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Attention: Consumer Protection Codes Division, Central Bank
By Email: code@centralbank.ie

10th of April 2012

Re: Response to Consultation Paper CP 63- Review of the Code of Conduct on Mortgage Arrears

Dear Sir/ Madam,

We wish to make submissions in relation to Consultation Paper 63 ('CP63') on the Review of the Code of Conduct on Mortgage Arrears. In drafting our response, we have considered feedback from the Central Bank of Ireland's Themed Inspections, our clients' experience to date and the interests of consumers and borrowers. This is an area of key interest to the industry and the public alike and has the potential to significantly influence financial recovery through addressing the arrears problem. We also note that it is an area where the Central Bank of Ireland (Central Bank) intends to conduct themed inspections in 2013 and has been listed as an enforcement priority for this year. We therefore welcome the Central Bank's engagement, with both lenders and the public more generally, in relation to the proposals contained in CP63. Throughout this submission any reference to mortgage arrears includes cases where a borrower is in pre-arrears.

The mortgage arrears crisis and drivers behind CP63

The Central Bank has published figures showing that of the 792,096 mortgages over primary residences in Ireland, 143,851 were in arrears on 31 December 2012. In the Government's statement 'Resolving the Mortgage Arrears Crisis' on 13 March 2013, the Government stated that "the mortgage arrears situation is one of the most serious social and economic issues facing the country. It is a cause of distress to many families. It is also an impediment to economic recovery". The Head of Financial Regulation at the time, Matthew Elderfield, stated in March that he expects to see a "substantial acceleration" by banks in tackling the arrears cases and that "early and on-going engagement between the borrower and the lender is crucial in each case".

The revised Code of Conduct on Mortgage Arrears (CCMA) came into effect on 1 January 2011. Following on from the introduction of the CCMA, the Central Bank published a useful FAQs document and a consumer guide to dealing with their lender in relation to mortgage arrears and in April and December 2012, the Central Bank wrote to the industry to clarify a number of matters under the CCMA. On 1 July 2011, the Central Bank of Ireland (Central Bank) published the findings of a themed inspection of mortgage lenders which examined compliance with the requirements set out in the CCMA.

Whilst 2 mortgage lenders were found to be in compliance, 4 were not. These failings occurred for various reasons including one-off systems errors, inadequate monitoring processes and lack of adherence to procedures in place.

In February 2013, the Central Bank published a press release entitled 'Research highlights positive experience of borrowers engaged in the mortgage arrears resolution process'. It also provided feedback on a themed inspection in relation to compliance with the CCMA of non-bank mortgage lenders. The inspections found that lenders were in compliance with the limits on contact and those in relation to establishing Appeals Boards. Brendan Sheridan, Director of Consumer Protection, stated "It is clear from our on-going mortgage arrears work that borrowers who engage early and meaningfully with their lenders get the best possible outcomes and benefit from the full protections that the CCMA provides. I would therefore urge consumers facing or in mortgage arrears to contact their lender as soon as possible to discuss their situation and not to ignore attempts by lenders to engage with them". The survey indicated that borrowers believed the overall Mortgage Arrears Resolution Process (MARP) was working well from their perspective and that lenders were complying with the CCMA's requirements in the areas of borrower contacts and the appeals process.

The objectives underpinning the proposed changes outlined in CP63 are to:

- Ensure appropriate resolution of each borrower's arrears situation
- Ensure that lenders deal with borrowers in a fair and transparent manner
- Support and facilitate meaningful engagement between lenders and borrowers
- Ensure borrowers' awareness of the benefits of co-operating with their lender and the consequences of not co-operating.

Given the significant and far-reaching impact of the CCMA to lenders, a significant portion of homeowners and the economy, we would suggest that a full regulatory impact assessment is warranted prior to finalisation of the revised CCMA. This should at a minimum evaluate the most appropriate way forward to resolving the arrears problem given both prudential and consumer protection considerations.

We would also suggest that in the interest of fairness clear transitional requirements should be included that deal with the transition of existing customers under the revised CCMA regime. This would include implementation timeframes that allow sufficient time to train staff, update documentation, processes, procedures and I.T. systems. Appropriate checkpoints could be included in this transition to allow the Central Bank to assess progress against deadline.

We will now address each of the key areas of consultation, following the numbering as set out in CP63, for ease of reference:

1. Co-operation and engagement

The CCMA allows a lender to classify a borrower as "not co-operating". When this occurs, the lender may apply penalty charges and may commence legal action for repossession immediately. CP63 includes a proposal to broaden the definition of "not co-operating". Under the current Code, the borrower need only respond to some communications to avoid being classed as "not co-operating" and the lender is prevented from progressing the resolution of the arrears because the borrower is afforded full protection under the Code until such time as they become "not co-operating".

The proposal is to amend this definition so that only genuine and meaningful engagement by a borrower will be considered as co-operation. Deliberately delaying real engagement is an impediment to the resolution of the issue and is not in the best interest of the borrower or the lender nor is it in keeping with the spirit or intention underlying the Code. Under the new proposed definition, the borrower will be considered to be "not co-operating" if the borrower fails to provide information that is relevant to the assessment of the borrower's case. This information must be provided within a reasonable timeframe. We believe this will make the MARP process more efficient and is a more proportionate approach to the process incorporating feedback from the industry to date. We would, however, suggest that some guidance be provided in relation to what the Central Bank considers to be a fair reasonable timeframe (as per provision 33 of the Revised CCMA). Although this will depend on the availability and nature of the information sought from a given borrower, it would be useful if lenders had an idea of what the Central Bank considers fair and reasonable. We believe it would also assist both the industry and borrowers alike, if the Central Bank could provide guidance on the types of borrower behaviour that would be considered "not co-operating" or further detail on factors a lender may consider in deciding whether a borrower is not co-operating. This would encourage consistency in approach across lenders in dealing with borrowers while being cognisant that each case must be dealt with on its individual merits and facts. The definition in the revised CCMA states that a borrower "can only be considered as not co-operating" when any of the 4 situations prescribed in that definition exist. Therefore a lender is prohibited from designating a borrower as "not co-operating" outside these 4 specific situations. We believe this approach may be too rigid, given the broad spectrum of potential scenarios and borrowers involved in mortgage arrears and could lead to abuse. There is an opportunity for strategic borrowers in arrears to fall outside these 4 criteria yet display non co-operative behaviours and lenders will be forced to continue to treat such borrowers as co-operating where this may not truly be the case in contradiction of the spirit of the Code. Under the proposed new definition, the circumstances in which a borrower can be designated as not co-operating are very limited and relate only to providing information, communication with the lender and making repayments.

It is also proposed that where a borrower has made contact or responded to a lender over a three month period but repeatedly failed to do so with a view to reaching an alternative repayment arrangement (ARA) or other solution, this borrower will be deemed "not co-operating". This is a somewhat vague provision and more detail may assist lenders in understanding their obligations more clearly. For example, what will be considered indicators that a borrower is acting "with a view" to reaching an ARA or other solution? This could potentially be very subjective and further guidance in relation to this would be helpful.

There will be an obligation on the lender to highlight to the borrower that these circumstances will mean the borrower will be considered non co-operative. Designation as "not co-operating" affects the borrower's protection in terms of the restriction on imposing charges and/or surcharge interest on arrears and the 12-month moratorium on applying for initiating enforcement proceedings no longer applies. Because of these serious implications and in the interests of consumer protection, it is proposed that lenders will be obliged to give advance notice to a borrower, in writing, explaining the implications of becoming not co-operating, how the borrower can avoid being classified as not co-operating and advising the borrower to seek independent advice. MARP booklets will also need to be updated, to explain the meaning and consequences of not co-operating. If the borrower continues to not co-operate then the lender will have to write to the borrower again once they have been deemed "not co-operating" to advise them of this and of the lender's intended actions. At this point, it is proposed that a borrower should be given one further opportunity to re-engage in order to be considered co-operating again. If this occurs, the lender would not be required to apply the MARP process to that borrower again if they were to once again become "not co-operating".

This is a burdensome approach for lenders. Given the resources, cost and time involved in producing this documentation and the administrative impact involved, this may at a critical time divert important resources and energy away from the primary purpose of the Code which is to provide a fair result for both lender and borrower in the treatment of arrears. Allowing a borrower the opportunity to become "co-operating" again may be open to abuse without the proper guidelines which should be included in the Code, a lender's knowledge of a second chance is also likely to reduce the impact and effectiveness of the not co-operating warnings that precede this status. While a second chance is an important safeguard it may be more effective where it is available at the discretion of the lender and appropriate checks are put in place to ensure that such status is not unreasonably withheld where it is deserved.

2. Contact between the lender and borrower

According to the Central Bank, feedback from the industry has indicated that the current limitations in relation to borrower contact are preventing lenders from making contact and engaging with borrowers and are therefore impeding the consideration and resolution of borrowers' cases. Currently a lender may only make 3 unsolicited contacts with a borrower per month. The proposed amendment in CP63 is intended to assist more efficient resolution by removing this cap and requiring lenders to draw up a contacts policy, ensure communications with borrowers are not aggressive or intimidating and borrowers will have to be given sufficient breathing space following each solicited communication before further unsolicited contact is attempted and where possible, future contact should be agreed in advance with the borrower.

We would comment that any contact that has been agreed with the borrower falls outside the definition of "unsolicited communication" under the CCMA and will therefore not be considered to be unsolicited from a lender's perspective. We would also suggest that this provision is open to subjective interpretation as to what a borrower may deem to be intimidating or aggressive and this will depend on the particular borrower, their history and relationship with the lender, and other factors, for example whether the borrower could be considered to be a vulnerable consumer under the Consumer Protection Code 2012. It might be beneficial for lenders to receive further Guidance in terms of how to deal with such borrowers in order to meet their obligations under the revised Code. The amendment of the definition of "unsolicited communication" in the revised Code to include the previous guidance dated 21 December 2012 in relation to missed /engaged calls is noted. In practice, lenders will be obliged to adhere to the restrictions on contact as set out in the Consumer Protection Code 2012 even if this proposed amendment is included in the revised CCMA. It would also be important to impose a positive obligation on borrowers to engage with the lender and it would be equitable that lenders would need to consider such communications as part of the resolution process.

Under provision 67 of the revised Code at Appendix 1, the Central Bank proposes to impose a new obligation on lenders to maintain recordings of all telephone calls made to or from a borrower in relation to his/her arrears or pre-arrears. A number of lenders use mobile staff, either "on the road" or in branches who deal with arrears and pre-arrears borrowers on a regular basis. It would be extremely difficult for lenders to introduce systems and controls to ensure this obligation is met in relation to every contact, whether by the borrower or the lender would be recorded. Furthermore, a borrower could discuss arrears with any staff member of the lender, even in the context of any other service being provided by the lender and not necessarily via the MARP team. This would also add to the difficulty in tracking and recording all telephone calls in relation to arrears/pre-arrears cases. We would suggest a more proportionate approach to ensuring that information is recorded in relation to contacts with such borrowers, for example updating notes centrally on a borrower's account after any such call logging the date and time and the substance of what was said on the call.

3. Link between the CCMA and the Personal Insolvency Act 2012

On 26 December 2012, the Personal Insolvency Act was enacted (though not yet in force) and the Insolvency Service of Ireland (ISI) was established on 1 March 2013. This marks a reform of Irish bankruptcy law, which impacts directly on the CCMA and how lenders will deal with borrowers in default. It will ensure the automatic discharge from bankruptcy, subject to certain conditions being met. The ISI will facilitate insolvent borrowers and lenders to come to an agreed solution and monitor the operation of arrangements relating to personal insolvency. The Central Bank's intention is to ensure that the process for insolvent borrowers, who have been through the MARP and wish to enter a Personal Insolvency Arrangement, is as smooth as possible. Under the revised CCMA, lenders will be required to include a link to the website operated by the ISI on the section of its website dedicated to borrowers who are concerned about/in financial difficulty. It is also proposed that lenders should provide a copy of ISI publications when writing to a borrower whose account has been in arrears that remain outstanding for 31 days.

Where an alternative repayment arrangement cannot be reached with a borrower, the Central Bank proposes imposing a number of additional obligations on the lender. The lender will have to provide the borrower, in writing, with the reasons why an alternative repayment arrangement has not been offered, a copy of the most recent Standard Financial Statement, an outline of other options open to the borrower and relevant publications of the ISI. This information will also have to be provided to a borrower who has been offered an alternative repayment arrangement which the borrower has refused, together with a written statement of what that offer was. While we believe that the intention is appropriate, without any clear guidelines on how that information should be communicated this may be counter-productive and confusing for a consumer, particularly where mortgages are held with a number of lenders.

We would also be concerned about the impact on the borrower's experience in the MARP as the borrower will be inundated with information about the Personal Insolvency process. We suggest that this requirement and indeed the Personal Insolvency process generally may not be appropriate to all borrowers who are in arrears, for example borrower in early arrears. A more tailored approach should be open to lenders when providing information to borrowers, based on their individual circumstances. Guidelines on what information may be provided might be a more approporiate way of dealing with this matter than prescribing rigid requirements of what must be provided to all borrowers. Where a borrower has indicated that they can be communicated with by email, provision of this information by electronic means may be more suitable. This would be a more proportionate approach, in terms of cost and time, than requiring the lender to generate copies of all ISI publications to post to each borrower. Lenders would then be in a position to ensure that available resources are appropriately assigned to dealing with borrowers in the MARP process rather than being assigned to administrative roles in terms of providing information to borrowers. There may also be a large volume of queries to the ISI from borrowers who have received publications and information from lenders and would rather speak to this independent body in relation to their financial difficulties and their available options. It may be the case that the ISI is not the appropriate forum for some of these borrowers and again we would have a concern that this may distract resources from dealing with cases that are most appropriate to the ISI due to being inundated with queries and requests for information or advice from other borrowers.

The Central Bank also proposes that a lender should be required to give a 30-day notice period, before commencing legal action, to a borrower who has declined an alternative repayment arrangement in order to allow that borrower time to consider their options, particularly whether to consult a Personal Insolvency Practitioner. We would agree with this proposal as a proportionate measure to allow a borrower a fair opportunity to consider their options under the new legislation, prior to a lender issuing proceedings. The costs and time involved in court proceedings has acted as a barrier to the resolution of many situations where a borrower defaults. It would be more efficient if a borrower was made aware of the options available under the new legislation and decide whether they might wish to avail of one of those options.

The Central Bank has asked for feedback on whether the 12 month moratorium preventing a lender from commencing legal proceedings should continue to apply where a lender has deemed a borrower's mortgage to be unsustainable or whether the above 30-day notice period is a sufficient alternative period of time for a borrower to consider their options. We would suggest that the full 12-month moratorium remain in place in these circumstances as the borrower is not disengaging from the process or refusing a proposal from the lender, rather the lender has assessed the borrower's case and decided that the mortgage is not sustainable. A borrower's circumstances may change in the intervening period and we believe in the interests of fairness these borrowers should be afforded the full protection of the 12-month moratorium in order to allow them sufficient time to understand why their mortgage has been deemed unsustainable and to consider the options available to them under the Personal Insolvency Act or otherwise.

4. Use of the Standard Financial Statement

The industry had previously asked the Central Bank to consider a shorter version of the Standard Financial Statement (SFS) for some borrowers and questioned whether this was even necessary in all mortgage arrears cases. Some lenders have highlighted borrower dissatisfaction that the level of information sought is excessive, particularly in respect of borrowers with a more straightforward arrears situation. Lenders have also advised the Central Bank that the time taken to complete and assess the SFS can cause delays in putting arrangements in place and that a borrower's situation can deteriorate further, while they are waiting for the lender to complete their review. On the flipside, a number of lenders have stated that the information in the current SFS is both relevant and necessary in order to allow them to assess an arrears case. The Central Bank's survey of borrowers' engaged in the MARP showed that 71% of borrowers surveyed were satisfied with the overall ease of completing the SFS. The Central Bank proposes allowing a lender to put a temporary arrangement in place for up to 3 months prior to receiving and completing the SFS. This is intended to avoid a borrower's arrears situation deteriorating further, pending completion of the lender's review. There is also a proposal to impose a new obligation on lenders to offer to assist borrowers in completing the SFS. As far as we are aware this reflects the current industry practice as lenders provide assistance to borrowers throughout the MARS process, including assisting borrowers to complete the SFS.

5. Reviews of Alternative Repayment Arrangements

The current regime requires lenders to review all arrangements made with a borrower every six months. Under the proposed amendments, the Central Bank is considering categorising repayment arrangements as short, medium and long-term and specifying the frequency of reviews for each category. We agree with this proposal as it takes account of the different types of arrangements which can be reached with borrowers and adopts a more appropriate tailored approach to those arrangements. This will allow lenders to focus time and resources on those arrangements that warrant more frequent review while more long-term arrangements, such as an interest only option for six years, would only need to be reviewed every five years. Short, medium and long-term arrangements are defined under the proposed revised CCMA. We welcome this amendment in principle but we would propose leaving the option open for a lender or borrower to review an arrangement, should either party wish to do so in the intervening period. We would also suggest that other factors outside the timeframe of an arrangement should be considered in assessing how frequent a review will be required; such as the reason why the borrower is in arrears in the first place and the likelihood of that circumstance changing, for example. Allowing some flexibility in revisiting an arrangement would ensure that where an arrangement is no longer appropriate or sustainable for the borrower, there is an option to revisit the arrangement without the borrower's situation deteriorating further while waiting for the next review. We also agree with the proposal that lenders should provide information on reviews to borrowers, when it initially offers an alternative repayment arrangement to that borrower.

Having reviewed the draft wording of provision 42 e) we do not believe it is reasonable that a lender should be expected to identify the potential outcomes of reviews at the initial point of offering the borrower an Alternative Repayment Arrangement. The majority of the information and circumstances that will lead to any amendment to an arrangement will be uniquely within the borrower's own knowledge and the lender will be reliant on the borrower advising the lender of any change in circumstance or additional factors that may impact on the outcome of a review of that borrower's arrangement, at any given point in time. We therefore suggest removing this reference to potential outcomes as it places an obligation on lenders who will not have the data to hand at that early point in the process to satisfy this provision.

In terms of the options available as "Alternative Repayment Arrangements" we note that the list provided in the revised Code is non-exhaustive and welcome this approach, given that each individual case must be reviewed and assessed on its own merits and a tailored approach to resolution designed, which is most appropriate and suitable for that particular borrower based on the facts and circumstances of each individual case.

6. Treatment of appeals and complaints

The CCMA required lenders to establish an internal Appeals Board to ensure that appeals by borrowers are considered fairly, consistently and in a transparent way. The Central Bank's themed inspections identified that lenders were in compliance with this requirement. Lenders have suggested to the Central Bank that while an appeal relating to the actual decision of the lender's Arrears Support Unit in relation to an individual case should be handled by an Appeals Board, appeals in relation to the lender's treatment of the borrower's case under the MARP process and the lender's compliance with the requirements of the CCMA should be handled by the lender's complaints department. We agree that this would better place the Appeals Board to focus on appeals relating to borrower outcomes specifically and would make the appeals process more efficient by removing those appeals that could more appropriately be dealt with as a complaint under the Consumer Protection Code 2012 and in line with the lender's existing complaints policy. We therefore welcome this amendment. We would also suggest that independent oversight of the functioning of the Appeals Board by internal audit or an external provider should be conducted on at least an annual basis so that consumers can have additional assurance on the treatment of their appeals.

7. Information on other options

There is a proposal to increase the obligations on lenders to provide more information to borrowers on other options, in order to increase transparency in the MARP process. In relation to each option the lender will have to provide the associated costs and charges, how much if any of the outstanding arrears must be repaid, the impact on the borrower's credit rating and the importance of seeking independent legal advice.

Under provision 26 of the revised Code at Appendix 1, for example, where three mortgage repayments have not been made in full as per the original mortgage contract and remain outstanding and an alternative repayment arrangement has not been put in place, the lender must notify the borrower, in writing, the potential for legal proceedings for repossession of the property, together with an estimate of the costs to the borrower of such proceedings. We do not believe that this is appropriate given that the borrower will be selecting the legal representation and the lender will have no way of estimating these costs, at this early stage.

8. Tracker mortgages

The Central Bank is considering whether there is merit in allowing a lender to move a borrower in arrears off a tracker rate, where the lender has offered an alternative arrangement which is advantageous to the borrower in the long term, e.g., a debt write off. This is essentially a matter between the lender and the borrower so we have not sought to offer a view other than to say that this matter demonstrates again the differing demands from a prudential and consumer perspective and validates the necessity for a full regulatory impact analysis.

In addition to the specific areas of consultation set out above, we have identified a number of additional points for consideration, which we believe are integral to this consultation process:

- On 13 March 2013, the Central Bank published specific, time-bound targets for the six main banks (ACC, AIB, Bank of Ireland, KBC Bank, Permanent TSB and Ulster Bank) to demonstrate measurable progress in tackling the mortgage arrears crisis. The new approach is aimed at ensuring that lenders offer and conclude sustainable solutions for their borrowers in arrears by setting specific performance targets and proposing revisions to provisioning standards. The Government in its statement, Resolving the Mortgage Arrears Crisis, has advised "the targets will become progressively more demanding so that the vast majority of distressed borrowers will have been proposed such solutions by end-2014".The Central Bank has made clear that it will consider regulatory action, including the imposition of additional capital requirements where necessary. The Central Bank is also setting out its plans to require more prudent provisioning for mortgage loans in arrears greater than 90 days which have not been subject to a sustainable solution. It is important that an appropriate balance is struck between protecting and assisting borrowers from a consumer protection point of view and the provisioning and capital requirements imposed on lenders as regulated entities in terms of prudential requirements and the knock-on impact on the broader economy.

- How will the CCMA/MARP process and work in parallel to the issues faced by Irish lenders under the current repossession process and what about the impact of Irish case-law such as Start Mortgages v Gunn and Tom Kavanagh and Fergus Lowe v Jeremiah Lynch and Saint Angela's Student Residences Limited on a lender's ability to commence repossession proceedings and the expected legislation to address these decisions in order to grant flexibility to lenders to consider repossession as a last resort option where other arrangements have failed to result in a satisfactory resolution for the lender and the borrower?
- In the greater legal context, there may also be a knock-on effect from recent European case-law such as Mohamed Aziz v Catalunyacaixa, which states that unfair terms in a mortgage contract will not be enforceable against a borrower, under the Unfair Contract Terms Directive 1993 (Unfair Contract Terms Regulations 1995 and 2000 as transposed into Irish law) where there is significant imbalance between the positions of the contracting parties or a clear absence of good faith. In relation to the good faith aspect, the European Court of Justice stated an appropriate test would be whether the debtor would have accepted the relevant mortgage term in hypothetical circumstances where the contract had been negotiated between the debtor and the bank.
- How will the CCMA interact in practice with the Code of Conduct on Lending to Small and Medium Sized Enterprises and the Consumer Protection Code 2012? This will be particularly important in relation to mixed-purpose borrowing and may lead to borrower confusion where a case of overlap exists.
- Is it appropriate for the lender to provide information to borrowers in default in relation to the personal insolvency process? There is a potential for conflict of interest where the lender may be perceived as acting as some form of adviser to the borrower. The lender cannot act in that capacity where they are also a creditor in terms of the Personal Insolvency process. There is a risk here that the borrower will not feel the need to seek independent legal and financial advice, despite being advised to do so by the lender.
- We believe that engagement with the Financial Services' Ombudsman (FSO) as part of this consultation, would be greatly beneficial. Lenders are currently experiencing uncertainty and potential delays where a borrower refers a case that is in the MARP process to the FSO. In some instances, lenders may not be made aware that the case has even been referred. In order to ensure the MARP process runs as efficiently as possible, it would be important to establish a process and timelines for the FSO in dealing with cases that are subject to the MARP process simultaneously. Provision 58 of the revised CCMA at Appendix 1 makes reference to the FSO's role in a lender's ability to commence legal proceedings.

We note that the Central Bank expects to publish the revised Code by the end of May 2013. We look forward to receiving a response from the Consumer Protection team in due course and we would welcome the opportunity to engage further with you in relation to this consultation.

Yours faithfully,

Colm McDonnell
Partner