ETAF Statement

Evaluation of the Whistleblower Protection Directive

Introduction

The European Tax Adviser Federation (ETAF) welcomes the opportunity to contribute to the European Commission's evaluation of Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (the "Whistleblower Protection Directive").

The Directive, transposed into national law by Member States by December 2021, sets minimum EU standards for the protection of persons who report breaches of Union law that may harm the public interest. Private sector organisations with 50 or more employees, including accounting and tax firms, are required to establish internal reporting channels. As regulated tax professionals operating under binding professional law frameworks, ETAF member organisations and the regulated tax professionals they represent are directly affected by the Directive in two distinct ways: as potential reporting persons, and as entities required to establish internal reporting channels.

As a preliminary remark, ETAF considers that the entry into force of the Directive has strengthened ethical behaviour in commercial transactions and is likely to have had a positive preventive effect on the lawful conduct of economic operators. The evaluation, foreseen by article 27(3) of the Directive itself, represents an important opportunity to address implementation weaknesses that currently undermine its coherence and proportionality.

This statement addresses two main issues: the inconsistent application of the "legal professional privilege" exemption and the disproportionate administrative burden on medium-sized firms arising from internal reporting obligations. It also builds on ETAF's position paper of 23 October 2025 on strengthening the protection of professional secrecy for tax advisers in EU law, as well as its statement of 17 September 2025 on the future evaluation of the Whistleblower Protection Directive.

1. Inconsistent translation and application of "legal professional privilege"

Article 3(3)(b) and recital 26 of the Directive provide an exemption from reporting obligations for information protected by "legal professional privilege". This term is firmly established in EU legislation and case-law of the Court of Justice of the European Union (CJEU). It reflects the principle that legal professions subject to a statutory duty of professional secrecy may be exempted from reporting obligations where compliance would otherwise create an irreconcilable conflict with the duty of client confidentiality. Professional secrecy is not a privilege in the sense of a favour accorded to professionals; it is a legal obligation and a democratic necessity. It underpins the trust between tax advisers and their

clients, protects fundamental rights, including the right to privacy and the right against self-incrimination, and supports the fair functioning of tax systems across the EU.

The way in which “legal professional privilege” has been translated across Member States differs significantly, with material practical consequences. In Germany, for instance, the term has been rendered in the national transposition of the Directive as “attorney-client privilege”, restricting its application to lawyers alone and excluding tax advisers, despite the fact that tax advisers in Germany are legally recognised independent professionals subject to an equivalent statutory duty of professional secrecy.

A direct consequence of these translation divergences is that the concept of professional secrecy has been implemented differently across Member States. In Austria, where the term was also translated as “attorney-client privilege”, the Austrian legislature nonetheless extended the professional secrecy exemption to auditors and tax advisers when implementing the Directive into national law (section 3(6)(2) of the Austrian Whistleblower Protection Act). By doing so, the Austrian legislature applied a teleological interpretation, aligning the Directive with its underlying purpose and the interests of the parties involved. By contrast, the German legislature relied solely on a grammatical interpretation, limiting the scope to the literal wording of the transposition text. This divergence is particularly significant given that Austria’s professional legal framework for tax advisers is closely aligned with that of Germany. The same professional activities, subject to the same statutory secrecy obligations, give rise to different legal outcomes depending solely on the interpretative approach taken at national level. This is particularly striking in the German context, where the professional status of tax advisers is, in substantive terms, closely equivalent to that of lawyers. Tax advisers in Germany are recognised by statute as independent bodies responsible for tax administration (Section 33(2) of the Steuerberatungsgesetz). They are subject to the same criminal-law duty of confidentiality as lawyers under Section 203(1) of the Criminal Code (Strafgesetzbuch), hold the same right to refuse to testify in criminal proceedings (Section 53(1)(3) of the Code of Criminal Procedure), and benefit from the same prohibition on seizure of professional documents (Section 97 of the Code of Criminal Procedure). They also hold full powers of representation before the tax courts up to the Bundesfinanzhof (Federal Finance Court) and, in relevant matters, before administrative and social courts. The practical distinction between an advisory mandate and a representative mandate is frequently fluid. As a direct consequence of the restrictive German transposition, a tax adviser in Germany who becomes aware of a potential breach through a client’s documentation faces a serious legal dilemma: any disclosure made in the context of a whistleblower report may simultaneously constitute a criminal breach of professional secrecy under Section 203 of the Criminal Code. This conflict deters taxpayers from seeking advice in a protected space and undermines their ability to remedy errors and ensure legal compliance, an outcome that serves neither the interests of clients nor the objectives of the Directive.

The CJEU has progressively strengthened the protection of professional secrecy and clarified its scope. Most notably, in its judgment in Case C-623/22 concerning the concept of legal professional privilege in the context of Directive 2011/16/EU (DAC6), the CJEU clarified that the relevant provisions were primarily intended to protect the professional secrecy of lawyers and other professionals who, by law, are authorised to represent clients before the courts. The Court further held that, under Article 8ab(5) of Directive 2011/16/EU, Member States retain a margin of discretion to extend the scope of that protection to other

professional groups, beyond lawyers, who are authorised under national law to represent clients before the courts.

In Case C-432/23, Advocate General Kokott clarified the meaning of the scope of "legal professional privilege" and endorsed a broad interpretation, extending its protection beyond lawyers to include non-lawyer professionals who, under national law, are authorised to advise and represent clients.

In ETAF Member States, tax advisers practice an advisory profession in tax law. They are empowered to represent clients in tax matters and are bound by professional secrecy in the same way as lawyers. Excluding them from the Directive's confidentiality exemption creates legal uncertainty and inconsistencies in the protection of legal professions across the EU, in conflict with the established jurisprudence of the CJEU.

ETAF therefore recommends the following:

- **Clarification of terminology:** The Commission should clarify that the confidentiality exemption covers all regulated legal advisory professions, including tax advisers, that are subject to equivalent statutory secrecy obligations under national law, regardless of whether they hold the formal title of "lawyer".

2. Disproportionate administrative burdens on medium-sized firms

Articles 7 and 8 of the Directive require private sector organisations with 50 or more employees to establish internal reporting channels and procedures. These channels must allow for oral, written or in-person reporting, and must comply with data protection requirements. In practice, compliance requires the implementation of IT-based systems and/or the engagement of external service providers as data-protection-compliant solutions, which creates significant bureaucratic burdens and high costs for companies.

For tax advisory firms and similar professional practices, the 50-employee threshold is too low. Many regulated firms that cross this threshold are medium-sized businesses operating within tight cost structures. The obligation to procure and maintain data-protection-compliant IT infrastructure, or to contract external reporting channel operators, imposes recurring compliance costs that bear little relation to the risk profile of the firm or the realistic likelihood of whistleblowing activity within it.

ETAF fully supports the objectives of the Directive in promoting the reporting of breaches of EU law and protecting those who do so. However, the administrative burden associated with the internal reporting channel obligation is disproportionate at the current threshold for medium-sized professional service firms. In line with the von der Leyen Commission's commitment to reducing administrative burdens on businesses, as reflected in the SME Relief Package and the Competitiveness Compass, ETAF calls on the Commission to raise the threshold from 50 to at least 100 employees. This would relieve medium-sized firms from disproportionate compliance costs while fully preserving the Directive's core objectives for larger organisations.

ETAF therefore recommends the following:

- **Raise the employee threshold:** The Commission should raise the threshold for the obligation to establish internal reporting channels from 50 to at least 100 employees, in line with the Commission's commitment to reducing administrative burdens on medium-sized businesses.

Conclusion

ETAF welcomes the Whistleblower Protection Directive as an important contribution to strengthening ethical behaviour and the enforcement of EU law. The evaluation represents a significant opportunity to remedy the structural and implementation shortcomings that continue to affect its coherence and proportionality.

The inconsistent translation and application of the "legal professional privilege" exemption creates legal uncertainty and unequal treatment of regulated legal professionals across the EU. A harmonised terminology and consistent application across all Member States, in line with the CJEU's case law, is necessary to ensure that the Directive operates coherently and in a manner compatible with established principles of professional secrecy.

The administrative burden associated with the internal reporting channel obligation is disproportionate at the current 50-employee threshold, particularly for medium-sized professional service firms. Raising the threshold to at least 100 employees would better balance the Directive's objectives with the principle of proportionality.

ETAF is ready and looks forward to engaging further with the Commission and the European Parliament on these issues. A summary of ETAF's recommendations is set out in the Annex below.

Notes
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Annex: summary of ETAF recommendations

Issue	Concerned article(s)	ETAF recommendation
Inconsistent translation and application of "legal professional privilege"	**Article 3(3)(b) in conjunction with recital 26**	The Commission should clarify that the confidentiality exemption covers all regulated legal advisory professions, including tax advisers, that are subject to equivalent statutory secrecy obligations under national law, regardless of whether they hold the formal title of "lawyer".
Raise employee threshold	**Articles 7 and 8**	Raise the threshold for the obligation to establish internal reporting channels from 50 to at least 100 employees.