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PO Box 9138
College Green,
Dublin 2

3rd September 2010

Re: CP46 – Consultation Paper on the Review of the Code of Conduct on Mortgage Arrears

Dear Sharon,

I am writing in response to your letter dated 13 August 2010, in which you invited the Bank to put forward its views in relation to CP46. This response also covers the views of both the ICS Building Society and the Bank of Ireland Mortgage Bank.

The Bank is supportive of the overall aim of the proposed revisions to the Code which is aligned with our own objectives in meeting the needs of our customers in financial difficulty. There are however some aspects which give rise to serious concern in terms of speed of implementation, the potential for some customers to use the proposals to create an unwarranted delay in the arrears process and targeting our effort efficiently which are outlined below.

Timeframe for Implementation:

The proposed revisions to the Code are material rather than incremental in respect of the IT development and process re-design necessary to ensure compliance with the Code. The fundamental nature of the change required does not facilitate deployment of manual workarounds as a short term interim measure. An excessively short implementation timeframe will result in the Bank being put in a position of 'forced' non compliance which would not reflect the Bank's absolute commitment to implementing the Code. Our initial view is that a minimum of six months will be required to implement the Code as proposed – the Bank is already well advanced in meeting the "spirit" of the Code and will continue this journey

Definition of Arrears and Differentiation between Late Payers and those in Financial Difficulty:

The Bank deems an account to be in arrears the day after the due instalment payment is missed. This definition is the basis for all reporting and relevant operational procedures within the Bank and any change would have an unwarranted and substantial impact. Lenders have different definitions of arrears supported by their IT systems, however, the critical fact to be established is whether the customer is in arrears due to genuine financial hardship.

Therefore, clarification is required in relation to application of the Code to 'technical' arrears arising from late payment as opposed to genuine financial difficulty.

This distinction is crucial to ensuring that (i) customers who do not exercise due care thereby creating incremental administrative cost for the Bank can be charged those costs and (ii) a resource intensive engagement with customers who are not experiencing genuine financial difficulty does not arise.

A further clarification is required to ensure that customers with whom a reduced payment is agreed as part of a pre-arrears arrangement and who continue to make such reduced payments in accordance with the terms of the arrangement are not in arrears and should not be deemed to be in arrears for the purposes of this Code.

Level of Communication:

The proposed limitation (three unsolicited communications per calendar month) would, in our view, be a 'blunt' instrument in seeking to address the behaviour of some lenders. The Bank's Regulatory Risk function and Internal Audit teams monitor and review compliance with the Code to ensure excessive contact does not take place. Furthermore, Rule 18 of the Code ("A lender must ensure that the level of contact and communications from the lender, or any third party acting on its behalf, is proportionate and not excessive.") should be adequate to protect the customer. The Financial Regulator can impose sanctions under the Code where appropriate and customers can make a complaint under the Consumer Protection Code.

Normal operational communications should not be deemed to be 'unsolicited', for example, letters regarding title deeds, fire or life cover. This needs to be clear in the Code.

Primary Residence:

A borrower can only have one primary residence which we propose should be described as their Principal Private Dwelling (PPD). This should be the home in which they reside. Once a property is rented out it ceases to be the customer's PPD.

The Bank would be concerned that customers could move from one property to another in order to frustrate the Bank and arrears process.

Appeals:

A third party mechanism for appeals is not necessary on the basis that each lender will have an independent appeals process in place. The proposed requirements under the Code, the provisions under the Consumer Protection Code and recourse to the FSO are appropriate and sufficient. An additional external mechanism would likely lead to spurious appeals in an attempt by some customers to delay the arrears process and only serve to frustrate the process and the contractual rights of the lender.

The lender has a legal right to rely on its security and the mortgage market functions on this basis. Any dilution of this right would be viewed, by external stakeholders, and international markets as an indication that Irish institutions are no longer permitted to fully control the management of their arrears exposures. This would inevitably affect lenders' risk appetite and lead to a rise in declines, higher prices for Irish mortgage borrowers and higher funding costs for lenders doing business in Ireland due to the perceived higher risk associated with the dilution of a lender's contractual rights.

Profiling Mortgage Book to Identifying Customers 'at risk':

There are a number of practical difficulties with the proposal to profile customers in the 'good' mortgage book, for example, profiling would rely solely on historic data provided at application to assess 'at risk' status. This data limitation will result in many customers being contacted unnecessarily when they are not in financial difficulty and many customers who may genuinely be at risk may not be identified.

A balance must be struck between the size of the effort and the extent to which the outcome is improved. The Code should recognise this assessment can only be implemented on a 'best efforts' basis and be performed on an annual basis.

The Bank's detailed response to the Consultation Paper is attached in a separate document.

Yours sincerely,



Brendan Nevin
Director, Consumer Banking (ROI & UK)

Review of Code of Conduct on Mortgage Arrears Consultation Paper CP 46 - August 2010

Introduction

The Code of Conduct on Mortgage Arrears (CCMA) was introduced on 27 February 2009. It replaced the voluntary Code of Practice on Mortgage Arrears issued by the Irish Banking Federation and built on the provisions contained in that code. The CCMA applies to all regulated mortgage lenders, except credit unions. The main provisions include communicating promptly and clearly with the borrower as soon as an arrears situation develops, handling genuine arrears cases positively and sympathetically, and exploring various alternative repayment measures with the borrower. When the CCMA was introduced, it contained a requirement that mortgage lenders could only apply to the courts to commence enforcement of legal action for repossession of a borrower's primary residence six months from the time arrears first arose.

Following a short consultation period, the CCMA was amended with effect from 17 February 2010 to require lenders to wait at least twelve months from the time arrears first arise before applying to the courts to commence enforcement of any legal action on repossession of a borrower's primary residence.

The Mortgage Arrears and Personal Debt Expert Group, established by the Government in February 2010, issued its Interim Report on 5 July 2010. The Report sets out a recommended process for dealing with mortgage arrears and makes specific recommendations in relation to the CCMA. We have reviewed the CCMA in light of these recommendations and we have also taken account of issues that have arisen since its implementation. We now propose a number of amendments, which are included in the attached revised CCMA.

Your views

We are seeking views on the proposed amendments to the CCMA. In addition, we would like your views on the following specific issues:

Level of communication

There have been reports that the level of contact by some lenders with borrowers in arrears is excessive. In order to address this issue, we intend to limit the number of times a lender may contact a borrower. We are proposing that, each calendar month, lenders would only be permitted three unsolicited communications with borrowers in respect of their arrears situation. The three unsolicited communications do not include any communications required under the CCMA. We would like views in relation to acceptable levels of communication and whether the level suggested is appropriate.

The proposed limitation (three unsolicited communications per calendar month) would, in our view, be a 'blunt' instrument in seeking to address the behaviour of some lenders. The Bank's Regulatory Risk function and Internal Audit teams monitor and review compliance with the Code to ensure excessive contact does not take place. Furthermore, Rule 18 of the Code ("A lender must ensure that the level of contact and communications from the lender, or any third party acting on its behalf, is proportionate and not excessive.") should be adequate to protect the customer. The Financial Regulator can impose sanctions under the Code where appropriate and customers can make a complaint under the Consumer Protection Code.

Normal operational communications should not be deemed to be 'unsolicited', for example, letters regarding title deeds, fire or life cover. This needs to be clear in the Code.

Arrears

Under the CCMA, a mortgage arrears situation arises as soon as the borrower fails to make a full mortgage repayment, or only makes a partial mortgage repayment, by the due date. We are aware that lenders have employed different practices when considering what constitutes arrears. The following are some examples:

- the date the first direct debit on the account was missed;
- the date the second and final direct debit on the account was missed;

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- the month that a direct debit was missed;
 - the month that the unpaid payment was due;
 - in the case of partial payments, when missed payments amount to one month's full payment.
- We are seeking views on the most appropriate definition of arrears for the purposes of the CCMA. When considering this issue, please bear in mind that the same definition will be used to compile the Quarterly Report on Residential Mortgage Arrears and Repossessions. Please set out your preferred definition and the reasons why you believe it to be appropriate.

Preferred definition: the day after the due instalment payment is missed.

This definition is the basis for all reporting and relevant operational procedures within the Bank and any change would have an unwarranted and substantial impact for the Bank. Lenders have different definitions of arrears supported by their IT system, however, the critical fact to be established is whether the customer is in arrears due to genuine financial hardship.

Therefore, clarification is required in relation to application of the Code to 'technical' arrears arising from late payment as opposed to genuine financial difficulty.

This distinction is crucial to ensuring that (i) customers who do not exercise due care thereby creating incremental administrative cost for the Bank can be charged those costs and (ii) a resource intensive engagement with customers who are not experiencing genuine financial difficulty as required under Rules 20 and 26 does not arise.

Primary residence

A number of terms have been used to describe the property to be protected by the provisions of the CCMA. In the CCMA itself, the terms 'principal private residence' and 'primary residence' are used. The Mortgage Arrears and Personal Debt Expert Group, in its Interim Report, uses the terms 'principal private residence', 'home' and 'family home'. In addition, for mortgage interest supplement purposes, the term used is 'sole place of residence'.

Principal Private Dwelling (PPD) is the most appropriate term for properties covered by the terms of the Code.

Some uncertainties have been highlighted in relation to the current wording of the CCMA. The aim of the CCMA is to assist borrowers in arrears with the mortgage on their home. However, individual circumstances and what constitutes an individual's home may vary and, therefore, the scope and definitions of the CCMA should be able to accommodate different situations. It is necessary to consider the property to be protected, the type of mortgage on that property, and the individual circumstances of the borrower. Some examples of individual situations have been drawn to our attention:

- The borrower temporarily moves out of the property and lets it to a tenant in order to generate income to help meet the mortgage repayments. The borrower may move back in with parents, into rented accommodation or into an investment property he/she owns. If mortgage arrears arise on the property let to the tenant, should the protections of the CCMA apply? If mortgage arrears also subsequently arise on the investment property in which the borrower is now residing, should the protections of the CCMA apply only to the original property that the borrower moved out of, the investment property in which the borrower currently resides or both properties?

There should be only one Principal Private Dwelling (PPD) per customer, and this should be the home in which they reside. Once a property is rented out it ceases to be the customer's PPD.

The Bank would be concerned that customers could move from one property to another in order to frustrate the Bank and use the proposals to delay the arrears process.

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- The borrower lets the property on a short-term rental while on a temporary foreign assignment. The tenant is in default and the Private Residential Tenancies Board dispute resolution process is ongoing. If mortgage arrears arise as a result or partly as a result of this situation, should the protections of the CCMA apply?

No.

- A couple holding a joint mortgage separates and one borrower moves into an investment property or holiday home they own, which also has a mortgage. As each property is now the home of one of the borrowers, should the CCMA apply to both properties?

Yes.

In this context, we would welcome views on an appropriate definition of primary residence or other suitable term to describe the property to be protected under the CCMA. We would also welcome views on the following questions regarding the scope of the CCMA:

- Should it apply to borrowers who have mortgage arrears on their main residence/property, regardless of whether they are currently living there or not and regardless of the type of mortgage on that property?

The Code should only apply to one property which is the Principal Private Dwelling i.e. the property in which they are living. Once a property is rented out it ceases to be the customer's PPD.

- Should it apply to the property originally purchased as the borrower's principal private residence, regardless of whether the borrower is currently living there or not?

The Code should only apply to the property in which the borrower is living.

- Should it apply to the mortgaged property in which the borrower is living now, regardless of what type of mortgage was originally taken out on the property or the original purpose of that property, e.g., the property may originally have been an investment property?

Yes.

- Is it the type of mortgage taken out on the property originally that is relevant? If the original mortgage was classified as a commercial mortgage should the CCMA apply?

No. The Code should apply to the borrower's current Principal Private Dwelling.

Appeals

A borrower may appeal the decision of a lender regarding the approach to be taken to address the borrower's arrears situation. We have included a provision requiring lenders to establish an appeals process to consider any appeals submitted by borrowers and to independently review the decision of the lender in relation to an alternative arrangement. The appeal must be considered by one or more senior personnel who have not been involved in the borrower's case previously.

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In addition, any complaint about the arrears resolution process or any of the other requirements of the Code must be handled in accordance with the Complaints Handling provisions of the Consumer Protection Code.

Where a complaint has not been resolved to the borrower's satisfaction, he/she may refer the matter to the Financial Services Ombudsman. However, under our current proposals, there is no mechanism for the borrower to appeal the lender's decision on an alternative arrangement to an independent external body. We would welcome your views on whether an external appeals mechanism is necessary and, if so, how this could be achieved.

A third party mechanism for appeals is not necessary on the basis that each lender will have an independent appeals process in place. The proposed requirements under the Code, the provisions under the Consumer Protection Code and recourse to the FSO are appropriate and sufficient. An additional external mechanism would likely lead to spurious appeals in an attempt by some customers to use the proposals to delay the arrears process and only serve to frustrate the contractual rights of the lender.

The lender has a legal right to rely on its security and the mortgage market functions on this basis. Any dilution of this right would be viewed, by external stakeholders, and international markets as an indication that Irish institutions are no longer permitted to fully control the management of their arrears exposures.

Code of Conduct on Mortgage Arrears

CHAPTER 1: SCOPE AND DEFINITIONS

INTRODUCTION

This Code sets out a framework within which mortgage lenders (referred to in this document as "lenders") must operate, with due regard to the fact that each lender adopts a different competitive approach to mortgage lending and each case of mortgage arrears is unique and needs to be treated differently. This Code sets out what the lender must do when dealing with borrowers in mortgage arrears or at risk of going into arrears. All genuine cases, where the borrower is dealing honestly and fairly with the lender, must be handled sympathetically and positively by the lender, with the objective at all times of assisting the borrower to meet his/her obligations. Any measures should, in so far as it is feasible and appropriate, be aimed at assisting borrowers to meet their mortgage obligations.

The Code should clearly state that it applies to borrowers whose arrears arise from genuine financial hardship and not, for example, in the case of late payment where the borrower has not funded their paying account on time.

The lender may enforce the mortgage in circumstances where application of this Code is not appropriate, such as, but not limited to, in the case of fraud or breach of contract other than the existence of arrears.

This Code does not relieve the borrower of his/her contractual duties to the lender, except where otherwise agreed by the lender.

In order to address a mortgage arrears situation it is important that the borrower and the lender act in good faith at all times. It is also important that the borrower promptly advise the lender of any problems or potential problems with mortgage repayments. This Code recognises that it is in the interests of both the lender and the borrower to address financial difficulties as speedily and as effectively as circumstances allow.

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This Code is effective from xx xxxxxx xxxx.

*The proposed revisions to the Code are material rather than incremental in respect of the IT development and process re-design necessary to ensure compliance with the Code. The fundamental nature of the change required does not facilitate deployment of manual workarounds as a short term interim measure. An excessively short implementation timeframe will result in the Bank being put in a position of 'forced' non compliance which would not reflect the Bank's absolute commitment to implementing the Code.
Our initial view is that a minimum of six months will be required to implement the Code as proposed – the Bank is already well advanced in meeting the "spirit" of the Code and will continue this journey*

LEGISLATIVE BASIS

This Code is issued under Section 117 of the Central Bank Act 1989.

The Financial Regulator has the power to administer sanctions for a contravention of this Code, under Part IIIC of the Central Bank Act 1942.

Lenders are reminded that they are required to comply with this Code as a matter of law.

This Code should be read as one with the Financial Regulator's Consumer Protection Code. All terms appearing in this Code of Conduct shall have the same meaning as in the Consumer Protection Code.

TO WHOM THIS CODE APPLIES – *No comment*

The following are defined for the purposes of this Code:

Arrears: A mortgage arrears situation arises as soon as the borrower fails to make a full mortgage repayment, or only makes a partial mortgage repayment, by the due date.

The definition should be amended to specify full mortgage repayment as agreed with the lender. Customers with whom a reduced payment is agreed as part of a pre-arrears arrangement and who continue to make such reduced payments in accordance with the terms of the arrangement are not in arrears and should not be deemed to be in arrears for the purposes of this Code.

Repossession: means any situation where a lender takes possession of a property either by way of voluntary agreement with the borrower, through abandonment of the property by the borrower without notifying the lender, or by Court Order.

The definition should be amended to make it clear that it relates to abandonment of the property regardless of whether the borrower has notified their intention to abandon the property to the lender or not.

Borrower: *No comment*

Standard Financial Statement *No comment*

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CHAPTER 2: PROVISIONS

GENERAL

1. *No comment*
2. *No comment*
3. *No comment*
4. *No comment*
5. *No comment*
6. *No comment*

7. A lender must assist **borrowers** by ensuring that all requests from **borrowers** for documentation and information required for the purposes of applying for State supports are processed within ten working days of receipt of the request.

Our ability to meet the specified timeline requires a consistent and reasonable approach to documentation requirements across all state agencies in relation to State supports.

PROVISION OF INFORMATION

8. *No comment*
9. *No comment*

10. A lender must notify all affected **borrowers** in writing in advance of implementing an increase in the interest rate applied to their mortgage loan account, and must advise the **borrower** to contact the lender if he/she anticipates difficulties meeting the higher repayments.

We accept the proposal but this requires IT development which will take time to implement.

11. *No comment*
12. *No comment*
13. *No comment*

PRE-ARREARS SITUATIONS

14. *No comment*

15. A lender must pro-actively carry out regular assessments of existing mortgage customers, at least every six months, with a view to identifying those suffering or anticipated to suffer financial stress.

There are a number of practical difficulties with the proposal to profile customers in the 'good' mortgage book, for example, profiling would rely solely on historic data provided at application to assess 'at risk' status. This data limitation will result in many customers being contacted unnecessarily when they are not in financial difficulty and many customers who may genuinely be at risk may not be identified.
A balance must be struck between the size of the effort and the extent to which the outcome is improved. The Code should recognise this assessment can only be implemented on a 'best efforts' basis and be performed on an annual basis.

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16. A lender must attempt to engage with **borrowers** whom it considers to be at risk of going into **arrears**. At a minimum, a lender must ensure that it sends a periodic mailing, at least every six months, to all mortgage holders it believes to be at risk of going into **arrears**, setting out options for dealing with financial distress and encouraging early action by the **borrower(s)**.

Please refer to comments under Rule 15 above.

MORTGAGE ARREARS RESOLUTION PROCESS

Step 1, Communication with Borrowers

17. *No comment*

18. *No comment*

19. Each calendar month, a lender, and/or any third party acting on its behalf, may not initiate more than three unsolicited communications, by whatever means, to a **borrower** in respect of his/her mortgage **arrears** situation. The three unsolicited communications do not include any communications to the **borrower** which are required by this Code.

The proposed limitation (three unsolicited communications per calendar month) would, in our view, be a 'blunt' instrument in seeking to address the behaviour of some lenders. The Bank's Regulatory Risk function and Internal Audit teams monitor and review compliance with the Code to ensure excessive contact does not take place. Furthermore, Rule 18 of the Code ("A lender must ensure that the level of contact and communications from the lender, or any third party acting on its behalf, is proportionate and not excessive.") should be adequate to protect the customer. The Financial Regulator can impose sanctions under the Code where appropriate and customers can make a complaint under the Consumer Protection Code.

Normal operational communications should not be deemed to be 'unsolicited', for example, letters regarding title deeds, fire or life cover. This needs to be clear in the Code.

20. When a mortgage account goes into **arrears**, the lender must:

- a) inform each **borrower** in writing of the status of the account as soon as possible, and provide the following information:
 - i) the date the mortgage fell into **arrears**;
 - ii) the number and total amount of payments (including partial payments) missed;
 - iii) the amount of the **arrears** to date;
 - iv) details of any fees and charges in relation to the **arrears** that may be applied if the **borrower** does not co-operate reasonably and honestly with the lender;
 - v) the importance of the **borrower** engaging with the lender in order to address the situation and informing the lender of the reason(s) the repayment schedule has not been adhered to;
 - vi) a statement that fees and charges in relation to the **arrears** will not apply as long as the **borrower** co-operates reasonably and honestly with the lender; and
 - vii) a general statement about the impact of missed mortgage repayments and **repossession** on the **borrower's** credit rating.
- b) provide the information booklet required under provision 12.

Clarification is required in relation to application of the Code to 'technical' arrears arising from late payment as opposed to genuine financial difficulty.

There is a significant cost associated with the provision of the information each and every time a customer misses their payment due to shortcomings in their own financial management. It should be sufficient to issue the booklet the first time an account goes into arrears where the customer is in financial difficulty.

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21. An updated version of the information specified in provision 20(a) must be provided to **borrowers** in all subsequent correspondence issued in relation to their mortgage **arrears**.

Implementation of this requirement would require a significant IT system change. A less onerous option to achieve this objective would be to issue periodic statements to the customer. This would still require IT development but could be delivered in a shorter timeframe.

Clarification is required on what is meant by "correspondence issued in relation to their mortgage arrears."

22. *No comment*

23. Where the **borrower** has not responded to the lender's correspondence in relation to the **arrears**, the lender must continue in its endeavours to make contact with the **borrower**.

This could conflict with Rule 19, which seeks to limit the number of unsolicited contacts a lender may initiate in a month. The alternative approach to Rule 19 suggested above would avoid such conflict.

24. A lender must inform the **borrower**, in writing, when it intends to appoint a third party, other than its legal advisers, to engage with the **borrower** in relation to **arrears** and must explain the role of the third party.

In this context 'third party' should be deemed to refer to debt collection agencies. It should not apply to other parties that might be engaged to assist with routine elements such as property valuation or delivery of financial review forms for completion by the borrower. We recommend the Code is amended to refer specifically to third party debt collection agencies.

Step 2, Financial Information

25. *No comment*

26. When a lender is first contacted by a **borrower** in **arrears** or at risk of going into **arrears**, the lender must:

- a) explain the MARP process to the **borrower**, including the alternative repayment measures available to **borrowers** and the lender's criteria for assessing requests for alternative repayment measures;
- b) provide the **borrower** with an SFS to complete;
- c) provide the **borrower** with a copy of the MARP information booklet; and
- d) advise the **borrower** that he/she may wish to seek independent advice to assist with completing the SFS, e.g., from MABS or an appropriate alternative.

This Rule should specify customers in arrears who are also in financial difficulty. Many customers will go into arrears due to a missed payment from time to time and will not be in any financial difficulty and therefore would not warrant this degree of engagement under the Code.

27. *No comment*

28. *No comment*

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Step 3, Assessment

29. *No comment*

30. *No comment*

31. *No comment*

32. A lender's ASU must base its assessment of the **borrower's** case on the full circumstances of the **borrower** including:

- a) the personal circumstances of the **borrower**;
- b) the overall indebtedness of the **borrower**;
- c) the information provided in the SFS;
- d) the **borrower's** current repayment capacity; and
- e) the **borrower's** previous payment history.

The lender can only make an assessment of the borrower's overall indebtedness and capacity to repay based on the information provided by the customer in the SFS. The Code must recognise that this may not reflect the full circumstances of the borrower.

35. *No comment*

36. *No comment*

37. The lender must monitor the arrangement on an ongoing basis and formally review the **borrower's** case, including the SFS, at least every six months.

*The Bank undertakes regular monitoring of a borrower's adherence to the terms of an arrangement but considers the requirement for a full review of the SFS on a six monthly basis unnecessary where the arrangement is being maintained.
The SFS should be subject to a full review where an arrangement breaks down. This would be a significantly less onerous requirement for both customers and lenders without putting customers at any disadvantage or any further risk.*

38. *No comment*

39. *No comment*

40. *No comment*

41. *No comment*

Step 5, Appeals

42. *No comment*

43. *No comment*

44. *No comment*

REPOSSESSIONS

45. The lender must not apply to the courts to commence enforcement of any legal action on **repossession** of the property secured by the mortgage:

- a) until every reasonable effort has been made to agree an alternative arrangement with the **borrower** or his/her nominated representative, or
- b) where the terms of an agreed alternative repayment arrangement are being adhered to; or
- c) where an appeal and/or complaint, including a complaint referred to the Financial Services Ombudsman, is ongoing.

The open ended nature of c) above provides an opportunity for some customers to use the proposal to delay the arrears process by making spurious complaints where the sole aim is to frustrate and prolong the process. The Code should indicate a maximum timeframe of three months in relation to FSO complaints.

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46. Where the mortgage **arrears** situation persists, the lender may reserve the right to enforce the mortgage agreement, subject to the following:

- a) Where the **borrower** continues to co-operate reasonably and honestly with the lender, the lender must wait at least twelve months before applying to the courts to commence enforcement of any legal action on **repossession** of a **borrower's** primary residence. The twelve-month period commences:
- i) when the **arrears** first arose, if a revised repayment arrangement has not been agreed, or
 - ii) when the **borrower** ceases to adhere to the terms of a revised repayment arrangement and no further arrangements are being entered into.

As drafted, there is a danger that some customers will seek to manipulate the process by entering into arrangements which are subsequently broken with the sole purpose of delaying legal proceedings. The Code should not provide protection where this behaviour persists.

The ERG cited some real disadvantages in prolonging legal proceedings beyond 12 months during its consideration of extending the current moratorium;

- *As lenders are not initiating legal action against borrowers who are facing up to the issue, such an extension would not benefit those who require assistance.*
- *An extension may discourage borrowers from addressing their problems promptly which would be counterproductive in terms of the aims of the CCMA.*
- *For some borrowers, the mortgage may prove unsustainable and the sooner the issue is addressed the better.*

- b) Where the **borrower** is appealing the lender's decision regarding a revised repayment arrangement or is making a complaint about the process to the lender or the Financial Services Ombudsman, the lender must wait until the appeals and/or complaints process has been exhausted before applying to the courts to commence enforcement of any legal action on **repossession** of a **borrower's** primary residence, even if it takes longer than twelve months from the time the **arrears** first arose to complete the appeals/complaints process.

A maximum timeframe of three months should be specified in the Code for complaints to the FSO to protect the lender's interests regarding the appeals process.

- c) Where the **borrower** fails to make a full and honest disclosure of information in the SFS, the lender may seek **repossession** and is not required to wait twelve months from the time **arrears** first arise or from the time a revised repayment arrangement breaks down.
- d) Where it is clear that the **borrower** is deliberately not engaging with the lender, or where other circumstances reasonably justify, the lender may seek **repossession** in the absence of any engagement with the **borrower**.

47. The lender must notify the **borrower** in writing immediately before it applies to the courts to commence the enforcement of any legal action on **repossession**. This notification may be issued by the lender's legal advisers.

There may be a conflict with Section 100 Land & Conveyancing Reform Act 2009 for mortgages executed on or after 1 December 2009. Under this section, a lender cannot exercise a power of sale unless it has provided the borrower with 28 days notice warning of the possibility of the sale and the warning must be in the prescribed form

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48. Even where legal action is being taken to obtain an Order for Possession, the lender must endeavour to maintain contact with the **borrower** or his/her nominated representative. If agreement can be reached, the lender must enter into repayment arrangements and put a hold on proceedings in the event of agreed regular repayments being maintained.

The Rule as drafted provides an opportunity to use the proposal to delay the arrears process by requiring the lender to enter into an arrangement during proceedings. Where this arrangement is subsequently broken, the lender must wait a further 12 months before proceedings can be initiated again (Rule 46(a) (ii)).
We recommend that the Code states that in the event of an arrangement being put in place where legal action has commenced and where that arrangement subsequently breaks down the lender has a right to commence legal proceedings without any further delay.

49. Following the disposal of the property, the lender must notify the **borrower** in writing (where applicable) of:

- a) the amount of outstanding debt,
- b) any costs accruing, and
- c) the interest rate to be charged on the remaining balance

There may be a conflict with Section 103 (2) Land & Conveyancing Reform Act 2009 for mortgages executed on or after 1 December 2009. Under this section, a lender must give the borrower notice within 28 days of completing the sale of the property, which notice, must be in the form to be prescribed in regulations.

DEMONSTRATING COMPLIANCE

50. *No comment*