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.

Ibec does not believe that Ireland should avail of the option to require anonymous reports to be accepted and followed-up.

Employers acknowledge that whistleblower protection is an important tool to enable companies identify and address unlawful or unethical conduct within their organisation. Ibec, therefore, recognises the importance of ensuring protection for those who disclose illegal activities or other wrongdoing in the workplace.

However, a fair balance must be drawn between the protection of whistleblowers and the ability of employers to properly investigate disclosures of alleged wrongdoing and the need for safeguards against misuse.

Unlawful or unsubstantiated disclosures can lead to disastrous reputational and economic consequences for companies, and individuals within companies. We must, therefore, also ensure adequate protection for those accused of wrongdoing. In this regard, a fundamental principle of natural justice and fair procedures is the right to know one's accuser. Indeed as noted in SI 464 of 2015 Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015 (the "Code of Practice"), a disclosure made anonymously may present a barrier to the effective internal investigation of the matter reported on. Although the guidance published on the Protected Disclosures Act 2014 requires, where possible, anonymous disclosures to be investigated, where this happens, there is a certain risk to the rights of those accused.

The requirements of the Whistleblowing Directive impose extensive requirements on companies to establish internal channels and procedures to address reports of breaches. Notwithstanding that most employers have adapted to the requirements of the Protected Disclosures Act, the obligations in the Whistleblowing Directive will require a large number of companies to adopt new structures and procedures at a time where companies are already burdened by legislation stemming from other areas, not to mention the current challenges posed by COVID-19.

For companies to be required to accept and follow-up on anonymous reports would give rise to significant challenges considering the Directive's extensive widening not only of the categories of "*relevant wrongdoing*" but also the definition of "*protected persons*". Currently, the Protected Disclosures Act extends its protections to "*workers*" where the relevant information disclosed came to his/her attention "*in connection with their employment*". However, the Directive extends protection to shareholders, interns, unpaid trainees, volunteers, those who report on breaches which they became aware of during employment, which has since ended, and those not yet employed where the information on a breach came to them during the recruitment process or other pre-contractual negotiation. Therefore, it will no longer be a requirement that the information came to the protected person "*in connection with their employment*", or that they be a "*worker*", which will significantly widen the scope of our current legislation. For an employer to be

required to accept and follow up an anonymous report where that may arise from a disgruntled former employee, interview candidate, or disgruntled shareholder, will raise significant challenges for employers leading to, at the very least, a disproportionate cost and administrative burden.

Furthermore, the Directive imposes stricter timelines for processing a protected disclosure and employers will be required to "*diligently follow up on disclosures*" within 3 months (extendable to 6 months in certain circumstances). How does an employer comply with such a requirement in a "*diligen*t" manner where it is dealing with an anonymous breach? Yet failure to adhere to such time limits in taking appropriate action will allow the whistleblower to report externally. This will likely result in detrimental consequences for employers particularly if the anonymous complaint is vexatious, unsubstantiated and/or malicious.

The difficulties imposed by public disclosures will be further heightened for employers as Article 21(7) of the Directive removes liability for a reporting person where he/she makes a disclosure which involves amongst others, defamation, copyright breach, breach of data protection rules or disclosure of trade secrets where the reporting person has "*reasonable grounds*" to believe the disclosure is necessary to reveal the breach. Therefore, a former employee/shareholder could make an anonymous disclosure of wrongdoing to an employer, if an employer fails to follow up diligently and no appropriate internal action is taken, that anonymous person can disclose externally and liability would be removed should he/she believe they had "*reasonable" grounds"* to disclose.

To extend the Directive's burdensome provisions further to require anonymous reports to be accepted and followed-up in the prescriptive manner required would, in our view, also pose huge practical challenges for companies. Article 9(1) requires, for example:

- acknowledgment of receipt of the report to the reporting person within 7 days of that receipt
- continued communication with the reporting person
- where necessary, requesting of further information from and the provision of feedback to the reporting person

How could an employer comply with such prescriptive requirements in respect of an anonymous report from an individual who will likely not have provided any contact details?

We note that both Article 6 of the Whistleblowing Directive and the provisions of the Protected Disclosures Act 2014 confirm that disclosures may be made anonymously. Furthermore, protection is extended to persons who report information on breaches anonymously, but who are subsequently identified and suffer retaliation. Those who report on breaches anonymously already enjoy, therefore, the significant protections afforded to all other whistleblowers. We do not, in these circumstances, believe it is necessary for Ireland to avail of the option at Article 6(2).

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.

Ibec does not believe that Ireland should provide that private sector entities with fewer than 50 employees should establish internal reporting channels and procedures.

The Whistleblowing Directive sets out prescriptive and inflexible requirements for the management of reports of breaches. According to BusinessEurope estimates, the cost to implement internal reporting channels will extend far beyond the estimate of the Commission. Depending on the company, BusinessEurope estimate that implementing the system will require a one-off implementation cost of €5,600-€30,000 and an annual operational cost of €4,800-€50,000 per year.

Small businesses in Ireland are currently faced with unprecedented challenges brought on by the COVID-19 pandemic. Unfortunately, for many small businesses, mere survival is not guaranteed in the current climate. Ibec submits that to impose such significant additional costs on smaller businesses at a time when they are suffering perilous financial challenges would further risk the future of many small businesses in Ireland.

In any case, existing legislation incentivises all employers to assess and investigate disclosures given that a failure to do so may enable an individual to avail of external disclosure channels provided under the Protected Disclosures Act. We would, therefore, argue that a legislative requirement to do so is unnecessary.

We cannot forget the significant protections and obligations which exist within our own Protected Disclosures Act 2014 and the other provisions of Whistleblowing Directive. These ensure a very high level of protection for whistleblowers regardless of the size of their workplace. Indeed, we note that the Protected Disclosures Act 2014 is regarded as a model of best practice for other countries to follow in implementing whistleblower legislation. We do not, in such circumstances, see the need to expand the very onerous obligations to establish reporting channels on smaller employers.

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.yhuj

Ibec does not see the need for Ireland to lay down less prescriptive requirements for reporting channels for private entities with fewer than 50 employees.

Recital 49 provides that Member States may encourage private sector employers with fewer than 50 workers to establish internal channels for reporting and follow-up. Ibec would argue that Ireland already does so by way of the Code of Practice. The Code of Practice sets out guidance and best practice to help employers and workers to understand the law on protected disclosures and how to deal with disclosures in the workplace. It recommends that all employers (regardless of size) have in place a Whistleblowing Policy setting out an accessible procedure for making protected disclosures and a clear roadmap for dealing with protected disclosures. Particularly helpful is the sample Whistleblowing Policy included in the appendix to the Code of Practice.

As required by Recital 49, the Code of Practice and sample Whistleblowing Policy emphasise the importance of assuring a worker making a disclosure that every effort will be made to maintain confidentiality and that all reasonable steps must be taken to maintain confidentiality.

The sample Whistleblowing Policy also provides for diligent follow-up. It provides that:

- the disclosure will be acknowledged
- a meeting will be arranged following the raising of the concern
- the manner of how the matter will be investigated will be communicated to the reporting person
- where possible, the outcome of any investigation will be communicated to the reporting person
- the likely time scales in regard to each of the steps being taken will be communicated to the reporting person.

Ibec submits that the Code of Practice and sample Whistleblowing Policy provide the practical guidance but also the flexibility that smaller employers need in implementing these requirements. It is, therefore, in our view a more appropriate and effective way of encouraging employers with fewer than 50 workers to establish internal channels for reporting and follow-up.

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

Ibec believes that Ireland should exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels.

It is already mandatory in Ireland for all public bodies (regardless of size) to have in place an agreed Whistleblowing Policy setting out procedures for making and dealing with reports of breaches. Therefore, such bodies effectively already have in place internal reporting channels.

As stated above, the Code of Practice and sample Whistleblowing Policy include much needed flexibility for smaller public sector bodies to ensure that their internal reporting channels are better tailored to their organisation size, structure, sector and available resources.

We, therefore, believe that the existing requirement for public bodies to put in place a Whistleblowing Policy such as that appended to the Code of Practice is sufficient. Further, it is more appropriate than imposing on them a further administrative burden of tinkering with existing procedures to ensure they are aligned with the prescriptive procedures set out in the Whistleblowing Directive.

Question 5

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

Ibec believes that local authorities should be permitted to share internal reporting channels.

As stated above, the prescriptive nature of the Whistleblowing Directive's requirements mean that the administrative and cost burden placed on employers and organisations is significant. Given the challenges currently being faced by local authorities (like many employers), additional administrative and cost burdens should be avoided unless absolutely necessary. Certainly, any mechanism which can serve to reduce this burden and streamline the process for organisations should be availed of.

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.

Ibec is satisfied with the current approach to designating competent authorities and does not see a need for change in this area.

The most recent statutory review of the Protected Disclosures Act 2014 carried out in July 2018 (the "Statutory Review") included a detailed review of the implementation of the Act over its first years of operation. The analysis indicated that the impact of the Act had been broadly positive to date and no legislative amendments were, therefore, recommended.

The current disclosure channel to competent authorities ensures that the authority dealing with disclosures already has regulatory functions in the area which is the subject of allegations. This expertise and experience, we believe, better enables them to properly deal with disclosures made to them. In particular, the regime relating to disclosures regarding offences under financial services legislation is governed by the Central Bank (Supervision and Enforcement) Act 2013. Furthermore, the recently published European Union (Money Laundering and Terriorist) Regulations 2019 also contain an internal reporting obligation on all designated persons to have in place appropriate procedures to report a contravention through a specific independent and anonymous channel. Although these Acts are in addition and supplemental to the Protected Disclosures Act 2014, they highlight the necessity for the competent authority dealing with the disclosure to have the necessary expertise so that the disclosure is dealt with in a more efficient and timely manner.

It is our fundamental belief that disclosures are best dealt with at company level in the first instance as companies are best placed to investigate alleged wrongdoing within their workplace. Only where the company has failed to take action or in exceptional circumstances, should external reports be facilitated. Positively, the Protected Disclosures Act and the Whistleblowing Directive are both based on this guiding principle. We understand, however, that this principle does not ground the equivalent legislation in the Netherlands where an independent Whistleblowing Authority was established as part of the legislative regime. We would be concerned by any amendment to our legislation which could undermine this underlying principle that disclosures should be made to the employer in the first instance.

Separately, we would have some concerns about the resources required of an organisation to deal with all disclosures regardless of subject matter. In this regard, we understand from the Statutory Review that after sixteen months in existence, the Whistleblowers Authority in the Netherlands had yet to complete an investigation. This would suggest that the workload and, therefore, resources required of such an organisation are extensive and we are not aware of any

existing regulatory authority with the capacity to take on such an extensive portfolio of work at this 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.

We believe that a level of flexibility and discretion should be afforded to organisations with regards communicating the final outcome of investigations to individuals who have reported information on an alleged breach.

It may not, in all circumstances, be appropriate for the whistleblower to receive the entirety of the investigators' findings. Therefore, companies must be afforded discretion in what information is shared in the final report as each case must be looked at on its own merits whilst ensuring adherence to fair procedures for all parties concerned.

In the first instance, the Department must recognise the privacy laws to which employers are subject including the General Data Protection Regulation and Data Protection Act 2018 which set strict limits for sharing of personal data. It should be specified that a company cannot share personal information about other employees in any report to be shared with the whistleblower.

Furthermore, the Department should be cognisant of legislation particular to certain sectors, including the financial sector, which limits the amount of information that can be disclosed to a whistleblower in any findings made.

Final reports must also protect trade secrets and sensitive commercial information of the company. It is crucial that reporting channels cannot be used to disclose company sensitive information externally. Therefore, companies must be permitted to redact any information which, in the company's view, may disclose details of a trade secret or other sensitive or confidential commercial information.

Notably, the Protected Disclosures Act 2014 was amended in June 2018 to incorporate the provisions of the EU Directive of the Protection of Trade Secrets Directive (2016/943). The effect of the amendment was to require whistleblowers to show they were motivated by the "*general public interest*" when disclosing commercially sensitive information. This is the case even if the relevant wrongdoing has been reported to the competent authority and the allegations are true. Ibec submits that it is concerning, in light of Article 21(7), that a whistleblower will no longer have to demonstrate that a public disclosure of trade secrets and/or commercially sensitive information is in the general public interest (which requires a test of objectivity) only that the whistleblower had reasonable grounds to believe the disclosure was necessary, which surely brings an unwelcome test of subjectivity.

Furthermore, Ibec submits that the proprietary and moral rights in commercially sensitive information, particularly trade secrets, belong to the company and therefore, such information must be protected including the non-disclosure of same in any final outcome.

Finally, a company should be entitled to determine if a disclosure was made in bad faith and where such a determination is arrived at, this should be included in the final report.

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.

It is crucial that Ireland provides that competent authorities may close or prioritise reports received in accordance with paragraphs 3,4 and 5 of Article 11.

As stated above, a fair balance must be drawn between protecting whistleblowers and the need for safeguards against misuse and/or unsubstantiated, repeated or irrelevant disclosures which can lead to serious reputational and economic consequences for companies.

Where reported breaches are clearly minor or repetitive or vexatious, it is essential that competent authorities have the discretion to close such reports without delay. This is necessary both for the avoidance of unnecessary investigation and use of resources, whether of the competent authority itself or the employer who must devote significant time and resources to co-operating with the investigations of competent authorities.

Furthermore, it is a matter of practical necessity that a competent authority could deal with reports of serious breaches as a matter of priority without prejudice to the timeframe set out in point (d) of paragraph 2. Clearly, preventing serious infringements of laws is a core objective of whistleblowing procedures. Where such serious infringements are identified, these should be addressed as a matter of priority even if this means that the addressing of less serious breaches suffers, in certain circumstances, minor delays.

However, Ibec would suggest that high inflows of reports are less likely to arise where, as is currently the case in Ireland, different competent authorities are charged with investigating different reports. If a single competent authority was to be established with responsibility for all such reports, an increased inflow of reports and consequent delays are more likely.

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.

Ibec is of the view that there are already significant measures of support in place for reporting persons.

Crucially, the Irish legislation provides simple and cost-free access to the resolution of complaints via the Workplace Relations Commission. In this regard, we note that Transparency Ireland's Best Practice Guide for Whistleblowing Legislation cites Irish legislation as an example of good practice as regards access to court and industrial relations mechanisms. We, therefore, do not believe that financial supports are necessary or indeed appropriate, for reporting persons. In fact, a reporting person not only has access to a cost free, non-legalistic forum, but should that claim be found to be vexatious or brought as a consequence of mala fides, there is no fine imposed on that reporting person for bringing that claim in the first instance despite the cost and administrative burden incurred by an employer.

We further note from the Statutory Review that free legal advice is already available from the Transparency Legal Advice Centre which was established in 2016 with grant support from the Department to provide legal advice and assistance to potential whistleblowers. Of course, the WRC also has an information and customer service which provides information on all employment rights matters including those relating to protected disclosures.

The level of awareness and willingness to speak up is further evidenced by the Integrity and Work Survey 2016 which found that of those who witnessed wrongdoing during the course of their career, 63% shared their concerns with a responsible person. Of those, 78% said that sharing a concern had a positive or no impact on them. This survey also pointed to positive attitudes to whistleblowing among employers with 91% of employers saying that they believed whistleblowers should be supported. These results would tend to show that there are effective measures of support for reporting persons, both within the workplace and externally.

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.

Ibec believes that the penalties already provided for in the Protected Disclosures Act are effective, proportionate and dissuasive.

The maximum award payable under the Protected Disclosures Act 2014 is up to 5 years' remuneration – over double the maximum award available under unfair dismissals and/or employment equality legislation. The existing legislation also provides for the ability to apply for interim relief to the Circuit Court and to bring a civil law claim for damages. It is clear from the jurisprudence of the Court of Justice of the European Union that for remedies to be "*effective, proportionate and dissuasive*" they should in effect be "*punitive*" and Ibec submits that up to 5 years' remuneration is already sufficiently punitive.

There are, therefore, extensive remedies available to reporting persons and arguably draconian penalties already in place for organisations found to be in breach.

Furthermore, the definition of penalisation in our current legislation is extraordinarily wide. It is concerning to Ibec that the Directive extends the scope of penalisation even further by specifically outlining a number of further measures that can amount to penalisation. In particular, the Directive specifically includes "*failure to convert a temporary contract into a permanent contract where an employee has a legitimate expectation that he/she will be offered one*" or "*failure to renew or early termination of a temporary contract*". Not only is there already a remedy under section 13 of the Protection of Employees (Fixed Term Workers) Act 2003 and/or the Unfair Dismissals Acts 1977-2015 for such a claim, but in the current climate where contracts are not being renewed or are being terminated due to the economic impact of COVID-19, to widen the definition in such a manner would be particularly unhelpful and unnecessary particularly given the statutory remedies already in place.

Ibec submits that any penalty should not go beyond economic loss and should be limited to a level similar to penalties for penalisation under other employment rights legislation including the fixed term workers legislation.

Ibec respectfully submits that it would be wholly unreasonable, given the extensive definition of penalisation, should penalties take into account the effects of penalisation, similar to compensating for the effects of discrimination under the Employment Equality Acts 1998-2015, This is predominantly due to the fact that the definition of penalisation has, Ibec submits, widened to an unreasonable extent. In particular, penalisation will include "*blacklisting*" and "*reputational damage, particularly in social media*", something an employer may have limited or no control over yet may be liable for, resulting in a punitive award being made.

Ibec, therefore, believes that transposing legislation should go no further than is absolutely necessary in extending penalties under this legislation.