HANDLING OF PROTECTED DISCLOSURES BY THE CENTRAL BANK OF IRELAND

CONSULTATION PAPER 79:2014

IRISH BANKING FEDERATION RESPONSE

Introduction

The recently enacted Central Bank (Supervision and Enforcement) Act 2013 provides the basis for the handling of protected disclosures regarding potential or actual breaches of financial services legislation. The Act includes provisions which specify protection s for persons who make a disclosure in good faith to the Central Bank of Ireland (CBI). The Act also encompasses a disclosure process which is mandatory for those in Pre-approval Control functions (PCFs) in relation to breaches of financial services legislation.

The Irish Banking Federation (IBF) supports a robust 'Whistleblower' regime with formal processes and transparent procedures. IBF members have already implemented internal 'speak up' or 'protected disclosure' practices providing opportunities to their staff to come forward with any concerns or evidence of potential/actual breaches of current financial services legislation. The introduction of standards concerning the Central Bank process for managing protected disclosures will build on these developments.

The IBF has reviewed the details of Consultation Paper 79 (CP79) and welcomes the opportunity to submit a response to the consultation on behalf of its Members.

General observations

Protections

As outlined in the consultation document, *'the Central Bank has no role in assessing what is or is not a protected disclosure as defined in the legislation'*. Due to the potential implications for any person making a disclosure, this fact should be made clear in all communications e.g. documents, submission forms, 'on hold' telephone messages etc. In a dispute over the assessment of whether a disclosure is protected or not, it will be up to the Courts to decide and subsequently on the basis of that decision a potential Whistleblower may not be protected.

Alignment with Single Supervisory Mechanism (SSM) Prudential Breach whistleblowing

As set out in the SSM Council Regulation and the SSM Framework Regulation, for significant institutions at least, the European Central Bank (ECB) is the Competent Authority on prudential regulatory matters including whistleblowing regarding any potential breaches of prudential requirements. It would be important for the Central Bank to clarify, once the SSM regulation is in place, how the reporting process should work in cases relating to SSM breaches. Guidance as to how prudential breaches should be identified and reported between the CBI under the Supervisions and Enforcement Act regime and the ECB SSM regime is requested.

Response to issues raised in the Consultation Paper:

The Whistleblower Desk

We note that the Central Bank have set up a Whistleblower Desk and have implemented an operating model which is based on the UK Financial Conduct Authority system.

Handling of Complaints and Business as usual disclosures

There is an independent and established process for dealing with Consumer complaints and this will continue to be the most appropriate avenue for responding to matters raised in this way. We also note that self-disclosures in relation to potential breaches of financial services legislation will continue to be dealt with in the normal course of business.

Confidentiality

We note that the Central Bank will put in place an approach which safeguards the identity of a Whistleblower to maximise the confidentiality of reports.

Anonymous disclosures

It may be necessary for the Central Bank to clarify, to any person who contacts the Whistleblower Desk, the implications of making a disclosure anonymously as set out in the Act. The Act explicitly disallows protection for anonymous reporting. The importance of this distinction should be clarified by the CBI upon being contacted by anyone seeking to make such an anonymous disclosure.

Exemption from Data Protection and Freedom of Information

It should be clarified by Central Bank if disclosures are exempted from the Data Protection Acts and the Freedom of Information Act. It is vital that should an accused party approach the Central Bank for information using those two Acts in support of their application, that this be resisted.

Feedback to the Whistleblower

To avoid any frustrations in the process, the Central Bank may wish to consider further whether the persons identifying themselves could be accommodated with perhaps a brief update on the disclosure unless they opt not to receive one. This update could perhaps state whether the case is being pursued, completed or disregarded. Whistleblowers who identify themselves could receive evidence that they have made a disclosure in the event that they are called upon to prove that they have made such a disclosure.

Disclosures by persons holding Pre-Approval Controlled Function Roles (PCF)

Page 9 of the CP states that: *"Information received by the Central Bank from a PCF after a request for information by the Central Bank in the exercise of its functions, will not be treated by the Central Bank as a protected disclosure benefiting from the Central Bank's Whistleblower policy'*.

The Act states that: '*A person appointed to perform a pre-approval controlled function....shall, as soon as it is practicable to do so, disclose to the Bank information relating to one or more of the matters specified in subsection (1)(a) to (d) which he or she believes will be of material assistance to the Bank. A disclosure under paragraph (a) will be a protected disclosure for the purposes of this Part'.*

In the scenario where a PCF provides information, which would otherwise fall into the category of a protected disclosure, on foot of a request for information by the CBI i.e. information relating to a breach of, or an offence under, financial services legislation or the concealment or destruction of evidence relation to such a breach or offence, and the PCF only became aware of that information as a result of acting on the request by the CBI, a PCF will not be held to be in breach of S38(2). In this situation, the PCF was not aware of the alleged breach / offence / concealment or destruction of evidence until acting upon the request received from the CBI and, therefore, would not have been in a position to make a protected disclosure in line with S38(2) prior to receipt of the request for information from the CBI. Further clarity on this point would be welcome.

Section 39 of the Act provides that the CBI may publish guidelines for PCFs in relation to protected disclosures. The timeline for publication of these guidelines should be included in the Central Bank response to the Consultation or as soon as possible thereafter.

Overlap with existing regulatory reporting requirements

Again, Section 38(2)(a) provides: "*A person appointed to perform a pre-approval controlled function (within the meaning of section 18 of the Central Bank Reform Act 2010) shall, as soon as it is practicable to do so, disclose to the Bank information relating to one or more of the matters specified in subsection (1)(a) to (d) which he or she believes will be of material assistance to the Bank.*"

Section 38(2)(c) provides "*Paragraph (a) does not apply if the person has a reasonable excuse*". Section 38(2)(f) provides "*Paragraphs (d) and (e) do not limit what is a reasonable excuse for the purposes of paragraph (c)*", and Sections 38(2)(d) and (e) provide respectively "*It is a reasonable excuse for the purposes of paragraph (c) for a person to fail to make a disclosure on the ground that the disclosure might tend to incriminate the person*" and "*It is a reasonable excuse for the purposes of paragraph (c) for a person to fail to make a disclosure on the ground that the information has already been disclosed by another person*".

These PCF mandatory whistleblowing reporting provisions seem to overlap with other specific mandatory reporting requirements on banks, and it is not apparent what criteria a PCF might use to determine whether information relating to a breach would be of 'material assistance' to the CBI.

This raises a number of relevant scenarios which could regularly arise and guidance on the CBI's intended interpretation of the requirements from a practical perspective would be useful to Financial Service Providers. While not providing an exhaustive list, some of the likely scenarios are outlined in Appendix 1.

Finally, we also include a minor point in relation to this section and the completion of Central Bank documentation. Currently, when PCFs make protected disclosures they are required to complete a form - the PCF S38 (2) Disclosure Form. The CP states that PCFs will be required to submit their disclosure in writing via e-mail or post, but doesn't advise whether it will still be a requirement to complete the PCF S38(2) Disclosure Form as part of this process.

Scenario	CBI Guidance requirement
The PCF has visibility of a breach relating to a set of facts which are not reportable by the bank under other equivalent mandatory reporting requirement on the basis of not meeting materiality / threshold criteria. Examples would include 'errors' under Requirement 10.3 of the CPC, where such errors have been resolved fully within 40 business days of the date the error was first discovered; or "loss history reporting" below the relevant value threshold in the CBI's license conditions imposed on banks in August 2013.	Guidance to the effect that such circumstances would constitute reasonable justification not to report under Section 38(2)(a) would be beneficial.
The PCF becomes aware of an apparent breach, but it is subject to internal investigation by the bank before a confirmed breach is substantiated.	Guidance would be welcome to the effect that it is not "practicable" under section 38(2)(a) to be required to report a breach at least until any internal investigation of the breach and the circumstances around it and extent of it has been completed (or it has been confirmed the bank will not investigate it or has abandoned any investigation).
The PCF becomes aware of a breach which he would reasonably expect to be reported by the bank following 'business-as-usual' investigation and reporting processes, and has not subsequently discovered or been informed that no report was ultimately made.	CBI guidance to the effect that it is a reasonable excuse not to report a breach where such breach is identified and being managed under a process which would usually result in a report being made by the bank concerned to the CBI if necessary, on the basis the PCF is entitled to assume such report will be / had been made. This would apply unless and until the PCF became aware or was informed that no report was actually made, and it reasonable for a PCF not to be expected to proactively confirm whether such report had been made in line with normal process.
The PCF becomes aware of a breach which does not meet internal GNEP / DNEP criteria, and is not required to be reported separately under legal and regulatory requirements applicable.	CBI guidance to the effect that PCFs can rely on internal GNEP / DNEP criteria as a legitimate measure of whether information on a breach would be of "material assistance" to the CBI or not.