Response to DPER on the Whistleblowing Directive Consultation July 2020

Background

The Irish Auditing and Accounting Supervisory Authority (IAASA) is the competent authority in Ireland responsible for:

- public oversight of statutory audit in accordance with the EU Audit Directive 2006/43/EC and Regulation 537/2014. Five recognised accountancy bodies (RABs) have been granted recognition to perform the day-to-day regulation of auditors in accordance with the Companies Act 2014 under IAASA's oversight; and

- supervision of compliance with the requirements of the Transparency Directive 2004/109/EC as transposed into Irish law.

The Annex to the Whistleblowing Directive scopes those EU laws into its remit.

In addition, under the Companies Act 2014, IAASA supervises eight prescribed accountancy bodies (PABs) in their regulation and monitoring of their members. Five of the eight PABs are also RABs (ACCA, CPA, ICAI, ICAEW, ICAS).

Auditing and accounting regulatory model

Under the model of independent statutory oversight set out in the Companies Act 2014, IAASA's role is to supervise how the PABs regulate and monitor their members, of which there are circa 40,000.

Primary responsibility for the regulation of members, including licensing, quality assurance and receipt and investigation of complaints about members resides with the PABs/RABs.

This independent statutory oversight model applies to audit-related matters unless it relates to the audit of a public interest entity (PIE). In that case, in accordance with Regulation 537/2014, IAASA undertakes the quality assurance inspection of PIE audits as well as the investigation of possible relevant contraventions arising in the conduct of statutory audit of PIEs.

IAASA's direct inspection and investigation remit applies to the eight audit firms who undertake the audit of PIEs in Ireland. The remaining circa 1,800 audit firms in Ireland are directly regulated by the RABs. This encompasses systems of licensing, annual returns, quality assurance and investigation and discipline.

While IAASA has discretion under the Companies Act 2014 to investigate non-PIE audit and accounting matters in the public interest, consistent with the above statutory model, most investigations are undertaken by the PABs/RABs.

Therefore, on receipt of a report of a possible contravention, unless the matter relates to IAASA's direct remit (i.e. a PIE audit), IAASA normally refers the matter to the relevant PAB/RAB for processing in accordance with its approved procedures.

Highlighted matters in respect of the transposition of the Whistleblowing Directive

1. Independent statutory oversight model and Directive 2006/43/EC

As outlined above, the current statutory framework for the consideration of possible contraventions relating to accounting and auditing is administered by the PABs/RABs under IAASA's oversight. In practice, reports of breaches may be handled through their licensing, quality assurance or investigation and disciplinary processes.

It is important that the transposition of the Whistleblowing Directive supports the continuation of a single consistent process for the receipt, follow up and communication of all reports of breaches. It would be suboptimal if, by virtue of the designation of IAASA as a competent authority under the Whistleblowing Directive, it was required to follow up, provide feedback and communicate on non-PIE matters which are currently handled by the PABs.

Also, as part of IAASA's role in approving RABs/PABs investigation and disciplinary procedures, the Authority has the statutory power to enquire into whether any particular investigation has been conducted in line with that body's approved procedures. Accordingly, the Authority has a policy of non-involvement in ongoing cases so that any such enquiry is not compromised. Such non-involvement may be impacted if it were necessary for the Authority to be a conduit to the complainant on the underlying complaint.

The Authority also wishes to avoid the risk of inefficiencies and inconsistencies in the handling of reports of breaches, which could arise if the system for follow up varied depending on the source of the report. Such inconsistencies increase the risk of the Authority's regulatory processes being undermined, for example by judicial review. Further, since reporting persons may report to multiple bodies, it is important that the system avoids two bodies undertaking follow up on the same matter under the same remit.

Therefore, in its transposition of the Whistleblowing Directive, IAASA requests that the Department implements it in a manner that does not negatively impact on the above regulatory model.

In that context, IAASA would require the power to onward transmit reports of non-PIE related possible breaches to a PAB/RAB, rather than being obliged to follow up the matter itself. That transmission and communication of it to the reporting person would then conclude IAASA's obligations under the Whistleblowing Directive on the matter.

Also, there are a number of other authorities with whom IAASA shares confidential information related to possible contraventions to facilitate the effective follow-up of reports received (for example, the ODCE and Central Bank). The power to share information received from whistleblowers with other relevant authorities would continue to be an important aspect of ensuring effective follow up of reports received.

2. Size of entities subject to the Whistleblowing Directive – questions 2 and 4

In respect of private sector entities operating in the auditing and accounting market:

- Section 934I(3) of the Companies Act 2014 requires audit firms to have effective procedures within the firm for employees to report breaches of that Act or the EU Audit Regulation 537/2014 that relate to the conduct of statutory audits.

These requirements are based on the provisions of Article 30e of the EU Audit Directive 2006/43/EC, which comes within the scope of Article 3.1 of the Whistleblowing Directive. It is IAASA's view that these provisions include reports by whistleblowers and that they apply regardless of the number of employees within an audit firm.

It is our understanding that section 21.1 of the Protected Disclosures Act 2014 already requires public bodies, as defined in that Act, to have procedures in place for protected disclosures from current and former employees. Therefore, to exempt public sector bodies with fewer than 50 employees from the obligation to establish internal reporting channels would seem to weaken the mechanisms for reporting by whistleblowers in the Irish public sector.

3. Centralised public body – Question 9

We would support the establishment of a centralised agency to provide support to reporting persons. It is not practical for small public bodies (such as IAASA) to provide the support envisaged in the Whistleblowing Directive beyond the effective investigation of the report and protection of the person's identity. Neither would it be an effective use of limited public resources to require duplication of effort in this area across multiple public sector entities.

4. Member state options in Article 11 of the Whistleblowing Directive – Question 8

Based on IAASA's experience of dealing with complaints and its oversight of the PABs' regulatory processes, it is our view that the options available in Articles 11.4 to 11.6 should be availed of.

It is not an effective or efficient use of limited resources to follow up minor breaches including those which may be dealt with via other applicable regulatory tools available to the Authority or a PAB, or repetitive reports that do not differ substantively from reports that have already subject to appropriate action.

We think it would also be prudent to provide for the possibility that a competent authority may receive a significant number of reports in a relatively short period of time and not be in a position to comply with the timelines set out in the Whistleblowing Directive.

5. Definition of final outcome

We would also note that there may be merit in clarifying in the transposition what is intended by communication of the 'final outcome'. While this may be straightforward for some follow up processes, it is less clear for others. For example, most disciplinary systems comprise several distinct stages, for example, an assessment, investigation committee decision, disciplinary committee decision and appeal committee decision. It is unclear whether a decision at one of the stages of that process is a 'final outcome' to be communicated regardless of whether progression to the next stage of the process or an appeal may be contemplated.