



Transparency International (Ireland)

Submission to the Central Bank and Financial Services Authority of Ireland in relation to Consultation Paper CP41 on Corporate Governance Requirements for Credit Institutions and Insurance Undertakings

30 June 2010

“A whistleblowing policy will improve the trust and confidence among employees by creating what one respondent called a “culture of honesty and openness” by encouraging employees to report internally. This was seen as “good for the morale of employees”, giving them confidence to come forward with concerns. Senior managers will be the first to know of any issues that they may need to address. These can be dealt with internally. This also means that the costs of investigating any problems, such as fraud, are reduced as problems can be caught quickly. The management time and resources saved mean that whistleblowing procedures are a cost-effective early warning system for firms”.

UK Financial Services Authority¹

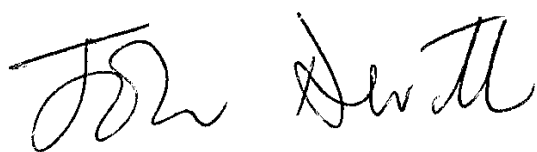
¹ Whistleblowing CP101 (2002) (feedback), page 26, cited in ‘Whistleblowing Arrangements – Code of Practice’, BSI, July 2008, p2

I write on behalf of Transparency International (TI) Ireland to offer its comments in response to your request for public submissions on the Central Bank and Financial Services Authority of Ireland's consultation paper on corporate governance requirements for credit institutions and insurance undertakings in Ireland.

This is a timely and welcome initiative and I am pleased to present you with an overview of TI Ireland's initial comments on the issue. We have not attempted to undertake a detailed analysis of the proposals in their entirety but would be happy to offer further observations upon request.

We should also inform you that Transparency International Ireland will soon launch an Advocacy and Legal Advice service for individuals and organisations seeking guidance on making honest reports in the public interest. Please let us know if you should like any further information in the meantime.

Yours faithfully,

A handwritten signature in black ink, appearing to read "John Devitt". The signature is written in a cursive, flowing style.

John Devitt
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Summary

We draw your attention to the need for any corporate governance framework to make statutory provision for clear requirements, channels and safeguards for (inter alia) directors, employees and consultants of Irish financial institutions reporting concerns in the public and shareholder interest.

Coupled with this is the need for an effective mechanism for ensuring that such reports are adequately pursued both internally by institutions receiving reports and externally by the relevant regulatory authorities.

Why is this important?

We bring your attention to this issue because we believe that the causes of the international financial crisis run deeper than inadequate oversight of credit institutions and insurance companies. Moreover we believe that increased oversight and intrusive supervision, while welcome, are insufficient on their own to raise the standard of corporate governance in Ireland. As the experience of Harry Markopolos in the US² and Eugene McErlean in Ireland³ have shown, supervision and regulation need to be wedded to measures that both protect persons reporting in the public interest, and ensure adequate follow-up by those responsible for acting on reports.

Regretfully the promotion of honest reporting in Ireland has not been given the urgent priority it deserves. This lapse has not been unintentional, with active opposition to legal protection for reporting persons manifested in the widely held but groundless assertion that "Ireland's reputation as a lightly regulated economy could suffer" if such safeguards were introduced in Irish company law.⁴

In addition, the Government has persisted with a 'sectoral' approach to whistleblower legal protection which provides for varying degrees and standards of assurances for reporting persons in different labour or professional sectors. Notwithstanding mandatory reporting requirements for non financial designated bodies, it is noteworthy that the aforementioned protections have never been extended to reporting persons in either the financial services sector or under company law.

The basis upon which opponents of universal statutory protection for reporting persons is further diminished by the effective implementation of such safeguards throughout the United Kingdom for the past decade. The UK 'Public Interest Disclosure Act' (PIDA) provides for honest reporting in all sectors including the financial services industry as well as bodies such as the Financial Services Authority. It has worked without legal mishap and the full support of both British industry and government since 1998. Needless to say, there is no evidence to show that PIDA has adversely affected the ability of Britain or Northern Ireland to attract foreign investment.

² See Harry Markopolos testimony before the US House of Representatives Committee on Financial Services - http://ncc.gmu.edu/events/09_MOT-markopols/markopolos_020409.pdf

³ See 'An Alternative to Silence – Whistleblower protection in Ireland', p10

⁴ See 'Report of the Company Law Review Group, 2007', p93

We contend that the cost of Ireland's opposition to effective regulation and measures such as statutory provisions for reporting persons is incalculable – both to Irish society and the reputation of the Irish financial services sector itself.

We will never know if the many alleged acts of malfeasance at Irish financial institutions currently under investigation might have been prevented or reported much earlier had such measures already been put in place. However it is certain that the risk of wrongdoing and excessive risk-taking by financial institutions would have been mitigated by effective statute-based whistleblower systems.

It is remarkable that Ireland has opposed protection of public and shareholder interest through such measures. The continued absence of regulatory or statutory whistleblowing measures will do nothing to enhance the international reputation of the Irish-based financial institutions and Irish regulatory agencies.

This is not to say of course that whistleblower legislation or regulatory provisions will prevent wrong-doing by themselves. Rather such mechanisms should be seen as an integral part of any mandatory risk mitigation strategy for persons responsible with protecting the public and shareholder interest.

Recommendations

We recommend the introduction in Corporate Governance Requirements for Credit Institutions and Insurance Undertakings:

1. A clear requirement for the introduction of 'speak up' or 'whistleblower' policies in all such financial institutions based in Ireland. These policies will provide for the protected and confidential internal disclosure of ethical or prudential concerns to designated persons or liable third parties; and where there is a substance to a concern of potential risk of harm to the public or shareholder interest, to the relevant regulatory agency.
2. The introduction of a requirement on boards consistent with their 'ethical oversight' role and the revised Combined Code ((C.3.4, 2003)⁵ to provide for mandatory audit committee review of arrangements for the confidential reporting of concerns in the public or shareholder interest by, inter alia, staff, executive directors, non-executive directors, and consultants contracted to any financial institution.

Supplementary Recommendations

We recommend the introduction of:

1. A universal statutory provision for protected disclosure across the public and private sectors in Ireland. This would provide legal protection for persons making honest reports a) internally (including to liable third parties); b) to regulators where there is a substantiated concern; and c) where the public interest demands, to any responsible recipient including

⁵ 'The audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee's objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action.'

TDs and journalists (subject to the Official Secrets Acts and s.33AK of the Central Bank Act 1942).

2. In the absence of the early adoption of a generic provision, whistleblower protection provisions should be extended, as an intermediate measure, to company law and financial services as a matter of urgency.

Resources and References

The need for statutory whistleblower protection and the promotion of honest reporting has already been highlighted by the Director of Public Prosecutions⁶, the Governor of the Central Bank⁷, and the Office of the Director of Corporate Enforcement⁸. We would encourage due consideration of their recommendations on this issue.

We would also encourage you to reference following guidance and analysis which accompanies this submission

1. 'An Alternative to Silence – Whistleblower Protection in Ireland', Transparency International Ireland, January 2010.
2. 'Guidance for Audit Committees – Whistleblowing arrangements', The Institute of Chartered Accountants in England Wales
3. 'Whistleblowing Arrangements – Code of Practice', BSI, July 2008
4. Public Concern at Work – UK and international guidance on whistleblowing- www.pcaaw.org.uk
5. Transparency International – guidance for legislators and policy makers http://www.transparency.org/global_priorities/other_thematic_issues/towards_greater_protection_of_whistleblowers

⁶ 'Prosecuting Corruption in Ireland', James Hamilton, Burren Law School, 1 May 2010

⁷ Address to Joint Committee on Economic and Regulatory Affairs, Professor Patrick Honohan, 15 December 2009 - <http://debates.oireachtas.ie/DDebate.aspx?F=ERJ20091215.xml&Node=H2#H2>

⁸ ODCE Discussion Paper C/2008/1 <http://www.odce.ie/GetAttachment.aspx?id=4bbd629d-5668-4c36-88bf-7cd4f8fd23ed>