

**CFE Professional Affairs Committee Opinion Statement PAC 2/2017 on the European
Commission public consultation on protection of whistleblowers**

Submitted to the European Commission on 17 May 2017

CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the European tax advisers. Our members are 26 professional organisations from 20 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe. CFE is registered in the EU Transparency Register (no. 3543183647-05).

We will be pleased to answer any questions that you may have concerning the CFE comments. For further information, please contact Wim Gohres, Chair of the CFE Professional Affairs Committee wim.gohres@nl.pwc.com or the CFE Brussels Office brusselsoffice@cfe-eutax.org +32 2 7610091, Avenue de Tervuren 188A, Brussels.

CFE, the European association of tax advisers, is pleased to submit comments to the European Commission public consultation on whistleblowers' protection. In addition to our response to the European Commission questionnaire, this position paper in the form of an Opinion Statement further clarifies our remarks.

Executive Summary

CFE acknowledges the recent initiatives at EU level (European Parliament, European Commission) for protection of whistleblowers who disclose information that is considered to be in the public interest and is aimed at protection of European Union's financial interests. CFE supports transparency and policies that strengthen the integrity of the tax systems and encourage voluntary compliance among taxpayers, in line with EU's ambitions of creating a more dynamic and competitive Single Market.

In respect of the European Commission whistleblowers' public consultation, CFE supports the Commission's aim to conduct a comprehensive impact assessment and a targeted stakeholder consultation before reaching a decision on the appropriate measures to be taken (legislative or non-legislative). In respect of the initiatives to protect whistleblowers who disclose information that belong to private entities, CFE draws attention to the need to strike the right balance between the objectives of these policy initiatives, and the danger not to encourage false reporting or breach of the confidentiality principle that can seriously undermine the relationship between the client and the tax advisor. Failure to acknowledge the specificity of the relationship between tax advisers and clients may damage the trust in both tax advisers and in the public institutions in case of publishing taxpayers' confidential information.

The protection of whistleblowers should not be extended to individuals who fail to follow internal disclosure procedures. In cases where internal codes of conduct are in place, such individuals are in breach of the client confidentiality principle by way of disclosing sensitive taxpayers' information to the press or the general public, whereby the relevant quality compliance/ ethics teams have not been duly informed prior to the disclosure.

Background

As noted in the European Commission's inception impact assessment of 26 January 2017 on horizontal or further sectoral EU action on whistleblower protection, and the European Parliament Report on the role of whistleblowers in the protection of EU's financial interests of 20 January 2017 (2016/2055/INI) (De Jong Report), as well as different reports of the OECD (ie. *Committing to Effective Whistleblower Protection*, 2016), Transparency International and other international bodies, the protection of whistleblowers' reporting who are disclosing information in public interest that amounts to wrongdoing gained significant traction. The European Union has committed to protecting the whistleblowers in both the public and the private sector, including revelation of cross-border fraud and irregularities related to protection of European Union's financial interests.¹ The European Parliament on the other hand has called upon the European Commission to proceed with establishment of comprehensive whistleblowers' protection framework at EU level, specifically where EU funds are concerned.²

In such a context, where the European Commission is following up on these motions, the CFE welcomes the public consultation as an effective instrument for the European institutions to gather appropriate feedback from all affected parties, and specifically the targeted impact assessment study of most relevant stakeholders.

General remarks

As matter of principle, CFE welcomes the direction taken by the European Union towards improved transparency and framework for protection of individuals who are disclosing information on a threat to the public interest. As noted by the European Commission, a legislative framework for whistleblowers' protection already exists in some Member states, and partially at EU level.³ Protection of whistleblowers organised in a proper manner could serve legitimate public policy interests, such as targeting and reducing corruption, abuse of public funds, improving transparency and strengthening the integrity of the system.

In order to strike the right balance, CFE welcomes the Commission's aim to conduct a thorough impact assessment in order to gather input, specifically as to the scope of the action at EU level (legislative or non-legislative). Additionally, avoiding overlap with existing EU legislation that accords protection to whistleblowers, subsidiarity aspects in respect of the rules already implemented by certain Member states, as well as the proportionality of legislation that might affect purely domestic situations in such a context are equally relevant. At this stage, it seems appropriate to limit the future proposals to cases involving a cross-border element aiming to protect the financial interests of the European Union, i.e. corruption, embezzlement of European Union funds or breach of EU State aid rules. Both legislative and

¹ Communication of the European Commission of 5 July 2016

² Messerschmidt Report, European Parliament, 21 October 2017, Opinion of the Committee on Constitutional Affairs, point (8)

³ Cf. Articles 37 and 38 of the 4th Anti-Money Laundering Directive

non-legislative proposals that might be horizontal or sectoral in nature ought to respect the principle of subsidiarity.

Objectives of the policy initiative- drawbacks

With respect to the objectives of the policy initiative, CFE would like to comment on some drawbacks of the rules that might impose legal obligation on private sector entities towards whistleblowers. CFE's comment are related on the policy aspects of relevance for the tax advisers.

As rule, tax advisers adhere by strict ethical codes of practice and standards, which often encourage speaking up against practices that might undermine the integrity of the tax advisory entity, to identify misconduct within the company, or to report a wrongful behaviour. Such a protection, specifically in large advisory firms, is guaranteed by dedicated risk and quality teams who are responsible to address the concerns and the disclosures made in the course of the tax advisory activities.⁴

As a rule, a protection for whistleblowers should not encourage false reporting, reporting to the press where adequate internal procedures or Code of conducts exist, or disclosure of sensitive information in the public domain. The issue of handling of these data, and to whom disclosures are made remains important. The measures should not encourage publication of sensitive tax information, as this could undermine the confidence in the public institutions and the European institutions (i.e. with relation to tax returns, personal income tax information, etc.).

Specificity of the tax adviser– client relationship

CFE considers important that prospective EU proposals acknowledge the specificity of the relationship between the tax advisor and the client, in case tax advisers are affected by future proposals. The sensitivity of this relationship, and the confidentiality of the documents and information provided in the course of this relationship must remain protected. A breach of the confidentiality principle could undermine the relationship of trust that exists between a tax adviser and their client, also leading to serious damage in the reputation of a tax advisory firm. A whistleblower protection scenario thus ought to acknowledge the client confidentiality principle, the specificity of the treatment of confidential documents and the protection of interests of both the tax advisers and the client- the taxpayer. Specifically, where internal Codes of conduct exist, the protection of whistleblowers should not be extended to individuals who failed to follow internal disclosure procedures and breached the confidentiality principle by disclosing to the press, the general public etc. Striking the right balance between these obligations is crucial for the confidence in the tax advisers, and encouragement of false reporting or over reporting for potential rewards or similar benefits unrelated to ethical standards could seriously undermine the provision of tax

⁴ For instance, PwC has adopted and implemented a Code of Conduct and Risk Management Policies that are aims to manage both internal and external expectations in respect of disclosing misconduct or wrongful practices identified by individuals within the firm

advice and the trust of the clients. Additionally, measures for protection of whistleblowers should not encourage 'leaking' of confidential business information in the public domain.

The client confidentiality principle and whistleblowing

With respect to the client confidentiality and the tax advisers, the scope of this right obliges tax advisers and employees of tax advisory firms for that matter that provide tax advice and have access to client confidential information and documents, to treat the information received in the course of their engagement as confidential.⁵ Considering that the client (taxpayer) owns the information or the document that is being handled by the tax adviser, it is a decision of the client whether to release the tax advisor from the confidentiality duty. Hence the importance of striking the right balance in this respect.⁶

Below is a brief summary of the scope of the client confidentiality duty for tax advisers in some European jurisdictions, that might be undermined by proposals which fail to acknowledge the specificity of the relationship between the client and the tax adviser.

The client confidentiality rules for tax advisers are a matter of legislative regulation in the following jurisdictions:

- Austria, Belgium, Croatia, Czech Republic, France, Germany, Italy, Latvia, Malta, Poland and Slovakia

Violation of the client confidentiality rules can be considered a criminal/ administrative offence or misdemeanour in the following jurisdictions:

- Austria, Belgium, Czech Republic, France, Germany, Luxembourg, the Netherlands, Poland and Portugal

The client confidentiality rules are regulated by professional bodies with mandatory membership in the following jurisdictions:

- Luxembourg, Portugal and Romania

The client confidentiality principle is established by professional associations with voluntary membership in the following jurisdictions:

- United Kingdom, Finland, Republic of Ireland, the Netherlands, Russia and Switzerland

⁵ The client confidentiality principle is also encapsulated in the CFE Professional Code and Ethics, as updated at the CFE General Assembly of 20 April 2012, http://www.cfe-eutax.org/sites/default/files/Professional%20Code_20042012.pdf

⁶ The exception to this rule would be the Czech Republic, where a derogation exists for the Czech tax advisers, who may handle information without client's consent, if this is in the client's interest

Some jurisdictions do not have specific confidentiality rules in place, however, client confidentiality may still be protected by general provision of the law, or it may be implied term of the contract between the tax adviser and the client, such as in Greece, Spain and Ukraine.

An upcoming whistleblowers' protection proposal should also take into account relevant case-law of the European Court of Human Rights, specifically *Guja v Moldova*, where the Court confirmed that a disclosure of confidential information cannot be protected where among other criteria, the individual had a recourse to more discrete means to remedy the wrongdoing.⁷

CFE also takes note of the Draft Opinion of the European Parliament's Committee of Employment and Social Affairs of 24 March 2017, where the Committee recalls that in the event of false reporting or false accusations, those responsible should be held accountable.⁸

Ends/

⁷ *Jacob GUJA v. Moldova* (ECtHR, Application No. 14277/04)

⁸ Opinion of the European Parliament's Committee of Employment and Social Affairs of 24 March 2017 on the legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies, 2016/2224/(INI)