

A New Regime For The Protection Of Whistleblowers

On 26 November 2019, the Whistleblowing Directive (the **Directive**) was published and will come into effect on 16 December 2019. EU Member States have until 17 December 2021 to put in place national laws transposing the terms of the Directive. The Directive introduces an EU wide, cross-sectoral regime for the protection of persons who report breaches of Union law through the establishment of effective, confidential and secure internal and external reporting channels and effective protection against retaliation.

Current Irish Whistleblower Regime

In Ireland, the regime for the protection of persons who make disclosures relating to offences under financial services legislation (**Whistleblowers**) is principally¹ governed by the Central Bank (Supervision and Enforcement) Act 2013 (the **Act**). The Act is supplemental and in addition to the general whistleblowing regime for workers who make disclosures within the scope of the Protected Disclosures Act 2014. While this briefing focusses on the protections for Whistleblowers under the Act (being the more pertinent for fund management companies and investment funds) if a disclosure is made by a worker in the manner specified under the Protected Disclosures Act 2014 then that disclosure may be treated as a protected disclosure under that legislation.

In addition to the Act, the Irish UCITS Regulations require UCITS management companies, corporate UCITS funds and depositaries to:

“have in place appropriate procedures for their employees to report infringements internally through a specific, independent and autonomous channel.”

The recently published European Union (Money Laundering and Terrorist Financing) Regulations 2019 (see article “New Irish Anti-Money Laundering Regulations Published” below) also contain an internal reporting regime obligation on all designated persons (including fund management companies, corporate funds, fund administrators and depositaries) to:

“have in place appropriate procedures for their employees, or persons in a comparable position, to report a contravention of the CJA 2010 internally through a specific, independent and anonymous channel, proportionate to the nature and size of the designated person concerned”.

¹ Other legislation can include provision for reporting breaches of that legislation. For example, the European Union (Market Abuse) Regulations 2016, the European Union (Payment Services) Regulations 2018 and the EU/Single Supervisory Mechanism Regulation. This briefing addresses the whistleblowing regime for Irish fund management companies regulated under the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (UCITS Regulations) or the European Union (Alternative Investment Fund Managers) Regulations, 2013 (AIFMD Regulations) only.

The Whistleblowing Directive, while not yet Irish law, may provide a useful reference in seeking to comply with such obligations as it contains a similar obligation (see table below) but, unlike the above UCITS and AML requirements, it also details how compliance may be achieved by in-scope entities.

Irish Whistleblower regime versus Whistleblowing Directive

The following table compares key provisions of the Act with those of the Whistleblowing Directive. As highlighted by the comparison, the Whistleblowing Directive is more expansive than the current Whistleblower regime in Ireland in terms of the scope of persons protected and the levels of protection. It also introduces new obligations aimed at facilitating whistleblowing and penalties for retaliation against whistleblowers. As such, the Irish Whistleblower regime will need to be both amended and expanded as part of Ireland's transposition of the Whistleblowing Directive ahead of the December 2021 deadline.

	CURRENT IRISH WHISTLEBLOWER REGIME	WHISTLEBLOWING DIRECTIVE
Protected Persons	<ul style="list-style-type: none"> • Persons disclosing possible, likely or historic breaches of financial services legislation to the Central Bank. • Workers disclosing to employers or other persons. • PCFs, who are under a mandatory obligation to make disclosures to the Central Bank. • Disclosures made anonymously are specifically excluded from protection. 	<p>All persons, named or anonymous, whether disclosing internally, externally, or publicly, who, by virtue of work-related activities, whether paid/unpaid and irrespective of nature, have privileged access to information on breaches that it would be in the public interest to report and who may suffer retaliation if they report them, including:</p> <ul style="list-style-type: none"> • workers/self-employed persons, • shareholders, • persons in the management, administrative or supervisory body of an entity, • persons disclosing in relation to another organisation with whom they came in contact through their work.

	CURRENT IRISH WHISTLEBLOWER REGIME	WHISTLEBLOWING DIRECTIVE
Obligations imposed by Regime	<ul style="list-style-type: none"> • mandatory obligation on PCFs to disclose to the Central Bank prescribed information which will be of material assistance to the Central Bank. • UCITS management companies, corporate UCITS and UCITS depositaries must have in place appropriate procedures for employees to report infringements internally through specific, independent and autonomous channels. • designated persons (including fund management companies, corporate funds, fund administrators and depositaries) to have in place appropriate procedures for their employees, or persons in a comparable position, to report a contravention of the CJA 2010 internally through a specific, independent and anonymous channel, proportionate to the nature and size of the designated person concerned. 	<p>Specified EU regulated entities, including UCITS management companies and AIFMs, to establish channels and procedures for internal reporting and for follow-up which provide for:</p> <ul style="list-style-type: none"> • reporting by workers of the entity, its subsidiaries or affiliates (the group), but also, to any extent possible, by any of the group's agents and suppliers and by any persons who acquire information through their work-related activities with the entity and the group, • confidentiality, • acknowledgement within 7 days of receipt of report, • oral, written or in person reporting, • follow-up and feedback within 3 months of report, • publication of internal and possible external reporting procedures, • function of recipient of internal reporting should ensure independence and absence of conflict of interest. For smaller firms it could be a dual function held by, for example, the chief compliance officer or a member of the board.
Penalties for retaliation	An employer may be prosecuted for penalising an employee.	All natural and legal persons that hinder reporting or attempt to; retaliate against, bring vexatious proceedings against or breach the duty of confidentiality of, 'protected persons' shall be subject to effective, proportionate and dissuasive penalties as shall be provided for by Member States.
Protections	Protections are principally provided for employees. Protections for other 'protected persons' (see row 1 above) limited to the exclusion of civil liability and a right of action in tort for victimisation.	All 'protected persons' (see row 1 above) benefit from protection measures including the prohibition of extensive list of forms of retaliation, support measures, exclusion of liability in any form and a presumption of retaliation in the event of suffering detriment.
Competent Authority Feedback	The current policy of the Central Bank, as published on its website, is not to provide feedback to whistleblowers.	Feedback is required to be given to the whistleblower within a reasonable timeframe not exceeding 3 months, or 6 months in justified cases.

How Can William Fry Help?

William Fry can assist in:

- carrying out a review of compliance with the existing Irish Whistleblower regime and identifying and addressing any shortcomings including the preparation and drafting of policies and procedures;
- reviewing current practices and procedures for the reporting of infringements of UCITS and AML legislation;
- advising on the upcoming requirements under the Whistleblowing Directive and preparing for compliance;
- providing training and advice with regards to compliance with existing and upcoming requirements for the protection of whistleblowers; and
- regulatory enforcement action.

Contact Us

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