



national consumer agency
gníomhaireacht náisiúnta tomhaltóirí

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REVIEW OF CODE OF CONDUCT ON MORTGAGE ARREARS

CONSULTATION PAPER – CP 46

SUBMISSION FROM THE NATIONAL CONSUMER AGENCY

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National Consumer Agency Response to the Consultation Document “Review of Code of Conduct on Mortgage Arrears” – Consultation Paper CP 46

The National Consumer Agency (NCA) is a statutory body established by the Irish Government in May 2007. It aims to defend consumer interests and to embed a robust consumer culture in Ireland. In March 2010, the NCA assumed responsibility for the statutory information and education functions of the Financial Regulator.¹

The NCA provides free, independent information that helps consumers to understand financial products, ask the right questions and make the right choices about personal finances. The NCA’s personal finance website www.itsyourmoney.ie provides a range of information to consumers including cost comparisons on day-to-day banking, savings, credit and insurance where consumers can compare the costs of various products offered by various regulated financial institutions.

Our response to the views sought by the Financial Regulator on pages ii – iv of CP46 are outlined below:

1. Level of Communication

We support the introduction of a limit on the number of unsolicited contacts made to a borrower in arrears. We believe that three unsolicited communications with borrowers per calendar month in respect of their mortgage arrears appears reasonable. However, the following issues should be addressed in the Code:

a. Purpose of unsolicited communications

It is likely that a customer who is experiencing difficulties making their mortgage repayments will also be experiencing difficulties in relation to other loan commitments such as overdrafts, term loans and credit cards. In the context of arrears we would like to see greater clarification on how financial institutions measure their whole relationship with the customer to ensure that a consistent approach is used by all the relevant sections of the financial institution in their dealings with a customer who is in arrears.

If the unsolicited contact relates to mortgage arrears only, does this mean that borrowers will receive further unsolicited communications in respect of personal and credit card debt? If this is the case, the number of unsolicited communications for each type of debt needs to be considered.

b. Type of communication

The CCMA should specify the type of unsolicited communication to be used when contacting borrowers in arrears i.e. telephone, email, face to face or letter and which of these communications constitutes one unsolicited contact. If a borrower is uncontactable, does a voice message constitute a communication? This needs to be clear in the CCMA. A limit should be applied to the number of times a lender can attempt contacting a customer by phone at which point a letter should be posted to the

¹ This follows a Government decision to transfer the statutory consumer information and education functions of the Financial Regulator, including www.itsyourmoney.ie, to the National Consumer Agency.

borrowers address detailing the arrears. We believe that contact should be limited to telephone, email or letter² when dealing with mortgage arrears and that contact in any of these forms will constitute one of the agreed unsolicited contacts. At least one written (posted) piece of correspondence should be required, leaving two other unsolicited forms of contact i.e. phone or email.

c. Recording communications

Two procedures should be put in place:

- lenders should be required to keep a record of all unsolicited contacts per calendar month and note any complaints made by the borrower.
- where unsolicited contact is made by telephone, the conversation should be recorded and the customer should be informed of the recording in advance. This will give the Financial Regulator or the Financial Services Ombudsman an opportunity, where necessary, to monitor the tone and language used by lenders when contacting customers and it can help identify customers who are co-operative and who are engaging in the MARP and those who are not.

d. Costs

As soon as a borrower is officially in arrears they should be made aware of any costs associated with communications required under the CCMA and at what point they are applied. Consideration should be given to prohibiting the cost of unsolicited communications to a borrower in mortgage arrears under the CCMA.

2. Arrears

We note the term direct debit has been referred to in CP46 when suggesting definitions for arrears. The CCMA should consider those who do not pay their mortgage by direct debit i.e. cash payments.

Being in arrears will have a significant impact on how the customer is treated by the financial institution. It is possible that a customer may miss a payment on their mortgage because of an important life event such as a sudden illness or a family bereavement or through a minor administrative issue like a late salary payment. Being in arrears and being captured by the Code of Conduct on Mortgage Arrears should be relative to ensure that customers who need assistance are given the support they need.

We suggest the following:

- In the event of one missed payment a standard letter is issued by the lender to the borrower. This confirms a payment has been missed (as provided under the Consumer Protection Code) and allows the lender to offer assistance and seek clarification on what has happened. It is possible that the lender could outline how a partial payment could be made on the mortgage account at this stage.

² We view unsolicited text messages and face-to-face visits to homes (unless by appointment) as intrusive and inappropriate when dealing with mortgage arrears

- In the event of two missed payments – this account is now in arrears and the customer should be issued with the agreed letters that outline the change in status on their account (provision 20).

a. Partial payments on a mortgage account

It is noted that many customers use the direct debit system to make payments on their mortgage account. Many mortgage accounts require “feeder” current accounts, which are designed to accommodate the mortgage repayments. Different banks use different systems. Depending on the lender it can sometimes be very difficult to make a payment into your mortgage account outside of the direct debit system.

We would like to see greater clarity on how lenders intend to accommodate borrowers who are willing to make partial payments on their mortgage accounts. We suggest that the MARP could include a provision for the setting up of a separate account, similar to a feeder account, to accommodate partial payments. Any payment made to this account could be transferred to the mortgage account on receipt.

b. Arrears charges and penalty interest

The NCA supports the view of the Mortgage Arrears and Personal Debt Expert Group that penalty interest/arrears charges should not be imposed on a borrower who is taking part in the MARP and this should be enforced either by amendment to S.149 of the Consumer Credit Act 1995, if possible, or through some other legislative change.

3. Primary Residence

We recommend that the CCMA should only be applied to the principal private residence of the borrower. The concept of a principal private residence is set out very clearly by the Revenue Commissioners. It is a well-understood concept that is used for calculating Tax Relief Source (TRS), the calculation of stamp duty, capital gains tax on the sale of houses and the calculation of principal private residence exemptions. Following this approach would ensure consistency in the scenarios outlined in the CP46.

The Revenue Commissioners have also put in place principal private residence exemptions for properties bought as a result of separation and divorce. It also covers homes purchased for dependent family members – such as a parent. For consistency these homes should also be viewed as a principal private residence and should qualify for inclusion in the CCMA.

One issue that is not covered in CP46 is the treatment of mortgages that cover the purchase of farms and farmhouses, public houses and homes, shops and homes – where the original loan was used to purchase part of a business which also provided a family home. If the business and the family home are indivisible, the CCMA should apply to the mortgage.

4. Appeals

We support the proposal that any complaint about the arrears resolution process or any other provision of the CCMA should be handled in accordance with the Complaints Handling process of the Consumer Protection Code.

In relation to the internal appeals procedures for alternative payment arrangements, we believe the CCMA should be more specific. It currently states “the appeal must be considered by one or more senior personnel who have not been involved in the borrower’s case previously” (Provision 42). We recommend that the borrower should first bring their complaint to the ASU in relation to any step of the MARP and if the problem remains unresolved, the borrower should have the right to seek a review independently by a separate Appeals Unit within each lender’s organisation. The unit should consist of senior personnel and one external party e.g. a solicitor, accountant or other independent professional. We suggest that the CCMA should outline the criteria for the types of complaints to be heard by the Appeals Unit.

Other

5. Pre-Arrears Situations

The Code does not specify at what point a borrower enters the MARP process. If a borrower has not yet fallen into arrears with their mortgage but contacts the lender to inform them of anticipated financial difficulty, it is not clear if that borrower will be categorised as entering the MARP. A number of factors should be considered:

a. Impact on Credit Rating

The CCMA should specify whether contact by a borrower will result in that borrower entering the MARP and if this will impact on the borrower’s ICB credit rating and internal scoring.

b. Moratorium on enforcement of legal action

It is not clear from the CCMA if early action by the borrower results in the beginning of the 12-month moratorium on enforcement of legal action in the event of mortgage arrears. The CCMA should specify that the 12-month moratorium does not apply to the pre arrears stage.

c. Profiling of borrowers

Provision 15 of the CCMA does not specify how a lender should pro-actively carry out regular assessments of existing borrowers. We suggest that customers could be profiled by year of mortgage drawdown, LTV, first time buyer, job security/employment status etc and risk rated accordingly.

6. Moratorium on enforcement of legal action

Provision 41 of the CCMA requires a lender’s ASU to formally review the borrower’s case when the borrower is unlikely to be able to adhere to the terms of the alternative repayment arrangement on an ongoing basis. Recent media coverage has indicated that an additional 12 month’s grace may be permitted where a borrower cannot adhere to the terms of the alternative repayment arrangement – does this apply here? The CCMA should state whether or not the 12 month moratorium could be extended in this case and the number of times a lender can review a case for a new repayment arrangement.

7. Communication with Government Departments, MABS & Revenue Commissioners

In order to assist a customer to review their finances and entitlements in entirety, all lenders should be required to establish working relationships and practices with

MABS, the Revenue Commissioners, the Department of Social Protection and the Department of the Environment, Heritage and Local Government. Mortgage Interest Supplement should be paid directly into the borrower's mortgage account and the lender should be required to notify the Department of Social Protection of any changes it becomes aware of that may affect the borrowers entitlement. The lender should advise borrowers of their entitlements and assist them in securing appropriate arrangements of same (through contacts with relevant departments) when completing the Standard Financial Statement.

A table of comments responding to the provisions outlined in Chapter 2 of the draft CCMA is attached.

Chapter 2 (Provisions) – Code of Conduct on Mortgage Arrears

Provision	Issue	Suggested amendment
General		
<p>2. A lender must establish a centralised and dedicated Arrears Support Unit (ASU), which must be adequately staffed, to manage <i>arrears</i> and pre-arrears cases under the MARP. <i>Arrears</i> cases and pre-arrears cases may be managed in two separate ASUs.</p>	<p>Borrowers who are already in arrears may receive priority treatment over pre-arrears customers from the ASU</p>	<p>We suggest that there should be two processes within the ASU – one for arrears and one for pre-arrears</p>
<p>4. A lender must draw up and implement procedures for dealing with <i>borrowers</i> in mortgage <i>arrears</i> or at risk of mortgage <i>arrears</i>. Such procedures must:</p> <p>a) allow for a flexible approach in the handling of <i>arrears</i> and pre-arrears cases;</p> <p>b) be aimed at assisting the <i>borrower</i> as far as possible in his/her particular circumstances;</p> <p>c) set out the how the lender will implement the five steps of the MARP; and</p> <p>d) set out how the ASU will assess cases referred to it, including the types of alternative repayment measures or any other relief method that may be offered to <i>borrowers</i> by the lender.</p>	<p>It is not clear what a flexible approach means. Is this referring to the options available?</p> <p>This appears to be covered by provisions 29-33</p>	<p>Options available for an alternative repayment plan should be consistent across all lenders</p> <p>Reference should be made to these sections of the CCMA here. It should state that procedures should include guidelines for decision making on which repayment approach/measure for typical sets of financial circumstances should apply</p>

<p>5. A lender must have in place management information systems to capture information on the handling of mortgage arrears and pre-arrears cases, including any alternative repayment arrangements agreed with borrowers.</p>	<p>This provision is very important but should also require lenders to report to the Financial Regulator with figures.</p>	<p>Lenders should be required to report information on all case handling to the Financial Regulator on a quarterly basis.</p>
Provision of information		
<p>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.</p>	<p>This provision does not specify how long in advance a notification about an increase in the interest rate must be made.</p>	<p>State when a lender must notify borrowers about an increase in the interest rate. The notification should state the new and old repayments in monetary terms, the new and old interest rate and the rates should be published on the lenders website</p>
<p>12. A lender must prepare and make available to borrowers an information booklet providing details of its MARP, which must be drafted in accordance with the requirements set out in paragraph 8 and must include:</p> <ul style="list-style-type: none"> a) an explanation of its MARP, including the alternative repayment measures available to borrowers and the lender's criteria for assessing requests for alternative repayment measures; b) a statement that the borrower will not be required to change from an existing tracker mortgage to another mortgage type; c) information about the potential availability of State supports such as mortgage interest relief or mortgage interest supplement; d) relevant contact points (i.e., the dedicated arrears contact points not the general customer service contact points); and e) reference to the Citizens Information Board (CIB)/Money Advice and Budgeting Services (MABS) web site, www.keepingyourhome.ie. 	<p>Allowing each lender to prepare and make available the MARP booklet allows lenders to vary their approach to alternative repayment measures and to guidelines on the decision making process for choosing these measures.</p>	<p>The MARP information booklet should be endorsed by the IBF to facilitate a consistent approach across all lenders.</p>

<p>22. When a third full or partial payment is missed and remains outstanding, the lender must advise the borrower, in writing, of the following:</p> <p>a) the potential for legal proceedings and loss of his/her property, together with an estimate of the costs to the borrower of such proceedings;</p> <p>b) the importance of taking independent advice from his/her local Money Advice and Budgeting Service (MABS) or an appropriate alternative;</p> <p>c) that irrespective of how the property is repossessed and disposed of, the borrower will remain liable for the outstanding debt, including any accrued interest, charges, legal, selling and other related costs, if this is the case.</p>	<p>This must correspond to the definition agreed on when arrears take place i.e. the date the first payment was missed, the month that a payment is missed etc.</p> <p>We are aware of the pressures the MABS service is experiencing at present and that this is resulting in time delays for consumers in arrears. How are regulated entities working with MABS to ensure borrowers can avail of their free service?</p>	<p>Lenders should allow sufficient time between receiving notification of arrears (provision 20) and advising borrowers about the potential for legal proceedings (provision 22 (a)).</p> <p>Consider taking out “or an appropriate alternative” to ensure borrowers avail of the MABS service or advise customers that many private debt advisors charge fees.</p>
<p>Step 2, Financial Information</p>		
<p>25. A lender must use the Standard Financial Statement (SFS) to obtain financial information from a borrower in arrears or at risk of going into arrears.</p>	<p>What does the SFS look like?</p>	<p>Provide a template of the SFS as an Appendix to the CCMA.</p>
<p>28. The lender may require the borrower to provide supporting documentation to corroborate the information provided in the SFS.</p>	<p>There should be a similar arrangement between the lender and state agencies to corroborate the information in the SFS.</p>	<p>Include this point in the CCMA.</p>
<p>Step 3, Assessment</p>		
<p>29. A lender may distinguish between borrowers who are genuinely unable to pay and those who could pay some/all of the arrears but will not.</p>	<p>Personal circumstances should be considered when distinguishing between borrowers who can pay and</p>	<p>Provision 29 should be considered in accordance with provision 32.</p>

	<p>won't pay e.g. if a borrower has savings set aside for his/her child's education and does not wish to use the whole sum to repay the mortgage arrears, will the borrower be categorised as "won't pay"? An arrangement should be made to facilitate needs.</p>	
<p>Step 4, Resolution</p>		
<p>33 (f) Capitalising the <i>arrears</i> and interest where there is insufficient capacity over the short term to clear the <i>arrears</i> but where repayment capacity exists to repay the capitalised balance over the remaining term of the mortgage.</p>	<p>We would like to see greater clarity on what capitalisation of arrears means. When a borrower is unable to make repayments on their account the common transactions that increase the balance on the mortgage account is interest, surcharge interest and possibly legal fees – missed repayments do not increase the balance of the account.</p>	<p>When arrears are being capitalised it should be made very clear to the borrower what is actually happening to their account. They have missed x number of payments and the options are to increase the overall repayments on the mortgage or to increase the term of the loan.</p>
<p>39. If a lender is not willing to enter into an alternative repayment arrangement, for example, where it is concluded that the mortgage is unsustainable and an alternative repayment arrangement is unlikely to be appropriate, the reasons must be given in writing to the <i>borrower</i>. In these circumstances, the lender must make the <i>borrower</i> aware of:</p> <p>a) other possible options (such as voluntary surrender, trading down or voluntary sale) and the implications of these for the <i>borrower</i>; and</p> <p>b) the right to appeal the lender's decision and the procedure for submitting an appeal.</p>	<p>It is not clear from this provision whether or not the 12 month moratorium still applies if a lender is not willing to enter into an alternative repayment arrangement</p>	<p>The 12 month moratorium on enforcement of legal action should apply from when the arrears first arose, as the borrower has not proven that he/she is unwilling to cooperate with the lender. Voluntary surrender, trading down, or voluntary sale should be optional within the 12 month moratorium.</p>

Repossessions		
<p>45 The lender must not apply to the courts to commence enforcement of any legal action on <i>repossession</i> of the property secured by the mortgage:</p> <p>a) until every reasonable effort has been made to agree an alternative arrangement with the <i>borrower</i> or his/her nominated representative, or...</p>	<p>It is not clear whether or not the lender is required to wait 12 months to begin legal proceedings</p>	<p>State that where the lender has made every reasonable effort to agree an alternative arrangement and the mortgage is unsustainable, the 12 month moratorium should commence when the arrears first arose (see provision 46 (a) (i))</p>
<p>46 d) Where it is clear that the <i>borrower</i> is deliberately not engaging with the lender, or where other circumstances reasonably justify, the lender may seek <i>repossession</i> in the absence of any engagement with the <i>borrower</i>.</p>	<p>It is important that engagement by the lender is attempted at each stage of the MARP and the legal process.</p>	<p>Delete “in the absence of any engagement with the <i>borrower</i>” and include “but must inform the borrower”</p>
<p>49. Following the disposal of the property, the lender must notify the <i>borrower</i> in writing (where applicable) of:</p> <p>a) the amount of outstanding debt, b) any costs accruing, and c) the interest rate to be charged on the remaining balance</p>	<p>This provision does not mention that the borrower will be liable for the accrued interest, legal, selling and other related costs following repossession/disposal</p>	<p>Include 22 (c) here.</p>