

## **The new Directive on whistleblowers' protection: Any impact on taxation?**

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On 16 April 2019 the European Parliament (EP) voted in favour of the proposed Directive on the protection of persons reporting on breaches of Union law (hereinafter 'the Directive').<sup>1</sup> While the Directive remains to be adopted by the Council, it seems very likely that after the overwhelming majority it enjoyed at the EP, it will be adopted as it stands.

In contrast to the EU, the US has long in place a protective whistleblowers' programme. In this context, the IRS offers whistleblower programmes where the informant can get a share of the recovery, that is, he is rewarded for revealing the information. Under the same programmes the whistleblower can proceed anonymously, in that his name and existence are concealed. Several notorious US (-related) scandals have become known thanks to whistleblowers, including the UBS tax evasion controversies, the Enron and the Caterpillar scandals.

Regardless one's views as to the value and appropriateness of protecting whistleblowers, two facts remain: a) before the Directive, no protection at EU level was afforded to whistleblowers. Domestic legislation in the EU would be sectoral (i.e. relating to labour law, financial law etc.). b) Several 'tax scandals' have come into light thanks to whistleblowers' actions. Some of these include the infamous Luxleaks as well as the Panama papers. The treatment of the whistleblower depended eventually on national law and the non-binding Guja criteria established by the ECtHR.

The revelation of these scandals led to a pressing need to adopt an EU-wide protective framework for whistleblowers. The Directive is in that regard and in many respects innovative, but far from flawless.

The relationship between the protection of the whistleblowers and taxation is obvious. The more protection, if not incentive, is granted to whistleblowers, the more likely it is that they will come forward with information related to tax evasion or tax fraud. As Dourado points out, whistleblowers should be protected when revealing tax evasion (tax fraud or other tax crimes), however, it remains

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (SWD(2018) 116 final and 117 final), 23 April 2018.

doubtful whether whistleblowers should also be protected when revealing tax avoidance or aggressive tax planning conduct.<sup>2</sup> In the former scenario, the whistleblower would be required to distinguish between the two different types of conduct; the ‘reportable ones’ (tax evasion and tax fraud that would qualify as crimes) and the ones that would not offer him the requisite protection (tax planning, aggressive tax planning and tax avoidance).

The distinction is not immaterial and it often becomes confusing. According to the stakeholder consultations conducted by the Commission, 93% of the respondents agreed that whistleblowers should be protected in the area of the ‘fight against tax evasion *and tax avoidance.*’ (*emphasis added*) The proposed Directive provides for a combination of the two lines of reportable activities. This Directive ‘provides for protection against retaliation for those who report *on evasive and/or abusive arrangements* that could otherwise go undetected, with a view to strengthening the ability of competent authorities to safeguard the proper functioning of the internal market and remove distortions and barriers to trade that affect the competitiveness of the companies in the internal market, directly linked to the free movement rules and also relevant for the application of the State aid rules.’ (*emphasis added*)

In specific, persons reporting on ‘breaches relating to the internal market, as referred to in Article 26(2) TFEU, as regards acts which breach the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law’ should be protected by the common minimum standards laid out in this Directive. The Directive, indeed describes abusive practices in this passage, which correspond to tax avoidance practices, in that the tax practice or scheme at issue relies on the literal interpretation of the law but it circumvents its purpose. Ultimately, the core concept of tax avoidance is linked to the possibility to obtain a tax advantage ‘by exploiting the friction between the form, which [the taxpayers] choose from those that do not trigger the liability to tax, and the substance, which is akin to events that would otherwise trigger the liability to tax.’<sup>3</sup>

Some preliminary questions arise with regard to the aforementioned provision and the impact of the Directive in its entirety on taxation: a) How would the whistleblower, who can be anybody from an employee to a facilitator and trainee be able to distinguish these ‘abusive tax practices’? b) The

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<sup>2</sup> Ana Paula Dourado, ‘Whistle-Blowers in Tax Matters: Not Public Enemies’ 46 (5) *Intertax* (2018), p. 424.

<sup>3</sup> Pasquale Pistone, ‘The Meaning of Tax Avoidance and Aggressive Tax Planning in European Union Tax Law: Some Thoughts in Connection with the Reaction to Such Practices by the European Union’ in A. P. Dourado (Ed.) *Tax Avoidance Revisited in the EU BEPS context* (IBFD, Amsterdam 2017)

whistleblower will be afforded protection for reporting any breaches of EU law. Such breaches in the field of taxation, would cover, in principle, the content of the existing Directives in EU tax law, notably (but not only) the DACs and the ATAD. Two possibilities arise here: 1) that the whistleblower reports something that should be reported to the tax authorities by the undertakings themselves (for instance under DAC 2 and DAC 4) or by intermediaries (DAC 6). In such a scenario, the risk of over-reporting, over-disclosure and an overflow of information to the tax authorities would arise. This problem would become even more evident in lack of an intermediary overseeing EU institution that could/would clarify questions as to the objective scope of the Directive. 2) that the whistleblower reports something that does not fall within the realm of EU (tax) law neither in terms of 'primary' nor in terms of secondary law. While good faith and certain objective knowledge are not prerequisites in the attribution of the whistleblower status and the protection that comes with it, one may wonder whether in this scenario the whistleblower would be protected if he mistakenly reported something that he perceived as a breach of EU tax law and/or an abusive practice. The lack of a commonly accepted definition of what constitutes (tax) abuse as a general principle of EU law would only exacerbate the problem.

I believe that the Directive constitutes one of the last elements of a long and growing secondary legislation on exchange of information. It broadens the subjective scope of reporting persons; now almost anybody can report any breaches of EU (tax) law either via using internal channels (within the company), or external channels (going directly to the tax authorities) or eventually and under conditions, publicly disclose the alleged breach. In terms of objective scope, in principle, one of the big questions remains whether the Directive has anything to add to the information to be sent to the tax authorities under DAC 6, which has the widest scope of all in that covers potentially aggressive tax planning schemes, as those are described in a number of hallmarks. I doubt anything beyond the disclosure requirements of DAC 6 would be covered by the whistleblowers' Directive. In this sense, the benefit remains in the subjective scope and the potential that information that should have been reported under the DACs and has not, might be disclosed by a new set of people. Whether the non-risk of retaliation suffices as an incentive to do so and whether the tax authorities will be confronted with an overflow of often duplicated or useless information are (only) two of the flaws of the Directive.