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.

We urge Ireland to adopt mechanisms that provide for safe and secure anonymous disclosures. Our answer is informed by 10 years of experience representing whistleblowers under the U.S. Securities & Exchange Commission's whistleblower program which allows whistleblowers to report anonymously to the SEC, submitting tips under pseudonyms like Ms./Mr. XYZ thereby shielding their identities. The SEC Whistleblower Program wisely recognizes what we have observed in our legal practice, i.e., given the enormous personal and professional risks whistleblowers face when speaking up, many whistleblowers distrust reporting channels and will only feel comfortable reporting if they can do so anonymously. In so doing, the SEC has increased its number of whistleblower reports, particularly in areas like money laundering, terrorist financing, bribery of government officials, where the stakes are particularly high and anonymity serves to protect whistleblowers' personal safety. (Transparency International, *A Best Practice Guide for Whistleblowing Legislation,* 2018, p.24: https://transparency.eu/wp-content/uploads/2018/03/2018_GuideForWhistleblowingLegislation_EN.pdf).

The inability to know the whistleblower's identity rarely impedes the SEC's investigation and/or enforcement actions. Under the SEC program where whistleblowers provide tips, the function of the whistleblower is to sound the alarm and alert authorities to possible wrongdoing. Much like a pointer dog alerting the hunter to the presence of prey, the whistleblower's job is done when it has signalled the existence/area of wrongdoing. It is up to the enforcement agency to take it from there, follow the whistleblower's lead and investigate the whistleblower's tip. In most cases, the agency is able to find other witnesses and/or documentary evidence to corroborate the whistleblower's information and rarely needs the whistleblower to serve as its primary or exclusive witness.

To engender whistleblowers' trust, legislation should make clear that reporting channels are designed in a way so as not to collect data which can be traced to a user's identity, such as a whistleblower's Internet Protocol (IP) address. Legislation should clearly differentiate between anonymity and confidentiality. Confidentiality implies that the identity of the whistleblower is known by at least one person at the agency to whom the report is made but that the whistleblower's identify will not be made public, whereas anonymity means the identity of the whistleblower is not known to the reporting agency.

Opponents of anonymous reporting argue it will encourage false reporting. However, there is little evidence of this being the case, including when anonymous disclosure is permitted (Transparency International, *Building on the EU Directive for Whistleblower Protection: Analysis and Recommendations*, 2019, p.8: https://images.transparencycdn.org/images/2019_EU_whistleblowing_EN.pdf). To minimize this risk, the SEC program requires whistleblowers to file their tips through retained legal counsel, who can screen the information.

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.

Internal reporting channels and procedures for whistleblowers are important for both private and public sector employers regardless of size and should allow for anonymous reporting. Employees are an employer's eyes and ears given their access to information regarding practices occurring on the ground and in real time in their workplaces and are, therefore, best placed to recognize suspicious practices and illegal activities and serve as forward indicators of risk. Research shows that most private sector employees make a disclosure first, if at all, inside the company. It is estimated that 50% of all fraud, corruption and wrongdoing is first reported by insiders, not by external persons or law enforcement agencies (Lauren Kierans and Kate Kenny, *Can organizations be kept honest during the pandemic*, 2020: https://www.rte.ie/brainstorm/2020/0526/1142701-organisations-whistleblowing-fraud-wrongdoing-coronavirus-/).

Data collected by the U.S. Securities & Exchange Commission under its whistleblower program shows that around 85% of the whistleblowers filing tips with the SEC program first report their concerns internally to their employers before going to the SEC (U.S. SEC 2019 Annual Report to Congress, Whistleblower Program, p. 18: https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf).

The OECD has acknowledged that ensuring the right mechanisms are in place that encourage insiders to report wrongdoing would enable organizations to uncover and respond quickly to malpractice in the workplace, such as corruption and fraud in the private sector (Lauren Kierans, *Whistle While You Work: Protected Disclosures Act 2014*, 2015, p.5-6: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467648).

A growing body of evidence suggests that whistleblower disclosure improves companies' performance in the long term when compared with firms with underdeveloped whistleblowing channels (Kyle Welch and Stephen Stubbens, *Evidence on the Use & Efficacy of Internal Whistleblowing Systems* Corporate-whistleblowing-research; Robert Towey, *Whistleblowers ultimately help their companies perform better, a new study shows*, 2018: https://www.cnbc.com/2018/11/23/whistleblowers-ultimately-help-their-companies-perform-better-study.html). As a result, companies may be motivated to strengthen internal compliance considering the knowledge that their employees have formal avenues to report malpractice. This, in turn, can contribute to building a more transparent and accountable workplace culture.

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.

As discussed in Question 2 above, Ireland should provide that all private sector entities, regardless of size, should establish internal reporting channels and procedures. Internal reporting channels and procedures for whistleblowers should be regarded as equally important for both private and public sectors regardless of their size. In accordance with the spirit and purpose of the Directive, confidentiality, anonymity and follow up must be guaranteed. These should be considered prescriptive requirements for private entities with fewer than 50 employees.

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

At present, all public entities in Ireland without exception need to have internal reporting channels and procedures in place. Written information concerning these procedures must be given by a public entity to all its employees. Enabling insiders to come forward with information on malpractice and illegal activity is critical for transparency and accountability in the workplace. Evidence demonstrates that whistleblowers use internal reporting channels within their organizations first to alert an employer about wrongdoing. The OECD has emphasized that ensuring the right mechanisms are in place that encourage employees to report wrongdoing would enable organizations to uncover and respond quickly to wrongdoing occurring in the workplace, such as mismanagement and misuse of public funds in the public sector (Lauren Kierans, *Whistle While You Work: Protected Disclosures Act 2014*, 2015, p.5-6: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467648).

It should, therefore, be obligatory for all public entities, regardless of size, to establish internal reporting mechanisms and Ireland should not exempt public sector bodies with fewer than 50 employees from this obligation.

Question 5

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

The current Irish legal framework covers unlawful or improper use of public funds or resources in a definition of the relevant wrongdoing. As local authorities routinely take decisions in areas such as public health or public procurement (which the EU Whistleblowing Directive identifies as areas where enforcement needs to be strengthened), it would be beneficial for municipalities in Ireland to share internal reporting channels to increase accountability and transparency at a local level, as well as strengthen local governance, provided that adequate procedures are in place to secure confidentiality and anonymity of the reporting person and the reporting person is made aware of the entities with whom his/her information could be shared and receives the permission of the reporting person before sharing.

Additionally, evidence reveals that structural aspects of local governance (e.g. organizational hierarchy, lack of clear separation between administration and politicians at local governance) can significantly affect whistleblowers and reporting channels of disclosure. For instance, data gathered by the Council of Europe in its study of whistleblowing protections at a local and regional level emphasized that, in some countries, whistleblowing in local government is taken less seriously and that a low expectation of a good investigation following a disclosure is more likely in this sector throughout the process of a disclosure (Council of Europe, *The protection of whistleblowers: challenges and opportunities for local and regional government*, 2019, p. 8: https://rm.coe.int/the-protection-of-whistleblowers-challenges-and-opportunities-for-loca/16809312bd).

In order to encourage and facilitate reporting, local authorities could set up and share impartial hotlines and investigation services to assist the flow of disclosures of alleged wrongdoing. Shared internal reporting channels would enable local authorities to coordinate and harmonize whistleblower protection across the authorities they represent, while strengthening local governance and increasing public trust about their reliability of handing reported wrongdoing.

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 should establish a well-resourced independent agency responsible for the implementation and enforcement of whistleblower protection. Whistleblowers need to be able to bring information to a clearly designated authority to enable it to enforce the law. Crucially, whistleblowers, who often pay a high personal price for bringing information to light and risk losing their careers and exposing themselves to different forms of retaliation, need to know that there is a competent authority to which they can safely report and be assured that their disclosure will be handled with utmost care and diligence. Evidence suggests that current regulators do not provide the necessary support for whistleblowers or hold wrongdoers accountable. If whistleblowers do not have confidence in current regulatory bodies to deal effectively with their disclosures, this can impact and distort the cost-benefit decision-making of potential whistleblowers and, in turn, will cause some to shy away and never speak up in the first place. The creation of a national Office for the Whistleblower is suggested which would (i) act as a central clearing house to which whistleblowers would bring information and (ii) oversee and enforce the whistleblower legislation.

Such an independent authority should be competent to oversee the implementation of reporting channels set up by private and public entities, ensure that reports of wrongdoing are referred to the right authority for investigation and address improper investigations of reporting. The overarching aim of the Office for the Whistleblower, however, would be to protect whistleblowers and provide them with free advice and support. It would have a trained and dedicated staff to handle reports and maintain a rapport with the whistleblower throughout the process of reporting. It would also maintain a panel of accredited law firms to represent whistleblowers, as well as a monetary fund to provide financial support to whistleblowers. The Office for the Whistleblower would closely monitor and review the existing whistleblowing framework and would publish annually statistics and reports of its activities and findings. Best practice dictates that such authority must be independent and possess sufficient power and resources to be work effectively (Transparency International, *Building on the Directive for Whistleblower Protection,* 2019, p.11: https://images.transparencycdn.org/images/2019_EU_whistleblowing_EN.pdf). Importantly, in July 2019, the All Party Parliamentary Group for Whistleblowing in the UK published a report on the benefits that whistleblowers bring to society and found that UK needs a comprehensive, transparent and accessible framework and an organization that will support whistleblowers. A bill proposing the creation of an Independent Office for the Whistleblower in the U.K. has been introduced. https://www.appgwhistleblowing.co.uk/

Such an independent authority would enhance transparency and accountability in Ireland and raise public awareness of the whistleblowing framework and protections.

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 Directive provides for an obligation to follow up on reports. In practice, follow up relates to a process of actions taken to assess the correctness of the allegations made in the disclosure and, when considered relevant, address the violation reported. By way of example, through an investigation with delineated objectives or by taking no further action. It is important to note that under the Directive there is an additional obligation to give reasons for the specific follow-up action taken.

To preserve whistleblower trust in external reporting channels, strong emphasis should be placed not only in the process in respect of communicating the outcome of investigations triggered by the report, but also in the content of the outcome response. Overly vague responses or those with formulaic or boilerplate language would run counter to the Directive's obligations.

The outcome response should consider how the reporting person wishes to be contacted. For example, if the whistleblower had expressed a desire to be contacted via telephone or an in-person meeting. In any case, the outcome response should be reflected in writing and provide clear and accessible information on the available remedies reporting persons may have if they are unhappy with the outcome. For instance, the reporting person may file a reconsideration petition followed by a rectification petition with the highest official within the competent authority and even an appeal with the supervisory body of the competent authority.

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 stated in question 7, to preserve whistleblower confidence in reporting channels, it is paramount that whistleblowers clearly understand not only how to report violations, but also the follow-up process, including potential outcomes.

Therefore, outcome responses require specificity. In other words, the competent authority needs to articulate the reasons for closure or termination of procedures due to minor violations or repetitive reporting deemed as lacking any meaningful new information. Again, it is crucially important for reporting persons to be made aware of the available remedies in the event they are unhappy with the closure of the proceedings.

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.

Ireland should strongly consider the adoption of whistleblower programs like those in North America that empower and incentivize whistleblowers to bring information about wrongdoing for the government authorities to act upon. Such programs have expanded beyond North America and also exist in Europe, Asia and Africa (e.g., Ghana, Nigeria, Namibia, Rwanda, South Korea, China, Pakistan, Nepal, Indonesia, Nepal, UK, Slovakia, and Hungary). Our recommendation is based on our firm's extensive experience representing whistleblowers under various US and Canadian whistleblower statutes that offer financial incentives to whistleblowers who come forward and report wrongdoing to authorities (primarily the False Claims Act (FCA) and SEC/CFTC programs under the Dodd-Frank Act), and thorough understanding of the motives underlying whistleblowers' decision-making, and the serious risks they face when reporting wrongdoing. US and Canadian programs recognise the critical role a financial reward system plays in encouraging whistleblowers to come forward and offset the risks underpinning their actions. Data shows their considerable success in helping expose fraud and corruption while recovering billions of dollars of taxpayer's money. Also, financial incentives encourage strong internal compliance and deter further misconduct. The US Department of Justice (DOJ) stated that the FCA is a critical tool in fighting fraud and noted that nearly 80% of all FCA actions are whistleblower-initiated. Since 1987, DOJ has recovered more than $44 billion in civil settlements and criminal fines as a result of whistleblower-initiated claims (Taxpayers Against Fraud, p.3: https://97ae160d-c32b-4fb0-96cb-320cabbdfe94.filesusr.com/ugd/471b50_8fe7a20e47834808a748bd90d1d9d4ee.pdf). Additionally, the Internal Revenue Service (IRS) collected $5.7 billion and the U.S. Securities and Exchange Commission (SEC) recovered over $2 billon as a result of informant tips. Globally, the US and Canadian programs helped governments recover approx. $71 billion.

Aside from the clear empirical evidence showing the effectiveness of financial incentives in rooting out fraud, protecting the integrity of financial markets and saving the US government significant resources into investigations of fraud otherwise very difficult to detect without the assistance of whistleblowers, there is also an underlying policy rationale militating in favor of financial incentives. Specifically, they are just and necessary to compensate whistleblowers for what will almost certainly be an ordeal with strong likelihood of retaliation, career loss and mental health conditions (e.g. depression) which typically develop as a result of whistleblowing. Therefore, financial incentives serve as a form of unemployment insurance against these significant hardships. Additionally, financial incentives make it possible for whistleblowers to partner more easily with qualified lawyers to represent and support them through the complex legal process. The magnitude of financial rewards therefore allows whistleblowers to afford qualified counsel and persuade them to take on their cases.

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.

Addendum to Question 9

We present further arguments setting out the benefits of implementing a system of financial rewards for whistleblowers in a supplementary letter attached to our submission.