

Consultation response

Consultation on the Protection of Whistle-blowers in the Field of Tax

Platform on Tax Good Governance

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

1. Should whistleblowing in tax matters be protected through tax-specific rules?

If your answer is no – please explain the reasons, e.g. why you think that it is already protected or why it should not be protected.

Comments

We are not convinced of the need for tax-specific rules but would rather support adequate protection for whistle-blowers on a wide non-exhaustive range of issues such as money-laundering, illicit finance, corruption and other criminal matters.

We believe that the primary goal should be ensuring strong internal whistleblowing arrangements which secure the commercial importance of confidentiality and the legal protection of business data.

2. Considering that tax whistle-blowers may not be able to determine whether the discovered issue involves tax avoidance or evasion, should whistleblowing be protected in both cases (of tax avoidance and evasion)? No

If your answer is no – would it be appropriate to limit the protection of whistleblowing to cases of tax evasion? Yes

Comments

There needs to be due recognition of the commercial importance of securing the confidentiality and legal protection of business data.

Accordingly, we believe that the primary goal should be for strong internal whistleblowing arrangements to be put in place, irrespective of what the issue may turn out to be. Internal whistleblowing is particularly appropriate and important given, as stated, it may likely not be possible for a whistleblower to determine in advance what they are dealing with – for example, a matter of tax avoidance, tax evasion or something else.

External reporting should be possible only in limited cases where internal processes have clearly failed. External reporting should then be limited to reporting to an independent government agency.

In the context of external reporting, the protection of whistleblowers should be limited to reporting cases of tax evasion, given tax evasion is in breach of the law. There should be no protection for someone externally reporting specific tax planning advice which they consider to be potentially aggressive, but which they know is in accordance with the law. The approach with regard to tax and non-tax whistleblowing should be consistent.

Also, we do not consider it necessary to protect whistleblowers from the legal consequences of excessive measures, such as illicitly copying or removing data, or selling such data against payment.

3. Which of the following situations, which have a negative impact on the tax base of at least one Member State, should EU legislation for the protection of whistleblowing in the field of taxation cover?
- a. only cross-border situations exclusively within the EU; or
 - b. cross-border situations within the EU and between a Member State and a third country; or
 - c. **domestic and cross-border situations within the EU and between a Member State and a third country**
 - d. none
4. Who should be protected as a whistle-blower?
- a. All individuals
 - b. **Both civil servants and private sector employees (irrespective of the type of employment contract) in connection with acts linked to their professional sphere**
 - c. Only civil servants (including those with temporary employment contracts) in connection with acts linked to their professional sphere
 - d. Only private sector employees (irrespective of the type of employment contract) in connection with acts linked to their professional sphere
 - e. No-one
5. What types of taxes should the protection of whistleblowing cover?
- a. Only corporate income tax
 - b. All types of direct taxes, i.e. personal and corporate income tax
 - c. All types of direct and indirect taxes (i.e. VAT and excise duties)
 - d. **All types of direct and indirect taxes and customs duties**
 - e. None

Comments

We do not believe that it would be justified to merely focus on corporate income tax in protecting whistle-blowers

6. **Do you agree that whistle-blowers should be protected only where the circumstances justify good faith or a reasonable belief that the disclosed information evidences tax avoidance and/or evasion (depending on the policy choice under Question 2)?** Yes

If your answer is yes – Which of the two criteria, i.e. good faith or reasonable belief, do you consider as the most suitable?

Comments

Yes. As mentioned in point 2, we only support better protection of whistle-blowers in cases of tax evasion AND where reporting is made either internally or, where internal processes have failed, to an independent government agency. We consider ‘reasonable belief’ as the most suitable criteria.

7. **If whistle-blowers have acted on good faith or a reasonable belief that the disclosed information evidences tax avoidance and/or evasion but it subsequently emerged that there was no illegitimate practice, do you agree that whistle-blowers should still be protected?** Yes

Comments

Yes, but only if they relate to disclosures that were initially reported through any prescribed internal channels or to an independent government agency (see point 9).

8. **Which of the following features should be included in the legislative framework for protecting whistleblowing?**

- a. Protection from any form of discriminatory or retaliatory action against personnel, including dismissal; disciplinary action; transfers to other posts or reassignments of tasks or significant changes in duties; prejudiced performance evaluation; decreases in salary, benefits, deterioration of working conditions, etc.; harassment, stigmatisation, threats.
- b. Availability of anonymous reporting for whistle-blowers
- c. Confidentiality for both the whistle-blower and the accused of wrongdoing. The information provided by anonymous whistle-blowers should be subject to rules limiting its further dissemination if this information might reveal the identity of the accused of wrongdoing
- d. Protection of whistle-blowers from civil claims and/or criminal charges, particularly defamation and breach of confidentiality or official secret laws.

In connection with this feature (d), would you give full and unreserved immunity to whistle-blowers? No

If your answer is no – would it be acceptable that whistle-blowers are given the right to demonstrate that they complied with whistleblowing laws?

Comments

We would support features a. and c. – anonymous reporting cannot always be guaranteed. The confidentiality of the procedure and the protection of data privacy should be guaranteed.

On d. we oppose full and unreserved immunity to whistle-blowers. There is a danger that whistle-blowing procedures are used for the wrong reasons (e.g. by disgruntled employees seeking to damage the company’s legitimate business interests). We believe it acceptable that whistleblowers be given the right to demonstrate that they complied with whistleblowing laws and procedures.

- e. The protection of whistle-blowers should include circumstances where it is subsequently proved that there has been no wrongdoing but the whistle-blower reasonably believes the opposite when it engages in whistleblowing action
- f. In the employment field, the employer should have the right to prove that any action which *prima facie* appears to be a retaliatory measure against a whistle-blower is not linked to the whistleblowing event itself but has been motivated by other reasons instead
- g. The protection of whistle-blowers should cover cases where they acted for the purpose of receiving a financial reward or other types of rewards.

Would you agree: **No**

If your answer is yes - What options should be considered in establishing a rewards system?

- h. **None of them**

Comments

We believe that financial rewards for whistleblowers – even in the case of evasion – can be problematic. Financial incentives for whistleblowing creates an element of self-interest in the process.

9. Which channels of reporting should be protected?

- a. Only disclosures that were initially reported through any prescribed internal channels
- b. Only disclosures made directly to the law enforcement authorities, i.e. tax authorities in the field of taxation
- c. All channels of reporting, including informing the media, civil society organisations, non-governmental organisations, etc.
- d. None of them

Comments

Both disclosures that were initially reported through any prescribed internal channels, and disclosures made directly to an independent government agency should be protected – however the latter only in circumstances where the internal arrangements have failed.

We would draw attention to the fact that awareness and education are of major importance. Recent UK research shows that 60% of employees are not aware of internal whistle-blower procedures.

Companies should be invited to have clear whistle-blowing procedures in place which are properly implemented, decided upon by their boards and regularly reviewed and revised.

10. **If whistleblowing is only protected for disclosures made to the law enforcement authorities, should whistle-blowers have the right to receive follow-up information on the actions that the state authorities took in response to their revelations? Yes**

If your answer is yes – Should whistle-blowers be protected if they report through channels other than the state authorities (e.g. the media) after the competent state authorities have failed to give feedback within 6 months of the first reporting?

Comments

Yes, whistle-blowers should have the right to receive follow-up information on how their complaint is being dealt with, to the extent possible.

We do not support protection of whistle-blowers through channels other than internal channels or to the state authorities even if the latter fails to give feedback within a certain period of time.

11. **How long whistle-blowers should be protected for? Based on what tests could the time of protection be limited?**

Comments

N/A – we don't believe any protection should be time limited.

12. **Do you agree that disciplinary action and civil and/or criminal penalties should be applied against those who engage in acts of retaliation against whistle-blowers?**

Comments

Attempts by a corporation to obstruct a whistle-blower should be made subject to sanction.

13. **Do you agree that whistle-blowers should have an individual right of action in court proceedings as an aggrieved party? No**

Should there be a special body or section dedicated to receiving complaints, investigating and prosecuting discriminatory and/or retaliatory action whistle-blowers?

Comments

We would underline the importance of good enforcement procedures, and believe that whistleblower cases should be dealt through normal (tax) law enforcement channels