



Banking & Payments
Federation **Ireland**

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

9 July 2020

BPFI Submission

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Introduction

Banking & Payments Federation Ireland (BPFi) is the voice of banking and payments in Ireland. Representing over 70 domestic and international members institutions, we mobilise the sector's collective resources and insights to deliver value and benefit to members, enabling them to build competitive sustainable businesses which support customers, the economy and society.

BPFi welcomes the opportunity to contribute members' views on Member States' options, being matters contained within the Directive in respect of which Member States can or must make a choice as regards implementation.

We have set out the Department of Public Expenditure and Reform's questions, with responses, below.

Responses to questions

1. **Anonymous Reports:** Should Ireland avail of the option requiring that anonymous reports be accepted and followed up?

We suggest that some level of discretion is afforded to firms, where they can decide that it would not be reasonable to deal with an anonymous report. If a firm decides that it is not reasonable for them to engage with an anonymous whistleblower, the concerns can be raised anonymously through the firm's designated Speak Up / Whistleblower channels.

The challenges which members have encountered around accepting and investigating anonymous reports include:

1. no contact information is provided by a whistleblower;
2. it is not clear on whether the whistleblower is a worker or in any way connected to the firm;
3. it is not clear if the report is genuine/ vexatious;
4. difficulty in obtaining further information on the alleged wrongdoing; and
5. it may be possible only to undertake a preliminary examination - rather than a full investigation.

Members encourage employees to identify themselves in making a report to facilitate a full investigation, where it has been decided that such an investigation is warranted. Certain elements of the Directive (e.g. keeping the discloser informed and protecting a discloser from being penalised) may be difficult or impossible to apply unless the employee identifies themselves.

2. **Private Sector:** 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?

No comment.

3. **Private Sector:** Should Ireland lay down less prescriptive requirements for channels for private entities with few than 50 employees? What should these requirements be?

No comment.

4. **Public Sector:** Should Ireland exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels?

No comment.

5. **Local Authorities:** Should Ireland provide that municipalities (local authorities in the Irish context) can share internal reporting channels?

No comment.

6. **Prescribed Persons:** Should Ireland continue with its current approach whereby the Minister can prescribe any person (by nature of their responsibilities) to receive reports of wrongdoing or should Ireland consider an alternative model to be considered?

No comment/ preference.

7. **Communicating Final Outcomes:** What procedures under national law should apply in Ireland in respect of communicating the final outcome of investigations, triggered by the report?

Any procedures should account for the diverse range of issues and outcomes which could be raised under Speak Up / Whistleblowing Procedures. A pro-forma response form or designated timelines may not be suitable for (i) complex investigations (ii) confidential content (including personal data, commercial information, potential legal liability etc.) (iii) situations where the issues are partially resolved, and/or investigation is suspended or partially challenged.

We suggest that a firm should have reasonable discretion in terms of communication on the final outcome of investigations.

The firm should have discretion as to what information it may be required to provide to anonymous reporters, where it is not possible to verify if the reporter is connected to the firm.

Separately, section 22 of the Protected Disclosures Act 2014 requires public bodies to publish details of protected disclosures received by the firm. It would be useful to have detail about what specific information is required to be disclosed.

8. **Prioritising/Closing Reports:** Should Ireland provide that competent authorities may close or prioritise certain reports?

Yes, members would be supportive of this. However, it would be useful to have clarity on which competent authority determines which reports should be prioritised, and what criteria are used to determine the priority of certain reports. It would also be useful to understand whether firms could raise reports with the competent authorities and recommend that the report is prioritised.

9. **Support Mechanisms:** What measures of support should Ireland provide for reporting persons? What mechanisms might be used to provide such support? Who should provide that support?

We agree that ensuring reporting persons are supported should be priority.

We suggest that any measures which require firms to have an appropriate measures/person(s) to support reporting persons give adequate discretion to the firm having regard to the size, diversity and structure of the firm. The measures should be proportionate so that support can be provided and made available.

10. **Penalties:** What penalties should Ireland impose in the following situations: where reporting is hindered; where there's retaliation against the reporting person; where vexatious proceedings are brought; or where there's a breach in the duty of maintaining the confidentiality of the identity of reporting persons?

We would need to understand how any regime would coincide with the existing regime under the Protected Disclosures Act 2014 in the Workplace Relations Commission, which primarily focuses on compensation for employees penalized for having raised a protected disclosure. For example:

- (i) What authority would be responsible for imposing penalties?
- (ii) What would be the procedure for imposing penalties?
- (iii) Would the authority be able to seek challenge a firm without a worker instigating a claim under the Protected Disclosures Act 2014?
- (iv) Could the authority rely on a WRC decision in imposing a penalty?
- (v) Would a separate hearing be required for the specific questions? Would this be essentially a rehearing of any claim by a worker under the Protected Disclosures Act 2014?
- (vi) What is the appeal process? Would appeals go to the Labour Court? Could the imposition of a penalty be stayed pending the outcome of an appeal of decision under the Protected Disclosures Act?
- (vii) Could a worker rely on the imposition of a penalty to ground a claim to the WRC or vice versa?
- (viii) Would decisions/findings be published? Will the names of parties be included in any publication?

BPFI members welcome this opportunity and will engage further as the legislative process progresses.