



Banc Ceannais na hÉireann
Central Bank of Ireland

Eurosystem

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Feedback Statement on CP79 - Consultation on Handling of Protected Disclosures by the Central Bank of Ireland



1. Introduction

On 19 March 2014 the Central Bank of Ireland (“the Central Bank”) published Consultation Paper 79 – Handling of Protected Disclosures by the Central Bank (“CP79”).

CP79 set out the Central Bank’s proposed approach to handling protected disclosures regarding alleged breaches of financial services legislation and the operation of a dedicated Whistleblower Desk within the Central Bank to deal with protected disclosures. The Central Bank (Supervision and Enforcement) Act 2013 (“the Act”) has prompted the Central Bank to put in place new arrangements regarding the receipt and handling of certain protected disclosures.

CP79 outlined the proposed policy and procedures that the Central Bank intends to put in place in response to the legislation. The closing date for submissions was 19 June 2014 and a total of nine submissions were received in response to CP79.

Section 2 provides an overview of the main submissions received and the Central Bank’s responses.

The Central Bank is grateful to all parties who responded to CP79 and wishes to thank them for their time and effort.

Section 2 Feedback on CP79

2.1 Definition of Protected Disclosures

CP79 outlined that under the Act where a person makes a disclosure in good faith to the Central Bank and the person making the disclosure has reasonable grounds for believing that there has been a breach of financial services legislation or destruction of evidence relating to such breach and provides their name, the disclosure is a protected disclosure. CP79 outlined that the Central Bank has no role in assessing what is or is not a protected disclosure under the legislation as this is a matter of law.

Submissions

A number of the submissions requested that the Central Bank provide guidelines on what is a disclosure that will or will not be protected, together with possible examples.

Central Bank Response

The Act outlines that where a person in good faith has reasonable grounds for believing that a disclosure will show that a contravention or offence under any provision of financial services legislation or the destruction or concealment of such evidence, these shall be considered a protected disclosure. As outlined in CP79 the Central Bank has no role in assessing whether or not a disclosure is a protected disclosure. Whether a disclosure is a “protected disclosure” is a matter of law to be assessed by a Rights Commissioner, the Labour Court or the courts.

2.2 Protected Disclosures - Guidance Material

CP79 is currently the main guidance that the Central Bank has published in respect of the internal arrangements the Central Bank will be establishing in response to the Act and some additional information is available on the Central Bank’s website.

Submission

Many of the submissions sought guidance from the Central Bank to assist potential whistleblowers in making disclosures. Submissions requested that the guidance should *inter alia* set out the circumstances under which a person should make a disclosure, how the process works in the Central Bank and how confidentiality is protected.

Central Bank Response

CP79 outlined the arrangements and policies which the Central Bank will implement when disclosures are made to the Central Bank’s Whistleblower Desk under the Act. The Central Bank has considered the submissions received and while the Central Bank cannot provide any legal guidance, the Central Bank is publishing a Frequently Asked Questions sheet (FAQ) on the website. This will supplement the information provided in CP79 and currently on the Central Bank’s website. The FAQ will be updated on a regular basis.

2.3 Section 38(2) Disclosures by PCFs - Guidance

Section 38(2) of the Act places an obligation on Pre-Approved Control Functions (“PCFs”) within a regulated financial services provider (“RFSP”) to disclose to the Central Bank, as soon as it is practicable, information which the PCF believes will be of material assistance to the Central Bank, relating to an offence, a prescribed contravention or a contravention under financial services legislation or information that evidence has been, is being or is likely to be, deliberately concealed or destroyed. Section 38(2) also sets out the circumstances under which the duty to disclose does not apply, e.g. if the person has a reasonable excuse. CP79 outlined that the Central Bank has established a dedicated email and postal address to facilitate PCFs disclosures. It also requires that all such disclosures should be submitted in writing.

Submissions

A number of submissions suggested that the Central Bank provide practical guidance for PCFs in making reports, including clarification of the term “*material assistance to the Bank*” and the time frame for “*as soon as it is practicable to do so*” together with examples of what should be reported. Some submissions noted that the Act outlines certain scenarios where a PCF is absolved of the obligation to make a report but it was identified that this is not a complete list and that further guidance on what other areas could fall under this section of the Act should be provided.

Central Bank Position

The Act places a legal obligation on PCFs to disclose to the Central Bank in the circumstances as outlined in the Act. As outlined earlier, the Central Bank cannot provide guidance or interpretation on the Act as this can only be formally determined by the Courts.

2.4 Protection/confidentiality of whistleblower

CP79 outlined that the Act places significant importance on protecting the identity of a person who makes a disclosure to the Central Bank. Accordingly, the arrangements being implemented in the Central Bank to deal with whistleblower reports places identity protection at its centre, which is considered critical to generating confidence in the system.

Submissions

A number of submissions recognised the Central Bank's objective not to disclose the identity of the person except in exceptional circumstance, but requested that the Central Bank should expand upon the exceptions envisaged in the legislation. It was suggested that the Central Bank should publicise that the confidentiality of a whistleblower cannot be fully guaranteed as the Central Bank may need to make disclosure in order to meet certain statutory responsibilities. In addition, greater detail on how the confidentiality would be preserved within the Central Bank were sought.

Central Bank Position

As outlined in CP79, the protection of a whistleblower's identity is considered critical to ensuring that whistleblowers have confidence when submitting reports and therefore the Central Bank has established dedicated internal policies and procedures for ensuring confidentiality of whistleblower. The identity of whistleblowers will, as far as legally possible, be protected by the Central Bank. The Act outlines the legal circumstances in which the Bank may be required to disclose the identity of a whistleblower, however, the Central Bank will make all reasonable efforts to notify the person before making any such disclosure.

2.5 Anonymous disclosures

CP79 outlined that the Central Bank will accept anonymous disclosures but that the Central Bank encourages people to provide their name and contact details. It is also noted that, under the Act, any person who makes a disclosure anonymously is not making a protected

disclosure and accordingly should the identity of the person become known, that person would not enjoy the protections afforded under the Act.

Submission

A number of submissions requested that clarity should be provided by the Central Bank to any potential whistleblower of the implications of making a disclosure anonymously. It was also suggested that anonymous disclosures should be protected.

Central Bank Position

Anonymous disclosures will be accepted by the Whistleblower Desk. The Act specifically excludes anonymous disclosures from protection. However, the Protected Disclosures Act 2014, which was enacted in July 2014, is silent on protection for anonymous disclosures. Accordingly, if an anonymous disclosure relating to contraventions of provisions of financial services legislation is made to the Central Bank and that disclosure comes within the scope of the Protected Disclosures Act 2014 (i.e. it is a disclosure made by a *worker* in the manner specified in the Protected Disclosures Act 2014) then that protected disclosure will be treated in accordance with the Protected Disclosures Act 2014.

2.6 Recording of Phone Calls

CP79 outlined that phone calls to the Central Bank's dedicated whistleblower lines will be recorded. This is to ensure that all information provided is correctly captured and to assist in any subsequent disputes about what was said.

Submissions

A number of submissions suggested that the calls should not be recorded if the caller was only seeking general information or advice; others supported the need for recording, while others outlined the need for a protocol to be developed.

Central Bank Position

As outlined in CP79, it is planned that all calls to the dedicated whistleblower lines will be recorded and the caller will be alerted to this by a voice message prior to the Whistleblower Desk answering the call. It would be difficult for the Whistleblower Desk, when calls are received, to distinguish between general queries and potential disclosures and then to advise

that the call is being recorded. In addition, the recording of calls ensures that the information is correctly captured and can be used in potential subsequent disputes about what was said. The Central Bank will establish a protocol in respect of recording of phone calls prior to the commencement of recordings. As the Central Bank expects that its website will be the first port of call for potential whistleblowers when seeking general information on the regime, we will publish notification that calls will be recorded. In this way, potential whistleblowers can make informed decisions on their options before contacting the Central Bank.

2.7 Feedback to whistleblower

CP79 outlined that the Central Bank will not inform whistleblowers of what action if any, has been taken as a result of their disclosure, as this could breach the legal rights of any person or firm who has been accused of wrong doing by the whistleblower.

Submissions

A number of submissions disagreed with the Central Bank's position not to provide feedback to whistleblowers and suggested this be reconsidered. Some submissions suggested that where the whistleblower identified themselves to the Central Bank they could be accommodated with perhaps a brief update on the disclosure, unless they opt not to receive one. This update could state whether the case is being pursued, completed or disregarded. Other submissions noted that the whistleblowers should be advised that they would not be provided with feedback prior to making a disclosure.

Central Bank Position

At the outset of an investigation there can be no way of predicting either its outcome or duration. As noted in CP79, any provision of information to a source could breach the legal rights of any person who has been accused of wrongdoing by the person making the disclosure. The provisions of Section 33AK of the Central Bank Act 1942 also impose limitations on the Central Bank on information which could be supplied to a whistleblower who was seeking feedback. In addition, providing information to the person who has made the disclosure could potentially compromise the investigation of the case. The current policy of not providing feedback to whistleblowers is outlined on our website and this position is being maintained.

Other comments submitted which were not referred to in CP79

2.8 Enhanced awareness

A number of submissions outlined that it is essential that the Central Bank actively engages with and encourages relevant regulated entities to publicise to their employees the Central Bank's procedure for handling protected disclosures. It was also noted that it is especially important that those holding relevant pre-approval controlled function roles are fully aware of their obligations to report to the Central Bank under Section 38(2) of the Act, and regulated entities themselves have a role in openly communicating this information. Comments noted that whistleblowing is an important part of a healthy corporate culture and encourages openness and transparency and that it is critical that regulated firms create the appropriate culture and tone from the top to ensure that employees feel secure in voicing concerns where necessary, and that individuals are aware of the appropriate channels to direct such concerns.

Central Bank Position

In order to promote awareness of the Act amongst the financial services industry and also to advise regulated firms of the legal obligations under the Act for PCFs to report breaches of financial services legislation, the Central Bank will issue a letter to all regulated financial service providers outlining the requirements of the Act. This letter will also be published on the Central Bank's website. Other opportunities will be taken to promote awareness of the whistleblower regime in our dealings with the financial services industry.

2.9 Protected Disclosures Bill 2013

A number of submissions sought clarification on how protected disclosures under the Act would operate once the Protected Disclosure Bill 2013 becomes enacted. The Protected Disclosures Act was enacted in July 2014 and introduced legal protection for all workers who make whistleblowers reports against their employer. Employers are required to have processes in place for the making of disclosures by workers.

Central Bank Position

The Protected Disclosures Bill was enacted in July 2014 and in regulations subsequently issued under this legislation the Central Bank is now prescribed to be the recipient of disclosures of matters relating to contravention of provisions of financial services legislation. Disclosures of breaches of financial services legislation may also be made to the Central Bank under the Protected Disclosures Act 2014. The Central Bank is in the process of updating its arrangements and policies to ensure that reports submitted under the Protected Disclosures Act 2014 will be treated with the same process and protection as those outlined in CP79 for disclosures under the Act.

2.10 Data Protection Acts & Freedom of Information Act

Submissions sought clarification in relation to protected disclosures and their protection or possible exclusion under the Data Protection Acts and/or the Freedom of Information Act while acting in good faith.

Central Bank position

While there are no specific exemptions from the Data Protection or Freedom of Information legislation in respect of information received from whistleblowers, the Central Bank will always seek to protect a whistleblower's identity as far as legally possible should any requests arise under the above legislation. Under the Data Protection Act, there is no obligation on a data controller to disclose personal data relating to another individual, unless consent has been given. Freedom of Information legislation also prohibits access to records that would involve the disclosure of personal information.



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