



An Roinn Caiteachais
Phoiblí agus Athchóirithe
Department of Public
Expenditure and Reform

Consultation on the transposition of Directive (EU) 2019/1937 of the European Parliament and the Council on the protection of persons who report breaches of Union law (EU Whistleblowing Directive)

Prepared by Department of Public
Expenditure and Reform
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Introduction

Purpose of this consultation

The Department of Public Expenditure and Reform invites submissions to a public consultation on the transposition of Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law (commonly referred to as the “EU Whistleblowing Directive”).¹

This Directive, which must be transposed by **17 December 2021**, aims to set a common minimum standard across EU Member States for the protection of persons who report information about threats or harm to the public interest obtained in the context of their work-related activities.

This consultation is seeking views on the use of Member State options – i.e. those matters contained within the Directive in respect of which Member States can or must make a choice as regards implementation. Interested parties are asked to bear in mind that, except for the exercise of these options, Member States, including Ireland, are obliged to implement the Directive.

Submissions

Submissions are invited on the transposition of the Directive in Irish law. In particular, answers to the questions raised in this consultation document are sought. A separate response template is provided. Completing the template will assist in achieving a consistent approach in responses returned and facilitate collation of responses.

Respondents are requested to make their submissions by email to:-

Email: PDconsultation@per.gov.ie

The closing date for receipt of submissions is **17:00, Friday, 10 July 2020**. Please clearly mark your submission in the subject line of your email as “Consultation on the Transposition of the EU Whistleblowing Directive”.

The Department regrets that on account of the measures it has had to put in place in respect of the Covid-19 pandemic it cannot receive hardcopy submissions by post.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=EN>

Data Protection and Freedom of Information

Please note that, in the interests of transparency, the Department intends to publish the content of all submissions received in response to this consultation and the identity of the party making the submission, including their name and the organisation they are affiliated to (if any). Any submission containing commercially sensitive or private or confidential material should therefore clearly identify that portion of the submission which contains such information and specify the reasons for its sensitivity.

All personal information contained in the submissions received under this consultation will be collected, processed and stored in accordance with the Data Protection Acts and the General Data Protection Regulation (GDPR).

All submissions will also be subject to the Freedom of Information Act 2014 and may be released or published on foot of third party applications or otherwise.

For further information on how the Department will use the personal data collected in the course of this consultation, please refer to the Privacy Notice, which is a separate document published at the same time as this consultation document.

Overview

Objective of the Directive

People who work for a public or private organisation or are in contact with such an organisation in the context of their work-related activities are often the first to know about threats or harm to the public interest which arise in that context. By reporting breaches of law that are harmful to the public interest, such persons act as “whistleblowers” and thereby play a key role in exposing and preventing such breaches and in safeguarding the welfare of society. However, potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. In this context, the importance of providing balanced and effective whistleblower protection is increasingly acknowledged at national, EU and international level.

In certain sectoral areas, breaches of law may cause serious harm to the public interest in that they create significant risks for the welfare of society. Where weaknesses of enforcement have been identified in these sectoral areas, and whistleblowers are usually in a privileged position to disclose breaches, enforcement of the law can be enhanced by introducing effective, confidential and secure reporting channels and by ensuring that whistleblowers are protected effectively against retaliation.

Whistleblower protections currently provided in the EU are fragmented across Member States and uneven across sectoral areas. The European Parliament and the Council have decided that common minimum standards should apply as regards acts and policy areas where there is a need to strengthen enforcement, under-reporting by whistleblowers is a key factor affecting enforcement and breaches of law can cause serious harm to the public interest.

Key features of the Directive

The Directive contains the following key features:

1. **Material scope:** persons may report on breaches of EU law in the areas of: public procurement; financial services; money laundering and terrorist financing; product and transport safety; nuclear safety; public health; consumer protection; and data protection as well as breaches affecting the financial interests of the EU and breaches affecting the EU internal market (including breaches or abuses of the rules concerning corporate taxes that affect the operation of the internal market).
2. **Personal scope:** the protections provided for under the Directive apply to all employees and former employees in the public and private sectors and also natural persons in non-conventional employment arrangements, including: agency workers, contractors, self-employed workers, suppliers, board members, shareholders, paid and unpaid trainees and volunteers as well as persons whose work-based relationship has yet to begin. Protections

are also provided for persons who provide assistance to persons reporting wrongdoing and any third parties connected with the reporting person.

3. **Reporting channels:** the Directive provides for three distinct channels for persons to report breaches:

- (a) Internal reporting to the person's employer;
- (b) External reporting to an appropriate competent authority, such as a sectoral regulator; and
- (c) Public disclosure to any other person, including to public representatives, journalists and social media.

4. **Obligations on recipients of reports:** the Directive imposes the following key obligations on persons who receive reports of breaches in accordance with the Directive:

- All private sector entities with 50 or more employees² (and all financial services companies regardless of size) must establish formal channels and procedures for internal reporting and designate staff competent to follow up on reports received.
- Similarly, all competent authorities must establish formal channels and procedures for external reporting.
- All reports of breaches made under the Directive must be acknowledged within 7 days of receipt.
- All reports must be followed up diligently by recipients.
- The identity of the reporting person must be kept confidential.
- Reporting persons must be provided with feedback on progress made in following up on their report within 3 months.
- Competent authorities are required to inform the reporting person of the final outcome of any investigations triggered by the report.

5. **Protections:** the Directive requires that reporting persons (and persons connected with them) are protected from:

- Unfair dismissal;
- Unfair treatment (including suspension, demotion, transfer of duties, reduction in pay and change of working hours);
- Coercion, intimidation, harassment or ostracism; and
- Civil and criminal liability in respect of the disclosure of confidential information, provided said disclosure was necessary to reveal a breach under the Directive.

² The Directive provides a derogation from this obligation for private sector entities of between 50 and 249 employees until 17 December 2023.

The Directive further provides that once a reporting person demonstrates *prima facie* that they made a report in accordance with the provisions of the Directive and suffered a detriment, the burden of proof should shift to the person who took the detrimental action who should then be required to demonstrate that the action was not linked in any way to the report the person made.

6. **Measures of support:** the Directive requires that Member States ensure that reporting persons and persons connected with them have access to appropriate supports, including comprehensive and independent information and advice on how to make reports under the Directive, the rights and protections that are provided and how to access them.

The Directive also provides that Member States may introduce or retain measures more favourable than those provided by the Directive in national laws. Furthermore, the implementation of the Directive should not constitute grounds for a reduction in the level of protection already afforded by Member States in their national laws.

Ireland's current legal framework

Ireland is one of ten EU Member States to have a comprehensive legal framework already in place for the protection of whistleblowers in the form of the Protected Disclosures Act 2014.³ The key features of the Act are as follows:

1. **Material scope:** persons may report on: criminal offences; failure to comply with a legal obligation; miscarriage of justice; endangerment of health and safety; damage to the environment; unlawful or improper use of public funds; oppressive, discriminatory or grossly negligent behaviour by a public body; and gross mismanagement in a public body. Under the Act it is immaterial whether the wrongdoing occurred in Ireland or elsewhere or whether the law applying to it is that of Ireland or another country or territory.
2. **Personal scope:** the Act applies to employees, agency workers, contractors, self-employed workers and paid trainees and interns. There are no explicit protections under the Act for suppliers, board members, shareholders, unpaid trainees or interns, volunteers and persons whose work-based relationship has yet to begin.
3. **Reporting channels:** the Act provides that workers can report wrongdoing under the Act:
 - (a) Internally to the person's employer;
 - (b) Externally to a prescribed person, such as a sectoral regulator; or
 - (c) To any other third party, such as a journalist or a public representative.

In addition, a worker in a public body can report wrongdoing to the Government Minister with responsibility for the public body concerned.

³ <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html>

There are also special conditions and channels applying to reports concerning: law enforcement, defence, national security and international relations.

4. **Obligations on recipients of reports:** the Act places an obligation on all recipients of a protected disclosure to take all reasonable steps to protect the identity of the discloser. There are no specific obligations under the Act to acknowledge, follow up and provide feedback to the discloser. However, these practices are recommended under the statutory guidance for public bodies for the performance of their functions under the Act⁴ and by the Workplace Relations Commission's statutory Code of Practice on Protected Disclosures.⁵
5. **Protections:** the Act protects workers (and persons associated with them) from any form detriment that may occur as a consequence of making a protected disclosure. This includes unfair dismissal, unfair treatment, bullying and harassment. These protections are accessed primarily through the Workplace Relations Commission and the Labour Court, although workers also have the option of seeking damages in tort through the courts. Interim relief from dismissal for having made a protected disclosure is available through the Circuit Court.

Workers are also protected from civil and criminal liability in respect of the disclosure of confidential information.

6. **Measures of support:** there are no specific obligations under the Act for the provision of supports for persons who have made or are considering making protected disclosures. However, the Department of Public Expenditure and Reform provides funding (€220,000 *per annum*) to Transparency International Ireland for a free helpline and legal advice centre to assist workers with protected disclosures.⁶

Implementation of the Directive in Ireland

The Department of Public Expenditure and Reform is consulting on the use of Member State options – matters in respect of which Ireland can or must make a choice in how it implements the Directive in Irish law.

Extracts from the Articles of the Directive where Member State options exist are reproduced in the following pages with the areas where Member State options exist shown in ***bold italicised text***. A set of questions is listed below each Article.

⁴ <https://assets.gov.ie/8752/e34572256f064479a2ee4f0deaf37b0b.pdf>.

⁵ https://www.workplacerelements.ie/en/what_you_should_know/codes_practice/cop12/

⁶ <https://www.transparency.ie/helpline>

Views are welcome from respondents on any other aspect of the Directive or the operation of the Protected Disclosures Act that they wish to raise. In particular, the Department is interested in hearing the views of interested parties on:

- The personal scope set out in Article 4 of the Directive – in particular the requirement to protect and to facilitate reporting by: suppliers, board members, shareholders, unpaid trainees, volunteers and persons whose work-based relationship has yet to begin.
- How disclosures by workers in public bodies to a relevant Government Minister under Section 8 of the Protected Disclosures Act should operate in light of the requirements of the Directive.

Questions to guide the discussion of views on these topics are also provided in the following section. The provision of such points of view will help inform the Department's work in transposing the Directive. However, interested parties are asked to bear in mind that, except for the exercise of Member State options, Ireland is obliged to implement the Directive.

Consultation Questions

EU Whistleblowing Directive

Article 6

Conditions for protection of reporting persons

1. Reporting persons shall qualify for protection under this Directive provided that:
 - (a) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and
 - (b) they reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15.

2. ***Without prejudice to existing obligations to provide for anonymous reporting by virtue of Union law, this Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches.***

3. Persons who reported or publicly disclosed information on breaches anonymously, but who are subsequently identified and suffer retaliation, shall nonetheless qualify for the protection provided for under Chapter VI, provided that they meet the conditions laid down in paragraph 1.

Persons reporting to relevant institutions, bodies, offices or agencies of the Union breaches falling within the scope of this Directive shall qualify for protection as laid down in this Directive under the same conditions as persons who report externally

Questions:

1. Should Ireland avail of the option to require anonymous reports be accepted and followed-up? Please provide reasons for your answer.

EU Whistleblowing Directive

Article 8

Obligation to establish internal reporting channels

1. Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law.
2. The channels and procedures referred to in paragraph 1 of this Article shall enable the entity's workers to report information on breaches. They may enable other persons, referred to in points (b), (c) and (d) of Article 4(1) and Article 4(2), who are in contact with the entity in the context of their work-related activities to also report information on breaches.
3. Paragraph 1 shall apply to legal entities in the private sector with 50 or more workers.
4. The threshold laid down in paragraph 3 shall not apply to the entities falling within the scope of Union acts referred to in Parts I.B and II of the Annex.
5. Reporting channels may be operated internally by a person or department designated for that purpose or provided externally by a third party. The safeguards and requirements referred to in Article 9(1) shall also apply to entrusted third parties operating the reporting channel for a legal entity in the private sector.
6. Legal entities in the private sector with 50 to 249 workers may share resources as regards the receipt of reports and any investigation to be carried out. This shall be without prejudice to the obligations imposed upon such entities by this Directive to maintain confidentiality, to give feedback, and to address the reported breach.
7. ***Following an appropriate risk assessment taking into account the nature of the activities of the entities and the ensuing level of risk for, in particular, the environment and public health, Member States may require legal entities in the private sector with fewer than 50 workers to establish internal reporting channels and procedures in accordance with Chapter II.***
8. Member States shall notify the Commission of any decision they take to require legal entities in the private sector to establish internal reporting channels pursuant to paragraph 7. That notification shall include the reasons for the decision and the criteria used in the risk assessment referred to in paragraph 7. The Commission shall communicate that decision to the other Member States.
9. Paragraph 1 shall apply to all legal entities in the public sector, including any entity owned or controlled by such entities.

Member States may exempt from the obligation referred to in paragraph 1 municipalities with fewer than 10 000 inhabitants or fewer than 50 workers, or other entities referred to in the first subparagraph of this paragraph with fewer than 50 workers.

Member States may provide that internal reporting channels can be shared between municipalities or operated by joint municipal authorities in accordance with national law, provided that the shared internal reporting channels are distinct from and autonomous in relation to the relevant external reporting channels.

Questions:

2. Should Ireland provide that private sector entities with fewer than 50 employees should establish internal reporting channels and procedures? If yes, what sectors should this requirement apply to? Please provide reasons for your answer.⁷
3. Recital 49 of the Directive provides that “*This Directive should be without prejudice to Member States being able to encourage legal entities in the private sector with fewer than 50 workers to establish internal channels for reporting and follow-up, including by laying down less prescriptive requirements for those channels than those laid down under this Directive, provided that those requirements guarantee confidentiality and diligent follow-up*”. Should Ireland lay down less prescriptive requirements for channels for private entities with fewer than 50 employees? What should these requirements be? Please provide reasons for your answer.
4. Should Ireland exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels? Please provide reasons for your answer.
5. Should Ireland provide that municipalities (local authorities in the Irish context) can share internal reporting channels? Please provide reasons for your answer.

⁷ Note that, as per Article 8(4) of the Directive that firms subject to the EU laws listed at Parts I.B and II of the Annex to the Directive are required to establish internal channels and procedures for whistleblowing regardless of size. This primarily affects firms in the financial services area and sectors particularly susceptible to money laundering and terrorist financing. Existing EU laws in this area already require these firms to have internal channels and procedures for whistleblowers regardless of size.

EU Whistleblowing Directive

Article 11

Obligation to establish external reporting channels and to follow up on reports

1. ***Member States shall designate the authorities competent to receive, give feedback and follow up on reports, and shall provide them with adequate resources.***
2. Member States shall ensure that the competent authorities:
 - (a) establish independent and autonomous external reporting channels, for receiving and handling information on breaches;
 - (b) promptly, and in any event within seven days of receipt of the report, acknowledge that receipt unless the reporting person explicitly requested otherwise or the competent authority reasonably believes that acknowledging receipt of the report would jeopardise the protection of the reporting person's identity;
 - (c) diligently follow up on the reports;
 - (d) provide feedback to the reporting person within a reasonable timeframe not exceeding three months, or six months in duly justified cases;
 - (e) **communicate to the reporting person the final outcome of investigations triggered by the report, in accordance with procedures provided for under national law;**
 - (f) transmit in due time the information contained in the report to competent institutions, bodies, offices or agencies of the Union, as appropriate, for further investigation, where provided for under Union or national law.
3. ***Member States may provide that competent authorities, after having duly assessed the matter, can decide that a reported breach is clearly minor and does not require further follow-up pursuant to this Directive, other than closure of the procedure. This shall not affect other obligations or other applicable procedures to address the reported breach, or the protection granted by this Directive in relation to internal or external reporting. In such a case, the competent authorities shall notify the reporting person of their decision and the reasons therefor.***
4. ***Member States may provide that competent authorities can decide to close procedures regarding repetitive reports which do not contain any meaningful new information on breaches compared to a past report in respect of which the relevant procedures were concluded, unless new legal or factual circumstances justify a different follow-up. In such a case, the competent authorities shall notify the reporting person of their decision and the reasons therefor.***
5. ***Member States may provide that, in the event of high inflows of reports, competent authorities may deal with reports of serious breaches or breaches of essential provisions falling within the scope of this Directive as a matter of priority, without prejudice to the timeframe as set out in point (d) of paragraph 2.***
6. Member States shall ensure that any authority which has received a report but does not have the competence to address the breach reported transmits it to the competent authority, within a reasonable time, in a secure manner, and that the reporting person is informed, without delay, of such a transmission.

Questions:

6. Section 7 of the Protected Disclosures Act provides that the Minister for Public Expenditure and Reform can prescribe any person by reason of the nature of their responsibilities to receive reports of wrongdoing. This is similar to the approach taken in other countries with whistleblower protection legislation, such as France and Latvia. Some countries, such as the Netherlands, have a single competent authority that receives reports and either refers them on appropriate authorities for follow up or follows up itself. Should Ireland continue with the current approach to designating competent authorities or should an alternative model be considered? Please provide reasons for your answer.
7. What procedures under national law should apply in Ireland in respect of communicating the final outcome of investigations triggered by the report, as per paragraph 2(e) of Article 11? Please provide reasons for your answer.
8. Should Ireland provide that competent authorities may close or prioritise reports received in accordance with paragraphs 3, 4 and 5 of Article 11? Please provide reasons for your answer.

EU Whistleblowing Directive

Article 20

Measures of support

1. Member States shall ensure that persons referred to in Article 4 have access, as appropriate, to support measures, in particular the following:
 - (a) comprehensive and independent information and advice, which is easily accessible to the public and free of charge, on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned;
 - (b) effective assistance from competent authorities before any relevant authority involved in their protection against retaliation, including, where provided for under national law, certification of the fact that they qualify for protection under this Directive; and
 - (c) legal aid in criminal and in cross-border civil proceedings in accordance with Directive (EU) 2016/1919 and Directive 2008/52/EC of the European Parliament and of the Council ⁽⁴⁸⁾, and, in accordance with national law, legal aid in further proceedings and legal counselling or other legal assistance.
2. ***Member States may provide for financial assistance and support measures, including psychological support, for reporting persons in the framework of legal proceedings.***
3. ***The support measures referred to in this Article may be provided, as appropriate, by an information centre or a single and clearly identified independent administrative authority.***

Questions:

9. What measures of support should Ireland provide for reporting persons? What mechanisms might be used to provide such support? Who should provide that support? Please provide reasons for your answer.

EU Whistleblowing Directive

Article 23

Penalties

1. Member States shall provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons that:

- (a) ***hinder or attempt to hinder reporting;***
- (b) ***retaliate against persons referred to in Article 4;***
- (c) ***bring vexatious proceedings against persons referred to in Article 4;***
- (d) ***breach the duty of maintaining the confidentiality of the identity of reporting persons, as referred to in Article 16.***

2. Member States shall provide for effective, proportionate and dissuasive penalties applicable in respect of reporting persons where it is established that they knowingly reported or publicly disclosed false information. Member States shall also provide for measures for compensating damage resulting from such reporting or public disclosures in accordance with national law.

Questions:

10. What penalties should Ireland impose under this Article? What will make these penalties “effective, proportionate and dissuasive”? Please provide reasons for your answer.



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