Irish Mortgage Holders Organisation

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Not for profit organisation.

Submission on the review of code of conduct on mortgage arrears consultation paper CP 63

Irish Mortgage Holders Organisation, April 9th 2013.

Attention: Mr. Bernard Sherridan, Central Bank of Ireland.

Dear Mr Sheridan,

We would like to thank you and your team for meeting us recently about issues and concerns we have at the treatment by banks of Mortgage Holders.

We are very concerned by the statements made by Mr. Elderfield at the launch of the "targets" (set by government and the Central Bank) for banks, with respect to dealing with those in arrears as well as comments surrounding the changing of the Code Of Conduct on mortgage arrears to allow banks to take swifter action against mortgage holders.

It is our view that the process of mortgages arrears resolution is being facilitated in an unsupervised and unstructured way, without due regard to the need for transparency and openness which would be consistent with the best practices for arrears resolution and consumer protection. The process – as outlined to-date – leaves the mortgagees fully exposed to banks putting their own objectives and strategies ahead of the needs of the Irish economy, society and borrowers, and provides a large deficit in consumer protection.

We would like to make the following specific points regarding the review of the code of conduct on mortgage arrears notwithstanding the fact that it may already be predetermined as demonstrated by Mr. Elderfield's comments as referenced above.

Legal standing:
In the first instance and reluctantly we have to raise the issue of the legality of the Code Of Conduct. This issue has been discussed behind closed doors for some time now and it is an issue of the utmost importance as the legal status of the code of conduct on mortgage arrears is by no means certain. We wish to reaffirm our concerns about the legality of the code which we expressed originally in our email to Governor Honohan last month.

A number of recent high court cases refer to this issue including Irish Life and Permanent v Duff where Justice Hogan raised "the somewhat troublesome issue of the precise legal status of the code of conduct". Justice Hogan followed recent high court precedent in the Fitzell case and warned
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'.

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. The Code 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 and 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 conduct of and helps to define its regulatory relationship with financial service providers, but it is not one that a consumer as a borrower has any involvement in. This we believe is a matter of extreme urgency that needs addressing.

Right of Appeal:

Section 49 & 52 as proposed allows for a lender to have 3 senior staff act as an appeals board. This is completely unacceptable and allows for no independent oversight. The appeal process must be fully detached from the banks or banking sector representative institutions and vested with an independent authority acting to protect the interests of all parties involved in a dispute. The process must be made explicitly transparent and any asymmetries in representation during the dispute that may arise due to (a) nature of the processes that lead to the appeal, and (b) resources available to the parties prior to and during the appeal should be removed. In practical terms, this requires provisioning for the independent and fully funded counsel for borrowers who cannot afford such professional help, and an appeals board that is fully operationally and membership-wise independent from both borrowers and lenders.

Moratorium:

The proposed and current code is flawed in not being prescriptive in defining the periods of time over which the moratorium clock is ticking. No time is given for gathering of financial information or indeed an exchange of offers between the lender and the borrower. This will become a significant issue when the legislation is introduced to reverse the Dunne Judgement, which will lead to a significant rise in repossession applications. Lenders can initiate delays in corresponding with borrowers, as they have done on many occasions to-date, and such periods of delays will account for time eaten into a moratorium period. Borrowers, however, are not accorded similar powers. Again in the absence of prescriptive process and recording of times borrowers can be seriously and unfairly disadvantaged by losing time that is taken off them ahead of potential repossession proceedings.

Provision 37 proposes
'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'.

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Unsolicited Contact by Lenders with Borrowers:

The Central Bank "themed inspections" as to the banks adherence to the previous rule of no more that 3 unsolicited contacts in one month was typical of light touch supervision. The lenders seem to have had significant influence in this proposal and the Central Bank seem to have accepted the industry's lobby position on this. In addition the Central Bank gave advance notice to banks before their "inspection".

'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'.

There are no provisions for the engagement with mortgage holders in this feedback system. Similarly, there are no explicit, transparent and enforceable provisions to ensure that lenders engagements with the borrowers will be "proportionate and not excessive". There are no data disclosure provisions relating to inspections and any remediation measures applied to institutions violating code of conduct.

The new unlimited contacts must not be "aggressive or intimidating". Once again, how is it proposed to ensure this will be the case? How will it be proven that all attempts to contact the borrower have been made and that these attempts have been made within the confines of the Code-permitted procedures?

The removal of this limited protection of mortgage holders is a significant regressive step in consumer protection and has left the borrowers unprotected against potential abuses by the banks.

Debt collectors acting on behalf of lenders are still unregulated within the existent structure and under the proposed code. How does this code cover their activities or can they adopt any means they deem appropriate to recover monies?

The Central Bank will have failed to provide symmetric protection of the interests of the borrowers and the lenders unless it allows for explicit, enforceable and transparent safeguards to protect many vulnerable people who are in arrears and will be set upon by lenders who have been given a free rein.

Unsustainability:

Many actions taken by the bank to repossess property are predicated on a decision by a lender that a loan underlying the property is unsustainable. The Code should include prescriptive rules defining what is sustainable and what is not sustainable. This may involve some sort of expenditure guidelines. These rules and guidelines should be transparent, public, enforceable and compulsory for all banks, and applicable to all borrowers.

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Trackers:

It is vital that provision 12 (d) is not changed unless there is a clear system for borrowers to seek advice to ensure that any removal off a tracker is of benefit to the borrower. Such advice should be delivered on a professional basis and borrowers in need of funding for procuring such advice should have access to such funding. Page 4 of the consultation paper suggests that the removal off a tracker might have merit if in the interest of the borrower. This determination cannot be solely in the remit of the lender nor can it be left subject to the appeal system that incorporates explicit conflict of interest between the appeals process and the bank interests per note above.

Engagement:

Our experience, confirmed by the experience of other organisations working on behalf of the borrowers in distress, is that lenders do not respond in a timely manner to borrowers proposals or engagements, which is unacceptable. What happens to a lender who does not engage, who does the borrower appeal or complain to, other than the bank, which is alleged to engage in the abuse of the system?

Engagement by lenders with borrowers can be painfully slow, tedious and difficult leaving the borrower exhausted, their financial resources significantly reduced and without a resolution. There needs to be a clear code of conduct enforcement by the central bank on lenders for their behaviour and engagement and such enforcement should be transparent, effective, verifiable and not based on an ad hoc system of inspections, criteria and judgements.

Borrower representation and advice:

Even in normally functioning bankruptcy regimes around the world, those in debt are at a significant disadvantage compared to the might of creditors. They face corporate strength and power that can crush any debtor financially, emotionally, socially and psychologically. Observed by passive regulators, as in Ireland, compounded by the insolvency regime that is both under the current statutes and in its 'reformed' reincarnation nothing short of draconian, leaves the debtor in great peril.

When this financial crisis happened it was the citizen who suffered where the regulated entities and regulators enjoyed protected pay, conditions and functionality. Now, the very same citizen is facing the immense power of the state backing the already significant powers of the banks when it comes to the personal debts.

Bankers have a Banking Federation that represents them. Bankers are also availing of the weaknesses in the Irish competition laws to sustain and even consolidate their market powers at the expense of the taxpayers. They discuss issues and present their views publicly and to the government rather effectively and are assisted by a receptive media. They tend to be in sync with government announcements and findings and have direct access to the Social Partnership process and all other avenues of policy formation.

Debtors lack any statutory or institutional power. They need assistance and protection, care and support. This is best achieved by a coming together of advocates and organisations that provide services and assistance to debtors. Organisations and bodies such as MABS, The Irish Mortgage Holders Organisation, Flac, Phoenix Project and others are providing exceptionally effective and professional services to debtors usually on the basis of voluntary engagement of experts and ordinary citizens, and in the majority of cases, with no cost to the state. These and other organisations have a combined knowledge, experience and passion of their volunteers to help those is debt.

Mabs has been effectively assisting debtors for the last few decades and they have experience and a national foot print from where services and supports could be head quartered.

Yet, even with these organisations behind them, Irish debtors do not have the resources needed to deal with aggressive and disruptive creditors.

With many commentators and practitioners expressing concerns and uncertainty as to how the new personal insolvency act will work there is a need to address the imbalance that exists today between debtors and lenders, as well as prevent the exacerbation of this imbalance threatened by the new legislation.

The New Insolvency regime will add additional hurdles for debtors, allowing vultures prey on the hundreds of thousands of households saddled with excessive debts, while providing little certainty to the debtor or any chances for a renewal to the economy.

Successive governments have chosen to ignore the one constant support debtors have had which is Mabs, in favour of diluting their effectiveness and giving banks and creditors a strengthened hand. Successive governments have also opted to ignore all other organisations currently working on the frontlines of the debt crisis. Despite the governments' best efforts these organisations continued to offer a better balance and chance for debtors to be represented and protected effectively.

These organisations deserve to be recognised as the de facto debtors' representatives and be allowed to fund professional provision of services to debtors by linking arrears and insolvency resolution savings delivered to the economy at large via their efforts to the resources available to them to achieve such savings.

The insolvency bill raises a serious question of how those deeply in debt will be able to afford professional representation to assist them deal with their debt in favour of those with cash flow who can avail of professional services. This will promote a two tiered system leaving the most vulnerable to fend for themselves in unchartered waters full of predatory creditors and commercial service providers.

What would be helpful to debtors in the years ahead would be a number of organisations that compete to provide a full suite of services to debtors including legal, financial, negotiation, mental health, conveyancing and creditor payment services. These organisations should be modelled around Mabs, with Mabs established on a stand alone basis with an independent Board filled with experienced directors. A Board with a strategic plan that addresses the needs of debtors in the years to come.

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Mabs is currently funded from the department of social protection to the tune of EUR18,5 million per annum. This funding could be directed towards the new organisation and additional funding could be raised by charging creditors as is done in many other jurisdictions. Many consumer credit counselling services agree voluntary payment arrangements with creditors on behalf of debtors and facilitate the cash transactions for a fee. A truly independent and well-resourced Mabs can act as a coordinator and supervisor over other organisations that compete with each other for representation of debtors in the process of developing systemic resolution to the debtor arrears or insolvency.

Given the disproportionate powers granted to the banks by the new legislation, existent debtors'-representing organisations will undoubtedly try their best to help but they are not adequately funded to achieve significant scale and scope of their operations to fully function as representatives of families and people in difficulty. Indeed, majority of them are not funded at all. There is an urgent need to consolidate these organisations' efforts, provide them with proper supervision and supports, and allow them to raise resources to deliver meaningful and effective change.

Yours sincerely,

David Hall
Dr. Constantin Gurdgiev

Directors
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Dublin, Ireland
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