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Directorate General for Taxation and Customs Union  
Unit for Direct Tax Policy and Cooperation Unit  
Corporate Tax Transparency Sector  
Ioanna Mitroyanni, Head of Sector

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Brussels, 28 November 2017

Dear Ms Mitroyanni,

The comments below supplement the CFE response to the European Commission questionnaire on the protection of whistleblowers in the field of tax for Platform on Tax Good Governance of 15 June 2017. CFE has submitted comments on the European Commission public consultation on whistleblowers and clarified our position with an Opinion Statement PAC 2/2017 of 17 May 2017. Furthermore, for the purposes of the Platform Tax Good Governance, CFE submitted comments on the questionnaire of 15 June 2017, which feed into the European Commission impact assessment on the policy initiative for whistleblowers' protection. In relation to the questionnaire on the protection of whistleblowers in the field of tax for Platform on Tax Good Governance of 15 June, and following the 25<sup>th</sup> Meeting of the CFE Professional Affairs Committee of 21 September 2017, CFE supplements our response with the additional remarks below.

At the outset, CFE welcomes the policy initiative to reinforce the comprehensiveness of the legal framework for protection of individuals who voluntarily disclose information of wrongdoings that can have harmful effect on various entities and interests. By doing so, these individuals contribute to the transparency and integrity of public and private entities, as well as safeguarding the broader societal and public interests.

### **Definitions**

CFE believes that *whistleblowing* should have been clearly defined. Arguably there is no single definition of who qualifies as a whistleblower, however a working definition is necessary. Elements that play a role in reaching a comprehensive definition include timing, form of disclosure, previous knowledge on the matter by the recipient, disclosure of information through a conduit. For instance, in case of a disclosure made to a colleague about an issue, who reports to the relevant authorities, the question is whether the individual has blown the whistle himself or herself. In respect of timing, for instance, an individual could be worried about something, and makes a disclosure to the authorities sometime later, the question arises when did he or she blow the whistle and who did he or she report to.

Furthermore, there should be a definition for a *whistleblower*. Questions that bear on this definition include limitations to the scope of individuals covered ie. the issue of whether anybody could blow the whistle or whether legal entities themselves could make a voluntary disclosure. Furthermore, the survey should have made it clear that a person is a whistleblower if he or she makes an internal report

too (for instance, an employee reporting to his employer). An individual who engages in external reporting is clearly blowing the whistle. Eligibility for protection is another issue to be considered in providing a definition of whistleblower. For instance, shall an individual qualify as whistleblower only if he or she is eligible for protection, or are *protected whistleblowers* type of *whistleblowers*. In respect of questions that concern the features included in the legislative framework, CFE opines that it is not always possible to protect whistleblowers from discriminatory or retaliatory acts by individuals at a managerial position at a whistleblower's place of employment. It is only possible to sanction managers who behave in certain way (or allow their employers to do so), and/or to require employers to compensate whistleblowers if they are unfairly treated at work.

### **Anonymity**

In respect of availability of anonymous reporting for whistleblowers, anonymity should have been clearly defined for the purposes of the survey. Presumably what is meant is complete anonymity which means that nobody will ever know the identity of the whistleblower. Complete anonymity requires complex and expensive reporting mechanisms. For instance, if an organisation pays an outside third party provider to receive whistleblowing reports and to feedback to whistleblowers.

### **Confidentiality**

With regards to the issue of confidentiality for the whistleblowers and persons accused of wrongdoing by the whistleblower, confidentiality should have been defined. Presumably what is meant is that a very limited number of people will ever know the identity of the whistleblower or the identity of the accused. Anonymity should not have been mentioned in this context, as it is different. Also, it would have been better if separate questions had been posed about the confidentiality of whistleblowers and the confidentiality of accused persons. Linking the two gives the impression that if the whistleblower's identity is kept confidential than the accused's identity should automatically also be kept confidential, and vice versa. Views should have been sought on different approaches being taken towards whistleblowers and those they accuse.

### **Final remarks**

The direction taken by the European Commission towards improved transparency and framework for protection of individuals who are disclosing information on already committed fraud or abuse as well as threat to the public interest is laudable. CFE recognises that whistleblowing is a form of civic engagement and a reflection of the freedom of expression, which is a fundamental right protected by the EU Charter of Fundamental Rights and the European Convention of Human Rights and Fundamental Freedoms. By doing so, the EU needs to take into account the best international standards and the jurisprudence of the European Court of Human Rights. Considering the complexities of this policy area, it is vital to provide clear definitions in the course of the policy options surveying and the subsequent analysis. Such a clarity would feed into a comprehensive and pertinent stakeholder input and involvement.

Please do not hesitate to contact us for further information related to the CFE remarks.

**With my best wishes,**

**Wim Gohres**



**Chairman of the CFE Professional Affairs Committee**