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.

Brief Overview of Transposition of Directive

The Directive is required to be transposed by 17 December 2021. Whistleblowing protections vary considerably across the EU and across sectors. The Directive aims to set a common standard across EU member states for the protection of persons who "whistleblow" about various wrongdoings in the context of their work. Ireland is obliged to transpose the Directive, save for specific measures which are optional for member states. These optional measures are set out below.

Ireland is one of only 10 member states that already has whistleblowing legislation in place, by way of the Protected Disclosures Act, 2014. This legislation in itself to an extent codified the various existing legislative provisions which dealt with "whistleblowing" across Irish law and extended further protection to a wide range of workers who made protected disclosures in their workplace. In part, one of the considerations when transposing the Directive is whether the Protected Disclosures Act 2014 should be appropriately amended or whether a separate piece of legislation should be enacted to deal with whistleblowing in an EU context. It would seem that one piece of legislation to address whistleblowing protection would be the optimal method. However, in so doing it must be borne in mind that there are substantial differences between the current domestic regime and that provided for in the Directive.

While member states in transposing the Directive are welcome to introduce or retain more favourable measures that already exist in national laws, implementing the Directive should not be used as a reason to reduce the level of protection already afforded. This is clear from Article 25 (2):-*The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive.*

The Directive deals only with reports of breaches of EU law whereas the PDA does not distinguish specifically between wrongdoing which is limited to national law. Section 5 of the PDA deals with the type of "wrongdoing" that is covered by the Act, and while it is clear that the provisions dealing with public bodies, are Irish only, the language in S.5(3) is extremely broad and could well already encompass possible breaches of EU law.

One of the issues subject to consideration here in transposition is whether the additional protections included in the Directive will apply only to reports of EU law breaches or whether they will apply across the board. It would seem that a two-tier system would be unwieldy and somewhat difficult to justify and accordingly it may be more appropriate that where there is an enhancement in protections, by reason of the Directive, these should apply to reports of wrongdoing which arise in the context of both EU and national law.

One of the significant differences between the Directive and the PDA is the provisions dealing with an obligation to actually follow up on reports that are made. The PDA is limited in its scope to protecting employees from retaliation for having made disclosures. However, the Act does not provide that the disclosures actually need to be dealt with nor do they provide for any follow up engagement with the discloser. The WRC are on occasion asked in claims under the PDA to address the fact that disclosures have not been properly dealt with but there are no such enforcement nor monitoring powers within the PDA. There are such provisions within the Code of Practice[2] and in the guidance for public bodies[3] but again there is no enforcement or monitoring role on the part of the WRC or any other entity.

The most striking impact of the Directive is the compensatory regime provided for. In effect, it envisages full compensation for damage suffered. This is unlimited jurisdiction.

With the exception of the **Optional Measures** set out below, Ireland is obliged to transpose the Directive in full. Much of the mandatory provisions in the Directive will have a very particular impact on the Workplace Relations Commission. However, notwithstanding such impact, these measures shall be implemented.

However, the Directive also provides that Member States may opt to provide for additional measures, or not to do so. The responses below address these measures.

By way of summary, the most substantial changes to the whistleblowing legislative regime in Ireland which will be caused by the Directive relate to the scope of persons who are protected, the reporting channels and the obligations to deal with disclosures which are made, and the compensatory implications where damage is suffered. In some ways, while the first two of

[2] Code of Practice on Protected Disclosures Act, 2014

[3] Guidance under Section 21(1) of the Protected Disclosures Act, 2014 for the purpose of assisting public bodies in the performance of their functions under the Act

these are broad and could result in a significant increase in potential claimants to the WRC, it in fact seems that the latter point on compensation is the one that causes the most potential difficulty. The Directive provides for unlimited monetary jurisdiction, where actual and future losses are suffered, legal costs or other economic losses, medical expenses and damages for injury. There is also provision for loss suffered by businesses that are blacklisted and suffer an economic detriment. These remedies and possible claims are not ones that are similar to the normal business of the WRC. Some will overlap with the Personal Injuries provisions within the Civil Liability Act and the Personal Injuries Assessment Board Act. It may be the case that a certain cohort of these claims would not be suitable for adjudication by the WRC and on appeal by the Labour Court.

Optional Measures

ANONYMOUS REPORTS	• **Receive and follow up on anonymous disclosures.**
INTERNAL REPORTING CHANNELS	• **Legal entities with fewer than 50 employees can be exempt from the requirement to establish internal reporting channels, either in accordance with what is required in the Directive for larger organisations, or instead be required to establish internal reporting channels that are in a less prescriptive form.** • **Public sector bodies with fewer than 50 employees can be exempt from the requirement to establish internal reporting channels, either in accordance with what is required in the Directive for larger organisations, or instead be required to establish internal reporting channels that are in a less prescriptive form.** • **Local authorities can avail of a shared option for internal reporting channels although there must also be a separate external channel.**

MINOR AND REPETITIVE REPORTS AND PRIORITISING REPORTS OF SERIOUS BREACHES	• **Competent authorities that receive disclosures may be permitted to decide that a reported breach is minor and does not require any follow up.** • **Competent authorities that receive repetitive disclosures may be permitted to decide to close procedures unless new legal or factual circumstances justify a different follow up.** • **Competent authorities may be permitted, where there is a high inflow of reports, to prioritise reports of serious breaches without prejudice to the general timeframes provided for in the Directive.**
FINANCIAL ASSISTANCE AND SUPPORTS	• **Member States may provide for financial assistance and support measures including psychological support, for reporting persons in the framework of legal proceedings. This may be done by an information centre or a single and clearly identified independent administrative authority.**

Question 1

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

Anonymous reporting is not currently excluded from the Protected Disclosures Act, 2014. It is not expressly referred to but it is generally accepted that anonymous reporting is permitted. This is clear from the Statutory Review of the Protected Disclosures Act wherein it is noted that *"The Act does not require disclosures to be made in writing nor does it prohibit the making of anonymous disclosures".*

However, with the possible exception of public bodies, there is no actual requirement in the PDA to investigate or follow up on any disclosure, anonymous or otherwise. Section 21(1) of the PDA requires every public body to establish and maintain procedures for the making of protected disclosures **and for dealing** with such disclosures.

Given that the Directive does not permit a dilution of protections which are already in place, it is arguable that to exclude anonymous reports from those to be accepted and followed up, would indirectly dilute protections which already exist in the PDA. While the PDA is a national piece of legislation, it is still within the broad scope of that Act that a person currently might make a protected disclosure about a possible breach of EU law.

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 obligation to accept and follow up on reports remains notwithstanding whether or not such a reporting channel is in place. Having the reporting channel in place can seek to assist the making of reports in a confidential and controlled manner which can protect an employer from the possible reputational damage of a disclosure which ultimately does not establish wrongdoing.

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.

The protections available under the PDA do not distinguish between employment in small or large employers. Workers are entitled to make disclosures and not suffer detriment for having done so, regardless of the size or nature of their employer. The reality is that the Directive will require legal entities with fewer than 50 employees to follow up on reports, in the same manner as large entities. The requirement to have an internal reporting channel is consistent with that obligation. It envisages the mechanics for how the reporting is to occur. It is difficult to envisage, where the protections are already available to workers in such employment, and where the Directive will require such employers to receive and follow up on reports of wrongdoing, how the establishment of internal reporting channels could be anything but consistent with fulfilling these obligations. The level of prescription required should be as simple and practical as possible for all concerned.

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

To do so would result in the reduction of measures which are already in place having regard to Section 21 of the Act. The Directive is clear that its transposition should not result in a reduction in the measures which are already in place in a member state.

Question 5

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

For reasons of efficiency this may well be a good option but care will be needed to ensure that there remains a clear delineation between internal and external channels, as required by the Directive.

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.

Ireland already has a system in place by way of Prescribed Persons under the Protected Disclosures Act. Given the relatively low level of protected disclosures in Ireland, a stand alone competent authority would not appear necessary at this point.

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.

Within a short timeframe, provide a summary of the findings in the final investigation, save where to do so would impede in a criminal or further investigation. It should also be confirmed whether the disclosures have been established or not. If not, reasons should be provided.

Failure to provide a summary of the findings and the reasons for rejection of a report of wrongdoing will impede on a reporter's decision as to whether they wish to report externally in accordance with the reporting channels.

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 a matter of practice, persons who report wrongdoing can find it difficult to accept when their view is not accepted, or where after investigation, no further action is considered necessary. This can result in a dissatisfied worker making multiple disclosures and engaging in lengthy litigation which can be costly and damaging for both the individual and the employer concerned. Measures to eliminate minor matters and such repetition with the necessary resources required to deal with same should be welcomed. It should be borne in mind that the worker retains the protection under the PDA (and the Directive) irrespective of whether the disclosure is followed up or not (as is the current position).

It would also seem sensible to permit the prioritisation of possible serious breaches over others, notwithstanding timeframes. This could involve something akin to an impending environmental disaster – a report that could if acted on timely, result in the alleviation of such an outcome, would sensibly be prioritised over a report regarding less serious or imminent outcomes.

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.

Establishing financial and/or psychological support for whistleblowers but not making those supports available on a wider basis to employees could create a 2-tier system in terms of access to employment rights that could be perceived as inequitable.

This would create a particular anomaly in the context of unfair dismissal cases where one of the grounds for dismissal can be the fact that a person had made a protected disclosure. It could be inconsistent if supports were available for only one type of unfair dismissal claim (irrespective of whether that claim was in fact ultimately successful).

If a claimant establishes damage caused by retaliation under the directive, they will be entitled to claim legal expenses and medical expenses from the perpetrator. This would presumably include any counselling supports that were necessary for the person in the course of the litigation.

Transparency Ireland are currently funded to provide an information and advisory service.

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.

Penalties should be consistent with those provided for offences under other employment statutes.

It is important to emphasise that penalties are different in the Directive to compensation.

Of note is the fact that compensation has no limit and in fact is full compensation for damage suffered by reason of retaliation for having made a report. This has the potential to be very considerable, particularly if the claim is made by a legal entity for economic loss or where an individual has a claim for damages for personal injuries suffered by way of retaliation.