

## CCBE response to the European Commission consultation on the EU Evaluation of the Whistleblower Protection Directive

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**Executive summary:** This paper contains the CCBE response to the European Commission call for consultation for its evaluation of Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law ('Whistleblower Protection Directive'). The CCBE welcomes the opportunity to contribute and recalls the Directive's key role in promoting transparency and accountability, including in combatting money laundering and terrorism financing. Without revisiting broader policy considerations, the CCBE stresses the imperative of fully preserving legal professional privilege and professional secrecy in the lawyer-client relationship, as expressly safeguarded in Recital 26 and Article 3(3) of the Directive (EU) 2019/1937. These provisions reflect fundamental rule of law guarantees, consistently recognised in the case law of the Court of Justice of the European Union and anchored in Articles 6 and 8 of the European Convention on Human Rights and Articles 7 and 47 of the Charter of Fundamental Rights of the European Union.

*The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law societies of 46 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.*

The CCBE welcomes the opportunity to respond to the European Commission consultation on the evaluation of Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law, "the Whistleblower Protection Directive". The Directive plays an important role in promoting transparency and accountability, including in the fight against money laundering, the financing of terrorism and other serious offences.

In this submission, the CCBE does not seek to address the broader policy considerations underlying the Directive. Rather, it wishes to recall its previous positions and highlight the necessity of fully preserving professional secrecy and legal professional privilege (LPP) in the lawyer-client relationship.

In this regard, the CCBE recalls the unequivocal recognition in Recital 26 of Directive (EU) 2019/1937 that the Directive "should not affect the protection of confidentiality of communications between lawyers and their clients ('legal professional privilege') as provided for under national and, where applicable, Union law, in accordance with the case law of the Court." This principle is given further enforcement in Article 3(3), which expressly provides that the Directive shall not affect the application of Union or national law relating to the protection of legal and medical professional privilege, the secrecy of judicial deliberations, and rules on criminal procedure.

Taken together, Recital 26 and Article 3(3) reflect the clear and deliberate need to preserve core guarantees that are intrinsic to the rule of law and the right to a fair trial.

The CCBE emphasises that these provisions are intended to safeguard strictly defined and well-established privileges – namely the confidentiality of communications between lawyers and their clients and the

secrecy of judicial deliberations – and not to introduce broad, indeterminate, or blanket exclusions from whistleblower protection.

At a national level, all European countries have provisions in order to ensure the protection of the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy. The countries differ in the methods by which this protection is achieved. However, by whatever means protection is achieved, and whatever its nature and extent, its purpose is the same in all states. The purpose is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his or her rights and liberty and, second, to ensure the fair and proper administration of justice. This cannot be achieved unless the relationship between the lawyer and his or her client is a relationship of confidence.

In addition, at a European level, legal professional privilege and the confidentiality of lawyer – client communications form part of the general principles of EU law, as consistently recognised in the case law of the Court of Justice of the European Union. These rulings confirm that professional secrecy and legal professional privilege are fundamental rights, anchored in Articles 6 and 8 of the European Convention on Human Rights and Articles 7 and 47 of the EU Charter of Fundamental Rights.

The CCBE notes in the Commission review on the implementation and application of the Directive, it is mentioned that:

*“The exemption of protection for reports covered by legal and medical professional privilege and by the secrecy of judicial deliberations (Articles 3(3)(b) and 3(3)(c)) has been incorrectly transposed in most Member States. In some of these Member States, the exemption for legal professional privilege has been unduly extended beyond the protection of confidentiality of communications between lawyers and their clients. Other transposition laws: (i) exempt reports covered in general by an obligation of professional secrecy or (ii) extend the exemption for the secrecy of judicial deliberations to cover all activities of judges or legal proceedings more generally.”*

Against this background, the CCCBE stresses that any corrective action in response to defective national transposition must be guided by a rigorous and principled reading of Article 3(3) of Directive (EU) 2019/1937. While exemptions that go beyond the narrowly circumscribed scope of legal professional privilege and the secrecy of judicial deliberations must be addressed in order to restore legal certainty and the effectiveness of whistleblower protection, such action must not result – directly or indirectly – in any weakening of the substance, scope, or effectiveness of legal professional privilege as recognised under Union and national law.

Furthermore, due consideration should be given in any future amendments to ensure the protection of lawyer-client communications in light of the explicit links made to the Whistleblower Protection Directive in other EU legislative instruments, such as Article 14 of the new AML Regulation.

**The CCBE therefore calls on the Commission and Member States to ensure that implementation, guidance, and enforcement measures fully respect legal professional privilege as a fundamental guarantee of the rule of law and the right to a fair trial, and to refrain from any interpretation that would undermine the essential trust underpinning the lawyer client relationship.**