



To: Director-General of DG Justice and
Consumers,
Ms Tiina Astola

Brussels, 29 May 2017

Dear Ms Astola,

Re: PwC Response to Public Consultation on Whistleblower Protection

PwC International Ltd (PwC), on behalf of the PwC network, welcomes the opportunity to respond to the European Commission's public consultation on whistleblower protection.

We understand that the objective of the Consultation is to collect information, views and experiences on the benefits and drawbacks of whistleblower protection; on the elements that are important for effective whistleblower protection; on problems arising both at national and EU level from gaps and weaknesses of existing whistleblower protection and the divergences of protection across the EU; as well as on the need for minimum standards of protection.

With the above in mind, to be as helpful as possible in our response and to provide you our viewpoint in a concise, direct manner, we would like to share our general observations by way of a public letter.

By way of summary of our position, PwC believes that constructive, safe and balanced ways for whistleblowers to provide information in an appropriately protected manner should be considered and developed, distinguishing between whistleblowing arrangements within organisations and the rights of individuals to disclose information externally. We support the development of this important distinction within the existing framework, and principles, already articulated in respect of whistleblowing and whistleblower protection, notably by the European Court for Human Rights (ECHR), the Parliamentary Assembly and Committee of Ministers of the Council of Europe.

Few market participants question the need for external whistleblowing in certain specific circumstances. However, these are by definition circumstances where the internal arrangements have failed. The primary goal should be to encourage the development of strong internal whistleblowing arrangements; the secondary goal, where this fails, should be to ensure that measures are in place in the EU that strike a clear and appropriate balance between the benefits of external whistleblowing and the commercial importance of securing the confidentiality and legal protection of business data.

PricewaterhouseCoopers International Limited
1 Embankment Place
London WC2N 6RH
T: +44 (0)20 7583 5000 / F: +44 (0)20 7822 4652



The current debate in Europe

We agree with the EC assessment that legal standards and protections for whistleblowing differ across the Member States of the European Union and internationally.

We note that important steps have already been taken at the European level to establish a framework for whistleblowing and whistleblower protection. Highlights, in this regard, include:

- Article 10 of the European Convention on Human Rights confirms the rights of all to freedom of expression.
- The Parliamentary Assembly of the Council of Europe, in its Resolution 1729 (2010) on the protection of whistleblowers, recognised the importance of whistleblowing. It invited Member States to review their legislation concerning the protection of whistleblowers, keeping in mind the following guiding principles:
 - that whistleblowing legislation should be comprehensive,
 - that whistleblowing legislation should focus on providing a safe alternative to silence,
 - as regards the burden of proof, it shall be up to the employer to establish beyond reasonable doubt that any measures taken to the detriment of a whistleblower were motivated by reasons other than the action of whistleblowing;
 - the implementation and impact of relevant legislation on the effective protection of whistleblowers should be monitored and evaluated at regulator intervals by independent bodies.
- In Recommendation 1916 (2010) Protection of “Whistleblowers”, the Parliamentary Assembly of the Council of Europe also positively referred to the guiding principles stated in Resolution 1729 (2010).
- On 21 July 2011, the ECHR in *Heinisch v. Germany* (28274/08) established a balancing test between the employer’s interest to protect its reputation and the employee’s right to freedom of expression under Article 10 of the European Convention of Human Rights. In doing so, the ECHR considered that the following criteria need to be considered in assessing an act of whistleblowing:
 - Whether the disclosed information is in the public interest.
 - Whether the employee had alternative channels for making the disclosure; for example, internal channels.
 - The authenticity of the disclosed information.



- Whether the applicant acted in good faith.
 - The detriment to the employer; for example, the employer's business reputation and commercial interests.
 - The severity of the sanction against the employee imposed by the employer for the act of whistleblowing.
- On 30 April 2014, there was a Recommendation by the Committee of Ministers of the Council of Europe to Member States on the Protection of Whistleblowers (CM/Rec (2014)7). This Recommendation sets out a series of principles to guide Member States when reviewing their national laws regarding whistleblowing or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems; including protection against retaliation.

We believe all of these are helpful contributions to the debate and can inform the development of a clear and appropriate EU-wide framework. As noted above, we think this framework should distinguish clearly between the rights and obligations of all parties in cases of internal and external whistleblowing. In common with other aspects of corporate governance we think it is also important that the framework for whistleblowing arrangements within organisations should be sufficiently flexible and principles-based to cater for the whole range of different circumstances and regulatory and legal contexts. For instance, the balancing test in *Heinisch v. Germany* considered situations where an employer is a regulated entity (for example, a bank) subject itself to professional secrecy and cases where the whistleblower is himself in breach by committing a criminal offence to get the information.

Further policy considerations and future directions

Our purpose at PwC, “to build trust in society and solve important problems”, is founded in our heritage of creating trust in the capital markets (for example, by auditing financial accounts) and providing advice to help public, private and voluntary organisations be successful (see, for example, from PwCIL: <https://www.pwc.com/gx/en/about/ethics-business-conduct/code-of-conduct.html> and from PwC's UK firm: <http://www.pwc.co.uk/who-we-are/corporate-sustainability/our-purpose.html>).

With our purpose in mind, PwC is of the view that society's interests, the needs of the capital markets, public, private and voluntary organisations and those who own, manage and work for these organisations should all be considered and balanced if effective whistleblowing mechanisms, both internal and external to organisations, are to be found. We believe that constructive, safe and balanced ways for whistleblowers to provide information in an appropriately protected manner should be considered and developed.

In response to the EC's consultation, we would therefore highlight the following:

- Whistleblowing is, by definition, an act which takes place in a contested environment. It is important that whistleblowing legislation and associated protections be clear as to where



protection begins and ends, and the specific criteria to be applied. This can only be in the interests of all concerned.

- We note that the Parliamentary Assembly of the Council of Europe, in its Resolution 1729 (2010) in setting out guiding principles for the protection of whistleblowers included the recommendation that whistleblowing legislation put into place appropriate *internal* whistleblowing procedures.
- Whistleblowing should be made internally into an environment, where the whistleblowing is protected and able to be investigated and assessed in constructive and independent manner fair to the whistleblower and the subject of the whistleblowing. Equally, where internal whistleblowing may fail, measures should be in place in the EU that strike a clear and appropriate balance between the benefits of external whistleblowing and the commercial importance of securing the confidentiality and legal protection of business data (for example, by disclosure to a defined, independent government agency).
- The appropriate education of staff within companies, to ensure that they understand their whistleblowing rights as well as obligations, would further assist and support a responsible whistleblowing process.
- An effective whistleblower and whistleblower protection mechanism should consider the broader imperative of transparency by governments of the systems which they administer as in some cases more transparency about these systems would give society confidence in how they are applied. This may obviate the need for the whistleblowing of otherwise legally protected information, such as the private records of individuals.

We would be pleased to discuss the points raised above in a follow-up conversation with the unit in DG Justice and Consumers. If you wish to discuss any aspect of this response in more detail, please contact me at Jan.e.McCahey@pwc.com.

Yours faithfully,

A handwritten signature in black ink that reads 'Jan McCahey' in a cursive, flowing script.

Jan McCahey
Global Regulatory Leader

PwC IL is registered under number 60402754518-05 in the EU Transparency Register