

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.

Protected Disclosure Reports (Reports) are an important supervisory tool to assist the Central Bank in discharging its supervision and enforcement mandate. They help to extend the Central Bank's supervisory reach and enhance its overall regulatory insight by providing a valuable source of information regarding sectors and regulated firms. The presence of a protected disclosures regime also plays a unique role in the promotion of high standards within regulated firms, and it aids in positively influencing behaviours.

The Central Bank currently accommodates anonymous reporting. All Reports received are thoroughly assessed, and appropriate supervisory action is taken as required.

While the Central Bank has received valuable information from anonymous Reports, it can be difficult to fully assess these Reports, as there is no mechanism to engage with the Reporting Person in order to raise queries or to clarify the details of the Report. As a result, the Central Bank would encourage those submitting Reports to provide contact details where possible.

To date the Central Bank has accepted and followed up on anonymous Reports and has found that anonymous reports can provide valuable information and as such, is supportive for Ireland to avail of this option.

As an employer, while it encourages reporting persons to identify themselves when raising a concern to enable effective follow up and feedback, the Central Bank allows for the making of protected disclosure on an anonymous basis and is committed to treating such complaints seriously, assessing them on their merits and investigating where appropriate.

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.

The Directive requires private sector firms with 50 workers or more to establish internal reporting channels and procedures. However, this exemption does not apply to entities that fall within the scope of Union Acts referred to in Parts I.B and II of the Annex to the Directive.

The Central Bank notes that many types of regulated financial service providers fall within the scope of the Annex, however some do not. This means that many, but not all regulated financial service providers in Ireland, regardless of the number of employees, will be required to establish and maintain adequate channels and procedures for the facilitation of whistleblowing and that there is no discretion in this regard.

The Central Bank notes that page 5 of the consultation paper incorrectly states that “all financial services companies regardless of size” must establish reporting channels and procedures.

It is important to ensure consistency and proportionality in the requirements across the financial services sector. Given the complexity and range of firms regulated by the Central Bank, the Central Bank will engage with the Department of Public Expenditure and Reform to address this matter following the conclusion of the public consultation.

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.

Please see response to Question 2

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 Central Bank notes the importance of a protected disclosures regime and that the priority for all public bodies should be to facilitate to the greatest extent possible the making of a protected disclosure. An exemption based solely on the size of a public body would not adhere to this principle and all employees should be allowed to make a protected disclosure and should be protected accordingly.

If it is not possible to establish internal reporting mechanisms due to the size of the public body, it may be useful to establish alternative reporting mechanisms to provide the same opportunity for staff to raise issues in an appropriate, confidential manner.

Question 5

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

N/A

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.

The Central Bank is a prescribed person for the purpose of receiving protected disclosures under the Protected Disclosures Act 2014. In addition, the Central Bank is designated to receive protected disclosures under Part 5 of the Central Bank (Supervision and Enforcement) Act 2013. We believe that this existing model has worked very well.

While the Protected Disclosures Act 2014 provides that a person may make a protected disclosure to “the Bank, an officer or employee of the Bank or an authorised officer” the Central Bank set up a centralised unit – the “Protected Disclosures Desk” to meet its legislative requirements and this has been very successful. The Protected Disclosures Desk provides a dedicated channel for members of the public or staff of regulated firms to provide information on suspected breaches of financial services legislation in a confidential form to the Central Bank and we encourage individuals to come forward to our dedicated Protected Disclosures team where they wish to provide such information.

In light of the complex nature of the Banks remit, it is essential that the details of protected disclosures relating to breaches of financial services legislation are assessed directly by the Central Bank. To this end, the Central Bank has a wide range of supervisory and enforcement powers at its disposal to enable it to investigate alleged breaches of financial services legislation.

In addition, it can be necessary to act quickly in response to information received and an assessment may necessitate engagement with the Reporting Persons. Furthermore, in order to protect the identity of Reporting Persons, it is best to limit the dissemination of their disclosure.

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.

The Central Bank recognises the importance of feedback to Reporting Persons.

We note that, in accordance with Directive (EU) 2019/1937, competent authorities have an obligation to provide feedback and an obligation to let Reporting Persons know the outcome of investigations triggered by their report.

With regard to communication with Reporting Persons, the Central Bank works within a complex regulatory framework at both domestic and European level and is subject to strict confidentiality / professional secrecy obligations under both national and EU law. Such obligations prohibit the Central Bank from disclosing confidential information to persons making disclosures and will, in many cases, prevent the Central Bank from providing detailed feedback to those persons. A protected disclosure may lead the Bank to a line of enquiry that may result in investigation and ultimately, a public outcome, but often disclosures lead to action by the Bank that does not have a clear outcome that it can disclose publicly, in light of obligations of professional secrecy. As such, the Central Bank is limited in the feedback it can provide.

Any procedures that will be prescribed pursuant to Art 11(2)(e) should recognise the limitations that national law and obligations of professional secrecy under EU law may impose on the Central Bank. The Central Bank will continue to engage with the Department of Public Expenditure and Reform on this matter following the conclusion of the public consultation.

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.

Reports are an important source of information for the Central Bank and it is essential that each Report is appropriately assessed.

The question of whether a Report is repetitive in nature or minor is dependent on the facts of each individual Report and / or a comparison with past Reports. Where it has been established that a Report is either minor or repetitive and that no further action is required, it is important that competent authorities retain the discretion to close these Reports.

Article 11 (3) provides that only after having “duly assessed the matter” the competent authority can decide that it is “clearly minor and does not require further follow-up pursuant to the Directive”. Article 11 (4) provides that a matter does not require follow-up whereby the Report does not “contain any meaningful new information on breaches compared to a past report in respect of which the relevant procedures were concluded”.

The provisions of Article 3 (3) and (4) ensure that each Report receives an appropriate level of assessment in order to determine whether the matter is minor or repetitive. Furthermore, it is not in the public interest that any competent authority is required to investigate repetitive Reports and / or minor matters.

The Central Bank supports the adoption of the discretions outlined in Article 11 (3) and (4).

The Central Bank notes that Article 11 (5) provides competent authorities discretion as to the timing of feedback required by Article 11(2)(d) in the event of a high inflow of reports. This discretion is important for the effective operation of the Central Banks protected disclosures function. The prioritisation of the most significant and serious reports in such circumstances is fundamental to the public interest and will allow competent authorities to focus on the most serious issues. The Central Bank therefore supports the implementation of the discretion outlined in Article 11(5).

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.

The Central Bank encourages individuals to come forward to our dedicated Protected Disclosures Desk where they have concerns or information relating to suspected regulatory wrongdoing in financial services. We understand that this can be a difficult and indeed stressful step to take. However, we value people coming forward and we have a team of people available to speak with those who come forward.

We also value and encourage our staff to speak-up and we have a robust internal reporting mechanism in place for this purpose. The Central Bank has appointed an independent body to support staff and provide free and confidential advice on how to raise a concern in work.

It is important that Reporting Persons be well informed, that they understand the steps they are taking and that they feel supported in this regard. As well as helping to protect Reporting Persons, this leads to better reporting and enhanced information for competent authorities.

The Central Bank recognises the importance of the protected disclosures regime and supports the provision of advice and psychological support for Reporting Persons. An independent body should provide these services.

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.

What penalties should Ireland impose under this Article?

The Central Bank suggests that criminal penalties be available in respect of the most serious aspects of Article 23. Depending on the approach adopted to criminal penalties, it may also be appropriate to provide for administrative civil penalties in the context of the Central Bank’s remit relating to financial services. Additionally, we note that the broader ‘enforcement’ landscape relevant to the Whistleblower Directive also includes civil remedies / civil enforcement mechanisms (for example a remedy in tort and the right to seek adjudication from the Workplace Relations Committee).

What will make these penalties “effective, proportionate and dissuasive”?

As the criminalisation of a breach and the creation of criminal offences is a matter of government policy, the Central Bank would defer to the government and AGO advice in this regard. However, the Central Bank notes that Recital 88 of the Directive states that a clear legal prohibition of retaliation would have an important dissuasive effect.

The Central Bank will engage with the Department of Public Expenditure and Reform to address these matters following the conclusion of the public consultation.