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Finance for Europe

Consultation response

Proposal for a Directive of the European Parliament and of the Council on the Protection of Persons Reporting on Breaches of Union Law

22 June 2018

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on **the Proposal for a Directive of the European Parliament and of the Council on the Protection of Persons Reporting on Breaches of European Law** (the "Proposed Directive"). AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

- AFME is strongly supportive of measures to encourage employees and other individuals to speak up where they suspect unlawful activities or abuse of law, confident that their concerns will be considered and that there will be no personal repercussions.
- Personal scope: we suggest that careful consideration is given to whether it is necessary to include suppliers, and that it is not necessary to include shareholders, given that they have other methods of redress and there is low risk of them suffering retaliation.
- Entity scope: We request confirmation that this Directive also covers all EU institutions and international and intergovernmental organisations based in the EU.
- Channels: There should be no restriction on whether reporting parties report internally or externally to the competent authority (other than reasonably to believe that the information is true). Entities should be required to advertise both internal and external (competent authority) channels as part of their whistleblowing policy. Disclosure to the public should be subject to reasonable parameters. There should be no requirement to provide physical meetings with reporting parties. Entities should be able to use third party providers or group-wide whistleblowing arrangements, irrespective of where these may be based.
- Confidentiality and anonymity: AFME is strongly supportive of protecting the confidentiality of reporting parties. However we note that there can be practical challenges for implementation, such as when conducting a full and thorough investigation leads to concerned or other persons being able to infer the identity of the reporting party. There should also be ability for reports to

be made anonymously, which is not currently the case in all Member States, as this would be yet another factor in encouraging reports to be made. Consistency across the Union would be welcome here, even though anonymous reports can be harder (or in some cases impossible, where insufficient information is provided) to investigate.

- Feedback: Careful consideration should be given to any requirement to provide feedback to a reporting party on the outcome of their report. There are likely to be situations in which feedback cannot reasonably be shared with the reporting person, either in detail or at all. In addition, the imposition of timeframes may be incompatible with longer or more complex investigations.
- Legal basis: We request clarity as to how this Directive interacts with other Union or national laws. We appreciate that the General Data Protection Regulation (GDPR) is covered under Article 18 but bank secrecy, for example, is not.

Detailed Comments

Recitals

Recital 1: AFME requests clarity as to what *"in contact with [an organisation]"* means in the context of the scope of this Directive. As noted in our comments under Article 2 below, careful consideration should be given to which individuals are covered.

Recital 6: As noted under Article 4 below, we assume that all EU institutions and international and intergovernmental organisations based in the EU would be subject to this Directive. This would fit with the Recital's commitment to tackling breaches of Union law in a broad spectrum of activities. We request confirmation that this is the case.

Recital 27: Further to our comments under Recital 1 and Article 2 on the personal scope of the Directive, we are concerned by the inclusion of shareholders. It is unlikely that retaliation against a shareholder who blew the whistle would be possible in the same way as against an employee, for instance, as the relationship between the reporting party and the entity or concerned person(s) would be different. Any attempt at *"blacklisting or damage to their reputation"* would be covered by existing libel laws. Shareholders would therefore fall under the statement in Recital 24 that *"where there is no such work-related power imbalance…there is no need for protection against retaliation"*. In addition, they may raise concerns via the entity's general meeting.

Recitals 40, 47, 54 and 63: AFME is extremely concerned by the suggestion that some individuals may be required to report internally to be protected by the Directive. As outlined in our comments on Article 4(2) and 13(2), this is likely to discourage reporting. In addition, Recital 47 states that *"persons who are considering reporting breaches...should be able to make an informed decision on whether, how and when to report"*, which would appear to support a free choice between internal and external channels. This language is echoed in Recital 54. While we would encourage internal reporting where possible, we believe that reporting parties should be able to make their own decision as to whether this is the most appropriate channel or whether to report to a competent authority and that entities should be required to advertise both of these internal and external (competent authority) channels as part of their whistleblowing policy.

Recital 43: We support the reference to use of third parties in providing whistleblowing channels. As noted under Article 4 below, we would welcome an explicit reference to this in the Articles of the Directive.

Recital 49: As noted in our comments under Article 5(1)(d), Article 6(2)(b) and Article 8(2)(c) below, we strongly advise that feedback should only be provided to the reporting party *"where feasible and appropriate"*. There are likely to be situations in which the progress or outcome of the investigation is highly sensitive, and cannot be shared with the reporting person, or in which the report has been made

anonymously and the reporting party cannot be contacted. This would fit with the statement in Recital 46 that feedback should only be given *"as far as such information would not prejudice the enquiry or investigation or affect the rights of the concerned person"*.

Recital 50: In addition to the above, the timeframe in which feedback should be given is likely to be problematic. In a complex and sensitive investigation, there may not be resolution within three or six months, meaning that any feedback would be limited to an acknowledgement of the report. The Recital also seems to contradict the definitive three-month timeline given in Article 5.

Recital 62: We suggest that the wording of the first sentence is amended to "Generally, reporting persons", in order to avoid any confusion with legal provisions. We then propose, in accordance with our comments on reporting hierarchies above, that the sentence continues *"reporting persons should be encouraged to first use the internal channels"*, as we do not believe that restrictions should be placed on whether an individual must report internally first or may report to the competent authority. We agree that reasonable parameters should be placed around disclosure to the public, as set out in the Articles (subject to our further comments on these below).

Recital 65 refers to "indirect retaliation" towards family members. This contradicts Article 14 which refers to retaliation "against reporting persons". It is arguable that taking action against a reporting person's family member could constitute retaliation against the reporting person in any event. But we consider that protection from retaliation should be limited to the reporting person, and perhaps immediate family members who work in the same organisation as the reporting person. Recital 69: As noted below under Article 10(g), it is unclear how this Directive relates to other laws etc within the Union. Does it prevail in case of a conflict, or not?

Recital 70: AFME agrees that reporting parties should be protected from any retaliation in relation to their report. However we note that there can be practical challenges for maintaining the confidentiality of the report, such as when conducting a full and thorough investigation leads to concerned or other persons being able to infer the identity of the reporting party.

Article 1: Material scope

As explained in our comments under Article 3 below, we suggest that scope of the Directive as currently drafted causes some confusion. We suggest that Article 1(a) is reworded to define the scope as: *"actual or potential breaches falling within…"* and that the definition of 'breaches' under Article 3(1) is removed.

Article 2: Personal scope

AFME is concerned by the inclusion of shareholders within the scope of this Directive. Shareholders are not generally included in existing legislation on whistleblower protection, which usually focuses on employees and those of a comparable status, such as consultants working within the business. Shareholders should be able to raise their concerns through other means such as general meetings. As noted in our comment on Recitals 27 and 24, shareholders would fall under the statement in Recital 24 that *"where there is no…work-related power imbalance…there is no need for protection against retaliation"*.

We would also suggest that careful consideration is given to the inclusion of the wide-ranging term of "*suppliers*" within the scope of the Directive. Whilst we support the idea that whistleblowing channels should be available to a broad range of individuals, we are concerned about how this is intended to apply in practice. In particular, the Explanatory Memorandum states on page 10 that the Directive is intended to capture individuals who *"…have privileged access to information on breaches"*, which would not apply to many suppliers, for example those who are not pivotal to an entity's activity (e.g. retailers of office supplies). The protection against retaliation under Article 14 would also not be relevant to this category. We therefore suggest that suppliers should be informed of the available reporting procedures, perhaps through contractual documentation, but that it should not be necessary to extend the remaining

protections in this Directive to suppliers as a category as suppliers should have contractual and other remedies available to them.

Finally, we note that if the reporting person does not reside within the Union, it is not entirely clear how full protection could be offered to them. There may be conflicting legal provisions in their home jurisdiction (for example, on whistleblowing itself or in other areas such as data protection), or they may reside in a jurisdiction which does not have any such provisions.

Article 3: Definitions

AFME suggests that definition given for "*breaches*" is potentially ambiguous. We understand that it is intended to be directly linked to the list of legislative acts in the Annex, however as drafted it could be interpreted that "*the scope referred to in Article 1*" is broader than, rather than defined by, the content of the Annex. We suggest that this could be addressed by removing the definition given in Article 3(1), which refers back to Article 1, and instead simply rewording Article 1(a) to define the scope as: *"actual or potential breaches falling within…"*.

Under Article 3(9), it would be helpful if the Commission could clarify which type of 'legal person' the Directive is intended to capture. For instance, while it would make sense to capture individuals who provide consulting services via their own service company, this may not extend to larger corporations, which have other forms of redress such as litigation or reports to competent authorities.

Regarding the definition of "*work-related context*" in Article 3(10), it would be useful to clarify whether this applies to the content of the report, or also to the context in which the reporting person becomes aware of the information that leads them to report.

We suggest that Article 3(12) is amended to *"on the grounds of the internal or external reporting, or public disclosure"*. The first amendment creates the necessary causal link between the reporting and the retaliation. The second amendment would align it with Article 3(8) and Article 13(4) which refer to individuals blowing the whistle by such means. It is also unclear whether the definition of "retaliation" includes "indirect retaliation" towards family members as referred to in Recital 65.

Article 4: Obligation to establish internal channels and procedures for reporting and follow-up of reports

Under Article 4(1) we request clarification that, where appropriate, the requirement to establish internal channels and procedures for reporting may be complied with at a group level, rather than an entity level. For global groups, in order to provide consistency for employees and to ensure that reports are dealt with by an experienced team, it may be appropriate that a single internal channel is provided, often run by the group's head office, which may or may not be within the Union. Provided that this centralised channel meets the requirements of the Directive, we request that this is specifically allowed within the final text.

We are strongly concerned by the wording of Article 4(2) which suggests that for some individuals, it would be mandatory to make an internal report before making an external report. While we would encourage internal reporting where possible, we believe that reporting parties should be able to make their own decision as to which is the most appropriate channel and that entities should be required to advertise both internal and external (competent authority) channels as part of their whistleblowing policy. Restricting to an internal channel would risk some individuals deciding that they do not feel comfortable making their report, or waiting longer before they decide to do so.

Requiring the use of an internal reporting channel before an external (competent authority) channel will be in direct conflict with existing national requirements for many firms. For example, the UK FCA rules (FCA handbook, SYSC 18.3.6) state that *"reporting to the PRA or to the FCA is not conditional on a report first being made using [an entity's] internal arrangements"*, and that a reporting person may use internal and external channels simultaneously. It is also a contradiction of the 2014 Recommendation of the

Council of Europe on the Protection of Whistleblowers that *"all [reporting] channels are interconnected, without any order of priority, and should be available and protected in an appropriate way"*[1]. Furthermore, individuals will be more likely to raise a report where it is clear that they will be protected by the Directive. For this reason, the related text in Article 13(2) is equally problematic. For instance, Article 13(2)(a) allows for an external report to be made where the reporting person "*first reported internally but no appropriate action was taken in response to the report within the reasonable timeframe*". There is no objective test or definition as to what would constitute appropriate action, particularly where the information that can be passed back to the reporting person about the investigation is limited (see our comments on Article 5 below). Similarly, Article 13(2) (d-e) present a similar problem, as they rely on a judgement made by the reporting person.

While we note the use of group-level channels above, we suggest that some consideration is given to Article 4(3)(c), and particularly whether this applies to companies with no or few employees, such as asset holding companies. If these cannot be included in a group-level policy, we suggest an exemption is made for such entities from the requirement to have individual entity internal whistleblowing channels.

Finally, we understand, and would be grateful for explicit confirmation, that under Article 4(6) all EU institutions and international and intergovernmental organisations based in the EU would be subject to this Regulation.

Article 5: Procedures for internal reporting and follow-up of reports

AFME generally supports the requirement to provide feedback to a reporting person on the progress of an investigation. However, we note that in some cases, for example where the report has been made anonymously, this may not be possible in practice. In addition, there may be circumstances in which the progress or outcome of the investigation is highly sensitive or covered by existing legislation (e.g. employment rights, data protection etc), and cannot be shared with the reporting person (see comments on Article 6 below). Therefore, we suggest that the wording of Article 5(1)(d) is amended to read *"…to provide feedback to the reporting person, where feasible and appropriate, about the follow-up to the report"*. This would fit with the statement in Recital 46 that feedback should only be given *"as far as such information would not prejudice the enquiry or investigation or affect the rights of the concerned person"*.

Furthermore, the timeframe within which feedback is required to be given is extremely short. Investigations into whistleblower reports can be very complex, particularly given the discreet manner in which they must be undertaken. It is therefore likely that, within three months of receiving the report, the investigating entity will not have concluded the investigation and feedback may be limited to acknowledgement of the report and a statement that the investigation is ongoing. The 3-month timescale is also inconsistent with the 3-6 month timescale set out in Recital 50. In addition, we recommend that the more detailed, additional information in Recitals 46 and 49 regarding follow up should be included within the Articles.

Under Article 5(2)(b) we suggest that provision of physical meetings should not be a requirement. As noted under Article 4 above, the provision of whistleblowing channels in large groups is often centralised, for example by running a global whistleblowing programme from the group's head office. Reporting parties may be located in a different location or jurisdiction, making physical meetings logistically challenging and onerous. While physical meetings may be offered, we suggest that the requirement is limited to the written or oral channels of Article 5(2)(a).

Finally, we support the reference in Article 5(2) which specifically makes reference to channels provided by third parties, as this is an arrangement used by many firms, which provides an additional layer of reassurance to the reporting party regarding the confidentiality of their report.

[1] CM/Rec (2014)7, paragraph 61 page 32

Article 6: Obligation to establish external reporting channels and to follow-up on reports

With respect to the procedures for external reporting channels, we refer to our comments on internal reporting channels in Article 5 above (in particular, regarding the definition and scope of "feedback", and the timeframe for providing it), to ensure consistency of approach.

Article 7: Design of external reporting channels

With respect to the procedures for external reporting channels, we refer to our comments on internal reporting channels in Article 5 above (in particular, regarding the requirement to offer physical meetings), to ensure consistency of approach.

Article 8: Dedicated staff members

AFME agrees that there should be staff at competent authorities to whom responsibility is given for handling reports. The Directive should mandate that such staff must have sufficient time and resources to perform this task, but should not suggest or require that this is the extent of their role within the competent authority. It is not proportionate or feasible to require all competent authorities to maintain staff wholly dedicated to handling of whistleblowing reports, given that for some authorities the volume of reports received is likely to be relatively low.

We reiterate our concerns made in relation to Article 5(1)(d) and Article 6(2)(b) on the extent to which feedback must be provided to the reporting person, and suggest that the language of Article 8(2)(c) is similarly amended to include "*where feasible and appropriate*".

Article 9: Procedures applicable to external reporting

AFME has no comments in relation to this article.

Article 10: Information regarding the receipt of reports and their follow up

AFME would like to understand the legal basis for the assertion in Article 10(g) that the Directive takes precedence over *"any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and are not to be involved in liability of any kind related to such disclosure"*. This language is then echoed in Article 15(4). It is unclear what the legal basis could be for such a statement within the Union. Furthermore, our understanding is that this Directive could not automatically override such restrictions on a reporting person who is either (1) based outside the Union or (2) making a report on activity outside the Union. We request additional clarification as to how this Article is intended to apply from a legal perspective.

Article 11: Record-keeping of reports received

We note that the record-keeping requirements set out in this Article must necessarily be performed in compliance with Regulation (EU) 2016/679, the General Data Protection Regulation (GDPR), and suggest that this is clearly stated here, as in Article 18.

Article 12: Review of the procedures by competent authorities

AFME has no comments in relation to this article.

Article 13: Conditions for the protection of reporting persons

We note that Article 13(1) provides protection where the reporting person *"has reasonable grounds to believe that the information reported was true at the time of reporting"* and we simply comment that this may be difficult objectively to assess.

As noted under Article 4, we are strongly concerned by the wording of Article 13(2)(c) which suggests that for some individuals, it would be mandatory to make an internal report before making an external report to a competent authority. While we would encourage internal reporting where possible, we believe that reporting parties should be able to make their own decision as to which is the most appropriate channel and that entities should be required to advertise both internal and external competent authority channels as part of their whistleblowing policy. Restricting to an internal channel would risk some individuals deciding that they do not feel comfortable making their report, or waiting longer before they decide to do so. This Article also suggests that the categories of person required to report internally are listed in Article 4(2), although that Article does not contain any such information.

Following our comments above on providing feedback to the reporting person, and the importance of having both internal and external (competent authority) channels fully available to all, we are concerned by the reference in Article 13(2) and Article 13(4) to *"appropriate action"*. While Article 5(1) (c-d) provides some indication, there is no objective test or definition as to what would constitute appropriate action, particularly where the information that can be passed back to the reporting person about the investigation is limited. While we would encourage internal reporting where possible, we believe that reporting parties should be able to make their own decision as to which is the most appropriate channel and that entities should be required to advertise both internal and external (competent authority) channels as part of their whistleblowing policy. Similarly, the use of *"appropriate action"* in Article 13(4) raises some concern. We believe that public disclosure should be a last resort for reporting persons, but the lack of objectivity or definition noted in the paragraph above would also apply here and could lead to public disclosures being made even where the matter is being thoroughly investigated either internally or by a competent authority.

We also request clarification on the differences between / definitions of / expected interactions between feedback (e.g. Article 5(1)(d), feedback…about the follow-up (e.g. Article 6(2)(b)), and appropriate action (e.g. Article 13(4)). All of these terms are currently ambiguous and used in similar circumstances.

We suggest that the UK parameters[2] for disclosures to the media may be useful for Article 13(4). These are that the individual:

1. Reasonably believes that the information disclosed and any allegation made in it are substantially true; and
2. Does not act for personal gain

And, either:

3. The conduct that is the subject matter of the disclosure is exceptionally serious and it is reasonable to make the disclosure in view of all the circumstances having regard, in particular, to the identity of the person to whom the disclosure is made;
   Or one of more of conditions 4 – 6 are satisfied:
4. The individual making the disclosure reasonably believes he would be subjected to a detriment by his employer if disclosure were to be made to the employer or to a prescribed person [competent authority];
5. In the absence of a prescribed person [competent authority], the individual making the disclosure reasonably believed that disclosure to the employer would result in the destruction or concealment of information about the wrongdoing;

[2] UK Public Interest Disclosure Act (1998) Chapter 23

6. The individual making the disclosure had previously disclosed substantially the same information to his employer or to a prescribed person [competent authority].

In addition, it must be reasonable in all the circumstances for the individual to make the disclosure.

Article 14: Prohibition of retaliation against reporting persons

AFME agrees that individuals should be encouraged to blow the whistle where they suspect unlawful activities or abuse of law, confident that their concerns will be considered and that there will be no personal repercussions. We note and support the proposed prohibition of retaliation. We suggest however that the right course of action is to require entities to put in place policies and procedures designed to discourage retaliation against reporting persons and to take action where it does occur.

We also note that some of the events listed under Article 14 may occur in the normal course of business and be unrelated to whistleblowing activities, for example lay-off, a transfer of duties or failure to renew a temporary employment contract. In such cases, it should be made clear that it remains possible for an entity to carry out such actions, provided that there is sufficient justification.

Article 15: Measures for the protection of reporting persons against retaliation

As noted in our comments above on Article 10(g), we request clarification as to how Article 15(4) would work in practice from a legal perspective.

We are concerned by the use of the term *"retaliatory measure"* in Article 15(5), which suggests that there should be a presumption of wrongdoing on the part of the person taking the action. We suggest that this is amended simply to *"measure"*, in order that the judicial proceedings may decide whether the action was retaliatory or not.

We also suggest that Article 15(5) should be re-worded to state that it shall be for the defendant to prove "the reason for the measure" so defendants are not required to prove a negative. Article 15(6) requires interim relief pending the resolution of such legal proceedings. We note that the duration of proceedings can vary significantly with the complexity of the case, and are therefore concerned that this could lead to situations in which a reporting person is, in effect, 'immune' from all action for a long period of time. This would be particularly challenging for an entity going through a period of restructure or downsizing, for example. We therefore request further clarity as to what 'interim relief' might mean in practice.

Article 16: Measures for the protection of concerned persons

We request that more detail is given on what *"the right to access their file"* means under Article 16(1), in order to ensure that reporting parties are not given access to information about the investigation, or information about other parties involved. Consideration could perhaps be given to Subject Access Requests under GDPR, and whether this might be sufficient. There is no point in introducing new regulation when existing regulation covers the point.

Article 17: Penalties

The meaning of *"vexatious"* under Article 17(1)(c) is unclear. We request that additional detail is given to outline the meaning and the burden of proof required.

We also suggest, under Article 17(2), that Competent Authorities should consult with each other as to appropriate sanctions for cross-border breaches of this Directive, including the levels of fines.

Article 18: Processing of personal data

As above with our comments under Article 11 on GDPR, we suggest that the final sentence of this article should be amended so as to read as follows *"Personal data which are not relevant for the handling of a specific case must be dealt with in accordance with Regulation (EU) 2016/679, Directive (EU) 2016/680 and Regulation (EC) 45/2001"*. This is because, depending on the circumstances, it may be lawful to retain such data rather than to delete it.

Article 19: More favourable treatment

AFME supports the right of Member States to retain or create their own whistleblower protection regulations in addition to this Directive. However, in order to ensure that there is no unintended conflict between this Directive and such national provisions where the wording of similar provisions may differ slightly, we suggest that the wording of this article is amended to read *"no less favourable"* instead of *"more favourable"*.

Articles 20-23

AFME has no comments on these articles.

Conclusions

AFME is strongly supportive of this initiative by the European Commission to harmonise protection for whistleblowers across the Union. However, there are some points to be addressed as above. We look forward to working with the Commission and other parties as this initiative develops, and would be happy to provide further detail on any of the comments made above.

AFME contacts

Will Dennis, will.dennis@afme.eu +44 (0)20 3828 2683

Richard Middleton, richard.middleton@afme.eu +44 (0)20 3828 2709

Fiona Willis, fiona.willis@afme.eu +44 (0)20 3828 2739