promoting access to justice

Submission on the Review of the Code of Conduct on Mortgage Arrears

Consultation Paper CP 63

FLAC

April 2013

About FLAC

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all.

FLAC Policy

Towards achieving its stated aims, FLAC produces policy papers on relevant issues to ensure that government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies drawing on its legal expertise and bringing in a social inclusion perspective.

You can download/read FLAC's policy papers at
http://www.flac.ie/publications/policy.html

For ***more information***, contact us at

FLAC,
13 Lower Dorset Street, Dublin 1
T: 01-887 3600 | E: info@flac.ie | W: www.flac.ie

FLAC Submission on the
Review of the Code of Conduct on Mortgage Arrears
Consultation Paper CP 63
April 2013

Introduction
FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. In making the following submission to the Central Bank on the Code of Conduct on Mortgage Arrears (Consultation Paper CP63), FLAC considered 14 distinct aspects of the Code, some of which are flagged in the consultation paper and some of which we have added. With the Central Bank's own figures showing that mortgage arrears have been growing since they were first gathered in 2009, we are now coming to a critical point in the personal debt and arrears crisis. The Code of Conduct is currently a primary vehicle for lenders to deal with borrowers. There are a number of significant developments about to occur in this area, and thus it is of vital importance that the Code be strengthened sufficiently to protect the family home wherever possible and to give borrowers the protection they need in their dealings with financial institutions.

Index of issues considered in this submission:

1. **Application of the Code to existing arrears cases**
2. **The admissibility of the Code in legal proceedings**
3. **Rights of appeal for borrowers under the Code**
4. **Co-operation and engagement**
5. **Time running for the purposes of the moratorium**
6. **The treatment of borrowers who separate**
7. **Unsolicited communications with borrowers**
8. **Use of the Standard Financial Statement (SFS)**
9. **Reasonable living expenses**
10. **The treatment of unsecured creditors**
11. **The link between the Code and the Personal Insolvency Act 2012**
12. **Reviews of alternative repayment arrangements**
13. **Tracker mortgages**
14. **Assistance for borrowers in arrears**

1. Application of the Code to existing arrears cases
In relation to the application of the Code to existing arrears cases, the current version of the Code provides at page 2 that:

> From 1 January 2011, this Code applies to all existing arrears cases falling within this Code. While lenders' attention is specifically brought to provisions 21, 35, 47 and to steps 3 and 4 Of the Mortgage Arrears Resolution Process, lenders must ensure that they comply with all provisions of this Code from 1 January 2011.

FLAC would submit that the plain meaning of this statement would have necessitated each lender writing to each existing borrower in arrears as of 1/1/2011, under the terms of Provision 22, within 31 days of the first instalment being missed in 2011. They should have had to instigate a fresh assessment of capacity to pay and a consideration of alternative repayment arrangements. In many instances, however, this did not happen or did not happen in a timely manner.

We are also of the view that, in the absence of any specific provision to the contrary, borrowers in arrears as of 1 January 2011 were entitled at that point to the benefit of Provision 47 of the Code in the same way as any fresh case of mortgage arrears occurring after the revised code came into operation, regardless of how long the client had been in arrears prior to this. Thus, from the time the case is first treated as a MARP case under the revised code, a borrower should have had the benefit of the 12-month moratorium rules before the lender could apply to a court for a Possession Order, and time should not run for this purpose where agreed repayment arrangements are in place and being met or where appeals are pending.

However, FLAC's distinct impression from discussions and meetings with the Consumer Protection section of the Central Bank is that this was not the <u>intention</u> of this particular statement in the Code, although the Bank was not specific on what exactly its intention was. Equally, lenders seem to have taken varying views on this question. One lender, for example, took a unilateral position that where it had served customers with legal proceedings for repossession of the dwelling prior to 1 January 2011, it did not consider that the protection of the Code applied <u>at all</u> to those particular borrowers because such proceedings had been served, even though it continued to otherwise negotiate on payments in accordance with the framework set out under the MARP.

The proposed revised Code is even less specific than the current Code in this regard. It simply proposes that *'from (insert date) 2013, this Code applies to all existing arrears cases falling within this Code. Lenders must ensure that they comply with <u>all</u> provisions of this Code from (insert date) 2013'.*

What are we to take from this? We know, for example, from the most recent quarterly arrears figures released by the Bank that some **23,523** mortgages on principal dwelling houses (PDH) have been in arrears for longer than two years at this point.[1] These arrears cases therefore stretch back to at least the end of December 2010 (and conceivably much longer) just before the current edition of the Code was set to come into operation. **How will these cases be treated in terms of the moratorium on repossession?**

FLAC's view is that in failing to be more prescriptive on the applicability of the proposed revised Code to existing arrears cases, the Central Bank has avoided facing this issue. The importance of this question comes into particularly sharp relief with the recent publication by the government of the Land and Conveyancing Law Reform Bill 2013, intended to reverse the effects of what has become known as the **'Dunne judgment',** amongst other matters. This will in effect restore to lenders the option of using the summary procedure for seeking to repossess dwellings where the mortgage is in arrears.

Repossession application rates are therefore likely to rise. The question therefore of who has exceeded and who has not exceeded the 12-month moratorium period becomes crucial for a number of borrowers who may suddenly find themselves in a veritable 'last chance saloon' as lenders may perhaps be more inclined to reject any further forbearance, either short term or long term, and declare mortgages to be unsustainable. Equally, the question of how much of the 12-month moratorium period remains for any given borrower also becomes a critical question for many others who may be approaching that situation.

[1] Quarter Four 2012, i.e. at the end of December 2012.

In this regard, it is worth noting that Provision 14 of the revised Code provides that:

> At the borrower's request, at any time, the lender must confirm the time period remaining during which the lender may not commence legal action for repossession of the borrower's primary residence.

So is the lender uniquely to decide this issue, based on some notional moratorium clock that is or has been running as we now approach the third incarnation of the CCMA and which has been masked up to recently because of very low rates of application for repossession?

FLAC would suggest that this would be highly unsatisfactory. Further we submit that the question of the application of the Code to existing arrears cases is a critically important issue to clarify in the context of the moratorium. Literally, the roof over people's heads may depend upon tackling it. FLAC has already raised this issue with the Central Bank and the failure to address and confront it in the revised Code is a potential recipe for confusion and deep distress.

Given the very difficult circumstances facing so many borrowers, and given what should be a clear public policy imperative to avoid repossession of family homes wherever possible, there is a strong case for the moratorium starting afresh for those who have clearly co-operated with their lender up to now and who wish to avail of it.

2. The admissibility of the Code in legal proceedings

This leads us to a related and important issue also potentially very contentious in connection with the current and/or revised CCMA. This is its potential admissibility in legal proceedings, specifically legal proceedings for the repossession of family homes. Both the current and proposed Codes address this issue identically, as follows:

> "This Code is issued under Section 117 of the Central Bank Act 1989", and
>
> "Lenders are reminded that they are required to comply with this Code as a matter of law."

The apparent simplicity and clarity of these statements belies a more complicated discussion and it is FLAC's contention that the Central Bank, in making such an apparently unambiguous statement, is seriously underestimating the complexity of this issue. Again, this question comes into very sharp relief with the imminent reversal of the Dunne judgment and the serial prodding that the Bank itself has recently engaged in towards getting lenders to act on unsustainable mortgages.

In short, if the borrower-in-arrears time has run out under the current or revised CCMA, will the lender's alleged failure to comply with the terms, processes and appeals mechanisms under the Code be a matter that the borrower can raise in his or defence before the relevant court. A secondary but equally important question is what assistance the State will provide to the borrower to present his or her argument in order to vindicate the right to access justice, for example, in the form of civil legal aid from the Legal Aid Board.

The recent decision of the High Court in the case of **Irish Life and Permanent -v- Duff** has provided a measure of clarity on this matter.[2] This case involved a claim by the plaintiff lender to recover possession of the defendant's family home. Amongst a number of other issues raised not directly relevant to this submission, the defendants argued that the plaintiff had generally failed to comply with the 2009 edition of the CCMA prior to seeking to

[2] [2013] IEHC 43

repossess in the High Court. In his examination of what he described as "the somewhat troublesome issue of the precise legal status of the Code of Conduct", Mr Justice Hogan noted the contrasting approach in two previous High Court decisions, these being Mr Justice Birmingham in **Zurich Bank -v- McConnon**[3] and the more recent decision of Ms Justice Laffoy in **Stepstone Mortgage Funding -v- Fitzell.**[4]

In brief, Mr Justice Birmingham suggested in the former case that codes issued under the Central Bank Acts did not create any justiciable rights at the hands of a consumer, whereas Ms Justice Laffoy in the latter held that:

> To take what is perhaps the best known provision of the Current Code, the imposition of a moratorium on the initiation of proceedings, which is now contained in provision 47 of the Current Code (and which is also to be found in the earlier codes, although the moratorium period in the case of the earliest code was six months, rather than twelve months), surely a court which is being asked to make an order which will, in all probability, result in a person being evicted from his or her home, is entitled to know that the requirement in provision 47, which has been imposed pursuant to statutory authority, is being complied with. Moreover, it is likely that it would render the enforcement of provision 47 nugatory, if a lender did not have to adduce evidence to demonstrate that the moratorium period had expired.

Ultimately, Mr Justice Hogan decided that he must "nonetheless follow the most recent pronouncement of this court in *Fitzell*, given that it was the most recent and authoritative analysis of this question where the judicial comments formed part of the ratio"[5] of the decision. However, this was not before he sounded something of a warning note on how a court might attempt to decide what constitutes every reasonable effort by a lender to agree an alternative repayment schedule before resorting to repossession proceedings under Clause 6 of the 2009 edition of the Code, as well as on the questionable legal status of the Code. He said as follows:

> 'The question, for example, of what constitutes a "reasonable effort" on the part of the lender does not easily lend itself to judicial analysis by readily recognisable legal criteria. How, for example, are "reasonable efforts" to be measured and ascertained? If, moreover, non-compliance with the Code resulted in the courts declining to make orders for possession to which (as here) the lenders were otherwise apparently justified in seeking and obtaining, **there would be a risk that by promulgating the Code and giving it a status that it did not otherwise legally merit, the courts would, in effect, be permitting the Central Bank unconstitutionally to change the law in this fashion'. (our emphasis added)**

Perhaps this statement reaches into the heart of the matter. With respect, the decision of Ms Justice Laffoy is the morally correct one – what is the point in having this process if it cannot be challenged when lenders don't stick to it – but the Code itself has no specific legislative status. It is neither a piece of primary legislation in the form of an act of the Oireachtas nor a secondary piece of legislation in the form of a ministerial regulation issued by the Minister for Finance. It is not even stated to be admissible in legal proceedings. It is a Code issued under the terms of Section 117 of the Central Bank Act 1989. Therefore, lenders who infringe its terms may be subject to the Central Bank's Administrative Sanctions Procedure. This is an internal process that allows the Bank to control the

[3] [2011] IEHC 75
[4] [2012] IEHC 142
[5] The *'ratio decidendi'* is a technical Latin legal term meaning literally the reasons for the decision. In the system of binding precedent used in our superior courts, these are the parts of the decision that a future court must follow when the same issue arises in a subsequent case. They should be contrasted with what a judge says *'obiter dicta',* meaning literally 'other things said' in the course of a decision that may be persuasive in a future case but are not binding. For the sake of completeness, the remarks on Central Bank codes made by Mr Justice Birmingham in the Zurich Bank case were '*obiter dicta'.*

conduct of financial service providers and helps to define its regulatory relationship with them, but it is not one in which a borrower has any involvement.

There is implicit in the statement of Mr Justice Hogan above a suggestion that the Supreme Court might ultimately have to pronounce upon this. However, we believe that this is avoidable. As far back as July 2010, the Mortgage Arrears and Personal Debt Group (or Cooney group), in which FLAC participated, recommended in its interim report that the CCMA should be admissible in legal proceedings and this recommendation is also reflected in the final report of the group.[6]

Evidently, this recommendation was not implemented back then but FLAC would suggest that it would clarify the matter if the Minister for Finance was now to issue a regulation under the Central Bank Acts to convert the Code into a statutory instrument which expressly provided that the CCMA would be admissible in possession proceedings in the courts. If the State is really serious about repossession being a last resort, and in a scenario where it is about to reverse the Dunne judgment and reopen the summary procedure for the potential repossession of properties, this must be done. We would then at least have a Code that lenders would have to follow to the letter so that borrowers could rely upon having a real chance of demonstrating their ability to service a sustainable alternative arrangement on their mortgage that would keep them in their homes, if they so chose. Failure to allow the borrower this opportunity and to accord the benefit of fair procedures and fair decision-making could then be challenged in the courts if necessary.

3. Rights of appeal for borrowers under the Code

A further and again related question follows. For the vast majority of borrowers, challenging the lenders processes in the courts is simply not pragmatic from a resources point of view. In light of the anticipated rise in repossession applications, how genuine and comprehensive is the borrower's right of appeal under the Code?

Both the current and proposed revised Codes are relatively identical on this issue.

Provision 42 (current) and Provision 49 (proposed) state that:

> A lender must establish an Appeals Board to consider any appeals submitted by borrowers and to independently review any of the following:
> a) the decision of the lender's ASU,
> b) the lender's treatment of the borrower's case under the MARP process, or
> c) the lender's compliance with the requirements of this Code.

In turn, Provision 44 (e) (current) states that:

> The lender must notify the borrower in writing, within 5 business days of the completion of the consideration of an appeal, of the decision of the Appeals Board and explain the terms of any offer being made. The lender must also inform the borrower of his/her right to refer the matter to the Financial Services Ombudsman and must provide the borrower with the contact details of that Ombudsman.

Provision 52 (e) (proposed) states that:

[6] Mortgage Arrears and Personal Debt Group, Final Report 16th November 2010, Page 6.

> The lender must notify the borrower in writing, within 5 business days of the completion of the consideration of an appeal, of the decision of the Appeals Board <u>and explain the reasons for the decision</u> and explain the terms of any offer being made. The lender must also inform the borrower of his/her right to refer the matter to the Financial Services Ombudsman and must provide the borrower with the contact details of that Ombudsman.

So a borrower in arrears can appeal three distinct (but related) matters to a lender's Appeals Board: the lender's decision whether or not or in what form to offer an alternative repayment arrangement; how the borrower's case is treated, presumably in terms of the borrower's stated rights under the Code; and how the lender complies with its obligations under the Code. The Appeals Board in the current code must be comprised of three members of the lender's senior personnel not involved in the borrower's case previously and one of the three must be independent of the lender's management team and must not be involved in lending matters. Under the revised code, it is additionally proposed that this third member may henceforth be an external professional such as a solicitor, barrister or an accountant.

In its recently publicised but not published research on the experience of a selection of borrowers under the rules of the Code,[7] the Bank suggests that of the 209 borrowers who took part in what research enquiries reveal was quite a limited interview (of which more below), of the 10 percent (i.e. 21 individuals) who used the appeals process, 60 percent (i.e. 13 individuals) stated that they had successfully negotiated a more suitable/sustainable arrangement. This finding would tend to suggest at first glance that this appeals mechanism works well for borrowers but it must be said that the numbers are very small and to our knowledge there are no general statistics on MARP/CCMA outputs and outcomes gathered let alone published by the Bank. However, even with the limited number here, some questions remain unanswered and may not even have been asked.

For example, under which of the three headings did these appeals take place? The fact that 13 of the 13 successful appellants appear to have stated that they had successfully negotiated a more suitable/sustainable arrangement would tend to indicate that these appeals concerned the lender's decision. However, is it really credible that this kind of percentage managed to get the Arrears Support Unit's decision overturned by what is essentially an internal Appeals Board? What was appealed? The failure to offer an alternative repayment arrangement or the type of arrangement offered? Finally, how many of the eight appellants whom it seems did not successfully negotiate a more suitable/sustainable arrangement sought a review externally through the Financial Services Ombudsman's Office?

This external review now becomes a critical area upon which to focus, again particularly as the Dunne ruling is about to be reversed through the Land and Conveyancing Law Reform Bill 2013; as the Central Bank exhorts lenders to act on unsustainable mortgages and even as the property market shows some tentative signs of recovery, albeit in very limited locations. It is notable that the wording of both the current and revised codes in this regard simply refers to an obligation on the lender to inform the borrower "of his/her right to ***refer*** the matter to the Financial Services Ombudsman and must provide the borrower with the contact details of that Ombudsman". **It is notable here that the word 'appeal' is not used and we believe that this should be remedied.**

Which brings us to another critical question: Is there or is there not an external appeal for the borrower against the lender's decision not to offer - or in what form to offer - an alternative repayment arrangement? Recent research enquiries conducted by FLAC with senior staff of the Financial Services Ombudsman's Office would

[7] See Central Bank press release, 21 February 2013. This incidentally seems to have been the only research carried out by the Bank into the borrower experience under the CCMA since it was first revised in 2010.

indicate that they do not see it as such and that the FSO neither wants nor feels it has the authority to question a lender's decision on the offering or otherwise of alternative repayment arrangements, although it is happy to deal with complaints concerning not a lender adhering to the procedural (as opposed to the substantive) requirements of the Code. Recent discussions with staff in the Consumer Protection section of the Central Bank confirm that it is of the same view.

An interesting aspect of the revised Code that may serve to confirm this clear impression is contained in the provisions in Step Four - Resolution (Provisions 38 – 48). Under Provision 44, a lender not willing to offer alternative repayment arrangement to a borrower must explain why in writing and must inform the borrower of his or her right of appeal to the Appeals Board. Under Provision 45, where a borrower is not willing to enter into the alternative repayment arrangement offered by the lender, the lender must equally inform the borrower of his or her right of appeal to the Appeals Board. An express right to refer the matter on to the FSO is never mentioned here, surfacing only in the more general provision on appeals in Step 5. In addition and only in the case of the borrower refusal of the alternative repayment arrangement offered by the lender, it is explicitly provided at 45 (f) that:

> Should the borrower decide not to make such an appeal or should he/she make an appeal that is not upheld by the lender's Appeals Board, that the twelve month moratorium on taking legal action no longer applies to the borrower's case.

If a lender, for example, proposes a split mortgage to a borrower as an alternative repayment arrangement and the borrower rejects the offer because

- interest is to be charged on the warehoused portion of the split; or
- the borrower has no idea how the principal in the warehouse will be treated when the split mortgage comes to an end; or
- because the borrower cannot afford to pay the part to be serviced,

he or she can make what is essentially an internal appeal. If that appeal is rejected, it is now proposed that the moratorium will be gone, irrespective of any further referral to the FSO.

In the final report of the Mortgage Arrears and Personal Debt Group (or Cooney group) published in November 2010, it is noted that the member representing FLAC would have preferred to see anew appeals body set up to deal with the full range of potential appeals arising out of the MARP.[8] Nothing that has occurred in the interim has changed that view. **Given the likely rise in the numbers of mortgages to be declared by lenders to be unsustainable in the future and the likely rise in proposals for sustainable long term arrangements by lenders that borrowers may find it difficult to accept, it is our view that in addition to the Code being admissible in legal proceedings before the courts; borrowers should have a genuine right of appeal to an independent third party not just on compliance with the mechanics of the MARP process but also on the substantive decisions made by the lender. Given the problem of resources, government may be against setting up a distinct body for this purpose, but that would be desirable. In the alternative, it could set up a fast-track appeal to the FSO for this purpose, but specific explicit authority would have to be conferred upon it to carry out this function.**

4. Co-operation and engagement

The failure of some mortgage lending institutions to reply promptly to correspondence sent on behalf of borrowers in arrears has been a problem since the revised code came into operation in January 2011. Money advisors from MABS have repeatedly observed this phenomenon, even where client consent has been expressly

[8] Mortgage Arrears and Personal Debt Group, Final Report, 16th November 2010 - Page 17, footnote six.

furnished to the lender. This has been particularly the case with one lender who has consistently failed to deal with correspondence in a timely manner, but that lender is by no means alone.

The Central Bank does not seem to have discerned evidence of this pattern but again its research on the operation of the MARP from the consumer perspective has been very limited, consisting of a limited number of questions posed to 209 consumers in mortgage arrears (outlined in more detail below).

FLAC notes that both the existing and the proposed revised rules on co-operation and engagement are one-sided, in that there is no consideration of a *lender* not co-operating or engaging under the MARP. For example, only non-co-operation by a borrower is defined. The implication here is that only borrowers are frustrating progress under the CCMA and this is also reflected in the proposals to remove the limit on unsolicited contacts each month. It is also important to note that currently time continues to run for the purposes of exhausting the 12-month moratorium on a lender bringing repossession proceedings whilst the process of filling out the SFS and deciding on an alternative repayment arrangement is being conducted. We believe that this may also act as a strong incentive for a lender to prevaricate.

Contrary to the sometimes cosy image portrayed of lenders and borrowers resolving their mutual problems in a spirit of co-operation, FLAC would suggest that negotiations on debt repayment for financially straitened borrowers can in some cases become a 'war of attrition'. Taking time to respond to correspondence and/or selectively ignoring letters from advocates may be just a part of the psychological warfare designed to undermine, frighten and otherwise 'soften up' the borrower. On the other hand, some of these instances of delay may be a result of inefficient systems on the part of the lender. However, where time is of the essence in terms of putting in place a sustainable arrangement for the borrower, inefficiency should not be tolerated either, although it is accepted that the institutions are also under pressure as a result of the processes that they have been required to put in place to deal with mortgage arrears cases.

In summary, we believe that the Central Bank should send out a strong message to lenders by specifically recognising and addressing the problem of non-co-operation and engagement by lenders (as well as borrowers) under the revised CCMA and penalising it in some tangible way. For example, the Central Bank could provide that the moratorium on the issuing of repossession proceedings against a borrower be extended by a set time period where evidence is provided of unreasonable or unexplained delay on the part of the lender in processing MARP negotiations.

5. Time running for the purposes of the moratorium

On the subject of the 12 month moratorium on repossession proceedings, a substantial flaw in the code is the <u>failure to stipulate</u> under Provision 47 in the current code and Provision 57 in the proposed revision that <u>time will not run</u> while the lender is assembling the borrower's financial information and considering whether to offer an alternative repayment arrangement. On the other hand, any time where the borrower is complying with an alternative repayment arrangement and any time processing an appeal whether to the lender's Appeals Board or to the Financial Services Ombudsman (FSO) does not count.

Perhaps this feature of the Code has not been unduly prominent up to now. However, as with many of the other points made in this submission, this issue will come into sharper focus with the imminent reversal of the Dunne judgment and a potential rise in repossession applications. As already outlined above, FLAC has seen instances where the lender has unaccountably delayed in processing MARP cases and has taken considerable and undue time in issuing, dealing with and replying to correspondence. If, for example, it takes a lender four months to process a case from the service of the Day 31 MARP letter to the offer of an alternative repayment arrangement, according to the both the current and proposed revised codes, that is four of the 12 months of the borrower's moratorium expired. What is the justification for this? Can it seriously be argued that there is any lack of co-operation on the borrower's part if it is the lender's system that is at fault? And where the lender expedites the MARP process quickly and efficiently, as was surely intended, why in all fairness should the time involved count towards the 12-month moratorium?

Of course it might be suggested that an amendment such as this would then allow the borrower to drag his or her heels and frustrate the process for as long as possible, knowing that for the purposes of the moratorium, time is not running. However, FLAC notes that the proposed revised Code (at page 19) now provides that non-cooperation will include the borrower failing "within a reasonable timeframe (which timeline may be set by the lender in accordance with provision 33), to provide information, relevant to the borrower's situation, sought by the lender..." so that eventuality is already covered.

It is worth noting that the revise Code at Provision 37 proposes that:

> Prior to completing the full assessment of the borrower's standard financial statement, a lender may put a temporary arrangement in place where a delay in putting an arrangement in place will exacerbate a borrower's arrears or pre-arrears situation. Such a temporary arrangement should not last for more than three months. Any subsequent arrangement should be based on a full assessment of the standard financial statement.

This provision should state that the duration of this temporary arrangement does not count for the purposes of the 12 month moratorium on repossession proceedings. Similarly, Provision 57 should state in relation to the twelve month moratorium that 'the twelve month period does not include any time period where a proposal for an alternative repayment arrangement is being negotiated'.

6. The treatment of borrowers who separate

The current code provides at page 2, under the heading of 'Application of this Code,' that "in the case of joint borrowers, who notify the lender in writing that they have separated or divorced, the lender should treat each borrower as single borrower under this Code".

It is thought that this provision was intended to allow the spouse/partner who remained in the family home following separation to negotiate as a single borrower with the lending institution with a view to making affordable payments and to remain in occupation of the family home notwithstanding the existence of arrears. Nonetheless, it is evident that some institutions have declined to treat such persons as single borrowers even when it is clear that there has been a separation and this has been confirmed in writing. The fact that the code provides that lenders 'should treat' as opposed to 'must treat' has perhaps influenced this. In other instances, where the separation is less than amicable, the written confirmation of separation or divorce has not been forthcoming from one party and this has also led to a refusal to treat the borrowers separately. Up to now, the Code has not addressed what might be done in this situation and this is an omission.

However, the intersection of debt and family law is very complex and this instance is an illustration of the Code trying to provide for rules (albeit in voluntary form) that are not provided for in existing legislation. The position of lenders in relation to separation is generally quite straightforward. Regardless of the fact that a couple no longer live together, both parties are jointly and severally liable for the debt and both are joint tenants with legal rights of ownership. Thus, the lender will argue that it can do nothing that would compromise such rights of ownership and it will do nothing that might undermine its ability to enforce its security and/or be repaid.

The revised code proposes to treat this issue with the following addition in bold:

> In the case of joint borrowers, who notify the lender in writing that they have separated or divorced, the lender should treat each borrower as single borrower under this Code **(except to the extent that an action requires the agreement of both borrowers as a matter of law, for example an alternative repayment arrangement which requires an amendment to a mortgage contract entered into by joint borrowers).**

The revised wording is intended, for example, to cover an alternative repayment arrangement such as a split mortgage proposal which effectively would involve a revised mortgage contract. Whilst this addition may reflect the legal reality of mortgage contracts entered into by married or cohabiting couples, it arguably undermines the spirit and intention of the provision. Sometimes when couples separate, one partner may either disappear or refuse to cooperate in any discussions or negotiations with the lender, leaving his (or her) former partner seriously compromised in terms of ability to continue to reside in the principal dwelling house.

FLAC would suggest that in the current crippling recession, where sometimes separation follows debt and sometimes debt follows separation, and where compromised earning capacity is often part of the mix**, a legislative initiative to navigate the tricky waters of relationship breakdown/breakup and over-indebtedness would be timely. In the meantime, we would suggest that the Central Bank, within the parameters of what it is capable of providing for in this area, might consider encouraging the sympathetic treatment of a now single borrower trying to hold onto her (or his) home.** For example, a short addition to the above might be considered, such as:

"Lenders are reminded that the capacity of a borrower or borrowers to service a mortgage may be seriously affected by relationship breakdown and are encouraged to enter into negotiations with such borrowers to facilitate insofar as is possible the retention of the family home".

7. Unsolicited communications with borrowers

It is arguable that the somewhat one-sided view of culpability under the terms of the Code is continued when one considers the removal of the limit of three unsolicited communications by lenders with borrowers per month in Provision 20 of the revised Code. The consultation document at page 8 states that "feedback from industry would indicate that the current requirements, particularly the limit of three successful contacts, are preventing lenders from making contact and engaging with borrowers and are therefore impeding the consideration and resolution of borrower's cases. The Central Bank does not believe that this is in the best interests of borrowers".

In the time-honoured relationship of confidentiality between the Bank and the lenders it regulates, no detail of the feedback is provided. On the other hand, the Central Bank's assessment of lender compliance with the CCMA since the revised Code came into operation in 2011 has consisted of what appears to be a limited interview with borrowers in arrears carried out as part of a wider research piece (explored in more detail below) and two 'themed inspections' of which FLAC understands the lenders in question received advance notice.[9] It is hardly a rigorous monitoring agenda.

[9] These are the themed inspections 1) on mortgage arrears charges imposed by lenders on borrowers in arrears, and 2) on the compliance of non-bank (or sub-prime) mortgage lenders relating to communications with borrowers and the appeals process, of 1 July 2011 and 21 February 2013 respectively

Although no one should seriously dispute that it is not in the best interests of borrowers to avoid dealing with an arrears problem and that there are some who persist in trying to do so, some of the language expressed in subsequent provisions (for example 20 and 25) betrays a worrying naïveté on the part of the Central Bank concerning the approach of hard-bitten institutions and their collection agents who are generally unrelenting in their pursuit of getting their money back. FLAC would have a number of questions in this regard.

- Thus, although the limit on unsolicited communications is removed, their level must be "proportionate and not excessive". How will this be gauged, by whom and when?
- These now limit-free, unsolicited communications must not be "aggressive or intimidating". Again how will an objective standard be put in place for assessing this and how will it be monitored?
- Borrowers must be given "sufficient breathing space following each unsolicited communication before further unsolicited communication is attempted". How long is this space - is it a day, a week, two weeks?
- On the question of unsolicited personal visits to a borrower's primary residence, these must only be attempted "when all other attempts at contact have failed". How will this be proved?
- Unsolicited personal visits must be preceded by at least five days' notice in writing and must take place at the latest within 15 business days. There does not seem to be a requirement for registered post here, so how is service of notice in writing to be demonstrated?

FLAC is not suggesting that all or even a majority of mortgage lenders are out to subject borrowers in arrears to harassment, or indeed that mortgage lenders do not approach this engagement constructively in many instances. However, it is the tone of this part of the revised Code that should be clearer. **There is no acknowledgement, explicit or implicit, that borrowers in arrears are often extremely vulnerable and are frequently under pressure from a variety of creditors as well as a variety of other pressures. Neither is it acknowledged that there are important issues of privacy at stake here. These matters should be acknowledged in writing in the Code.** In addition, the language must be much more assertive to send out a message to lenders **(and perhaps more importantly any debt collectors (still as of yet unregulated by the State) who may act on their behalf)** that there will be consequences for aggressive conduct and that it is aware that sharp collection practices can and do occur.

Thus, if the Bank is intent on removing limits on communications and visits in this part of the Code, it should commit itself to **regularly monitoring by inspections the action of lenders under this heading. The Code should also explicitly allow for a borrower to make a complaint to the Consumer Protection section of the Central Bank (as opposed to the FSO) that the lender has exceeded its authority in terms of communications. It should state that such a complaint may trigger an investigation under the Administrative Sanctions Procedure and that if the complaint is substantiated, penalties may follow for the lender concerned.**

In turn, **the Bank should immediately prioritise the regulation of debt collection on a statutory basis with a proper licensing system and code of conduct applying to such entities. A suitable vehicle for this, it is suggested, might be the Central Bank (Supervision and Enforcement) Bill 2011.** However, having been referred to the Select Committee on 26 October 2011, this Bill seems to have stalled. It is curious that a piece of legislation ostensibly designed to improve the regulation of financial service providers by the Bank should fail to progress in this manner.

In the absence of such provisions, FLAC is vehemently opposed to the removal of the limit of three unsolicited communications per calendar month.

8. Use of the Standard Financial Statement (SFS)

FLAC notes that the Bank refers at page 10 of the Consultation paper to contradictory views being expressed on the use of the SFS, but that it then quotes from its own consumer research to suggest that a majority of borrowers surveyed (71%) were satisfied with the overall ease of completing the SFS. There were some 143,851 mortgage accounts on principal dwelling houses in arrears at the end of 2012. The Bank interviewed 209 borrowers in arrears on their experiences with the MARP.

Our understanding from subsequent discussions with the Bank is that this was not a scientifically selected sample but a group culled from a larger sample of some 2000 interviewees assembled by IPSOS MRBI for the purposes of the Household Income Survey being conducted by the Bank's Financial Stability department (itself as yet unpublished). The interview concerning the CCMA/MARP was limited in time and scope because it formed part of a larger interview. The borrowers in arrears were customers of only three of the six pillar banks and no customers of sub-prime lenders were interviewed at all. The interview focused on outputs rather than outcomes, so for example, there is no detail provided of how the group is actually faring at this stage in terms of the sustainability of the alternative repayment arrangements they were offered or what happened to those who were not offered an arrangement. It is not planned to conduct any follow-up with the group.

Finally, the research was not published. A recent parliamentary question from the current Chairman of the Joint Oireachtas Committee on Finance and Public Expenditure, Ciaran Lynch TD asking the Minister for Finance if he would request the Governor of the Central Bank of Ireland to publish it met with a mute response. The Minister replied that:

> I have been informed by the Central Bank that, under Section 33AK of the Central Bank Act 1942, the Bank is restricted in its ability to provide information in relation to the performance of the functions of the Bank or the exercise of its powers. Therefore the Central Bank is unable to provide the information requested by the Deputy.[10]

Citing it as evidence in its Consultation Paper therefore seems a little dubious. However, taking it at face value, what we can glean about the research is not entirely comforting either. It would appear that 71% of the borrowers surveyed (148 out of the 209) entered into an alternative repayment arrangement as a result of the MARP, thus 61 did not and there is no more information about them. 80% of the 148 completed the SFS. The other 20% to our knowledge either did not recall filling out the SFS or said that they did not fill it out.

Leaving aside questions as to whether and in what form the SFS could be simplified or made easier to fill out for the borrower, a matter which MABS money advisors are in our view best qualified to provide guidance on, it is supposed to be the cornerstone of the CCMA/MARP process. The financial information on the SFS, together with other factors such as previous payment history, is the basis for the decision as to which (if any) alternative repayment arrangement should be offered to the borrower in arrears. Thus, if there is no SFS, there is no MARP process and the lender is simply not complying with the CCMA.

In the preamble to the revised code at page 3-4 nonetheless, the Bank suggests that "in recognition of the range of views expressed on the SFS since it was first published, the Central Bank is considering whether there may be

[10] For written answer, Wednesday 6 March – Reference Number: 11789/13

specific situations where full completion of the SFS is not warranted". A case in point here might be pre-arrears cases, where the borrower is not actually yet in arrears but anticipates an arrears problem developing. In this instance, the borrower may not be necessarily want or need to fill out the full SFS, and, equally, the lender may not require it in order to put an arrangement in place. However, it might otherwise be dangerous from the borrower in arrears perspective to depart from the SFS as it may permit an inconsistency of approach by the lender, arguably an unacceptable feature of the Code since it was revised in late 2010. **Simplify the SFS where it can be simplified by all means, but in FLAC's view the same statement should apply in all cases.**

Thus, Provision 29 in the revised Code which states that the lender must use the SFS to obtain financial information should provide that **a lender must only use the SFS and failure to use it in relation to a borrower in arrears or in pre-arrears will be considered to be a contravention of the Code.**

Provision 30 (b) of the Code obliging a lender to offer to assist the borrower with completing the SFS should add that "**lenders must ensure that the information contained in the SFS is accurate insofar as is possible and that any deliberate omission of information or deliberate inclusion of inaccurate information by a lender will be considered to be a breach of the Code".**

9. Reasonable living expenses

At the time of writing (April 2013), guidelines on a reasonable standard of living and reasonable living expenses to be issued by the Insolvency Service under Section 23 of the Personal Insolvency Act 2012 for the purpose of applications under that Act have been drafted but not published. However, leaks to the media have ensured that something of a furore of speculation has occurred about their suspected lack of generosity.

It is FLAC's view that some of this discussion has been taken out of context. For example, these guidelines will not specifically apply to mortgage arrears situations in and of themselves. They will apply to insolvent debtors who have applied for one or other of the three options **under the legislation only**. One of these three options – the Debt Relief Notice (DRN) – does not envisage any payments being made to the creditors concerned at all if the applicant debtor qualifies. Such is the perceived lack of financial capacity of many potential insolvent debtors, repayment proposals under the other options – the Debt Settlement Arrangement (DSA) and the Personal Insolvency Arrangement (PIA) – may in many instances constitute a small percentage of the amounts theoretically owed. Such proposals have to be voted on and accepted by a majority of creditors who will want to receive something tangible and a write-off of unsecured debt will be available for the debtor at the end of a repayment period.

Thus, such guidelines were never going to be generous and FLAC's experience of international debt settlement practice would suggest that the debtor will always pay a heavy price for the prospect of a write-off and that is living (and usually working) on a restricted income for the duration of the arrangement. Perhaps, in this regard, it is the over lengthy repayment periods – 5/6 years for a DSA, 6/7 years for a PIA – that is as great or perhaps a greater concern with the Irish legislation. The clearer the light coming from the end of the tunnel, the less difficult it may be to put up with the darkness.

In addition, one person's outrage at a restricted income may be another person's relief that at least a part of their income is protected, depending on a household's experience of the current personal debt crisis. For example, it is FLAC's experience that many households in the current crisis have felt so pressurised by their creditors, particularly mortgage lenders, they are paying an undue percentage of their household income towards their credit commitments. In many instances, this has left the household short of money for essential food, heat, light and other services, and this has subjected many to unacceptable levels of deprivation. In setting a benchmark below which the household's income for essential needs cannot go, the Insolvency Service may therefore in fact be performing something of a valuable service. It should also be remembered that these figures are only guidelines and any applicant together with his or her Personal Insolvency Practitioner (PIP) may make out a case for a higher retained income.

It is notable that neither the current nor the proposed revised CCMA addresses the question of the minimum income that the household must be allowed to retain to cover living costs, before the question of what remains to pay the mortgage (and other creditors) is addressed. Whilst FLAC is not suggesting that the Insolvency Service's guidelines be incorporated into the CCMA, given that they are only appropriate for insolvency as opposed to mortgage arrears alone, we do submit that its concept of minimum income be referenced by the Central Bank in the document and that lenders should be obliged to take cognisance of the right of borrowers in arrears to have sufficient income to meet the full range of living costs.

10. The treatment of unsecured creditors

FLAC awaits the publication of the Central Bank's 'Household income Survey' with interest and hope that it will provide detail on the span of debt being endured by the 2000 or so respondents interviewed. The absence of data on over-indebtedness in Ireland has been a major handicap in assessing the extent of the problem since the personal debt crisis began and therefore the remedial action required. However, we would suggest that a significant percentage of the 143,851 accounts in mortgage arrears also have other significant debts with unsecured creditors, as well as other secured debts in some cases. FLAC is of the plain view that all debt must be taken into account when seeking to resolve the situation of an over-indebted consumer. We would suggest that the undue emphasis put on repayment of the mortgage has been one of the weaknesses of the CCMA. Whilst we understand this emphasis perfectly well in theory – the mortgage is after all the key debt as it is secured on the roof over the household's head - in practice an over-emphasis can and does leave the household exposed at the hands of unsecured creditors to frequent debt collection, legal action and even securitisation of judgments by way of judgment mortgage on the very property the CCMA is attempting to protect. By contrast, the Personal Insolvency Act 2012 takes an all debt approach and in the design of the Personal Insolvency Arrangement (PIA), for example, will attempt to ensure that an accommodation can be reached that both secured and unsecured creditors can live with and vote in favour of.

The current CCMA does not specifically acknowledge the competing claims of unsecured creditors. The closest it would appear to come is in Provision 32 where the lender's Arrears Support Unit must base its assessment of the borrower's case on the borrower's full circumstances including his or her 'overall indebtedness' and there is no proposal in the revised Code to alter. Whilst the CCMA does not explicitly oblige the borrower in arrears to prioritise mortgage payments, in practice this has been the approach taken by many lenders in their negotiations with borrowers. This has led in some cases to impractical arrangements being put in place that may in the long run impeded the borrower's recovery and in some instances by extension the lender's prospects of ensuring the mortgage becomes sustainable.

For example, where a borrower has a Hire Purchase agreement on the vehicle that he or she uses to get to work and arrears worsen on that agreement because the mortgage is being prioritised, the vehicle may be repossessed and this may threaten the borrower's employment prospects because of difficulty getting to and from work. Or a borrower in arrears may have an outstanding balance on a credit card facility that is accumulating penal interest charges because the mortgage is being prioritised, when it might make more sense to pay off the credit card balance as a short-term priority. In addition, it is the sheer stress of having to deal with a multiplicity of creditors shouting for money that threatens the efficacy of the CCMA/MARP arrangements from the borrower's perspective. **In short, the mortgage lender may be happy that a sustainable arrangement is in place, but how sustainable is it in the context of the borrower's overall financial situation?**

Recently, there has been some tacit acknowledgement of this problem. The recent Irish Banking Federation (IBF) Protocol whereby IBF members agree to negotiate constructively with each other on write-off where one has a secured debt with a customer and another has an unsecured debt with the same customer is some evidence of this. However, the understandable adverse reaction of the Irish League of Credit Unions (ILCU) to this announcement illustrates the difficulties involved. Following this announcement, FLAC understands that the new Registrar of Credit Unions at the Central Bank has initiated discussions between the IBF and the ILCU and it will be interesting to see what becomes of these.

In summary, perhaps what is needed is a Code of Conduct on Debt Arrears rather than just on mortgage arrears. At the very least, the Central Bank should ensure that the revised CCMA addresses in a meaningful way the difficulties that multiple debt causes for a borrower in mortgage arrears and obliges the mortgage lender to take this into account. For example, a statement such as the following might act as some sort of guide:

> **'Borrowers in arrears must in principle prioritise their mortgage payments under this Code. However, it is recognised that there may be situations where it may be necessary to prioritise unsecured debts. Lenders are encouraged to adopt a flexible approach to negotiations on repayments with a view to finding the most practical way of making the mortgage sustainable and are obliged to take into account the existence of unsecured debts as set out in the Standard Financial Statement (SFS).**

11. The link between the Code and the Personal Insolvency Act 2012

The Consultation Paper states at page 8 that "this review (of the CCMA) is timely in the context of the recent enactment of the Personal Insolvency Act". It then states that "the 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".

On pages 9 and 10, it then goes on to pose two scenarios. The first is where the lender offers the borrower an alternative repayment arrangement which the borrower declines. The second is where the lender declines to offer an alternative repayment arrangement and declares the mortgage unsustainable. In the first scenario, with due regard to the borrower's right of appeal to the lender's Appeals Board (**and it should be noted, in contrast to the proposed provision in 45 (f), a right to refer the appeal to the FSO**), the Bank is proposing that the moratorium will lapse but that the borrower will be granted a 30 day window before legal action may commence to consider his/her options, including to approach a Personal Insolvency Practitioner (PIP). In the second scenario, the bank seeks views on whether the moratorium should continue to apply.

Before turning to these questions, we would suggest that the stated aim - 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 - may contain a critical flaw. **Where either the borrower declines the alternative repayment arrangement on offer, or the lender declines to offer one because the mortgage is deemed unsustainable, what are the prospects of a PIA application getting any traction with the lender, particularly if the borrower exercises his or her right of appeal under the MARP to no avail?**

According to Section 104 (1) of the Act, a PIP formulating a proposal for a PIA shall not require the debtor to dispose of his or her interest in or cease to occupy the family home, unless he or she does not wish to remain there or the PIP determines that the cost of remaining in that family home are disproportionately large (S.104 (3)). In either of these eventualities, the debtor must obtain independent legal advice before his or her interest in the family home is disposed of according to S.103 (4) (though where an insolvent debtor is to get such advice is not stated).

Notwithstanding these exceptions, a debtor proposing a PIA is likely in the main to wish to remain in his or her family home. If he or she has been through the MARP process culminating in either a declaration of unsustainability or an offer of an alternative repayment arrangement which has been declined, it is also more than likely that he or she will be looking in the PIA to propose a write down on the principal sum owed on the mortgage or at the very least a more accommodating alternative repayment arrangement than that already offered and refused.

Section 103 (2) of the Act envisages that a PIA application may be made that would seek to write down the principal sum as low as the current value of the security (or for example the current market value of the mortgaged dwelling) with the possibility of a claw-back for the lender should the property be subsequently sold by the borrower for a greater amount. Section 102 (6) provides that a PIA may include any one or more of a wide range of forbearance measures including a write down of the principal sum that essentially mirror the revised suite of alternative repayment arrangements set out in Provision 38 of the revised Code. In many ways, these are probably the most far-reaching watermark provisions in the PIA. They go where both the mortgage lenders and indeed the Central Bank have so far feared to tread – into the realm of write-down of secured (as opposed to unsecured) debt.

Thus, the application to write down the mortgage in the hope of making it sustainable can technically be made. However, it must be noted that under Section 110 of the Act at least 50% in value of voting secured creditors must approve a PIA proposal (in addition to at least 50% in value of voting unsecured creditors and 65% in value of voting creditors generally) at the creditors meeting. **If a write down or more favourable accommodation has not been offered as part of the MARP process, what realistic chance is there that a mortgage lender will change its mind on the issue and vote in favour of the proposal?** We would also suggest that in a significant majority of cases, the mortgage debt will be the only secured debt and therefore the mortgage lender will have an effective veto on the proposal.

We would submit therefore on the basis of this analysis that the process of transition from MARP to PIA is likely to be far from smooth and that on the contrary, unless the mortgage lender undergoes something of a Pauline conversion, the PIA is unlikely to be of assistance to borrowers in arrears who have exhausted the MARP process.

This then begs a bigger question. Why would a borrower in arrears with his or her mortgage who also has other debts in difficulty (unsecured or secured or both) go through the MARP process in its entirety before applying for a PIA, when he or she may risk painting themselves into a corner? In this regard, Section 91 (1) (g) of the Act suggests that a debtor will not be eligible to make a proposal for a PIA unless (amongst other qualifying conditions) he or she has:

> made a declaration in writing declaring that he or she has co-operated for a period of at least 6 months with his or her creditors who are secured creditors as respects the debtor's principal private residence in accordance with any process relating to mortgage arrears operated by the secured creditors concerned which has been approved or required by the Central Bank of Ireland and which process relates to the secured debt concerned and that notwithstanding such co-

operation the debtor has not been able to agree an alternative repayment arrangement with the secured creditor concerned, or that the secured creditor has confirmed to the debtor in writing the unwillingness of that secured creditor to enter into an alternative repayment arrangement.

So if a borrower can show at least six months co-operation under the CCMA/MARP but notwithstanding this, he or she has not been able to agree an acceptable alternative repayment arrangement or none has been offered, an application for a PIA may be made (assuming the other criteria are met). How many of the holders of the 143,851mortgage accounts in arrears are currently in a position to meet this criterion, for example, those who have been paying interest only for at least six months. We would suggest that this may amount to a sizeable number. **In summary, the choreography between the CCMA/MARP and the PIA may not be as well thought out as may have been suggested. It is conceivable that borrowers will short circuit the CCMA/MARP and go straight to a PIA application.**

Returning then to the two scenarios set out on pages 9 and 10 of the Consultation Paper:

On the first question, we would suggest firstly that a 30 day bar on the lender taking legal action is too short a window for the borrower to consult a PIP with a view to making a PIA application. We would also suggest that the Code would need to specify at what point any expanded time limit (for example 60 days) would stop running, for example, where a PIP set out in writing that he or she had agreed to take on the debtor's case with a view to making an application under the legislation. **In addition, however, we also fail to see why a borrower who has declined an alternative repayment arrangement proposed by a lender should automatically lose the protection of the 12 month moratorium period, especially given that it is questionable as of now whether the Code allows for a full and proper appeal to an independent third party on the question of what is or is not a sustainable payment arrangement.** The arrangement in question may not be sustainable from the borrower's perspective and that position may be perfectly valid, even though the lender's appeals board upholds its Arrears Support Unit's decision.

On the second question, similarly, there is no reason in our view why the borrower should lose the benefit of what remains of the 12 month moratorium because the lender has deemed the mortgage to be unsustainable, again in the absence of a full and proper appeal to an independent third party on the question of what is or is not a sustainable payment arrangement.

Finally, related to this issue, we note the recent publication by the Government of the Land and Conveyancing Law Reform Bill 2013. Apart from reversing the effects of the Dunne judgment as already outlined, this Bill also purports to empower a Court (presumably Circuit or High Court) to adjourn any proceedings for the potential repossession of a principal private residence for up to two months (with a possibility of an extension) to allow the mortgagor (or borrower) to consult with a Personal Insolvency Practitioner with a view to making a proposal for a PIA. **Although it is conceivable that this may be of assistance in cases where the borrower has exhausted the CCMA/MARP process but has not considered the PIA option, it is notable that the court has no power to review any subsequent veto of any PIA application that might follow. It is also worth noting that this Bill does not take the opportunity to provide on a statutory basis that a lender must show the court that it has adhered to the CCMA/MARP rules before an application for a Possession Order can proceed.**

12. Reviews of alternative repayment arrangements

Provision 43 of the revised Code proposes to allow for the classification of alternative repayment arrangements into short term, medium term and long term. It provides that as part of the review process, the lender must check with the borrower whether there has been any change in circumstances since the arrangement was put in place. The Consultation document in turn at page 12 suggests that because the Code already has an in-built mechanism for automatic review when the borrower ceases to adhere to the terms of the arrangement or when the arrangement is due to come to an end, formal reviews will "mainly capture cases where a borrower's circumstances improve".

However, the Code is silent on how improvements in circumstances might be treated and this has the potential to be a very vexed question. For example, a borrower may be offered a split mortgage over 25 years as an alternative repayment arrangement and may agree to it but may feel that the arrangement is very restrictive in terms of the financial room for manoeuvre it provides. Should that borrower's financial position improve, it is likely that he or she may wish to retain at least some of that improvement to take some of the financial stricture away, which in turn may serve to continue to motivate him or her to seek to continue such improvements.

It is worth noting that the Personal Insolvency Act 2012 anticipates this issue and provides for it. For example, Section 82 (3) provides in relation to the variation of a Debt Settlement Arrangement (DSA) and Section 119 (3) in relation to a variation of Personal Insolvency Arrangement that **'a debtor shall be considered to be acting reasonably where the debtor refuses to consent to a variation of a DSA/PIA where that variation would require the debtor to make additional payments in excess of 50% of the increase in his or her income available to him or her** after (relevant) deductions are made. Similarly, a notional 50% threshold applies in principle to the amount of the value of any property acquired by the debtor (for example any inheritance) that may be taken by creditors after the DSA/PIA comes into operation.

Although the Central Bank may not wish to be as prescriptive as this in the revised CCMA, Provision 43 should be revised to suggest that in the event of the borrower's financial circumstances improving, that the borrower shall be entitled to retain a portion of that improvement for his or her own use and that of his or her dependants.

13. Tracker mortgages

Provision 12 (d) of the current code basically prohibits a lender from moving a borrower in arrears off an existing tracker mortgage to another mortgage type. However, the Consultation Paper at page 4 suggests that the Bank is considering whether there is merit in allowing a lender to move a borrower in arrears off a tracker rate where an alternative arrangement which is advantageous to the borrower is offered (and presumably accepted) by the borrower, such as a debt write off.

Our understanding is that the Troika have expressed considerable concern at the prevalence of tracker mortgages in Ireland where the borrower is in arrears but is nonetheless entitled to maintain the tracker provided he or she is co-operating under the CCMA/MARP, citing the costs to the lenders and the taxpayer involved. However, we also understand that the Minister for Finance has resisted suggestions that there should be any forced changes in this area and perhaps with good reason. Only today (April 9), the *Irish Independent* carries a story suggesting that Bank of Ireland has been carrying out research on ways to get homeowners to give up their valuable tracker mortgages and that this revelation has provoked a storm of protest, with the bank being accused of "dirty tricks". Clearly this illustrates the potential value to any mortgage lender of engineering these switches.

Perhaps this story also indicates in a timely manner the danger of amending the Code in this context. In the absence of a third party that would properly and objectively assess whether the borrower got sufficient value for giving up their tracker, there is a serious danger that a customer in arrears and already under considerable

pressure and stress would be coerced into giving up their rate. It is clear that the only scenario where this could possibly be justified is in the event of a write-off. But how big a write off of principal would there have to be for it to be fair to the borrower? And if what notionally looked like a write off actually led to the payment of far larger amounts on interest over the remaining term of the mortgage in the long run and therefore a greater amount of money on the mortgage as a whole, this would not be a concession to a borrower in arrears but rather would amount to his or her exploitation. **We would therefore be opposed to any change in the Code in this regard.**

14. Assistance for borrowers in arrears

By any rational measurement, the landscape for indebted people in Ireland has become fraught not just with ever present stress and uncertainty, but also with an increasing complex legislative and regulatory labyrinth to navigate. In a matter of months, it is increasingly likely that four major events that will have a profound effect on household indebtedness will converge. These are:

- A fundamental overhaul of the CCMA/MARP rules and procedures concerning the processing of arrears cases by mortgage lenders;
- The roll out of the requirements on lenders to meet Mortgage Arrears Resolution Targets (MART) set by the Central Bank in terms of proposed sustainable solutions for mortgage holders in arrears (which includes repossession or voluntary sale where an agreement could not be reached or is not appropriate);
- The passage of the Land and Conveyancing Law Reform Bill 2013 to facilitate the swifter repossession of family homes;
- The roll out of the Personal Insolvency Act 2012 to potentially allow insolvent debtors to resolve their indebtedness without recourse to bankruptcy.

This submission has already called into question how successfully these initiatives knit into each other. Other FLAC submissions have called into question the potential effectiveness of the Personal Insolvency Act 2012. However, what is clear is that the State, after years of inaction and spurred on by the Troika, now intends to act to 'resolve' the mortgage debt crisis.

One matter of vital importance is missing from this jigsaw. Where are borrowers in arrears to obtain the ongoing financial, debt and legal advice from the State that they require to negotiate on some kind of level playing field with their creditors and to make sustainable and workable decisions for them and their dependants?

FLAC receives a significant number of calls daily from mortgage holders in difficulty and many also seek advice from our legal advice centres, a number of whom are struggling alone to deal with increasingly complex financial and legal situations. Other non-governmental organisations such as New Beginning, the Irish Mortgage Holders Organisation, Threshold, the Phoenix Project and others also do their utmost to provide debtors with varying types of assistance, from similarly limited resources.

We believe that **there is a serious imbalance of power here.** This was even acknowledged by Minister for Finance, Michael Noonan TD on 13 March 2013 at the press conference to announce the Mortgage Arrears Resolution Targets plan, when he made reference to the need to "even up" that balance. Lenders have geared up for these developments and have staff dedicated to this work. Borrowers on the other hand are unlikely to be able to afford to pay for legal advice privately.

Many will thankfully have the support of the state funded Money Advice and Budgeting Service (MABS). However, this is a service under huge pressure of demand and it cannot possibly deliver on the remit expected of it with its current resources. Indeed, an example of the misunderstanding of its remit is evident in Provision 27 (d) of the revised Code wherein a lender, prior to classifying a borrower as not co-operating, must include a statement "that the borrower may wish to seek appropriate legal and/or financial advice, for example from MABS"**.** Although highly skilled at debt negotiation and income maximisation, most money advisors would not purport to specifically provide either legal or financial advice in the strict sense of the words.

In theory, people in arrears potentially facing repossession may also be entitled to legal aid from the state funded Legal Aid Board. However, many debtors may have incomes that exceed the threshold (allowances are strict) and even if they do qualify, they will go to the end of the list. At the end of January 2013, only 2 of the Board's 29 Law Centres had waiting times for an appointment of less than four months and waiting times in some centres were up to 13 months for a first appointment. Realistically therefore, civil legal aid is not an option either as people cannot wait that long for assistance.

Other options for borrowers include the Mortgage Arrears Information Helpline announced by the Citizens Information Board in July, 2012. This helpline operates in conjunction with the *keepingyourhome.ie* website but arguably does not have the necessary legal and financial experience to deal with complex cases. The National Consumer Agency also provides useful information on financial and debt issues but does not have a specific advocacy role. Finally, there is the potential availability of free independent professional financial advice to borrowers in mortgage distress announced by the Minister for Social Protection, Joan Burton, TD in September, 2012. However, this scheme is very limited in that borrowers can only access it after a proposal for a long term sustainable arrangement has been made by the lender. The advice given by any accountant on the relevant panel is at best limited to explaining the proposal made by the lender and its consequences for the borrower. There is no ongoing support available to initiate, conduct and conclude negotiations.

As we enter a new and potentially far reaching phase of the personal debt crisis with the prospect of repossessions and the loss of family homes, it is perhaps worth noting what the government's own Inter-Departmental Mortgage Arrears Working Group (or Keane Group) had to say in its report on the issue of more specific support and advice for borrowers in arrears with their mortgages[11]. Its recommendations may be summarised as follows:

- The group recommended the establishment of a mortgage support and advice function;
- It did not believe that MABS was structured or resourced to provide this service;
- It was safe to assume that 100 independent advisors would be needed <u>at first;</u> (our emphasis added)
- The skills required would included financial, accounting and legal;
- The new advisors should operate in three to four regional clusters;
- These clusters should be linked to MABS offices, could legally be a part of MABS but would not have to be, but would have to have a link to the MABS network for referral purposes.

Against what was considered at the time by many to be a limited template, it is clear that what has been provided by the State since falls lamentably short. MABS is the obvious body to which a more specialist support service in the area of mortgage arrears should be attached.

In addition, the Legal Aid Board is similarly situated country wide, with a wide legal expertise. Therefore substantially increased resources could be made available to MABS and the Legal Aid Board to meet this need.

[11] 30 September 2011.

An alternative solution is to build on an existing scheme and require lenders to make suitable financial assistance available to all those engaged in negotiations with their lenders under the MARP by covering the reasonable fees of all licensed accountancy and legal practitioners. With ongoing financial, legal and debt advice for borrowers to help in negotiations, proposals for so called sustainable arrangements may indeed become sustainable. Without it, many borrowers in arrears are terribly exposed.

We thank the Central Bank for the opportunity to make this submission and hope it will prove useful in revising the Code.

FLAC, 9 April 2013.