

European Commission
DG Justice and Consumers
Unit C2 'Fundamental Rights Policy'
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Sent by email:
JUST-C2-CHARTE@ec.europa.eu

Brussels, 24 May 2017

Subject: Public consultation on whistleblower protection

Dear Ms. Adamo,

We responded to the public consultation on whistleblower protection. This comment letter aims at complementing the answers given in the online consultation. In this respect, we would like to note that the format of certain online consultations of the Commission does not always enable stakeholders to substantiate and explain their responses appropriately. In certain cases, this could generate misunderstandings or misinterpretations.

The comments provided in this letter relate to voluntary reporting ('whistleblowing'), i.e. not for reporting obligations of the accountancy profession such as those laid down in Regulation 537/2014 on specific requirements regarding statutory audit of public-interest entities, Regulation 575/2013 on prudential requirements for credit institutions and investment firms, Directive 2013/36 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, Directive 2009/65 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), and Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

This letter will first touch upon the gaps in existing sectorial legislation, which is applicable to the accountancy profession, and will then turn to the need for a coherent approach for providing 'whistleblower' protection to everyone.

Before doing so, we would like to outline that the term 'whistleblowing' requires to be clearly defined. The notion of 'whistleblowing' in the public debate can cover a wide range of situations. It is therefore important to legislate based on a clear concept of what a 'whistleblower' is.

To provide legal certainty to all, it is also important to consider how different legal frameworks will interact (e.g. the Trade Secrets Directive, professional confidentiality duties, as well as the General Data Protection Regulation).

CLOSING GAPS IN EXISTING SECTORAL LEGISLATION

EU sectorial legislation foresees the establishment of reporting mechanisms for certain accountancy professionals. Audit firms must establish appropriate procedures for their employees to internally report potential or actual breaches of the Audit Directive or Regulation through a specific channel. Furthermore, Member States must establish effective mechanisms to encourage reporting of such breaches to the competent authorities.¹

Similarly, the Fourth Anti-Money Laundering Directive (AML Directive) requires external accountants, tax advisors, and auditors to put in place appropriate procedures for their employees, or persons in a comparable position, to internally report breaches of the national provisions transposing the AML Directive. Moreover, Member States must have effective and reliable mechanisms to encourage the reporting to competent authorities of potential or actual breaches of the AML Directive.²

These existing rules have, however, limitations when it comes to their scope and coherence.

The above-mentioned sectorial legislation only concerns reporting by employees in external audit firms when it comes to breaches of the Audit Directive or Regulation, or by employees in external accountant, tax advisory, and auditor firms for breaches of the AML Directive.

However, both external and internal accountancy professionals are likely to come across situations that they must or want to bring to the attention of the appropriate persons or entities. It is therefore important that both external and internal accountancy professionals are safe to report illegal behaviour.

Moreover, the Audit Directive and the AML Directive require firms to set up appropriate reporting procedures, but do not specify that these should contain provisions for the protection of ‘whistleblowers’ or the rights of the accused person³.

Finally, the current sectorial legislation is not aligned. For example, the Audit Directive requires firms to set up appropriate procedures to allow internal reporting through a ‘specific channel’. On the other hand, the AML Directive requires a “specific, independent and anonymous channel, proportionate to the nature and size of the obliged entity concerned”.

PROVIDING A PROTECTION FRAMEWORK FOR EVERYONE

Apart from specific professions like accountants, everyone working in business or in the public sector can come across situations that appear illegal or against the public interest.

Speaking up when discovering such situations is a matter for every citizen. ‘Blowing the whistle’ can be an ethical choice to stand up to contribute to upholding the rules and to protect the legal interests of one’s organisation (private or public) and of society.

‘Whistleblowing’ is thus about being loyal to the long-term interest of one’s organisation. It is about protecting it from those that endanger it by going around the rules. Such behaviour can threaten an organisation's reputation, financial sustainability, the wellbeing of its employees, the wealth of its shareholders, or the environment in which it operates.

¹ Article 30e, Directive 2014/56 on statutory audits of annual accounts and consolidated accounts, OJ L 158, 27.5.2014.

² Article 61, Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 141, 5.6.2015.

³ On the other hand, the requirements for Member States to set up reporting mechanisms are more detailed.



For example, organisations are estimated to lose around 5% of annual revenues to occupational fraud. Such wrongdoing is most commonly exposed through tips to the organisation.⁴ With the right reporting mechanisms, companies can thus avoid financial and reputational losses and become more successful.

A proper 'whistleblower' framework should therefore foresee:

- a clear definition of its scope, making clear what is understood by whistleblowing and the circumstances in which the framework applies or does not apply
- effective internal and external reporting channels (with a clear reporting escalation process)
- proper investigations of the reports, including where possible a feedback mechanism to inform the whistleblowers of the follow up given (or not) to their report
- protection of the whistleblower whose rights, reputation, financial situation and personal safety ought to be appropriately safeguarded
- protection of the accused person whose rights, reputation, financial situation and personal safety also ought to be appropriately safeguarded
- protection of the rights of the organisation involved

We remain committed to contribute to the ongoing debate on the need for EU legislation on whistleblower protection.

Sincerely,

Edelfried Schneider
President

Olivier Boutellis-Taft
Chief Executive

ABOUT ACCOUNTANCY EUROPE

Accountancy Europe unites 50 professional organisations from 37 countries that represent close to 1 million professional accountants, auditors, and advisors. They make numbers work for people. Accountancy Europe translates their daily experience to inform the public policy debate in Europe and beyond.

Accountancy Europe is in the EU Transparency Register (No 4713568401-18).

⁴ ACFE, "2016 ACFE Report to the Nations on Occupational Fraud and Abuse", available at: <http://www.acfe.com/rtn2016.aspx>