article 9 - Mobility

Where, as a protection against any possible retaliation, a whistleblower wishes to be moved internally if it is possible or to another EU body, the EDPS will support and assist with this request as much as possible.

Article 10 - Appraisal and promotion

Managers shall ensure that acts of whistleblowing done in good faith are not taken into consideration, favourably or unfavourably, in staff appraisal and promotion procedures.

They shall ensure that whistleblowers suffer no adverse consequences in this context.

Whistleblowing shall only be mentioned in the whistleblower's staff report, if he or she explicitly requests that such a reference should be included. In such cases, the whistleblower will be informed that the confidentiality rules may be different than those applied in the whistleblowing procedure.



Article 11 - Penalties for persons taking retaliatory action

Any form of retaliation against a whistleblower is prohibited. 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.

If such retaliation occurs, the EDPS will take appropriate action, including, if necessary, disciplinary measures, against any member of staff concerned.

Article 12 - Remedies

Members of the EDPS staff who blow the whistle and who consider that they have not received adequate support and protection may request assistance in accordance with Article 24 of the Staff Regulations.

An express decision, including reasons, shall be given to the whistleblower as rapidly as possible and in any event no later than two months after he or she submitted the request.

Where the whistleblower regards the decision as unsatisfactory, he or she may make a complaint, within three months, under Article 90(2) of the Staff Regulations.

If the whistleblower so requests, the EDPS shall offer the opportunity to present the complaint orally. The whistleblower has the right to be accompanied by a member of the Staff Committee and/or any other person at a meeting for this purpose.

In dealing with Article 90(2) complaints, the EDPS may, with the whistleblower's agreement, consult a person or persons from outside the EDPS or EDPB Secretariat in order to ensure that the procedure is as fair and equitable as possible.

Unless a longer period is justified in the circumstances, the EDPS's express decision on the complaint shall be given to the whistleblower no later than two months after he or she submitted the complaint.

Article 13 – Malicious or frivolous reports

A malicious or frivolous report does not constitute whistleblowing and may lead to disciplinary measures.



Article 14 - Rights of persons implicated. Possible deferral or restrictions of data subject rights

Staff members (the whistleblower, the alleged wrongdoer, witnesses and third parties) implicated in reports of serious irregularities shall be informed as soon as possible of the allegations made against them. Where there is a substantial risk that such notification would jeopardise the ability of the EDPS to effectively investigate the allegation or gather the necessary evidence, notification may be deferred⁹ as long as such risk exists. In the same circumstances, the EDPS might raise restrictions to the data subject rights pursuant art. 2.(1)(b) of the Decision on Internal rules concerning restrictions of certain rights of data subject of 2 April 2019. The restriction will be based on art. 25(1)(h) of Regulation (EU) 1725/2018 and is aimed at protecting the data subject or the right and freedom of the others.

If the opening of investigations is considered necessary, the EDPS may seek the assistance of IDOC in accordance with the terms of the Service Level Agreement signed with that office.

Upon termination of any internal investigation, the staff members concerned shall be informed as rapidly as possible of the results of the investigation.

This obligation of information applies where the whistleblower reports to the Director of the EDPS. Where a whistleblower reports to OLAF, it is for the latter to decide how to proceed.

Article 15 - Awareness raising

These rules and the relevant procedures shall be drawn to the attention of persons when they join the EDPS's staff and not less than once a year thereafter.

Information sessions shall be organised with the aim of ensuring that all staff members of the EDPS, including the EDPB secretariat, understand that readiness to blow the whistle on serious irregularities plays an essential role in maintaining a culture of integrity in the organization.

A training session shall be organised for managers and the Director on how to deal with whistleblower reports.

⁹ In accordance with Article 25 of Regulation 2018/1725 and with Article 8 of EDPS Decision of 2 April 2019 on internal rules concerning restrictions of certain rights of data subjects in relation to the processing of personal data in the framework of activities carried out by the European Data Protection Supervisor



Article 16 - Reporting

The annual activity report to the budgetary authority shall include a section on whistleblowing by members of the EDPS, including the EDPB secretariat, and shall respect all the confidentiality commitments as per article 8 of this decision. It shall also give details of the activities mentioned under Article 15 above.

Article 17 - External whistleblowers

Every person who enters into a contract with the EDPS shall be informed of the existence of this decision and that it is possible to raise suspicions of serious irregularities either with the EDPS or with OLAF and that making use of this possibility in good faith will not result in any retaliation, reprisal or other negative action on the part of the EDPS.

The EDPS shall also, whenever appropriate, consider encouraging contractors to adopt whistleblower rules of their own.

Article 18 - Data protection

Any processing of personal data in application of these rules is subject to Regulation (EU) 2018/1725 and shall be carried out in accordance with the EDPS record on whistleblowing. Staff members shall be informed of the data protection statement notice prepared together with the record of the processing operation at stake.

The Director's office will take care of informing the whistleblower of the existence of the data protection notice as soon as contacted.

Article 19 - Data retention

Upon the closing of an initial investigation led by the EDPS, the data gathered to build the investigation will either be sent to OLAF if it concerns fraud or if not relating to fraud, dealt with through the appropriate channels within the EDPS. If a case is sent to OLAF and an investigation is opened, there is no need for the EDPS to keep the information for a longer period. In cases OLAF decides not to start an investigation, the EDPS will delete the information without delay. Files on the basis of which an administrative inquiry or disciplinary procedure is opened by the EDPS, the information should be kept in line with the retention periods foreseen for those files. When the investigation has dismissed a report of whistleblowing, the data gathered to build the investigation will be retained for a period of 2 months after the final decision has been issued to all the parties involved.



Article 20 – Dealing with excessive personal information

Should the EDPS receive information that is clearly of no interest/relevance to the investigation because the information is not relevant for the purposes of investigating fraud or other serious wrong doing through the whistleblowing procedure, the information should not be further processed and should be erased. This requires doing a first check of the reports as soon as possible.

Article 21 - Review

These rules shall be reviewed within two years of their adoption, with a view to deciding whether they need to be supplemented or revised.

Before deciding on any changes to these rules, the EDPS shall consult the Staff Committee.

Article 22 - Entry into force

The decision shall enter into force on the day of its signature.

Done at Brussels on 29 November 2019

A handwritten signature in black ink, appearing to read 'Wojciech Wiewiorowski', written over a horizontal line.

Wojciech WIEWIOROWSKI
Assistant Supervisor

Annex: Simplified risk assessment for Whistleblowing decision



Annex on (simplified) risk assessment for Whistleblowing Decision

Assets:

- Personal information of the involved individuals (whistleblower, alleged wrongdoer and witnesses)
- Registry to be held in the relevant office
- all supporting material that could be involved in the processing of the report.
- Organisational welfare in the institution

Threats

Basic threats:

- Natural Disasters
- Utilities Failure
- System/Services Failure
- Human errors
- Outsider attacks
- Internal Attacks
- Personnel attacks/social engineering

Specific threats:

- Internal or external actors who might be affected /involved in the report.
- Intentional or unintentional loss of information.
- Physical or electronic failures.



Risks

- Circulation of sensitive information, possible leaks on the report, the witnesses and the alleged wrongdoer and the whistle blower.
- Possible modifications on the report
- Risks for the individuals (retaliation, possible reactive behaviours, self-damaging behaviours)
- Risk for the organisation (reputation of the organisation, possible disruption, security of assets, risk from false reports, reliability of people dealing with such an issue,).
- Ineffectiveness of the policy (lack of motivation for whistleblowers).

Mitigation measures

- Whistleblower Decision itself.
- Strict need to know policy (already in the Decision).
- Appropriate reporting channels, and workflows.
- Media used: report on paper only or on encrypted electronic messages. Zip encryption possibly used only between authorised personnel.
- Confidentiality (paper or encryption); integrity (paper copies , electronic signatures) and availability controls (limited back ups)
- Access control mechanisms