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)

Template answer sheet

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.

Question 1

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

There should be a discretionary function to let persons who are identified or prescribed for the receipt of disclosure information to also accept and assess anonymous reports. The receivers of the anonymous information will often be best placed to assess whether the information contained within is already known, requires further examination or is not known. Therefore the acceptance of information should be permitted with a discretionary function to direct follow up actions based on the information contained, if it discloses a potential wrongdoing.

In summary, GSOC's view is that the receipt of anonymous information should be included but left to discretion of the persons identified to receive the information or prescribed person's based on a review of the information provided as to any further action required.

GSOC have received anonymous information previously on more than one occasion, have assessed the information, commenced an investigation and the discloser has subsequently identified themselves to GSOC providing additional information in the knowledge that action had been initiated.

Question 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.

GSOC's view on this is that, for many private sector entities this would be useful. The purpose of the legislation is to encourage the reporting of wrongdoing and the reporting of wrongdoing in most sectors has the potential to safeguard the public. A company may have less than 50 employees but have an extensive remit and deal with multiple other agencies, public sector bodies and have extensive private sector connections.

In the finance sector reports of financial misappropriation or unlawful risk taking has the potential to save money and protect finances.

In the health sector information on medicines and their safety is essential as exemplified by the recent Johnson Talcum powder scandal.

Similarly food hygiene and safety practices in the food/farming industry are extremely important and whistleblowing should be encouraged in these sectors.
Safety on transport can save lives and reports of safety flaws or concerning work practices should be encouraged too.

If there is no formal internal reporting procedure it is difficult for employees to know how/where to report and whether such reporting is encouraged. If the corporate message is that reporting wrongdoing is to be encouraged then persons might feel more inclined to do so.

Question 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.

GSOC's view on this is taken only from our own experience where persons can report internally within An Garda Síochána and where they subsequently come to GSOC. The processes are less prescriptive within An Garda Síochána than coming to GSOC as a matter must meet the criteria under the Protected Disclosures Act 2014 but also be deemed to be in the Public Interest to initiate an investigation in GSOC. This can often cause confusion on the part of disclosers as different requirements are in place.

It is therefore considered that an overarching scheme might be preferable in terms of consistency across the board. This would ensure a parity of schemes established in the workplaces and would provide commonality in terms of what is expected.

The aim of any scheme should be to encourage reporting where it is observed in the workplace and to ensure that this is easy to report, complies with fair procedures and provides for the statutory safeguards for whistleblowers.

Question 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

The purpose of the legislation is to encourage the reporting of wrongdoing and the reporting of wrongdoing in most sectors has the potential to safeguard the public. A public sector body may have fewer than 50 employees but have an extensive remit and deal with multiple other agencies, provide oversight over bodies and have extensive private sector connections regarding procurement.

Public sector bodies often operate in the public interest and it must also be in the public interest to promote reporting of wrongdoing. Oftentimes internal reporting of such wrongdoing means that it can be tackled directly without delay by the agency/organization.

Where a concern about anonymity/reprisal exists in relation to the internal reporting the option to externally report should also be available in bodies with fewer than 50 employees. This is to take into account that in a smaller working environment it may not be possible to report a matter in confidence, even where good internal procedures exist.

A view can be taken that depending on the nature of the wrongdoing and the positon of the person against whom the disclosure is being made, the internal reporting should be the preferred option, The external option could be available if the internal route be compromised in any way.

Question 5

Should Ireland provide that municipalities (local authorities in the Irish context) can share internal reporting channels? Please provide reasons for your answer.

GSOC cannot offer an opinion on question.

Question 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.

Most of the differences between EU member states are found in the type and numbers of existing competent authorities (external channel) in their country. In the absolute majority of member states, more than one authority is considered as the competent authority. In some countries there are more multiple relevant authorities that can receive disclosures, sometimes the number depends on the specific state structure (Federal, Regions, and Communities).

Depending on the number of competent authorities in a member state, several trends can be distinguished. There are countries in which disclosers have the option to address a report to any institution whose competence falls within the scope of the matter reported by them. In this way, the whistleblower must choose which authority has the competence to investigate the report and it can sometimes be the case that a discloser will not be able to correctly choose the right competent authority. If the competence is chosen incorrectly, the process of investigating the disclosure will take more time. Difficulties also arise where a disclosure surrounding the same matter is made to different authorities who have no way of communicating with each other that the disclosure is already under investigation.

In other EU states meanwhile, a single competent authority has been designated to receive disclosures as an external channel. It identifies the correct body to conduct the investigation, directs the discloser to that body and receives a report at the end of the disclosure process where it is held centrally. These single bodies are also envisaged to provide both physiological supports and legal supports into the future.

As an EU member state if we continue with the current process, GSOC feels it needs to be reformed in certain areas, for example multiple reporting and the ability to communicate where necessary on this topic. Having engaged with some of the central authority bodies from the other member states over the past year, GSOC feels that this it is preferable to have one body as the central repository for external reporting. This can avoid duplication, ensure the discloser gets the advices needed to make an informed decision, be in a position to receive updates and closed disclosure outcomes, report centrally on disclosure statistics, identify issues centrally to continually develop this important area of legislation and this authority could integrate any legal supports and physiological supports which may be put in place in the future.

The bodies currently investigating disclosures would remain doing this, but could now continue in the knowledge that the discloser has received support and advice prior to approaching them and that only one investigation is occurring at that time.

Question 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.

GSOC recently participated in discussions on this very topic within the Network of European Integrity and Whistleblowing Authorities (NEIWA) as one of the group leaders within this multi-country body. The outcome of these discussions demonstrated that this area is one of the most considered within each EU member state.

Where possible national law should specify what material the final report should contain. A format may include, for example, the nature of the investigation conducted; the evidence or material collated and identified; statements obtained; the nature of any disciplinary / criminal proceedings as a result of the investigation and the effects on the discloser during the process. Fair procedures dictate that there would be a right of reply in relation to any adverse comment made in any final draft report. National law should dictate who is entitled to a copy of such a report and should ensure that there is a clear legislative basis for the provision of personal and third party data to ensure that data protection legislation is complied with.

Legislation should dictate that such a report should be in writing in the agreed format and given the contentious nature of such reporting consideration might be given to a statutory entitlement to qualified privilege in relation to defamation for such reporting.

Some additional considerations may be required when transferring the physical reports, these are:

- Restrict/abridge the report and case materials
- Choose the most appropriate channel to use for transferring a report
- Nominate responsible persons in both institutions to handle the transfer
- Respect the precautions set up for transferring restricted information
- Notify the reporter of the transfer

When transferring reports and files, different channels are used:

- Registered post
- Confidential courier/In person
- Email
- Electronic communication/information system

Reports should be stored and handled confidentially. Confidentiality of the information should be ensured at all times. Staff members receiving information from disclosers should be bound by the professional secrecy within the limits imposed by law. No access to staff and institutions not participating in the investigation/handling process should be permitted. Consideration to classify/abridge reports, and use pseudonyms to further protect the identity of the discloser. The duty of professional secrecy and confidentiality should remain in place when transmitting data internally and externally and even after a person's employment ends.

Question 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.

As an investigative body GSOC has prior experience in this area and systems in place allow for open and transparent reporting.

Given the legislative provisions which GSOC operates under, that being the Garda Síochána Act 2005, there is a threshold for admissibility of a disclosure for investigation. The disclosure must first meet the criteria under Section 5(3) of the Protected Disclosures Act 2014 and subsequently be deemed in the public interest for investigation. This process identifies matters which fall outside of the scope of the legislative provisions and decisions are recorded in writing and conveyed to the discloser in an open and transparent manner.

There should also be a mechanism for closing a disclosure matter which has already been determined or where there is no prospect of further the enquiries into the matter. GSOC again operates under its current legislation and where this occurs can report on the findings recommending that matters can be discontinued for the following reasons;

1. as a result of information obtained after the disclosure was determined to be admitted for investigation, it was considered that the disclosure is frivolous or vexatious,
2. It is considered that the disclosure was made in the knowledge that it was false or misleading,
3. or having regard to all the circumstances, it is considered that further investigation is;
   a. not necessary, or
   b. reasonably practicable to continue.

Again such matters are recorded in writing, and the discloser is informed of such decisions in writing in an open and transparent manner.

Question 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.

Should a single competent authority be designated to receive disclosures as an external channel, it could provide both physiological supports and legal supports into the future for persons making disclosures as necessary. This single body would be the most efficient mechanism for the administration of such supports. As the uptake in reporting of wrongdoing continues, it should not be left to NGO's to fill this gap.

This single authority could also assess the impact of the disclosure process on the person making the disclosure based on the final report received and counselling services could also be made available as required at the end of the process.

These are support measure which have been observed as being necessary during the course of GSOC's interaction with disclosers. It would be extremely difficult to administer if there was not a central system in place. Likewise the provision of consistent and informed legal advice to disclosers could be administered through a single competent authority, disclosers have reported difficulty in obtaining such advice as this is a specialized area of legal practice.

Question 10

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

In respect of the prohibition of retaliation, it is felt that a scaled list of penalties should be in place within the legislation from administrative to financial against both an individual but also at an organisational level in order to dissuade individuals within an organization or the organization itself from retaliating against the discloser concerned. These should be in addition to measures and reliefs already in place.

Should a central body or authority be appointed, this body could administer such penalties where information and evidence of clear infringements can be demonstrated while a disclosure is being examined.

Similar penalties should be adopted with regard to breaches of the anonymity of the discloser in addition to the remedies in place already to dissuade the release of this information as a form of retaliation.

An example of an administrative action could be requiring the issuing of a public statement of apology while appropriate and financial penalties could be on a set scale laid out in future legislation.

These measures would be proportionate to the act or omission which occurred and may be dissuasive enough to reduce the instances of this occurring into the future.