

7 September 2018

ACC Position Paper on the European Commission’s Proposal for a Directive on the protection of persons reporting on breaches of Union Law

The Association of Corporate Counsel (ACC) welcomes the European Commission’s proposal for the protection of whistleblowers. The Association of Corporate Counsel (ACC) is a global bar association for in-house lawyers. ACC has more than 42,000 members in 85 countries, including more than 2,500 members across Europe. As in-house counsel are often responsible for maintaining their companies’ legal and regulatory compliance, ACC members have a vested interest in ensuring that whistleblowers feel safe to report instances of suspected corporate wrongdoings. ACC members are employed by public and private corporations, associations, and other entities that, as an essential component of their compliance protocols, rely on whistleblowers to receive information about potential corporate misconduct.

Tiered reporting: adequate balance of interests with need for specification

Whistleblowing is an important factor for improving, supporting and ensuring legal and regulatory compliance of companies. Internal reporting is crucial for companies to rectify potential wrongdoings inside their business. No other entity is as able to execute change as quickly and thoroughly as the company itself. However, whistleblowing can also unintentionally or unnecessarily harm a company’s reputation if directly reported to the public without sufficient prior substantiation of the allegations. Ex-post evaluation of whether the act in itself was actually wrong and/or whether reporting was indeed in the public interest always comes too late. ACC therefore believes that the proposed tiered approach represents a good balance between the whistleblower’s need for protection and right of expression and the company’s right to protection from harm due to incorrect or inconsequential whistleblower information.

ACC is however concerned that the requirements for reporting outside of internal channels are not sufficiently concrete. The proposal does not define what is meant by “reasonable grounds” to believe the information reported was true (Art. 13), leaving both whistleblowers and companies in an ambiguous situation that will need to be evaluated ex-post by the public Authorities. Additionally, Article 13 allows whistleblowers to bypass the internal reporting channels when they do not work or could not reasonably be expected to work. There should be more guidance as to when internal reporting channels are considered to not work and therefore justify government or public disclosure. Greater clarity around these definitions in the proposal will give whistleblowers greater confidence that they are protected and put companies on notice regarding expectations for their internal reporting channels.

Legal Professional Privilege: necessary across the EU for whistleblower protection

Compliance is boosted by setting up an environment where free, honest and trusted talks between in-house lawyers and business managers and employees are facilitated. Without accessible, confidential legal advice from in-house counsel, companies are far less likely to discover legal violations or report those violations to authorities once discovered.

In many EU member states, in-house counsel enjoy similar legal professional privilege (or professional secrecy) as their outside counsel counterparts.¹ Applying privilege in the context of an internal investigation allows in-house counsel to quickly and more effectively investigate alleged wrongdoings, because employees can discuss the facts in a confidential setting. In a 2016 ACC survey, 52 percent of European in-house lawyers in countries with legal privilege for in-house lawyers said that not having the privilege would negatively affect their companies' compliance efforts.

Experience in other countries with whistleblower programs has shown that employees prefer to report their suspicions of misconduct internally. They want to know that their suspicions will be investigated by those competent to do so and who understand the context and the reality of the company's business and industry. But when there is an absence of privilege for in-house counsel, the quality of an investigation may suffer as employees are reluctant to share information and/or the company does not have the resources to hire outside counsel to investigate the whistleblower's tip. Moreover, having to hire outside counsel to investigate every whistle-blower tip is not a practical solution. In-house counsel also play a key role in ensuring that the learnings from any such investigations are reflected in the company's compliance program moving forward, improving not only the results of compliance programs, but also preventing future non-compliant conduct.²

For this reason, it is important to preserve the ability of in-house counsel to maintain legal professional privilege protections consistent with their national law, and moreover, create this level of confidentiality where it does not exist to date. The respect for legal professional privilege of in-house counsel across the EU in the case of whistleblower reporting therefore needs to be enshrined both in recital 69 and in Art. 2. We strongly believe this will ensure a higher level of compliance by companies.

¹ Belgium, Cyprus, Germany, Greece, Hungary, Ireland, Malta, Netherlands, Poland, Portugal, Spain and the UK. Several members of the European Economic Area (EEA), such as Norway and Iceland, also provide LPP to in-house counsel. And some other major European countries, such as Switzerland, are considering to apply LPP for in-house counsel.

² Context of the European Commission's Proposal for a Directive on the protection of persons reporting on breaches of Union Law: *"The introduction of robust whistleblower protection rules will contribute [...] to preventing and detecting corruption, which acts as a drag on economic growth, by creating business uncertainty, slowing processes and imposing additional costs."*