Submission to the Central Bank of Ireland (CBI) on CP158 - Consultation Paper on Consumer Protection Code

June 2024

About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights, including economic, social and cultural rights. FLAC operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information, and runs a nationwide network of legal advice clinics where volunteer lawyers provide free legal advice.

As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year. As well as being important for the individual client, these cases are taken with the aim of benefiting a wider community. FLAC also operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic.

FLAC makes policy recommendations in relation to social welfare law, equality and anti-discrimination law, human rights and access to justice. This includes policy reports and submission to national and international bodies, including human rights bodies. Through our *Casebook* Blog, FLAC provides updates and analysis of developments in social welfare law and our casework in this area.

FLAC is a member of the Department of Social Protection's Migrant Consultative Forum. We are also a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

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1. Comments and issues concerning process and structure

This process began with the publication of a lengthy discussion paper – the Consumer Protection Code Review - in October 2022, to which FLAC made a detailed submission in May 2023. We have received no formal written feedback to that submission to date.

The Consultation Paper of March 2024 follows on from the Discussion Paper of October 2022, and in the interim, there was a series of meetings hosted by the CBI with stakeholders, that FLAC attended in late 2022 and through the course of 2023.

This Consultation Paper is a lengthy document running to 96 pages relating to consumer protection in the provision of financial services. It sets out the Bank's thinking on a number of pertinent issues and discusses a number of proposals to amend the Code over the diverse range of areas covered and explores their rationale.

It states that *'The consultation period will be open for 3 months until 7 June 2024. We will then consider submissions received, and **publish the final revised Code in 2025** alongside a feedback statement'.* Subsequently, at a stakeholder meeting with 'Civil Society' groups held by the Bank on May 29th, 2024, Bank representatives suggested that the revised Code would be finalised in early 2025. The Bank then intends to allow a further 12 months for firms to ensure *'high quality and consistent implementation'.* Thus, the new provisions will come into operation at some point in early 2026, 12 months after they are finalised.

On closer examination, at the back of the Consultation Paper and separate from it, a number of annexes, some of them very detailed, provide draft text of the provisions it proposes should make up the constituent parts of the revised Code.

These are:

- Draft CENTRAL BANK REFORM ACT 2010 (SECTION 17A) (STANDARDS FOR BUSINESS) REGULATIONS 20[ ] (12 pages, 15 provisions) **– Annex Three**
- Draft CENTRAL BANK (SUPERVISION AND ENFORCEMENT) ACT 2013 (SECTION 48) (CONDUCT OF BUSINESS) REGULATIONS 20[ ] (241 pages, 420 provisions) – **Annex Four.** It might be noted that the above were referred to as Consumer Protection regulations in the Consultation Paper, but the words Consumer Protection have since been replaced by Conduct of Business.
- Guidance on Protecting Consumers in Vulnerable Circumstances (14 pages)- **Annex Five**
- Guidance on Securing Customers' Interests (29 pages) – **Also in Annex Five**

It is evident from a cursory examination of the second of these documents listed above that what is in fact proposed here, amongst other measures, is the

amendment and replacement of the existing Consumer Protection Code 2012 (unofficially consolidated in December 2023) and the Code of Conduct on Mortgage Arrears, 2013, with a very detailed and very wide ranging (currently draft) statutory instrument. The second of these draft documents also puts revised standards for buisnesses into statutory form.

Thus, Page 8 of the Consultation document further outlines that:

> *'The revised Code will be contained in two new Central Bank Regulations.*
>
> *The first will set out Standards for Business, complemented by Supporting Standards for Business, which will replace the existing General Principles of the Code.* **(The draft CENTRAL BANK REFORM ACT 2010 (SECTION 17A) (STANDARDS FOR BUSINESS) REGULATIONS) (set out in Annex 3 of the Consulation Paper).**
>
> *The second will set out General Requirements, which will complemented by Supporting Standards for Business set out on a cross-sectoral and sector-specific basis. The revised Code will also consolidate a number of existing Central Bank codes and requirements into the Code. In addition, we plan in future to support consumers and firms in accessing the information they need through new digital tools, explainers and guides'.* **(The Draft CENTRAL BANK (SUPERVISION AND ENFORCEMENT) ACT 2013 (SECTION 48) (CONDUCT OF BUSINESS) REGULATIONS) (set out in Annex 4 of the Consulation Paper).**

The domestic consumer protection codes the second regulation will consolidate include:

- The Code of Conduct on Mortgage Arrears (CCMA) 2013.
- The Consumer Protection Code 2012 (unofficially consolidated in 13th December 2023).
- The Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Licensed Moneylenders) Regulations 2020.
- The Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Insurance Requirements) Regulations 2022.

The proposed structure to be adopted in framing the revised rules is quite convoluted and is not properly explained. It might benefit, for example, from an explanation as to **why** this structure has been adopted. Thus, it might have been clarified why it was required to issue two regulations under two separate pieces of Central Bank legislation for this purpose, i.e. the Central Bank Reform Act 2010 and the Central Bank (Supervision and Enforcement Act) 2013.

The complicated nature of the structure may also have had an impact on the submission process. Many people may not have realised that far more detailed text –

the draft provisions that the Bank proposes to put into operation in many areas – were separately contained in Annexes, particularly Annex 4.

In FLAC's case, for example, we looked initially at the Consultation Paper and began a draft submission by considering one of the first issues of importance to our work in this area – mortgage credit, arrears and the CCMA/Mortgage Arrears Resolution Process (MARP). Here, the Consultation Paper outlined six core proposals and our initial response sought to critique these proposals and to also make some alternative proposals. However, when we eventually discovered the draft 'Conduct of Business' regulations in Annex Four, we could clearly see that they proposed a fully revised Mortgage Arrears Resolution Process to replace the existing one.

Thus, at Part 3 of this draft regulation entitled *'Consumer Banking, Credit, Arrears and Certain Other Financial Commitments',* there is a Chapter 9 entitled *'Arrears – Mortgage debt secured by a borrower's primary residence'* consisting of **Regulations 220-265, Pages 122 -154** which contains detailed provisions that propose to replace the existing MARP process. Thus, there are 32 pages to review here that make some significant alterations to the MARP process and require careful analysis and review, especially any advocate for borrowers in financial difficulty such as this organisation.

It is unclear **what the Bank is asking for submissions on, for example, in terms of the review of the CCMA/MARP?**

Is it the limited text of one and a half pages in the Consultation Paper indicating the broad changes it proposes to make to the MARP or is it the 45 draft regulations and 32 pages of text in Chapter 9 of the draft Statutory Instrument that proposes to replace the existing MARP, or is it both?

On further examination, it then became clear that Chapter 9 of Part 3 is not the only updated process set out to deal with arrears in this regulation.

Thus, Part 3 also contains a Chapter 10 entitled '*Arrears – debts of personal consumers – other than mortgage debt secured by a mortgage borrower's primary residence'* consisting of **Regulations 266-280 on Pages 154 -159.** This chapter contains detailed provisions that appear to replace the arrears handling provisions of the existing Consumer Protection Code (Chapter 8).

Further, there is also a Chapter 11 entitled *'Arrears – debts in relation to high cost credit agreements' -* consisting of **Regulations 281-286 on Pages 159 -161.**

Other areas of both interest and concern are also covered in detail in the regulation. For example, Part 2 includes the following chapter headings:

Part 2 - GENERAL CONDUCT OF BUSINESS REQUIREMENTS

Chapter 1 - Knowing the consumer and suitability

Chapter 2 - Conflicts of Interest and information about remuneration
Chapter 3 - Consumers in vulnerable circumstances
Chapter 4 - Digitalisation
Chapter 5 - Informing effectively
Chapter 6 - Information about charges
Chapter 7 – Informing about regulatory status
Chapter 8 - Unregulated activities
Chapter 9 – Advertising
Chapter 10 – Bundling and Contingent selling
Chapter 11 – Errors resolution
Chapter 12 – Complaints resolution
Chapter 13 – Unsolicited personal visits and phone calls
Chapter 14 – Records and compliance
Chapter 15 - Miscellaneous business requirements

For the record, Part 3 includes:

Part 3 - CONSUMER BANKING, CREDIT, ARREARS, AND CERTAIN OTHER FINANCIAL ARRANGEMENTS

Chapter 1 - Knowing the consumer and suitability – additional requirements
Chapter 2 - Additional information requirements
Chapter 3 - Additional post-sale information requirements
Chapter 4 - Advertising – credit, savings, and home reversion agreements
Chapter 5 - Additional miscellaneous business requirements
Chapter 6 - Additional requirements specific to mortgage business
Chapter 7 - Deposit agents
Chapter 8 – High Cost Credit Providers
Chapter 9 - Arrears - Mortgage debt secured by a mortgage borrower's primary residence
Chapter 10 - Arrears - debts of personal consumers, other than mortgage debt secured by a mortgage borrower's primary residence
Chapter 11 - Arrears – debts in relation to high cost credit agreements
Chapter 12 – Debt Management Firms

When the extent of the information that might require review was pointed out by FLAC at the Civil Society stakeholder meeting held on May 29th (2024), nine days before the submission date, it became apparent that the significant majority of attendees were not aware of the detailed regulations in the annexes. There is a lack of transparency here that is somewhat worrying in light of a consultation process that this and other organisations have endeavoured to participate fully in since October 2022.

As already noted above, it was stated by the Bank that *'the consultation period will be open for 3 months until 7 June 2024. We will then consider submissions received, and publish the final revised Code in 2025 alongside a feedback statement'.* The Bank then states that it intends to allow a further 12 months for firms to ensure *'high*

quality and consistent implementation'. Thus the new provisions are likely to come into operation at some point in early 2026.

This suggests that from the closing date for submissions, depending on when it publishes its final measures in 2025, the Bank will have a minimum of seven further months to consider its position following submissions from interested parties, even though it already has very detailed draft regulations in place. When asked by FLAC at the May 29th meeting, in light of the depth and detail of those regulations, whether it would be possible to extend the submission date by a month to facilitate more detailed analysis of them, the Bank's response was unclear. Subsequently, it has allowed a further seven working days.

Finally, under this heading, it is not clear to us what the purpose of the feedback statement referred to above is, given that it does not appear that there will be a further explicit opportunity to comment on the content of the revised Code at that stage. However, some time after the meeting of May 29th, the Bank sent out what is described as its 'Summary of the Meeting' to participants. Under a heading of 'Code Review timeline' it recorded that *'Some attendees noted the challenges for Civil Society organisations in reviewing the Consultation Paper and other associated materials given their limited resources. (*A Named person*) assured attendees that the Central Bank would give full consideration to stakeholders' submissions and that engagement would continue after the official closing date in early June',* a commitment this organisation does not explicitly recall being made.

2. The question of sanctions

A further question that arises is **what** additional scope the revised structure will provide to enable the Bank to exercise its powers effectively?

What additional powers, if any, are conferred on the Bank in this regard by the change of statutory basis in adopting these rules?

Will the legislative basis for the respective regulations affect the sanctions that may apply in the event of a breach of the relevant standards by a regulated financial service provider?

On this question it is notable that, as far as we can see, the Consultation Paper does not discuss potential sanctions nor provide any assessment or record of the application of sanctions under the current Codes to date. The sole reference to penalties in the second (and clearly most important) of the two regulations is contained in the very last provision – No 420 – which states as follows:

> *'A failure by a regulated financial service provider to comply with any requirement or obligation imposed pursuant to these Regulations is a prescribed contravention for the purpose of the administrative sanctions procedure under Part IIIC of the Act of 1942 and may be subject to*

enforcement action and the imposition of administrative sanctions by the Bank in accordance with that Part'.

The current CCMA/MARP was issued under s.117 of the Central Bank Act 1989, which provides for very light potential penalties for 'licence holders' who fail to *'provide all relevant information to the Bank to enable the Bank to satisfy itself as to compliance with the code by such licence holder or other person'.* To our knowledge, not a single sanction has been imposed on a '*licence holder'* over the duration of the current Code despite apparent infringements, much to the surprise of the current Minister for Finance, for example, when he was opposition spokesperson on Finance.[1]

Section 48 of the Central Bank (Supervision and Enforcement Act) 2013, by contrast, provides a wide basis for the Bank to *'make regulations for the proper and effective regulation of regulated financial service providers'.*

Section 52 of that Act goes on to provide that *'If, in the opinion of the Bank, a person has engaged, is engaging or is about to engage in conduct that involved, involves or would involve contravening a provision of financial services legislation the Bank may apply to the* (High) *Court for an order restraining the person from engaging in the conduct'.* It is perhaps unlikely that the Bank would wish to seek such an order, unless the conduct involved was particularly egregious, but the power is there nonetheless.

Notably, in addition, the Bank also has a power under S.43, '*where it is satisfied that there have been widespread or regular relevant defaults by a regulated financial service provide, and that in consequence of the relevant defaults, customers of the regulated financial service provider have suffered, are suffering or will suffer loss or damage, the Bank may give the regulated financial service provider a direction requiring the making of appropriate redress to the customers'.*

In our view, rules without potential sanctions do not, broadly speaking, work effectively to protect consumers. We would therefore ask that the Bank:

- **provide an account of any sanctions issued under the respective Codes up to this point;**
- **explain the extent of its statutory powers under the revised regulations; and**
- **outline how its approach to imposing sanctions for potential breaches in the future will be handled.**

3. Securing Customers' Interests

[1] See for example: https://www.thecork.ie/2015/11/30/carrigaline-td-says-banks-were-let-off-the-hook-over-breaches-of-mortgage-arrears-code/.

It is unsurprising, that the Bank's consumer research carried out as part of the Code Review, *'showed that further work is needed to build consumer trust in the financial system'.*

We were one of the parties at the discussion paper stage who questioned how the 'consumer's best interests' obligation can be effectively balanced with the obligations firms have in relation to their shareholders, i.e. to maximise profits and return as best as possible. Like many others, we call into question the best interests narrative as being somewhat naive.

We note that the Bank now suggests in the Consultation Paper (Page 28) that *'firms exist in the first instance to pursue their commercial objectives. However, in this pursuit, financial services firms are required to act in a manner that places their customers' (and potential customers') interests at the heart of their culture, strategy, business model and decision-making'.*

This more candid and realistic statement, obvious though it may seem, is welcome nonetheless. Securing customer's interests is a more concrete expression of what is required. Thereafter, it is to be hoped that most financial services firms will have the good sense to understand that treating customers fairly and respectfully will, broadly speaking, be good for their business, apart from being a regulatory necessity.

4. Mortgage Credit, Incentives, Switching, Lifetime Mortgages and Home Reversion Agreements and the CCMA/MARP review

As explained above, the Consultation Paper outlines proposals for reform in the area of mortgage credit (pages 43-49) and Annex Four – draft Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Conduct of Business) Regulations – goes on to proposed a revised updated draft Mortgage Arrears Resolution Process (MARP). We posed the question above – what does the Bank wish us to comment upon? Is it the general proposals in the Paper or the more precise measures in the draft regulations?

In the section that follows here, we attempt to do both.

4.1. The Consultation Paper

4.1.1 Mortgage Incentives

In the case of mortgage incentives, we agree with the statement made on page 44 of the paper to the effect that:

> *'The upfront benefit of these offers can create a potential risk that borrowers discount other important cost indicators (i.e. applicable mortgage interest rates) when choosing a mortgage product, and may not be aware of the total cost of credit of the mortgage on offer at the point of decision-making'.*

We note that *'over the coming period, the Central Bank plans to undertake further research and analysis to understand the consumer impact of cashbacks, and*

potential further actions will be considered once this is complete' and this seems a sensible strategy prior to deciding on what rules to put in place.

Mortgage incentives are generally likely to involve an element of 'what you gain on the swings, you lose on the roundabouts'. Mandatory transparent and accessible information outlining the relevant pros and cons should therefore accompany offers from lenders and potential borrowers should always be strongly recommended to seek advice from appropriately qualified financial advisors before acting.

4.1.2. Mortgage Switching

Both the Bank's current practices and suggested proposals in relation to internal switching – annual notifications of options, personalised euro savings estimates alongside each refinancing option and reminders of such options (presumably in writing or electronically) – are sensible.

In terms of switching to a new lender, the issue of costs is noted, as is the suggestion that *'identifying any common process enhancements amongst lenders that could be reflected in an industry protocol or charter'* in association with the BPFI might help to simplify the process and overcome certain barriers to switching.

4.1.3 Lifetime Mortgages and Home Reversion Agreements

It is notable that there is no definition provided in the Consultation Paper for information purposes of these forms of agreement. However, the current Consumer Protection Code (CPC) defines a "lifetime mortgage" as meaning a loan secured on a borrower's home where: a) interest payments are rolled up on top of the capital throughout the term of the loan; b) the loan is repaid from the proceeds of the sale of the property; and c) the borrower retains ownership of their home whilst living in it.

A lifetime mortgage allows a loan to be drawn down in terms of a percentage of the value of the home; the borrower/s uses the money as s/he sees fit and continues living in that home. No instalments are paid. Instead interest is charged year or year on the amount borrowed and compounds year on year. The cumulative loan amount is paid off upon death or if the home is sold.

A home reversion agreement is defined in Part V of the Central Bank Act 1997 as meaning an agreement between a vendor and a home reversion firm that provides:

(*a*) for the conveyance by the vendor to the home reversion firm of an estate or interest in land (which includes the principal residence of the vendor or of the vendor's dependants) for a discounted sum or an income (or both), and (*b*) for the vendor to retain the right to live in the residence until the occurrence of one or more events specified in the agreement.

Thus, in this case, the vendor sells a share of his/her home at an agreed price and the purchaser recovers that money generally upon death and/or sale of the property.

'Releasing the equity in your home', as it is sometimes termed, may be costly and is not a decision to be taken lightly. The potential implications for the borrower/s in terms of future family inheritance, ability to downsize and funding future needs such as healthcare, some of which may be hard to predict, may be significant. **In both cases, professional advice should be mandatory here before any loan is drawn down. Such an agreement should not be allowed to proceed without a sign-off from a financial advisor and a declaration by the firm that it has carried out the necessary due diligence.** Enhancements to the warnings already required in the existing Code, as suggested in the Consultation Paper, should also be put in place.

4.1.4 Proposed amendments to the CCMA/MARP

In FLAC's 'Pillar to Post' series of papers exploring in detail the legislative and related mechanisms currently in place to resolve consumer debt problems in Ireland, we reviewed the CCMA/MARP processes in some detail and made significant recommendations for reform[2]. We have also discussed these proposals to reform the CCMA at more than one meeting with the Bank's consumer protection division. While that section of the Bank did not signal specifically with us which of the recommendations we have made it would propose to implement, it did indicate that the recommendations made in Paper Four, were *'extremely timely'* in the context of the review of the Consumer Protection Code (CPC) and particularly the forthcoming review of the CCMA/MARP process, and in light of the cost of living crisis and high interest rate environment that has pertained over the past few years.

The Consultation Paper allots a slim one and a half pages to the CCMA and suggests a number of standard changes to it, without providing much in the way of discussion or rationale for these proposed changes nor an explanation as to why it has proposed quite limited measures. This makes it difficult to review and comment upon them.

This text in the **Consultation Paper** reads as follows (**pages 48-49**):

> *'Our proposals include a requirement in the revised Code to ensure firms consider an appropriate and sustainable range of ARAs, which are broad enough to meet the needs of impacted borrowers. We also intend to issue updated guidance on what we mean by appropriate and sustainable within the revised Code, reflecting our engagement with firms in relation to the application of sustainable resolutions for mortgage arrears in practice.*
>
> *In addition, the following specific changes are also being proposed for the CCMA:*

[2] https://www.flac.ie/assets/files/pdf/from_pillar_to_post_paper_4_-_a_review_of_debt_resolution_mechanisms_and_debt_support_services_with_final_recommendations_for_reform.pdf.

- *A requirement for the provision of additional information by firms to borrowers in relation to the offering (or not) of ARAs as set out in the Central Bank's letter to firms of 22 March 2019[3];* (our footnote inserted for explanation purposes)
- *A requirement for the provision of information on the sale of property post-repossession;*
- *The introduction of a 12-month validity period for a completed Standard Financial Statement;*
- *The introduction of limited unsolicited visits outside the MARP, so that only one unsolicited visit request can be issued every six months;*
- *The inclusion of the borrower's future repayment capacity as well as their current repayment capacity, when assessing potential ARAs; and*
- *A requirement to provide additional information on the implications of a personal insolvency arrangement for a borrower and his/her mortgage loan account in a number of borrower communications.*

Our response to these proposals, one by one, is as follows:

The opening paragraph here seems aspirational only and lacks clarity. A continuing problem here is the wording of Rule 39 of the Code. It provides that '*a lender must explore all of the options for alternative repayment arrangements offered by that lender (our emphasis)'* before going on to set out a list of 12 such potential arrangements. This wording effectively allows a lender to decide for themselves which of the suite of arrangements it may choose to offer or not offer, as the case may be. Unless this wording is adjusted, commitments such as set out above '*to ensure firms consider an appropriate and sustainable range of ARAs, which are broad enough to meet the needs of impacted borrowers'* would seem unlikely to be successful. Thus, it is notable that this 'proposal' is not backed by any specific wording for the suggested 'requirement' here, significantly undermining its intent.

- This problem continues with the first bullet point. It also refers to a 'requirement' for 'additional information' by firms to borrowers on offering (or not offering) ARA's. What this requirement may entail is not explained or expanded upon, and no revised wording is provided for it.

- A similar problem occurs with Bullet Point 2. What will this requirement look like in practice? In addition, how will this requirement align with the European Union (Consumer Mortgage Credit Agreements) Regulations 2016, (transposing the EU Mortgage Credit Directive (2014/17/EU) which provide 1) at Regulation 29 (4) that '*where the price obtained for the secured immovable*

[3] The Central Bank issued a letter to industry on 22 March 2019 setting out the Central Bank's expectation that regulated entities provide each borrower with fuller information on the assessment of his/her mortgage arrears case and the reasons why alternative repayment arrangements considered, but not offered to the borrower, are not appropriate and not sustainable for the borrower's individual circumstances. Regulated entities must provide this additional information to borrowers as soon as possible, and no later than from 1 January 2020. While the provision of this information does not apply retrospectively, regulated entities should act in the best interests of consumers and facilitate requests for this information from such borrowers.

property affects the amount owed by the consumer under the credit agreement, the creditor shall ensure as far as is reasonably practicable that the secured immovable property is sold at the best price reasonably obtainable' and 2) at Regulation 29 (5) that *'where, after possession proceedings, an outstanding debt remains, the creditor shall, in order to protect the consumer, put in place measures to facilitate repayment of the outstanding debt by the consumer'.*

- The third bullet point, if we understand it correctly, in addition to validating a SFS for 12 months, may also enable a lender to request a revised SFS every 12 months, should it wish to do so. Have the views of MABS money advice practitioners, MABS dedicated mortgage arrears advisors (DMA's), Personal Insolvency Practitioners (PIPs) and lenders themselves been sought on this proposal?.

- The fourth bullet point whereby the '*introduction of limited unsolicited visits outside the MARP, so that only one unsolicited visit request can be issued every six months'* is proposed, is something of a mystery to us, though we may be missing something here. It is not clear to us what the words 'outside the MARP' signify here. Why would a lender require an unsolicited visit facility to a borrower's primary residence, when that borrower is not in the MARP process, i.e. where arrears have not arisen on an account or where arrears have arisen but do not remain outstanding 31 calendar days from the date the arrears arose?

- The proposal in Bullet Point Number Five is one we have specifically made ourselves in PtP Four and elsewhere. This involves an amendment to the key Rule 37 which sets out the five essential matters which the lender's Arrears Support Unit (ASU) must examine in order to assess the full circumstances of the borrower/s with a view to putting in place alternative repayment arrangements. Item d) currently reads – '*the borrower's current repayment capacity'.* Logically, an assessment of the borrower's future repayment capacity is just as important, if not more so, than current capacity.

- The final (sixth) bullet point again lacks specifics to the extent that it is difficult to comment upon. The personal insolvency legislation was in its infancy when the CCMA was last significantly amended in 2013. It may make sense over a decade later to refer to it more precisely in the context of mortgage arrears and to add to references such as in Rule 14 (f) (iii) of the current MARP - the lender's obligation in its MARP booklet to warn a borrower in arrears that not co-operating may impact on his/her eligibility to propose a Personal Insolvency Arrangement (PIA). On the other hand, too many references to the personal insolvency legislation may not necessarily be appropriate here, where arrears are in an early stage and potentially easier to resolve.

If the proposals for reform made in this Consultation Paper concerning the CCMA are as far as the Bank is prepared to go, after 11 years of the current iteration of the

Code, it is to say the least very disappointing. It does not help that the proposals themselves are under-developed and lacking in specific detail.

Looking through this section headed **'Mortgage Credit and Switching'** in the Consultation Paper in general, it is notable that the areas reviewed relating to borrowers who are not in arrears – Mortgage Incentives, Mortgage Switching and Lifetime Mortgages and Home Reversion Agreements – seem to contain more specific proposals for improvements than the section concerning the Code of Conduct on Mortgage Arrears (CCMA) which relates to people in specific financial difficulty.

Some FLAC proposals

Before concluding here, we feel it is important to articulate here some of the FLAC proposals for reform and improvement of the CCMA from the borrower's perspective.

1. The first of these is that the borrower/s should be entitled to receive a detailed explanation of the lenders's assessment of the case under Rules 37 and 39 of the Code. In this regard, the existing wording of Rule 40 provides a template. It provides that '*A lender must document its considerations of each option examined under Provision 39 including the reasons why the option(s) offered to the borrower is/are appropriate and sustainable for his/her individual circumstances and why the option(s) considered and not offered to the borrower is/are not appropriate and not sustainable for the borrower's individual circumstances'.*

Remarkably, in our view, a borrower is not explicitly entitled to this information as it stands, with Rule 62 going on to provide that '*A lender must maintain full records of all the steps taken, and all of the considerations and assessments required by this Code, and must produce all such records to the Central Bank of Ireland upon request'.* Only the Bank is entitled to demand this information. The borrower is not explicitly entitled to it and it has been the practice of some lenders to provide the bare bones of the decision with no detail. In our view, this makes a mockery of the borrower's right of appeal to an Appeals Board assembled by the lender (Rules 49-55). How can an appeal be effectively presented if the person seeking to appeal does not have at his/her disposal the full detail and rationale for the decision?

It should be noted that the first bullet point in the Paper's suggestions above proposes '*A requirement for the provision of additional information by firms to borrowers in relation to the offering (or not) of ARAs as set out in the Central Bank's letter to firms of 22 March 2019'.* This general proposal is certainly in the ballpark of providing a borrower with more detail of how decisions in their case were arrived at, but it would appear to fall far short of the standard of fair procedures that is required to allow for a meaningful process and right of appeal.

2. In addition and related to No.1 directly above, we are also of the view that the appeal mechanism under the Code is inadequate and does not reflect core principles of fair procedures. Thus, the 'Appeals Board' to which the borrower in arrears has a

right to appeal a decision of a lender under the MARP is controlled by the lender, since it is provided that the Appeals Board '*must be comprised of three of the lender's senior personnel, who have not been involved in the borrower's case previously. At least one member of the Appeals Board must be independent of the lender's management team and must not be involved in lending matters, for example, an independent member of the lender's Audit Committee or an external professional such as a solicitor, barrister, accountant or other experienced professional.*

Our understanding from discussions with the Bank is that it is not in favour of putting in place a right of appeal to an independent third party as the Code is a function and expression of the regulatory oversight of the Bank over lenders. In response on this question, FLAC has argued that an independent appeal is warranted since the borrower in arrears is, in effect, also obliged to comply with the code and is regulated by it *de facto*, since a refusal to comply with the MARP process leaves the borrower open to repossession proceedings in the Circuit Court, where failure to comply with the MARP would be likely to have adverse consequences for that borrower.

The question of the legal basis for the revised Code, raised in Section 2 above in a discussion on the **'Structure of the proposed revised Code and enforcement powers'** is also a significant issue here. The current CCMA was issued under s.117 of the Central Bank Act 1989, which provides for very light potential penalties for 'licence holders' who fail to *'provide all relevant information to the Bank to enable the Bank to satisfy itself as to compliance with the code by such licence holder or other person'.* To our knowledge, not a single sanction has been imposed on a '*licence holder'* despite apparent and acknowledged infringements, noted by the current Minister for Finance, when he was opposition spokesperson on Finance.[4]

4.1.5 Legal basis for the revised CCMA/MARP

As explained in the introduction to this submission, the proposals made in the Consultation Paper concerning the CCMA/MARP process are a mere summary of a more detailed review. The annex containing the draft Central Bank (Supervision and Enforcement Act) 2013 (Section 48) (Consumer Protection) Regulations sets out, amongst many other revised measures, a draft revised MARP process.

As outlined above, the legal basis for the revised Code stems from Bank powers under the Central Bank (Supervision and Enforcement Act) 2013. S.48 (1) in Part 8 of that Act empowers the Bank to *'make regulations for the proper and effective regulation of regulated financial service providers'.* In turn, sub-section (2) (a-y) of s.48 (as amended) provides for an exhaustive list of areas of financial services activity wherein the Bank has the power to make such regulations.

[4] See for example: https://www.thecork.ie/2015/11/30/carrigaline-td-says-banks-were-let-off-the-hook-over-breaches-of-mortgage-arrears-code/.

For the sake of clarity, it would be helpful if the Bank identified the relevant provision within this list that forms the basis for the revised MARP regulation, though it would appear that S.48 (2) (r) is the likely source, reading as follows:

> *(r) provision about how regulated financial service providers are to deal with customers who are or are likely to be in financial difficulty (including customers who are or are likely to be in arrears) including, in relation to such customers, provision—*
> *(i) setting out the considerations to be taken into account in considering how to deal with such customers,*
> *(ii) specifying the information to be provided to such customers about the management of the arrears and the consequences of default, and*
> *(iii) specifying the resolution processes to be adopted in relation to arrears,*

In relation to parts of the proposed revision of the Consumer Protection Code such as consumer complaints mechanisms, it would appear that provision (u) is the basis. It reads as follows:

> *(u) provision requiring the making available of simple and inexpensive resolution procedures for disputes between regulated financial service providers and customers and for securing that complaints by customers about regulated financial service providers are dealt with speedily, efficiently and fairly, including provision—*

(i) about the first point of contact for complainants,
(ii) regulating the recording of complaints,
(iii) specifying timescales for responding to complaints,
(iv) about the remedies and redress, including reimbursement or compensation (or both), to be available in cases of complaints,
(v) for determining where responsibility for dealing with complaints lies in cases where more than one financial service provider is involved, and
(vi) about the keeping and retention of records relating to complaints;

From what we can see, there are no explicit enforcement provisions that set out the potential penalties for breaches of any regulation issued under S.48 in Part 8 of the Act, although a combination of Part 6 headed Customer Protection (Sections 43-44) and Part 9 of the Act headed 'Enforcement' (Sections 52-58) does provide a range of sanctions generally. Again, as noted in the introduction above, we would like to see some more specific detail on this question.

4.2. The draft statutory instrument - Proposals to reform the CCMA/MARP

At the risk of repetition, it came as some surprise to us that the statutory instrument contained in Annex Four of the Consultation Paper contains full draft proposals to reform not just the CCMA/MARP process, but a host of other measures in addition, including many of the rules and processes currently set out in the Unofficial Consolidation of the Consumer Protection Code 2012 (revised 13th December 2023).

Immediately below and in the various sections that follow, we attempt to make observations from a consumer rights perspective on a number of these proposals. These focus largely on our priority areas of consumer credit, arrears and complaints procedures, as the tight submission date has not allowed for a more extensive review of issues relating to insurance and investment

Part 3 - Chapter 9 - Arrears - Mortgage debt secured by a mortgage borrower's primary residence

4.2.1 Definitions

"Arrears" – means arrears arising on a mortgage loan account where a mortgage borrower has not made a full repayment of all outstanding amounts due, or only makes a partial repayment of any such amount, as set out in the original loan account contract, by the scheduled due date.

The wording of this definition has the potential to confuse, in using the words *'has not made a full* (our emphasis) *repayment of all outstanding amounts due, or only makes a partial* (our emphasis) *repayment of any such amount'*. Are these not one and the same thing?

"personal insolvency arrangement" means –

(a) an arrangement entered into by a debtor, or

(b) an arrangement for which a proposal is made, under Chapter 4 of Part 3 of the Act of 2012;

Should the words 'under Chapter 4 of Part 3 of the Act of 2012' be placed below Part (b) here, as shown above, since they apply to both (a) and (b)?

"Pre-arrears"

The third condition under this definition triggering pre-arrears reads – ***'****a regulated financial service provider to whom a mortgage debt is owed by a mortgage borrower establishes that the mortgage borrower is in danger of experiencing financial difficulties that may impact on the mortgage borrower's ability to meet his or her mortgage debt repayments'*

This plank of the definition of pre-arrears is concerning. It seems to allow the RFSP to unilaterally establish that the borrower is in danger of experiencing financial difficulties without any consultation. On the face of it, the borrower appears to have no say in this. Is the RFSP to be allowed to 'establish' this without consulting with the borrower?

4.2.2 Scope and application

"Credit servicing"

The Chapter *'applies to mortgage lending activities, and credit servicing activities* (our emphasis) *in respect of mortgage loans, of regulated financial service providers'*

Does this 'scope and application' take into account the recent **'Credit Purchasers and Credit Servicers'** Directive **(Directive (EU) 2021/2167)** recently transposed by the **European Union (Credit Servicers And Credit Purchasers) Regulations 2023** (SI 644/2023, applicable from 30th December 2023).

And, in light of that measure, is there any obligation on the original lender to assess the borrower's financial circumstances, go through the MARP process and consider the offer of ARA's or can it sell the loan on or move the loan on to a third party retail credit firm or credit servicing firm once arrears are established?

"Joint mortgage borrowers"

Clause 221 (3) replicates the existing failure to deal with the situation of separated couples, where one party refuses to co-operate or acts wilfully in an arrears situation. This often sees a joint borrower refusing to complete a SFS, refusing to make any payment towards the mortgage, refusing to agree a ARA and refusing to attend court and leaves the other spouse/partner, often a woman who also has the care of children, vulnerable to legal action and repossession.

Given that this is an Statutory Instrument, not a Code of Practice, and arguably has greater potential leverage, the Bank should consider exploring how it could attempt to ease the restrictions of strict joint and several liability here and give lenders and hard pressed borrowers greater scope to enter workable payment arrangements in relationship breakdown scenarios?

4.2.3 Meaning of 'not co-operating'

This very important definition now consists of Draft Conditions 1 and 2.

In Condition 1, there are three requirements. **This draft condition is similar to the current 2013 definition and is arguably overly complex and difficult for borrowers to understand (particularly requirement c).** Failing to meet any one of these three is considered to be not co-operating.

The draft first requirement of Condition 1 reads:

a) *the mortgage borrower fails to make a full and honest disclosure of information to the regulated financial service provider* ***and this information would have a significant impact on the regulated financial service provider's assessment of the mortgage borrower's financial situation***;

The wording here is amended from the 2013 version and is questionable. If there is an alleged failure to make a full and honest disclosure of information, **at what point and by what process is it ascertained that it would have or would have had a significant impact and who determines this question?**

The draft second requirement of Condition 1 reads:

b) *the mortgage borrower fails to provide information relevant to the mortgage borrower's financial situation within the timeline* ***specified by the regulated financial service provider in accordance with Regulation 252(3);***

The current wording reads – '*within the timeline* ***specified by the lender in accordance with Provision 34'.***

Provision 34 provides at present that *'Where the lender imposes a timeline for return of information, including a standard financial statement, the timeline must be fair and reasonable and it must reflect the type of information requested and whether the borrower may need to obtain the information from a third party'.*

The draft Regulation 252(3) similarly reads ***'****Where a regulated financial service provider requires a mortgage borrower in a case referred to in Regulation 241 (***Refers specifically to Circumstances in which MARP is to be applied***) to return information, including a standard financial statement, according to a particular timeline, the timeline shall be fair and reasonable and shall provide sufficient time to the mortgage borrower having regard to the type of information requested and having regard to whether the mortgage borrower may need to obtain such information from a third party'.*

Both the current rule and the proposed draft rule are arguably flawed, since they both allow the lender to decide what is a fair and reasonable timeline. What if an unreasonable timeline is imposed in the circumstances and the borrower fails to comply with it? The lender may potentially declare that the borrower/s is not co-operating and they may potentially be exited from the process.

Draft Condition 2 ***'****means that the letter, required pursuant to Regulation 250, has been issued to the mortgage borrower and the mortgage borrower has not carried out the actions specified in that letter'.*

The draft Regulation 250 provides that where the lender has invoked the MARP and the borrower/s do not respond, the lender is obliged to write to the borrower/s warning that she/he has 20 working days to take 'specific actions' or be classified as not co-operating. This clause reprises Rule 28 of the existing CCMA/MARP.

Over many years working with MABS money advisors, it has been suggested to us that in some instances borrowers have been declared as not co-operating under this heading but no warning letter seems to have been received by the borrower. **As this**

is a 'last chance saloon' scenario for the borrower/s, there should be a requirement here to serve this notice by registered post.

4.2.4 Mortgage Interest Supplement

A reference is made in draft Rule 237 (3) (h) reprising Rule 14 g) of the existing MARP that information should be made available to the borrower concerning State supports including mortgage interest relief and mortgage interest supplement.

To our knowledge, Mortgage Interest Supplement has been closed to new entrants since January 2014, is no longer in use, and is unlikely to return.

4.2.5 Communications with borrowers

Draft Rule 245 (1) reprising Rule 22 a) of the current MARP provides that communications with borrowers by lenders or third parties acting on their behalf should be *'proportionate, reasonable and not excessive, taking into account the circumstances of the mortgage borrower, and the principle that unnecessarily frequent communications should not be made'.*

Admittedly, it is difficult to police this but some attempt at defining what is unnecessarily frequent communication and more imposing language would be useful. For example, ***'frequent communications must not be made'*** would be preferable. **In addition, the possibility of sanctions being imposed on lenders for breaches of this and other standards should feature somewhere in the MARP itself and not just as a vague afterthought in the final Regulation 420.**

4.2.6 Alternative repayment arrangements

The wording of draft Regulation 254 (1) is a disappointment and effectively perpetuates the existing situation in Rule 39, whereby a lender may decide for itself which of the ARA's it wishes to offer as part of its suite of resolution options, in providing that *'a regulated financial service provider shall assess all of the options for alternative repayment arrangements offered by that regulated financial service provider'.* Thus, should they choose, lenders may continue to avoid more radical ARA's such as permanently reducing the interest rate on the mortgage or writing down the principal sum owed to a specified amount.

An attempt is then made in draft Regulation 254 (2) to compensate for this by ostensibly increasing the pressure on lenders to offer a wider suite of ARA's in providing that *'the options for alternative repayment arrangements offered by the regulated financial service provider shall be comprised of a suite of alternative repayment arrangements options that is, amongst any other relevant elements, appropriate and sustainable, and broad enough, to meet the needs of the regulated financial service provider's customers that are mortgage borrowers'.*

There is a clear tension between these draft provisions. What process will be deployed, and by whom, to review a given lender's suite of alternative repayment arrangements options to determine whether they are broad enough to meet the needs of mortgage borrowers at any given time, as per 254 (2), when 254 (1) allows a lender to determine which options it wishes to offer in the first place?

Draft Regulation 254 (4) then goes on to set out the potential list of ARA's in similar terms to the existing Rule 39. A very significant potential addition to this list from the current range of options in the CCMA 2013 is 254 (4) j) – *Equity Participation* – defined in 254 (8) as *'an arrangement whereby the principal sum due on the primary residence is reduced, provided that a share in the mortgage borrower's equity in the primary residence is transferred to the regulated financial service provider, or a third party'.*

The question of equity participation, or **'debt for equity swaps'** as they have also been called, has been the subject of much discussion ad speculation in recent years in the sphere of personal insolvency arrangements. In FLAC's 'Pillar to Post' series, Paper Four[5], we reviewed a selection of High Court review/appeal cases where the question of the imposition of a debt for equity arrangement on lenders in order to enable a sustainable Personal Insolvency Arrangement to be put in place has been teased out. Broadly speaking, the essence of these decisions is that the secured creditor's consent is required under the legislation for such an arrangement to be agreed. From a debtor advocacy viewpoint, this outcome has been disappointing, as has been the ongoing failure of the review of the personal insolvency legislation to materialise and potentially amend the applicable law. This is particularly the case as 'debt for equity' is often a preferable arrangement to a 'split mortgage', particularly for ageing borrowers whose income and payment capacity may be declining.

In the revised MARP, lenders presumably have the discretion under 254 (1) to offer or not to offer equity participation as a potential ARA. **Should a given lender decide not to offer this option, it will be notable whether the Bank will be prepared to look at determining whether this means that a lender's offering to mortgage borrowers is not sufficiently broad under the terms of 254 (2).**

4.2.7 Documenting the consideration of alternative repayment arrangement options

Draft Regulation 252 in turn provides that:

(5) A regulated financial service provider shall document its consideration of each option assessed in accordance with paragraph (1).

(6) Paragraph (5) includes documenting the reasons why –

[5] Ibid, see Section Four, Pages 74-81.

(a) any option offered to the mortgage borrower is appropriate and sustainable for his or her individual circumstances, and
(b) any option assessed and not offered to the mortgage borrower is not appropriate and not sustainable for his or her individual circumstances.

(7) A regulated financial service provider shall provide the mortgage borrower with a copy of the information documented by the regulated financial service provider in accordance with paragraphs (5) and (6).

These sub-sections provide a significant amendment to the existing Rule 40 of the MARP which provides that:

'A lender must document its considerations of each option examined under Provision 39 including the reasons why the option(s) offered to the borrower is/are appropriate and sustainable for his/her individual circumstances and why the option(s) considered and not offered to the borrower is/are not appropriate and not sustainable for the borrower's individual circumstances'.

but which neglects to provide that a lender must provide a borrower in arrears with such considerations and reasons in writing. Whereas, under Rule 62 *'a lender must maintain full records of all the steps taken, and all of the considerations and assessments required by this Code, and must produce all such records to the Central Bank of Ireland upon request* (our emphasis)*'*.

We have characterised this as a 'fair procedures' nightmare, that has rendered the appeal/review mechanism largely meaningless in many cases (of which more below). **In future at least, the assessment of each option examined must be documented and the reasons why each option assessed has or has not, as the case may be, been considered appropriate and sustainable for the borrower's individual circumstances, must be provided to the borrower/s.**

As ever of course, the 'devil will be in the detail' and it will be important here for the Bank to lay down a marker with lenders that the account provided to the borrower/s here must avoid being a 'box ticking' exercise and must be sufficiently detailed to enable a borrower's potential appeal to be properly informed.

4.2.8 Appropriate legal advice

Draft Regulation 255 (1) (reprising Rule 42) provides that *'Where an alternative repayment arrangement is offered by a regulated financial service provider to a mortgage borrower in a case referred to in Regulation 241, the regulated financial service provider shall advise the mortgage borrower to take* ***appropriate independent legal advice*** (our emphasis)*, financial advice, or both, and shall provide the mortgage borrower with a clear explanation, on paper or on another durable medium, of how the alternative repayment arrangement works'…….*

This is a sensible suggestion of course but the question that follows here is where the borrower in financial difficulty is to source this independent legal advice? The website of the Legal Aid Board[6], for example, suggests that 'A person will be eligible for advice and assistance under the Abhaile Scheme if they:

a) are insolvent (as defined under the Personal Insolvency Act 2012: this simply means that the person is 'unable to pay their debts in full as they fall due'), and
b) are in mortgage arrears on the home in which they normally reside (their principal private residence), and
c) are at risk of losing their home (for example, they may have received from their mortgage lender repossession proceedings, a letter indicating that such proceedings will issue, a letter indicating that they are deemed non-cooperating, or an invitation to consider sale, surrender or other loss of all or part of the home).

The question that may arise here is whether the third criterion above is met, when the MARP is invoked by a lender and a borrower is in comparatively early arrears. It is certainly appropriate for a borrower to have independent legal advice (in addition to money/financial advice which can be obtained through MABS/PIPS) before agreeing to an ARA proposed by a lender.

The Bank should consult with the officials and bodies who administer and oversee the Abhaile scheme, in order to ascertain that a right to legal advice under that Scheme actually applies to early arrears MARP cases.

4.2.9 Removal from a tracker rate

In the case of a borrower with a tracker rate mortgage, draft Regulation 255 (3), reprising Rule 46, allows a lender, where it concludes *'that there is no option which is appropriate and sustainable for the mortgage borrower's individual circumstances whereby the mortgage borrower may retain the tracker interest rate',* to offer an ARA with a different interest rate basis, if that arrangement is long-term appropriate and sustainable.

The efficacy and indeed fairness of this offer may depend on the relevant interest rate cycle at the time it is applied. For example, in a period of rising ECB interest rates, a borrower might indeed benefit in getting away from a tracker rate. In a period of declining base ECB interest rates, which seems to now be upon us, it may be the reverse. **The key point perhaps is that such an offer should not be permitted where its effect is to benefit the lender financially, rather than assist the borrower in financial difficulty.**

4.2.10 Appeals and legal proceedings

[6] https://www.legalaidboard.ie/en/our-services/legal-aid-services/abhaile-scheme/overview.html#:~:text=The%20Scheme%20is%20designed%20to,of%20charge%20to%20eligible%20borrowers..

Draft Regulation 256, reprising Rule 45, allows a lender to decide not to offer a mortgage borrower an alternative repayment arrangement *'including where the regulated financial service provider concludes that the mortgage borrower's mortgage is not sustainable for the mortgage borrower's circumstances and an alternative repayment arrangement is unlikely to be appropriate'.* In such a case, *'the regulated financial service provider shall, within 10 working days of its decision, provide the reasons for that decision to the mortgage borrower on paper or on another durable medium'.*

In turn, a borrower may appeal that decision to the *'regulated financial service provider's Appeals Board'* but *'the regulated financial service provider's MARP no longer applies to the mortgage borrower'* and *'the protections of the regulated financial service provider's MARP no longer apply'.* (our emphases)

It also continues to be the case that *'the regulated financial service provider may commence legal proceedings after 3 months have elapsed from the date the reasons were provided to the mortgage borrower, or after 8 months have elapsed from the date upon which the arrears first arose, whichever date is the later'.* (our emphasis)

Both of these latter provisions also continue to apply in Draft Regulation 257, reprising Rule 47, in relation to a situation where an ARA is offered to the borrower but the borrower declines to accept it, for example where s/he feels it is not sustainable from his/her financial perspective.

There is something almost pre-destined about these rules and the language used. **Even though the borrower has a right of appeal, the protections of the MARP no longer apply to him or her. Neither does time stop running in terms of the three months (from the date of the lender's decision) or eight months (from the date arrears arose) limits respectively for the lender to commence legal proceedings for repossession of the family home against that borrower.** It is almost as if the right of appeal is an afterthought.

In Pillar to Post, Paper Two, figures on the traffic into and the outcome of appeals between Quarter Three 2014 and the end of Quarter Two 2015 provided by the Bank, covering a 12 month period of considerable activity in the mortgage arrears space, noted as follows[7].

- MARP completed 163,962
- ARA offered 144,443
- ARA not offered 19,519
- ARA accepted 120,384
- ARA rejected 9,919
- Appeals 8,048
- Upheld/partly upheld 2,738
- Rejected 6,197

[7] Page 61: https://www.flac.ie/assets/files/pdf/flac_pillar_to_post_paper_2_final_v.pdf.

- Warned on co-operation 47,544
- Declared not co-operating 32,305
- Appeals 1,685
- Upheld/ partlyupheld 549
- Rejected 1,249

From our reading of these figures, in terms of the offer of an ARA, 19,519 borrowers were not offered an ARA during this period; in addition 9,919 borrowers rejected the ARA that they were offered; 8,048 ARA related appeals were brought during this time and 8,935 ARA related appeals were heard. 2,738 (31%) of these were upheld or partially upheld; 6,197 (69%) were rejected.

In terms of a declaration of not co-operating, 32,305 were so declared during the period and 1,685 not co-operating related appeals were brought during this time and 1,798 such appeals were heard. 549 (31%) of these were upheld or partially upheld; 1,249 (69%) were rejected.

The existing Rule 53 of the MARP provides that *'a lender must undertake an appropriate analysis of the patterns of appeals from borrowers on a regular basis including investigating whether appeals indicate an isolated issue or a more widespread issue. This analysis of appeals from borrowers must be escalated to the lender's ASU, compliance/risk function and senior management'.*

Has the Bank accessed any up to date MARP data on appeals from lenders to inform its deliberations on reviewing the appeal mechanism?

Has the Bank spoken recently to consumers in mortgage arrears about their experience of the system of appeals?

If such has been done, it has not affected the appeals mechanism in any tangible way in terms of preparing this statutory instrument to incorporate a revised Mortgage Arrears Resolution Process (MARP). Thus, Draft Regulation 259, reprising Rules 47-55 appears to make little or no tangible change to the provisions on appeals.

Critically, the composition of an Appeals Board remains largely unchanged. It must comprise three members, at least one of whom must be *'an experienced professional, independent of the regulated financial service provider's management team, including an independent member of the regulated financial service provider's audit committee or an experienced professional who is independent of the regulated financial service provider, such as a solicitor, barrister, accountant or other experienced professional',* **a profile that does not immediately suggest any consumer representation.**

The remaining member/s are to be *'drawn from the regulated financial service provider's senior employees who have not previously been involved in dealing with the mortgage borrower's arrears or pre-arrears in respect of the mortgage loan'.*

Following the decision of the Appeals Board, as in the existing Rule 51 g), the draft Regulation 259 (5) (g) provides that *'the regulated financial service provider shall inform the mortgage borrower of his or her right to refer the matter to the Financial Services and Pensions Ombudsman and shall provide the borrower with the contact details of that Ombudsman'.*

It is not clear to us what the purpose of this provision has been in the past or is intended to be in the future, even if, on the face of it, this would appear to offer some further right of appeal for borrowers against the lender's original decision and the lender's Appeals Board confirmation of it.

In practice, the FSPO's normal practice is to propose to a complainant that s/he engage in mediation as part of its dispute resolution process, even where the provider has declined or failed to investigate the initial complaint in a timely manner. Largely for resource reasons, a full investigation of a complaint will only take place *'if you and your provider don't reach a resolution through the dispute resolution service',* and it will take a considerable period of time before such an investigation takes place, time that is not available in a mortgage arrears scenario in terms of the MARP time limits referred to above.

In summary, this further avenue of appeal held out to mortgage borrowers is not a workable mechanism in practice and the Central Bank is, or certainly should be, aware of this. In preparing this draft SI that leaves the appeal mechanisms largely unchanged, did the Bank research this issue or consult with the FSPO in relation to it. How many cases has the FSPO dealt with under this heading since 2013?

In brief, where a mortgage borrower's home is on the line as a result of arrears and legal proceedings and potential repossession of the family home is threatened, s/he should be entitled to the benefit of fair procedures and a fair process.

In Pillar to Post, Paper Four, we proposed that *'taking into account the existence of a prescriptive personal insolvency regime that the State would be very unlikely to wish to dismantle at this point, a Mortgage Arrears Review Office should be provided for in legislation. Such an Office would act as a 'clearing house' to resolve family home mortgage arrears cases to avoid repossessions, while simultaneously acting as a conduit to a potential increase in Personal Insolvency Arrangements'.*

In the pages that followed, this proposal was discussed in some detail across the various categories of depth of mortgage arrears, and included a consideration of the constitutional issues that would be likely to arise[8].

4.2.11 Credit Unions and the MARP (and CPC)

[8] See Pages 136-141: https://www.flac.ie/assets/files/pdf/from_pillar_to_post_paper_4_-_a_review_of_debt_resolution_mechanisms_and_debt_support_services_with_final_recommendations_for_reform.pdf.

RTE reported on May 28, 2024 that **'***Lending at credit unions increased by almost 14% in the past year, driven by a significant rise in mortgage lending.That is according to figures from the Irish League of Credit Unions (ILCU), which represents over 90% of the credit unions here. Its latest results show that around 1,800 mortgages were issued by ILCU-affiliated credit unions in the 12 months to the end of March. The value of mortgages issued jumped 70% in the past year, with its mortgage loan book reaching €473m. Across the entire credit union sector, the mortgage loan book topped €600m.The ILCU said it is on target to reach €1 billion in mortgage lending over the next two years*'.

Neither the (revised) draft MARP nor the arrears resolution processes of the Consumer Protection Code apply to credit unions, even though they extend mortgage finance and personal loans to consumers the same as other lenders and in considerable volume. **Though we appreciate that credit unions are regulated separately within the Central Bank structure by the Registrar of Credit Unions, there is no reason we can think of why such borrowers should not be entitled to the same protection as Bank customers.**

5. The draft statutory instrument - Proposals to reform arrears processes related to unsecured personal debt (not including the principal private residence of the borrower)

Draft Chapter 9 - *Arrears - debts of personal consumers, other than mortgage debt secured by a mortgage borrower's primary residence.*

As a general initial comment, this draft chapter is disappointing. Although it is admittedly more detailed than the previous equivalent Chapter 9 of the Unofficial Consolidation of the Consumer Protection Code 2012 (revised 13 December 2023), it appears to largely repeat the approach of that Chapter in prescribing a process that approaches the problem as if the borrower was in arrears on one loan only.

The reality is that borrowers in financial difficulty often have more than one and sometimes multiple debts, with pressure for payment coming from more than one creditor. **A consumer borrower who is insolvent requires a system where all creditors are aware that there is debt to more than one party and that a system of *pro rata* payment is the best way to manage limited resources and avoid often fruitless legal proceedings being brought against the borrower.**

Thus, it is notable that the one of the first provisions here – Draft **Regulation 267** - states that *'where legal proceedings have been issued in respect of a relevant debt, Regulation 270 and paragraph (2) of Regulation 273 do not apply in respect of that debt'.* In effect, this basically means that the obligations to seek an agreed approach on arrears and to provide regular notifications updating the status of an account do not apply, once legal proceedings have been issued.

In our view, it would be preferable to begin this Chapter by stating a general principle that creditors should seek to avoid legal proceedings wherever possible, rather than largely exempting creditors from having to do the due diligence of assessing capacity to pay when they have issued such proceedings. Notwithstanding, of course there will be situations where a lender suspects that a borrower has greater financial resources than they are letting on, and legal proceedings may be justified in such situations.

This Chapter applies to personal consumers only, defined as *'a consumer who is a natural person acting outside his or her business, trade or profession'.* It does not apply where Chapter 9 applies, i.e. to mortgage loans secured by a mortgage borrower's primary residence (see observations on Chapter 10) above, but it does otherwise apply to 'mortgage debt' as outlined in draft **Regulation 274**.

It is not clear what exactly the scope of this application is to mortgage debt. Since the chapter does not apply to a borrower's principal private residence, but does apply to a natural person acting outside his or her business, trade or profession, it would seem likely that it is intended to cover a borrower who enters into an investment or buy-to-let mortgage or mortgages. **This should be clarified by a statement of who are considered to be 'in scope' borrowers here.**

If this assumption is correct, a question arises as to when a borrower may no longer be acting outside his or her business, trade or profession. If a given borrower has five mortgages on five houses that are each rented out to tenants and derives his/her living from the relevant rental income, should s/he still be classified as a personal consumer?

Draft **Regulation 274** provides that *'Where, in respect of a mortgage debt, a personal consumer fails to make 3 full mortgage loan repayments'* s/he should be informed, on paper or another durable medium, of *'the potential for legal proceedings for repossession of the property on which the mortgage loan is secured, together with an estimate of the costs to the personal consumer of such proceedings'.*

It also provides *'that taking independent advice in such circumstances is important and that the personal consumer should take such advice from his or her local MABS or from an appropriate alternative'.*

In the case of the application of this regulation to buy-to-let mortgages, there appears to be no reference to the position of tenants here. **Consideration should be given to introducing a requirement here to provide tenants with information when their landlord is in arrears and either facing or in proceedings, in addition to some updates relating to their ongoing security of tenure.**

Draft **Regulation 276** typifies the 'one debt' approach in stating that *'Where a regulated financial service provider reaches an agreement on a revised repayment arrangement with a personal consumer, the regulated financial service provider shall*

provide the personal consumer with the following on paper or on another durable medium within 5 working days of reaching such agreement:

(a) all details of the revised repayment arrangement;
(b) the data relating to the personal consumer's arrears that will be shared with the Central Credit Register or a credit reference agency.

However, as noted above, if such a revised repayment arrangement is not cognisant of other debts and the borrower in arrears comes under pressure to make payment to other creditors or face legal proceedings, it may only be a matter of time before that revised payment arrangement breaks down, if it is not realistic in the first place.

Draft **Regulation 277** in turn provides that a regulated financial service provider rejecting an offer of a revised payment arrangement by a borrower *'shall maintain a record of its reasons for rejecting the offer and communicate these reasons to the personal consumer on paper or on another durable medium within 10 working days of its decision'.* **Notably, unlike the MARP process, there is no review or appeal mechanism available here, regardless how reasonable the payment proposal is in the circumstances. It is curious that a record must be maintained of the reasons for refusal, when it appears that there is nothing the borrower can do about that refusal in any event.**

Draft **Regulation 269** obliges RFSP's to maintain a dedicated webpage, containing amongst other elements, a hyperlink to the MABS website and Draft **Regulation 273**, again amongst a number of other elements, obliges a lender where arrears of over 31 days duration have occurred, to provide a statement including that *'the personal consumer may wish to seek assistance from the MABS, the contact details for the MABS national helpline and the link to the MABS website'.*

To what extent has the Bank consulted with the Money Advice and Budgeting Service (MABS) in framing this Chapter. As the State funded debt advice service across the country, it is particularly well placed to provide views on this Chapter in terms of its potential effectiveness.

In addition, this draft chapter makes insufficient provision for RFSP's to highlight to borrowers the availability of insolvency arrangements under Personal Insolvency Act 2012 (as amended) and the information and services that can be provided to debtors by the Insolvency Service of Ireland (ISI), personal insolvency practitioners (PIPS) and MABS approved intermediaries.

Both Debt Settlement Arrangements (DSA) and the Debt Relief Notices (DRN) are potentially available to borrowers, who may be insolvent due to a range of unsecured debts in arrears (including utility and rent arrears). The sole obligation here at present is at Regulation 273 (1) (b) (xi) which obliges a lender to include *'a hyperlink to any website operated by the Insolvency Service of Ireland which provides information to personal consumers on the processes under personal insolvency legislation'.* **Far more detailed and targeted information is required here.**

In conclusion, we reiterate that an 'all of debt' approach is the only transparent and effective way to attempt to address consumer over-indebtedness in our society and economy. In the Pillar to Post Series, Paper Four, we offered the following recommendations in this regard[9]:

A single CBI regulatory Code for regulated entities should be put in place encompassing early resolution procedures for both mortgage and non-mortgage debts. It should incorporate rules of engagement for the three standard scenarios that generally apply – a borrower with mortgage debt only, with non-mortgage debt only, and (the most problematic and common) with both mortgage debt and non-mortgage debt together.

Such a Code should provide:

- General guidance on the relative priority of debts - MABS methodology provides a useful framework in this regard.
- Ensure as a first priority that essential services are paid so they are not cut off (subject to the latitude provided by the Energy Engage Code, which obliges energy suppliers to offer a range of payment options to customers in arrears, such as a debt repayment plan).
- In a mixed mortgage debt and non-mortgage debt scenario, the family home mortgage should be accorded payment priority but with a recognition that non-mortgage credit agreements in arrears must also be factored in where possible.
- Where there is no mortgage and the debtor lives in rented accommodation, the payment of the rent in order to avoid potential eviction should be prioritised before payments to non-mortgage creditors.

6. The draft statutory instrument - High Cost Credit

Draft Chapter 11 - Arrears – debts in relation to high cost credit agreements

It is notable in this very short chapter at draft **Regulation 285** that a High Cost Credit Provider (HCCP) is required to *'advise a consumer of relevant debt counselling services, and the contact details for such services including the name and address of a local MABS office upon the third default or missed payment under a high cost credit agreement* (our emphasis)*, whether consecutive or otherwise, during the currency of a high cost credit agreement'.* This is subject to exceptions which include where payments under the agreement are made at any place other than the business premises of the high cost credit provider (most likely a referral to home colleted credit) or the business premises of the supplier of goods or services under the agreement, or where the HCCP has agreed to a variation in payment in advance.

[9] See Pages 59-60: https://www.flac.ie/assets/files/pdf/from_pillar_to_post_paper_4_-_a_review_of_debt_resolution_mechanisms_and_debt_support_services_with_final_recommendations_for_reform.pdf.

We do not disagree with this proposal but would note that it goes beyond what is provided in Chapter 10 of the draft SI in relation to arrears on unsecured debts of personal consumers and Chapter 9 in relation to mortgage arrears.

Thus, for example, draft Regulation 273 in Chapter 10 provides that *'where an account is in arrears for 31 calendar days after the arrears first arose, the regulated financial service provider shall, within 3 working days'* provide *'a statement that the personal consumer may wish to seek assistance from the MABS, the contact details for the MABS national helpline and the link to the MABS website.*

In addition, Regulation 249 (b) in Chapter 9 concerning family home mortgage arrears provides that when the MARP process is being initiated by a mortgage lender and a mortgage borrower *'fails to make 3 full mortgage loan repayments in accordance with the original mortgage loan contract agreed by the mortgage borrower, and such repayments remain outstanding, and an alternative repayment arrangement has not been put in place, the regulated financial service provider shall notify the mortgage borrower, on paper or on another durable medium'* that *'taking independent advice in such circumstances is important and that the mortgage borrower could take such advice from his or her local MABS, or from a legal advisor or personal insolvency practitioner'.*

It makes perfect sense to refer borrowers in arrears to money advice services for assistance. However, it would also be sensible to provide for a more uniform message to lenders in terms of their obligations to notify and to borrowers in terms of their right to access assistance. It is conceivable that a borrower might simultaneously have arrears in all of these categories, and could do without what might be interpreted as a mixed message. Again, it is perhaps worth asking whether MABS been consulted on these draft provisions?

A comparable scenario occurs with the final draft Regulation 286 in this Chapter which provides that '*If a high cost credit provider engages the services of a third party to collect debts on its behalf, the high cost credit provider shall have in place a written contractual arrangement with that third party which ensures that its consumers are treated in accordance with the relevant Regulations and the relevant provisions of the Act of 1995'.*

From what we can see, there is not a similarly worded 'Debt Collection' provision in Chapters 9 and 10. **Again, a provision like this should have overall application to all forms of debt collection, in ensuring that where lenders have engaged a third party to collect debts on its behalf, it is clearly stated that there are contractual arrangements in place which ensure that relevant regulations and applicable legal provisions are complied with.**

7. Consideration of Hire Purchase (HP) agreements, Personal Contract Plans (PCP) and Consumer Hire (CH) agreements

7.1. Introduction

From what we can see, the draft statutory instrument is silent on HP/PCP and CH, though by implication, some draft provisions apply to these agreements, for example, Chapter 10 in relation to arrears on debts of personal consumers. **However, otherwise the absence of any explicit reference to these now widespread forms of car finance credit in the proposed Code is concerning.**

Page 69 of the Consultation Paper accordingly poses the question whether there *'are there specific elements of the revised Code that should be tailored to BNPL, PCP, HP and consumer hire providers?'* The answer should be a definitive yes in our opinion, as each of these forms of credit comes with particular features that require addressing from a consumer information and protection perspective.

The Consultation Paper records at page 68 as follows:

> *In 2022, the provision of indirect credit such as Buy Now Pay Later agreements (BNPL), along with Hire Purchase agreements (HP), Personal Contract Plans (PCP), and consumer hire agreements, became regulated business. The Central Bank subsequently applied the following chapters of the Code to providers of these products:*
>
> *• Chapter 2 – General Principles*
> *• Chapter 5 – Knowing the Consumer and Suitability*
> *• Chapter 9 – Advertising*
>
> ***It is now proposed that the revised Code will apply in full to these lending activities*** (our emphasis)*, to ensure that customers of these credit providers are afforded the same protections as customers of other credit providers. These additional protections will include the general requirements of the existing Code as well as existing Code requirements relating to provision of information, arrears handling, errors and complaints resolution, and records and compliance procedures. These credit providers will be in scope of the protections set out in the Standards for Business, and the requirements in relation to digitalisation, unregulated activities, vulnerability, climate and frauds and scams, outlined earlier in this consultation paper.*

Hire Purchase, in particular, has been significantly under-regulated in terms of the application of the CPC and the regulation of providers. The Code was first put in place by the Bank in 2006. Amongst a number of measures, it introduced a set of rules relating to the provision of loans to consumers from entities regulated by the Bank. At first, HP and CH agreements and providers were not specifically excluded from the Code. However, by virtue of an **Addendum made to the Code in May 2008**, regulated entities when *'carrying on the business of entering into hire purchase agreements or carrying on the business of entering into consumer hire agreements'* became excluded from its application.

The reasons for this were never made clear. However, the rationale for this decision appears to have been that neither HP nor CH were considered by the Department of Finance to be credit agreements (i.e. loans) within the meaning of the Consumer Credit Act 1995, but rather were (and still are) classified as rental agreements (or bailments). Thus, both HP and CH were separately regulated under different parts of the Consumer Credit Act 1995 and neither required an APR (or cost of credit) to be quoted in the agreement.

In our view, which we articulated at the time, this was mistaken. We maintained that a Hire Purchase agreement is a credit agreement since the ultimate objective is that the Hirer will purchase the goods the subject of the agreement and there is generally a significant cost of credit and deposit and instalment payments involved. **This failure to classify HP as a form of credit agreement led to an anomalous situation where the agreements themselves were regulated but the provider was not, unless it was an already regulated credit institution.** This in turn led over time to some unregulated non-Bank entities starting to offer HP agreements of their own. Though these agreements were regulated (by the CCA 1995), the providers were not subject to CBI regulation and, in time, what we would characterise as a **'sub-prime' hire purchase car finance market developed** that was not monitored by the Bank.

This was plainly unsatisfactory from a consumer protection perspective and some reform eventually came in the **Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act, 2022.** It is important to note firstly here that this Act fails to make any specific reference to Personal Contract Plans (PCP), therefore appearing to classify PCP as a form of Hire Purchase, as broadly suggested by the Tutty Report[10]. It might be added, however, that this report did observe that *'there are some significant differences'* between HP and PCP. **In our view, these differences should have been explicitly addressed in the legislation and there is an opportunityto partially address this failure in the revised Code.**

As a result of the relevant provisions in the 2022 Act, hitherto unregulated providers of HP, PCP and CH became (or have to become – **note that in the list of such firms currently on the CBI website, many are still described, dated 16th August, 2022, as transitional at the time of writing**) retail credit firms. It was then open to the Bank to provide that a number of rules in the Consumer Protection Code 2012 (as amended) would also apply to them. This was done through yet another addendum to the Code, dated May16th 2022.

In light of the above, it is concerning that the Bank's array of CPC reform related documentation, elaborately detailed and prescriptive in many areas, contains no proposals on these forms of credit in terms of specific elements of

[10] See: Review of Regulation of Personal Contract Plans, commissioned by the Minister for Finance from Michael G Tutty, 1 September 2018 at https://assets.gov.ie/3909/061218122212-f875ff7879c743c486f08f10edc0df68.pdf.

the revised Code that should address them. Why this is the case is not clear, but perhaps it may conceivably reflect a comparative lack of experience in this area.

Mindful again of the limited time available to make submissions, we outline below in bullet point form a non-exhaustive list of suggested information items (assuming that the agreements concern car finance) that might be useful in terms of consumer information and protection and might conceivably be incorporated in some reshaped form into a Chapter in the draft Code. Consideration might also be given to obliging providers of car finance agreements to provide certain key information notices to Hirers that might reflect some of the points considered below.

Please note that these are very much draft information pieces only, intended to reflect some understanding of the difficulties that Hirers (as the borrowers are termed) and their MABS advisors might experience with these products.

7.2 Hire Purchase (HP)

- A Hire Purchase (HP) agreement is not the same as a personal loan. Under a personal loan, the vehicle purchased with the money borrowed is the property of the borrower from the outset and the borrower has the right to sell it whenever s/he wishes, while still being liable to the lender for any unpaid instalments and interest.
- The Hirer under a HP agreement is obliged to tax and insure the vehicle at all times at his/her own expense
- The goods the subject of a Hire Purchase agreement (almost invariably a motor car) do not become the property of the Hirer until the final payment is made to the Owner under the agreement. There is no right to sell the goods until then without the explicit written consent of the Owner.
- A hirer may also end the agreement early and become the owner of the goods by making full payment, and is entitled to a rebate of interest for early repayment (though the Central Bank has yet to put in place a rebate formula under the terms of the Section 52 of the Consumer Credit Act 1995 (as amended))
- The Hire Purchase price (the total amount the Hirer has to pay) under a Hire Purchase agreement is normally made up of the the cash price put on the vehicle by the Owner and the amount of interest charged, usually payable by monthly (or weekly) instalments over three years (or more). There will often be Documentation and Purchase fees also.
- Where a Hirer has paid one-third or more of the total HP price, the Owner must, under the relevant legislation, obtain a court order to repossess the vehicle without the Hirer's consent. Any deposit paid by the Hirer forms part of the HP price.
- A Hirer has a right under the relevant legislation to end a Hire Purchase agreement at any time and return the goods the subject of the agreement to the Owner. Where s/he has paid less than half the HP price, s/he is liable to

pay the difference between what has been paid and half the HP price. Where s/he has paid over half the HP price, s/he may be liable to pay any instalments that have fallen due and have not been paid, if any. In either case, the Hirer may also be liable for failure to take reasonable care of the goods and should be advised to obtain an assessor's report before returning the relevant vehicle.

- The Consumer Credit Act 1995 (as amended in 2022) provides that the Annual Percentage Rate of charge (APR) in respect of a hire-purchase agreement shall not be greater than 23 per cent.

7.3 Personal Contract Plans (PCP)

- A Personal Contract Plan (PCP) is now considered in Irish law to be a form of HP agreement under consumer credit legislation, as explained above. However, it differs from a standard HP agreement in a number of practical ways and it is very important to understand the differences before committing to one.
- These kind of car finance agreements have come to Ireland via the US and the UK over the past decade and are available only on new or reasonably new vehicles.
- The PCP price (or HP Price) is made up of three elements. These are: 1) a deposit (which may be in cash or the agreed value of a trade-in vehicle), usually for a much larger amount than under a standard HP agreement; 2) monthly instalments usually paid over three years (usually lower in amount than standard HP instalments) and 3) a final payment referred to as the Guaranteed Minimum Future Value (the GMFV), which is the dealer's estimate of what the vehicle may, at a minimum, be worth after three years when the agreement ends.
- There are in turn three standard options for completing a PCP agreement: 1) The Hirer pays the cash deposit (or trade in), pays the instalments and the GMFV (if s/he has saved enough during the course of the agreement) and becomes the owner of the vehicle; 2) The Hirer pays the cash deposit (or trade in), pays the instalments and returns the vehicle and owns nothing to show for the payments made and 3) The Hirer pays the cash deposit (or trade in), pays the 36 instalments and trades the vehicle back into the dealer and starts into a new PCP for another vehicle.
- The third scenario is the dealer's/lender's/Hirer's ideal outcome here. However, this depends upon a Hirer having another deposit ready to begin the next agreement. In theory, this will be made up of the difference between the GMFV (the minimum projected value) and the actual value of that vehicle (normally a larger amount), together with the money that the Hirer has been advised (by the dealer) to save during the agreement to form the next deposit for another new or next to new car.
- There are other potential problems that can get in the way of this idealised scenario. PCP agreements usually contain other terms such compulsory mileage limits and servicing obligations, that standard HP agreements do not.

If not adhered to, these can lead to financial penalties and lower settlement figures for vehicles at the end of agreements, and that may adversely affect the Hirer's next move.

- In summary, PCP agreements may work well for people who understand them and who adhere to them and who require a vehicle in good condition on an ongoing basis.

A PCP agreement has features that are distinctly different from a standard HP agreement and these should, in our view, have been distinguished from HP in the 2022 Act, in terms of their key features. The legislation should also have obliged providers to set out clear statutory warnings in relation to the mileage and servicing provisions and related issues in PCP agreements. In our view, failure to do this is a case of very minimal regulation and reflects a culture of a poor standard of consumer protection for hirer/borrowers. As suggested above, the revision of the CPC proposed by the Bank provides an opportunity to correct these omissions to some extent.

7.4 Consumer Hire (CH)

In the area of consumer car finance, Consumer Hire agreements remain the eternal pointless exercise in our view. They were first legislated for in May 1996, under Part VII of the Consumer Credit Act 1995, when the leasing of vehicles for tax purposes was often preferred by businesses to their purchase (and probably still is).

There are no such tax breaks available to leasing consumers, to our knowledge, however. In addition, since a consumer hire agreement is defined as *'an agreement of more than three months duration for the bailment* (i.e. rental) *of goods to a hirer* ***under which the property in the goods remains with the owner'*****,** it is difficult to see the benefit of it.

If ownership does not ultimately pass to the Hirer at the end of the agreement, it is hard to see of what use they can be to a consumer, and, accordingly, our experience is that they are now very rare.

8. Buy Now Pay Later (BNPL) agreements.

Buy Now Pay Later (BNPL) agreements appear to have grown significantly in recent years as a convenient way of purchasing goods (or services) on credit online or in store. The **Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act, 2022,** already mentioned above, recently moved to regulate one prominent provider of this form of credit as a retail credit firm. Another prominent provider is already regulated as a credit institution holding a banking license in another Member State of the European Union.

The Consultation Paper at page 68 states that *'in November 2023, the Central Bank published research on consumers' experience and understanding of Buy Now Pay*

Later products. In 2024, the Central Bank will undertake further consumer-based research and study of indirect credit products to determine if additional requirements might be needed to enhance consumer awareness and to better protect consumers'.

The draft regulations (at page 27) provide that a "BNPL agreement" means *'an agreement for the provision of credit, as defined in section 28 of the Act of 1997, indirectly to a consumer for the purchase of goods or services from a vendor, whereby the provider of the credit makes a payment to the vendor in respect of the goods or services and the consumer owes an equivalent amount to the provider of the credit'*

It is not clear to us whether this is a statutory definition or a definition applied by the Bank for the purposes of the revised Code. To our knowledge, there is no specific definition of BNPL to be found in the **Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act, 2022,** although a relevant activity that triggers a requirement under the terms of that Act for a provider to be regulated includes *'directly or indirectly providing credit to a relevant person'*. Notably, the most up to date (16th May 2022) online version of Section 28 of the Central Bank Act 1997 (as amended) does not contain this definition of BNPL.

Neither is it clear to us that this definition properly reflects the essence of Buy Now Pay Later. When the provider '*makes a payment to the vendor in respect of the goods or services'* it is suggested that '*the consumer owes an equivalent amount* (our emphasis) *to the provider of the credit'.* If that were the sum total of the amount payable by the consumer to the provider, where would the profit be for the provider under the transaction, though it is conceivable that the provider may pay the vendor less than the actual retail price of the goods.

The profit, as we understand it, lies in the variety of fees and charges, in addition to interest, that generally come with these agreements. These potentially include:

- An application fee at the time of loan establishment
- A monthly account keeping fee
- A dishonour (late payment) fee
- A variable Interest rate (ranging from 0% - 14.99% APR) calculated daily on the outstanding credit balance and is charged on the installment payment date.

Payments are by credit or debit card only. As a result, if there are insufficent funds in the relevant account to meet the scheduled payments, the borrower may incur further charges with the card provider, in addition to the provider's late payment fee. **Again, the key issue here is that the borrower/purchaser should be aware of the nature of the agreement/s s/he is proposing to enter into and not just on the basis of the information and documentation provided by the lender. A short section in the revised Code providing some information items on BNPL and obliging providers to issue appropriate warning notices and to have arrears procedures in place should be included.**

9. Comments on other processes in the draft revised Code

9.1 Consumers in vulnerable circumstances - Chapter 3, Part 2

The definition in **Regulation 2** – Interpretation – of the draft statutory instrument of "consumer in vulnerable circumstances" *'means a consumer that is a natural person and whose individual circumstances make that consumer especially susceptible to harm, particularly where a regulated financial service provider is not acting with the appropriate levels of care, and 'vulnerable circumstances' shall be construed accordingly'.*

Thereafter, some limited provisions follow with draft **Regulation 33** making provision for *'such reasonable assistance as may be necessary to facilitate that consumer in their dealings with the regulated financial service provider'*; draft **Regulation 34** focusing in detail on appropriate training for a range of provider staff, including those in consumer-facing functions; and **Regulation 35** dealing with processes for the appointment of a 'trusted contact person' at the request of the personal consumer.

The facility to allow a 'trusted contact person' to be appointed by a vulnerable person where financial abuse may be suspected, and in other relevant circumstances, seems a sensible proposal to us. However, the views of organisations with specialist knowledge in this field, such as Safeguarding Ireland, are of critical importance here.

It is notable that the consumer in vulnerable circumstances is still largely defined by his/her individual circumstances. By contrast, Principle 6 of the OECD 'High Level Principles' under the heading of *'Equitable and Fair Treatment of Consumers'* suggests that *'approaches may take into account that consumer vulnerability can manifest differently and be applicable in different circumstances, and may be due to a combination of personal characteristics, economic situations and market conditions'* (our emphasis). It has also suggested '*special attention should be paid to the treatment of consumers who may be experiencing vulnerability or financial hardship'.*

This may be read in our view as suggesting that financial hardship, a problem shared by many consumers, is a vulnerability in itself. Thus, it properly belongs in the spectrum of risk. The duty of firms to secure the interests of their customers should be reflected by fair resolution mechanisms that acknowledge financial hardship as an inherent risk, and which engage consumers effectively and tackle problems early. **It is proposed here that the definition of a 'consumer in vulnerable circumstances' should make specific reference to financial hardship as a factor contributing to vulnerability.**

9.2 Errors resolution - Chapter 11, Part 2

Draft **Regulation 100** provides that:

(1) A regulated financial service provider shall take all reasonable steps to make a prompt refund due to a consumer as a result of an error made by the regulated financial service provider causing a consumer to make an overpayment or to suffer a financial loss, and shall keep a record of the steps that it has taken to make the refund concerned.

(2) Where the regulated financial service provider has taken all reasonable steps for the purposes of paragraph (1), but has been unable to make the refund, the regulated financial service provider –

(a) shall not benefit from the refund amount, and
(b) shall make the refund with appropriate interest when claimed by a consumer to whom the refund is due.

It would appear from these provisions, unless we are mistaken, that although the consumer is entitled to be reimbursed or refunded for the overpayment or the financial loss suffered as a result of the provider's error, s/he is not entitled to any compensation for the effect of that error and/or the distress that it may cause. **This is an issue that requires re-examination.**

The wording of the second sub-section here in turn appears a little odd. It is not clear to us in what circumstances a provider would be unable to make the relevant refund, since it would in all likelihood have access to the consumer's details to enable it to take place. Needless to say, the provider should not benefit from the refund amount, in the unlikely circumstances that it was unable to make the refund. **What is to happen in this scenario if the consumer never claims the refund?**

9.3 Complaints resolution - Chapter 12, Part 2

The first draft **Regulation 103** here is perhaps unfortunately worded in providing that *'A regulated financial service provider shall take all reasonable steps to resolve any complaint with the complaining consumer'.* We would be fairly confident that a consumer would prefer to be referred to as a consumer making a complaint, rather than the complaining customer.

Thereafter, draft **Regulation 107 (4)** provides the essential rules that a RFSP must follow in terms of complaints mechanisms for consumers and the key provisions within that sub-section read as follows:

(d) the regulated financial service provider shall provide the consumer making the complaint with a regular update, on paper or on another durable medium, on the progress of the investigation of the complaint at intervals no greater than 20 working days, starting from the date on which the complaint was received;

(e) the regulated financial service provider shall investigate and make reasonable efforts to resolve (our emphasis) *a complaint within 40 working days of having received the complaint;*

It appears to us that little has changed here in terms of the essential procedural requirements a provider will have to initially adopt in its complaints mechanism. A RFSP shall provide an update to the consumer at four week intervals, the same as in the existing procedure, essentially halfway through the same notional 40 day (or eight week) time limit to complete the investigation of a complaint.

The current wording that '*the regulated entity must attempt to investigate and resolve a complaint within 40 business days'* is tweaked with an obligation that the provider *'shall investigate and make reasonable efforts to resolve a complaint'* within that timeline. Assuming that the words 'must' and 'shall' in the two versions carry the same mandatory meaning, the essential difference between them seems to be that currently an entity has to *'attempt to investigate and resolve'* within the time limit and in future an entity will have to '*investigate and make reasonable efforts to resolve'* within the time limit.

The question here is whether the latter is any significant improvement on the former in terms of what we identified in our submission to the 'Discussion Paper' as the occasional provider practice of putting complaints from consumers 'on the long finger' from time to time and still complying with the obligation to attempt to investigate. **Perhaps this is an improvement, as the obligation now will be to investigate within the timeline, not just to attempt to investigate.**

However, the proposed revised wording now also provides that the investigation must make 'reasonable efforts' to resolve the complaint within the 40 working day timeline and this introduces a new potential flexibility. How are the words 'reasonable efforts' to be construed here? Does this allow a provider to argue that we investigated the complaint within the 40 working day timeline as required, but our 'reasonable efforts' failed to resolve it within that time, causing further delay.

Although some might consider the discussion above to be unnecessarily picky, it may matter hugely to the consumer making the complaint who may have little or no access to assistance to frame that complaint and may already feel intimidated by an inequality of arms between s/he and the provider. **We propose that the words 'reasonable efforts' here be replaced by the words 'every effort', i.e. to read '*shall investigate and make every effort to resolve a complaint within 40 working days of having received the complaint;***

Draft Regulation 107 (4) than goes on to deal with the question of where a consumer may turn, when s/he is unhappy with the process deployed or the outcome of the complaint and, again, there is little or no change here. Here it is proposed that:

(f) where the 40 working day period referred to in subparagraph (e) has elapsed and the complaint is not resolved, the regulated financial service provider shall –

(i) notify the consumer making the complaint of the anticipated timeframe within which the regulated financial service provider hopes to resolve the complaint,

(ii) inform the consumer of their right to refer the matter to the relevant Ombudsman, and
(iii) provide the consumer with the contact details of such Ombudsman;

(g) within 5 working days of the completion of the investigation, the regulated financial service provider shall advise the consumer making the complaint on paper or on another durable medium of –

(i) the decision at the conclusion of the investigation, including the reasons for that decision,
(ii) where applicable, the terms of any offer or settlement being made to the consumer making the complaint,
(iii) the fact that the consumer may refer the matter to the relevant Ombudsman, and
(iv) the contact details of such Ombudsman.

As we emphasised in our submission on the CPC Consultation Paper, implicit in point (f) is that the provider may not make the 40 day timeline and the wording here does nothing to deter that outcome or suggest that it should be exceptional. The consumer then has a right to refer the complaint to the FSPO, but from the consumer's point of view, might that take more time than waiting for the provider to conclude its investigation and reasonable efforts at resolution?

In the FSPO's document 'Overview of Complaints for 2022', the current Ombudsman stated that:

> *'It is clear that many of the consumers making complaints to this Office could have had their complaints addressed by their provider, at an earlier point in time'….. 'I encourage all providers of financial services and pension products, to adopt an approach of seeking, where possible, to resolve complaints quickly with their customers. In many cases, complaints are resolved promptly when the provider receives an initial contact from the FSPO, requesting a final response letter or simply advising of the receipt of the complaint. There are several such case studies in this publication which describe how the complaint was resolved once the complaint was made to the FSPO. Providers seeking to resolve complaints at the earliest stage would not only contribute in a positive way to the vision of this Office for a progressive financial services and pension environment built on trust, fairness and transparency, where complaints are the exception; it would also make a significant difference to the customers of those providers, by removing the requirement for complainants to use the services of the FSPO'.*[11]

The above are no nonsense observations, no doubt based on experience, but it does not appear that this delaying of the investigation of consumer's complaints involves any specific penalty. **Nor is it proposed to alter the rules here by adopting some form of deterrent to prevent this occurring, despite this problem having been**

[11] See page 4, https://www.fspo.ie/documents/Overview-of-Complaints-2022.pdf.

already discussed in detail in our submission on the Consultation Paper. In addition, implicit perhaps in the Ombudsman's comments is that this creates a drain on resources that may adversely affect the capacity of that Office to carry out investigations that require more detailed considerations.

Again, in our submission on the CPC Consultation Paper, we suggested that *'a key question that the Bank might address is the extent, if at all, to which it monitors the adherence of regulated entities to the notional limits in this complaints process'* and we asked the question ***'Is anyone in the Bank inspecting the files of providers to monitor their track record and compliance with what are already quite liberal timeframes?'***

We have yet to receive any form of reply. In light of draft **Regulation 108**, which provides that *'a regulated financial service provider shall keep and maintain an up-to-date log of all complaints from consumers'* and their outcomes, **we repeat this query.**

Draft Paragraph (g) in turn essentially repeats the existing process for a consumer to appeal or seek a review of the decision itself via the FSPO. Again, in our submission on the CPC Consultation Paper, we posed the question of how effective the FSPO system is as a third party complaints resolution mechanism. In particular, it is notable that there is no access to any designated avenue of assistance for complainants to help formulate and pursue their complaints, though FSPO officials do their best to assist. However, this is not the same as having an advocate.

In practice, as we understand it, the FSPO seeks to persuade the complainant to engage in mediation as part of a dispute resolution process, even where the provider has declined or failed to investigate the initial complaint in a timely manner. A full investigation of the complaint only takes place *'if you and your provider don't reach a resolution through the dispute resolution service',* and it can take a very long time for an adjudication to be completed, largely for resource reasons. A limited appeal lies to the High Court where appellants often remain unrepresented and very vulnerable to a costs award against them.This is a pattern repeated in many other alternative dispute resolution (ADR) mechanisms in the legal system in Ireland.

The largely unchanged draft provisions here in relation to both complaints by consumers to providers and onward referrals to the FSPO would suggest that the Bank is happy with the current processes and procedures that are in place. If this is the case, what research has been carried out to substantiate this position? Has any review been conducted by the Bank concerning the pattern of appeals by consumers and their outcomes, both to RFSP's themselves and onward to the FSPO? Has the Bank sought to speak to any sample of consumers in connection with their experience of making a complaint and, if so, what was the feedback provided?

10. Conclusion

There is little doubt that the Bank has put an enormous amount of work into this review and has engaged in a significant level of consultation, both in terms of seeking submissions and holding meetings with consumer and 'Civil Society' groups and, doubtless, consulting in detail with regulated financial service providers themselves.

There remains, nonetheless, a lingering sense that this consultation has also involved a certain amount of box ticking and going through the motions. This is evidenced, in particular, by the call for the submissions to the Consumer Protection Code Review in October 2022 and the subsequent failure to provide any cogent feedback on submissions made (in the case of this organisation at least), particularly in terms of whether recommendations proposed were likely to be acted upon. In addition, a significant number of group meetings were held and attended, but at some of these, more talking was done by the Bank than the attendees, albeit in fairness there was a lot of material to summarise and explain.

The final phase of the Consultation, as already outlined in detail above, became confusing, particularly when it came to light that a very detailed statutory instrument had been prepared and drafted in the background to house the revised Codes. This left insufficient time for some groups who wished to comment in more detail on the wide range of rules and processes revised. It would have been preferable had this been disclosed at an earlier stage.

Finally, a point worth emphasising is that a statutory instrument of this size and breadth is not the most accessible format for consumers and those who advocate for them to access the kind of information required to protect their interests. User friendly guides will be needed in a number of areas.