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# **Opinion Statement PAC 4/2018 on the European Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law ('Whistleblowing')**

**Issued by the CFE Professional Affairs Committee  
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CFE Tax Advisers Europe is a Brussels-based association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers. CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Wim Gohres, Chair of the CFE Professional Affairs Committee or Aleksandar Ivanovski, Tax Policy Manager, at [info@taxadviserseurope.org](mailto:info@taxadviserseurope.org). For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

## 1. Introduction

This Opinion Statement sets out CFE's position on the European Commission proposal of 23 April 2018 for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law ('Whistleblowers proposal' or 'The proposed directive')<sup>1</sup>.

CFE has commented on this matter in the course of the consultation on the protection of whistleblowers in the field of tax for the Platform on Tax Good Governance in June 2017, and prior to that, by issuing an Opinion Statement on the European Commission public consultation on protection of whistleblowers in May 2017<sup>2</sup>. This Opinion Statement supplements the previous position papers issued by the CFE on the matter.

## 2. Policy Intention

CFE welcomes the Commission proposal that seeks to establish horizontal rules for protection of persons disclosing breaches of European Union law, specifically in relation to tax. We appreciate the important societal role that whistleblowers play in advancing public policy interests, specifically in reporting tax fraud, corruption, abusive and illegal practices.

CFE acknowledges that achieving change in this area must be accompanied by a public debate that highlights the benefits for society by the actions of those individuals that believe that they genuinely disclose wrongful conduct or malpractice.

CFE has consistently advocated for measures that promote transparency, that restore public trust and strengthen the integrity of tax systems, as well as the sense of fairness and equity at a more general level. By advancing these aims, the proposals that seek to establish legal channels for individuals to voluntarily disclose wrongful conduct are likely to achieve beneficial outcomes that reduce malpractice in organisations and ensure individuals can report without fear of reprisal. Further, from an organisation perspective, a properly channelled and tiered reporting on wrongdoings can serve as a supplementary internal audit tool.

CFE thus welcomes this proposed directive but also wishes to further comment on certain aspects of the proposal in relation to taxation that in our view merit further technical refinement.

## 3. Personal Scope

CFE believes that the tiered-level reporting procedure as set out in the Commission proposal will ensure that remedies are in place whilst protecting the process from any disingenuous reporting and will not undermine these genuinely beneficial developments. Such an approach is sensible from both organisational perspective and also from a perspective of an individual who genuinely believes that their information will be helpful for their employer, regulators or the society at large.

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<sup>1</sup>Proposal for a Directive of the European Parliament and the Council of the EU on the protection of persons reporting on breaches of Union law {SWD(2018) 116 final} - {SWD(2018) 117 final}

<sup>2</sup> Available on the following link: <http://taxadviserseurope.org/publications/>

CFE hopes that the EU's whistleblowers' framework will strike the right balance between protecting individuals who disclose information in the public interest, and those individuals who seek to cause harm by disclosing confidential and commercially sensitive information. CFE recognises that there may be legitimate reasons to override client confidentiality, such as when an adviser or an accountant may be legally required to disclose what would otherwise be confidential information, eg. when they make disclosures related to the domestic or EU anti-money laundering rules, including reporting on tax evasion.<sup>3</sup>

In this vein, CFE welcomes the establishment of 'reasonable belief' as a scrutiny standard, whilst still protecting those who believe that they genuinely report in good faith. Achieving change relies on responding positively to those who disclose malpractice and acknowledging the benefits it brings.

CFE also recognises that the whistleblowers protection may need to be extended to persons who do not make an internal disclosure as first step, which may be justifiable in limited circumstances.<sup>4</sup>

## 4. Material Scope

The proposed directive aims to further enhance transparency in taxation by way of complementing Commission's recent initiatives on fair taxation of businesses operating in the Single Market. In particular, the proposal highlights the legislative actions aimed at protecting base eroding practices and the reinforced anti-money laundering rules (ATAD and the 5<sup>th</sup> Anti-Money Laundering Directive, respectively).<sup>5</sup>

In relation to the tax, Article 1.1.d.) sets out the material scope as a minimum common standard for protection of persons reporting unlawful activities or abuse of law falling within the scope of the breaches, *inter alia*, in relation to corporate tax arrangements.

Furthermore, if the intention of the Directive is to limit the protection in relation to tax to the equivalent to corporation tax, or taxes payable by companies, CFE believes that the policy reasons need to be set out clearly. CFE expects all equivalent enterprises to be within scope, such as companies, charities, partnerships of all forms, trusts with commercial purpose, investment funds etc.

The CFE appreciates that breaches of the corporate tax rules whose purpose is to obtain a tax advantage and to evade legal obligations defeat the objectives of legislation, and could have serious negative consequences on the Single Market such as affecting competition and aiding tax evasion. This level playing field argument is doubly important in the context of uncompetitive behaviour by certain companies that may undermine tax revenues that legitimately belong to EU Member states.

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<sup>3</sup> CFE refers to the International Ethics Standards Board for Accountants (IESBA) International Code of Ethics for Professional Accountants, which applies to some CFE member organisations. The amended IESBA Code related to the overrides to client confidentiality, enters into force on 1 January 2020, and some CFE member organisations will become subject to these revisions. The revisions continue to differentiate circumstances where accountants are legally required to disclose what would otherwise be confidential information, and circumstances when accountants voluntarily choose to disclose information in the public interest.

<sup>4</sup> Failing to extend whistleblowers protection to individuals who have not followed internal procedures conflicts with existing obligations of members of certain CFE member organisations from the United Kingdom, as well as the UK's Public Interest Disclosure Act (1998).

<sup>5</sup> Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market; and, Directive amending Directive (EU) 2015/849 on the prevention of use financial system for purposes of money laundering or terrorism financing.

As such, more detail may be required to define the material scope of the widely drawn wording of Article 1.1.d.). Consistent language would bring clarity for both persons who report on breaches of EU law related to corporate tax and organisations alike. At present, the broad wording of Article 1.1.d.) read in conjunction with Article 3(1), which defines breaches as ‘actual’ or ‘potential’ could leave scope for uncertainty.

We appreciate that the extension of the scope to cover ‘potential breaches’ has legitimate policy reasons, such as preventing offence from taking place, however, we believe that in a complex area of law such as tax, broad wording may not be helpful.<sup>6</sup>

Further, due to the fact that the directive sets out ‘minimum standards’ of protection, Member states may introduce more favourable provision for protection of whistle-blowers. In an EU context, this fact, in conjunction with the broad wording of Article 1.1.d) may compound the uncertainty in relation to the material scope of the directive in the area of taxation from a perspective of a reporting person and an organisation.

This may be compounded by the fact that inconsistent language could also dissuade whistleblowers from pursuing legitimate concerns, whilst leaving taxpayers and organisations potentially exposed to ‘leaks’ which is not the policy intention of the directive, as understood by the CFE.

## 5. Tiered Reporting Channels & Standard of Scrutiny

CFE welcomes the tiered- level reporting as set out in the proposed directive. The obligation to establish internal reporting channels and procedures will benefit organisations and protect individuals that believe that their information will be helpful for their employer, regulators or the society at large. The proposal establishes a protection only for those persons reporting externally who first made an internal disclosure, where applicable. The proposal therefore rightly seeks to establish tiered-level reporting, ensuring that established procedural guarantees are in place.<sup>7</sup>

CFE recognises that there may be limited circumstances when whistleblower protection may need to be extended to persons who do not make an internal disclosure as a first step.<sup>8</sup> CFE welcomes the proposal’s requirement for Member States to develop routes for external reporting with dedicated staff and record-keeping.

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<sup>6</sup> For instance, under Article 33 (1) (a) of the 4<sup>th</sup> EU Anti-Money Laundering Directive Member States shall require obliged entities, and, where applicable, their directors and employees, to cooperate fully by promptly by informing the FIU, including by filing a report, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by promptly responding to requests by the FIU for additional information in such case; Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

<sup>7</sup>According to Article 13 which sets out the conditions for protection, a person can report externally only after an internal report, where applicable, on reasonable belief that the information was true and within scope of the Directive. As such, the proposal follows the case-law of the European Court of Human Rights in *Guja v Moldova* which establishes that a disclosure of confidential information cannot be protected where the individual had a recourse to more discrete means to remedy the wrongdoing, *Guja v Moldova*, App no 14277/04, IHRL 3209 (ECHR 2008), 12th February 2008, European Court of Human Rights; Similarly, the Opinion of the European Parliament’s Committee of Employment and Social Affairs of 24 March 2017 recalls that in the event of false reporting those responsible could be held into account.

<sup>8</sup> Failing to extend whistleblowers protection to individuals who have not followed internal procedures conflicts with existing obligations of members of certain CFE member organisations from the United Kingdom, as well as the UK’s Public Interest Disclosure Act (1998).

On a related point, those individuals who are involved in ‘leaks’ and other undesirable disclosure of confidential information belonging to organisations are likely to cause harm and such inappropriate release should be discouraged.

To this end, CFE has expressed a concern that due to the specificity of the tax adviser- taxpayer relationship, as well as the confidentiality of client information, the proposals need to find the right balance among these equally important issues. In general, the client confidentiality principle, where applicable, requires tax advisers to treat as confidential any information received from clients in the course of their work.<sup>9</sup> Considering this right is primarily attached to the client, and is in place to protect the client/ the taxpayer, consideration needs to be given to this principle and the right balance should be struck.<sup>10</sup>

From this perspective, CFE welcomes the proposed establishment of ‘reasonable belief’ as a scrutiny standard for persons disclosing information on wrongdoings in the public interest.

As regards the conditions for protection of reporting persons, Article 13 of the proposed Directive sets out ‘reasonable grounds to believe’ that the information that is disclosed was true at the time of reporting and that the information falls within scope of the Directive. Whilst we appreciate that there is mandatory internal reporting for a person to qualify for protection under this Directive, we believe that the proposals strikes the right balance by establishing measures for prohibition of retaliation against the reporting persons. Equally, the detail of the proposal must ensure that the national implementing acts transpose the elements of the directive that effectively protect organisations from retaliatory disclosures.

## About CFE Tax Advisers Europe

CFE Tax Advisers Europe is a Brussels-based umbrella association representing European tax advisers. Founded in 1959, CFE brings together 30 national organisations from 24 European countries, representing more than 200,000 tax advisers.

CFE’s role and mission is to:

- Safeguard the professional interests of tax advisers and assure the quality of tax services provided by tax advisers;
- Exchange information about national tax laws and contribute to the co-ordination and development of tax policy in Europe;
- Maintain relations with the European institutions, the OECD and other international and national bodies, and share with the European Union institutions the tax technical experience and insight of our members from all areas of taxation;
- Seek to provide the best possible conditions for tax advisers to carry out their profession;
- Inform the general public about the role, mission and the services that tax advisers provide.

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<sup>9</sup> For further information on the client confidentiality principle and the potential issues arising with relation to whistleblowing, please refer to the CFE Opinion statement PAC 2/2017, pages [4-5] available on the following link: <http://taxadviserseurope.org/blog/portfolio-items/opinion-statement-pac-2-2017-on-the-european-commission-public-consultation-on-protection-of-whistleblowers/>

<sup>10</sup> As noted *supra*, CFE refers to the IESBA ethics regime, which applies to some CFE member organisations. The amended IESBA code related to the overrides to client confidentiality, enters into force on 1 January 2020, and some CFE member organisations will become subject to these revisions. The revisions continue to differentiate circumstances where accountants are legally required to disclose what would otherwise be confidential information, and circumstances when accountants voluntarily choose to disclose information in the public interest.