

# 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”).<sup>1</sup>

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](mailto: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.

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<sup>1</sup> <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.

No.

*Rationale for this response.*

1. With anonymous reports there is no mechanism for back-and-forth communication. Therefore, without clarification the process can be hindered.
2. With the acceptance and follow-up of anonymous reports there is the potential for a pattern of the same report from the same individual being submitted on numerous occasions. In addition, this individual also may have their own alternative motives for making and submitting the same report in the first instance.

## 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.

'Yes' to a particular sector but 'No' to internal reporting channels.

*Rationale for this response.*

Product safety and compliance is of paramount importance when treating a patient and in particular with life-saving equipment. Therefore, employees of small private sector companies who wish to report breaches of product safety and compliance should be provided with the mechanisms to do so. Article 8, parts 5 and 6 if extended to SMEs (small and medium-sized enterprises):

5. Reporting channels may be operated internally by a person or department designated for that purpose or provided externally by a third party. The safeguards and requirements referred to in Article 9(1) shall also apply to entrusted third parties operating the reporting channel for a legal entity in the private sector.
6. Legal entities in the private sector with 50 to 249 workers may share resources as regards the receipt of reports and any investigation to be carried out. This shall be without prejudice to the obligations imposed upon such entities by this Directive to maintain confidentiality, to give feedback, and to address the reported breach.

provide the opportunity for external third party services and they could also avail of shared resources.

### 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.

No.

*Rationale for this response.*

Ireland should not lay down less prescriptive requirements for channels for private entities with fewer than 50 employees where such SMEs are providing goods/services where product safety and compliance is of paramount importance when treating a patient.

#### 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

No.

*Rationale for this response.*

A public body normally refers to a formally-established organisation, normally created by statute and publicly funded for the purposes of delivering a public or government service. Where a public service is being delivered then then it should not be exempt. Possibly, these smaller bodies could use the reporting channel resources of a larger body.

Question 5

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

Not applicable to the National Ambulance Service.

### 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.

*Rationale for this response.*

Ireland should continue with the current approach to designating competent authorities. In addition, the Health Act 2004, as amended by the Health Act 2007 (Part 14 Protected Disclosures of Information), provides for the protection of employees and members of the public who disclose possible wrongdoing within the health sector.

### 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.

Complex issues can arise in relation to the outcome of investigations related for example to social impacts or governance issues. For this reason, and because of the sensitivity of relations where numerous parties are involved, particular attention needs to be paid to communication processes.

*Rationale for this response.*

The 'in camera' rule for Family law cases protects privacy and the reporting of same. A similar type rule could be applied to the reporting of sensitive investigations, as outlined above, unless the 'whistleblower' wishes not to protect their privacy and with their written permission (signed disclaimer).

### 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.

Yes.

*Rationale for this response.*

There are satisfactory protection provisions under each of the paragraphs. For example, under paragraph 3:

***This shall not affect other obligations or other applicable procedures to address the reported breach, or the protection granted by this Directive in relation to internal or external reporting. In such a case, the competent authorities shall notify the reporting person of their decision and the reasons therefor.***

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.

Transparency International Ireland who receive annual government funding provide a free helpline and legal advice centre. An external review of these provided services could guide the development of other supports if deemed necessary by such a review.

### 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.

There are no straight forward responses to this question.

Potential common criteria to determine the level of penalties could include the nature of the breach; the numbers affected; the response by the company/public body; whether the breach was intentional or negligence; how a company has profited; and any other aggravating or mitigating factor applicable to the circumstances of the breach.

Fines in the private sector should also take annual turnover and profits into account. For example, a determined level of fines with an absolute cap are unlikely to be a sufficient deterrent to prevent similar action by large companies and are unfair to smaller businesses.