

CCBE comments on the Proposal for a Directive on the protection of persons reporting on breaches of Union law

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE regularly responds on behalf of its members on policy issues which affect European citizens and lawyers.

On 23 April 2018, the European Commission presented a package of measures to strengthen whistle-blowers' protection in the EU. The package consists of a Commission Communication and a Proposal for a Directive on the protection of persons reporting on breaches of Union law.

With this paper, the CCBE wishes to share its initial remarks on [the Commission's Proposal for a Directive on the protection of persons reporting on breaches of Union law](#). The CCBE published last year a "[Submission on whistle-blowing protections](#)" within the framework of the Commission's public consultation on whistle-blowers' protection. The importance of preserving the professional secrecy/legal professional privilege is highlighted in the statement. The observations made should also be considered in the context of the current proposal and the following general remarks are based on that previous statement.

1. **General remarks**

The CCBE welcomes the Commission's new proposal and accepts the general principle that those who selflessly reveal information for the public benefit should be protected in their employment, provided the public benefit outweighs any harm which may result from the disclosure and their actions are legal. However, as mentioned above, **the CCBE wishes to underline the importance of preserving the rights of all those seeking legal assistance to the protections of professional secrecy/legal professional privilege in their dealings with lawyers, as a cornerstone of the rule of law.**

Therefore, it can never be the case that the universal public benefit of professional secrecy/legal professional privilege can be prejudiced in the interests of individual employment protection from whistle-blowing (in a similar way that some human rights are evaluated as prevailing over others). In order to uphold the rule of law, it is essential that the confidentiality attached to the relationship between lawyers and their clients is protected.

Professional secrecy is an obligation that is protected under sanctions in the criminal law codes in many Member States. It is important to note that professional secrecy cannot be used to protect or disguise illegality or to circumvent the law. Similarly, the scope of legal professional privilege does not extend to cover a case where the lawyer is engaged with the client in the furtherance of a criminal activity.

2. Specific remarks

The main issue which the CCBE would like to address at this stage concerns professional secrecy/legal professional privilege and, in particular, **Recital 69** of the proposal:

(69) It should not be possible to waive the rights and obligations established by this Directive by contractual means. Individuals' legal or contractual obligations, such as loyalty clauses in contracts or confidentiality/non-disclosure agreements, cannot be relied on to preclude workers from reporting, to deny protection or to penalise them for having done so. At the same time, this Directive should not affect the protection of legal and other professional privilege as provided for under national law.

Given the importance of the principle, the CCBE stresses that the proposal needs to exclude more clearly the information protected by professional secrecy/legal professional privilege from its scope of application (unless a breach is required by law, e.g. in the case of money laundering). Even though the aim of Recital 69 is also to prevent such information from being disclosed or prejudiced because of whistle-blowing, this cannot be considered as enough, as recitals and articles do not have the same legal value.

Therefore, the last sentence of Recital 69 should be included in Article 2 of the proposal (personal scope) and amended as including both the obligations of professional secrecy and legal professional privilege. It can be noted that the same approach is adopted in the 2014 Council of Europe Recommendation on Protection of Whistle-blower, in which the Commission's proposal is also founded.¹ According to the CCBE, there is no reason why Recital 69 could not be incorporated in Article 2 of the proposal.

Lawyers could play a significant role in protecting the reporting persons and the persons concerned by whistle-blowing in the context of the directive. Professional secrecy/legal professional privilege would guarantee that the rights of those persons to obtain legal advice, assistance and representation would be adequately protected.

3. Final remarks on translation

Finally, the CCBE would like to make some observations on the translation of the proposal.

As a general remark, it should be ensured that different translations do not leave room for different interpretations. Regarding the current proposal and the last sentence of Recital 69, it can be observed that the translations of that sentence diverge (the verb "should" has been translated mostly in conditional, but not in all translations). For example, in the French translation, instead of having "-- *Dans le même temps, la présente directive **ne devrait pas** affecter la protection du secret professionnel et des autres privilèges professionnels prévus par la législation nationale*", the wording could be : "*Cette directive **ne devra pas** affecter--*".

This is a question of legal certainty which needs to be taken into consideration.

¹ **Recommendation CM/Rec(2014)7** adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum. According to Principle (6) on personal scope: "*These principles are without prejudice to the well-established and recognised rules for the protection of legal and other professional privilege*".