

Appendix 1: BPFi response to Questions 1-8 of CP91

April 2015

Question 1: Do you have comments on the attached draft regulations? In your response, please quote the number of the specific provision(s) which give rise to your concerns and, if possible, suggest alternative drafting or solutions.

BPFI has set out a number of specific amendments and comments on the proposed regulations in the appended document. Please see attached Appendix 2.

Further to the points raised in Appendix 2, BPFI would like to highlight the key concerns of the sector regarding the proposed Regulations as follows:

BPFI - Key Sector Concerns

1. **Extension of smaller enterprise protections to all SMEs** - Given the nature of the Irish market, it is not appropriate to extend the protections granted to smaller enterprises under the existing SME Code to all SMEs (which employ fewer than 250 employees and which have a turnover less than €50 million and/or an annual balance sheet not exceeding €43 million). Entities with this level of turnover and employees are usually highly sophisticated and financially astute and therefore, we believe there is no merit in extending the protections granted to smaller enterprises to all SMEs.
2. **Legal Protections** - The proposed Regulations must not restrict lenders ability to act to protect/realise their security by placing overly restrictive and lengthy processes on them that are not applied to other creditors, for example trade suppliers. The proposed Regulations must take into account the nature of the underlying entities and not add additional bureaucratic constraints. BPFI requests the reinsertion into the Regulations of the following text from the existing SME Code:

“Nothing in these Regulations prohibits a lender from acting with all necessary speed:

- a) where in the circumstances of the case it is necessary to initiate a liquidation, receivership, examinership or similar insolvency event or where another lender or other third parties initiate such actions;*
- b) where it is necessary in order for a lender to protect its legitimate commercial interests; or*
- c) where there is reasonable evidence of fraud, terrorist connections, money laundering, terrorist connections and/or misrepresentation,*

and the provisions of these Regulations are without prejudice to a lender’s regulatory and/or legal obligations and legal rights to enforce any agreement including any security taken in connection with any agreement.”

3. **Lending Criteria** - Nothing in the proposed Regulations should impact on the ability of each lender to set their own lending criteria, risk appetite and terms around provision of security/guarantees. In addition, guarantees operate differently in business lending than in consumer lending and some provisions of the proposed Regulations, particularly Regulation

12 (4), relating to guarantors are deemed onerous in that context.

4. **On-Line fulfilment and evolving business models** - The proposed Regulations must take into account that banks and SMEs are embracing online service fulfilment, and banks have adopted (and continue to evolve) new business models to reflect customer needs. This is particularly relevant in the context of lending and customer engagements, where online fulfilment will streamline processes and provide flexibility to SMEs.

We advocate that there should not be a requirement to appoint an individual with responsibility for provision of credit, arrears and financial difficulties in each office of the lender which is concerned with lending activity, as provided for under Regulation 6 (1), as this impinges evolving business models, which are designed around the needs of SMEs.

5. **Appeals** - Further to point 3 above, the standard Terms & Conditions which make up part of every lending agreement and apply to all SME customers are integral to the product offering and form a key part of the lending process. SME customers are entitled to appeal bespoke terms and condition of sanction which are particular to them. However, in the interest of fairness to all SME customers and being mindful of prudential lending standards, standard Terms & Conditions should not be subject to potential appeal as might be implied by the proposed Regulations.
6. **Reasons for Decline** - Standardised decline letters are used by banks to facilitate a meaningful response to customers within a tight timeframe. Customisation of decline responses on a case-by-case basis would be impractical, cause significant technology issues and would serve only to extend the timeframe in which banks can respond to customers.

As the CBI will be aware, two member banks revisited the standard list of reasons for decline and the language used in October last year. The revised list of decline reasons was submitted to the CBI by the relevant banks in November 2014 and the banks in question have proceeded to implement the system changes to reflect the enhanced standard of language used in setting out the reasons for a decline. We assume that compliance by other banks with the standard reasons for decline, as submitted to the CBI last year, is sufficient in the case of communicating a decline.

7. **Arrears** - BPFi is of the view that, as currently drafted, the requirements of Regulation 14 (2) are particularly concerning and are unnecessary from both a borrower and lender perspective. The proposed operative timeframes as set out in Regulation 14 (2) will potentially bring into scope arrears cases which are temporary in nature. For example, SMEs may have temporary cash flow problems which could be rectified on day 11; however, the proposed Regulations would require a formal engagement with the SME at this point, which may be intrusive from the SME's perspective.

We would request that Regulation 14 (2) aligns the process for overdrafts and arrears on other types of accounts. The 10 day timeframe should only apply to overdrafts (i.e., already in excess for 30 days), with the 40 day timeframe applicable to other accounts. We also request that Regulation 14 (2) (c) and Regulation 14 (3) are deleted, as it would be too early at this stage in the arrears process to determine whether the customer is in financial difficulties and would be unfair to the customer to try to conduct such an assessment.

8. **Communication with Borrowers in Financial Difficulties** - Member banks are committed to ensuring that when contacting a borrower in financial difficulties that all contact is

proportionate, not excessive, never aggressive or intimidating. Our understanding is that an overarching communications policy which each lender must have in place, as opposed to any individually negotiated communications plan with the borrower, is the optimum way to achieve this. An overarching communications policy ensures a transparent and standard approach for all borrowers, promoting fairness, which can be easily measured.

As currently drafted, the proposed Regulations might imply that lenders are required to agree individual communication plans with borrowers in difficulties. An individually agreed communications plan would be hugely impractical and difficult to implement from both a borrower and lender perspective. It is likely to be problematic to gain agreement between both parties on what constitutes “appropriate” timeframes for communication. This could lead to delays in the agreement of an alternative repayment arrangement and consequently, increased arrears for the borrower. On this basis, we request the CBI to revisit the wording of proposed Regulation 17.

9. **Unnecessary costs for SME customers** - As currently drafted, elements of proposed Regulation 12 (Security) may cause unnecessary costs for SME customers. In particular, it would not be in the best interest of the SME if lenders are required to release security where credit has been repaid (in the absence of a request from the borrower to release same) and where the use of prescribed warning statements might give rise to questions in so far as they relate to “all sums” guarantees.
10. **Implementation Timeframes** - The proposed changes outlined in the revised Regulations will require significant changes to procedures and processes and, critically, will also require IT change for certain provisions.

Based on the experience of our member banks in relation to the implementation of previous codes, it is imperative that member banks are provided adequate time to make appropriate system changes which focus on customer-centric solutions as opposed to meeting the implementation deadline. In this regard, the CBI must be mindful to afford member banks sufficient time to allow for controlled assessment and implementation of the changes presented, to ensure that they are robust and effective.

Also, the revised Companies Act legislation, due for implementation in 2015, will impact on the business community’s ability to absorb the proposed Regulations, and financial institutions ability to implement same. We would request that cognisance is taken of this parallel legislative change, with regard to the implementation timeframes afforded for the proposed Regulations from the date of their publication.

Question 2: Are there specific areas that you feel should be expanded on? If so, please provide details and if possible, drafting suggestions or proposed solutions.

BPFI does not have any suggestions for specific areas of the proposed Regulations that should be expanded on.

Question 3: Do you have any suggestions for further reform e.g., are there any gaps or areas omitted from the protections proposed? If so, please set out your proposals.

Legal Protections afforded to Lenders

With regard to areas omitted from the protections proposed, BPFi requests that the CBI reinsert the text below from the existing SME Code to ensure lenders are afforded certain protections under the proposed Regulations:

Nothing in these Regulations prohibits a lender from acting with all necessary speed:

- a) where in the circumstances of the case it is necessary to initiate a liquidation, receivership, examinership or similar insolvency event or where another lender or other third parties initiate such actions;*
- b) where it is necessary in order for a lender to protect its legitimate commercial interests; or*
- c) where there is reasonable evidence of fraud, terrorist connections, money laundering, terrorist connections and/or misrepresentation, and the provisions of these Regulations are without prejudice to a lender's regulatory and/or legal obligations and legal rights to enforce any agreement including any security taken in connection with any agreement*

The onus placed on lenders by the Regulations to follow an overly prescriptive approach is based on the assumption that the borrower is acting in accordance with lending agreements throughout the process.

In addition, SMEs also typically have a number of creditors, of which a lending institution would only be one. The fact that the proposed Regulations would not apply to other creditors means those other creditors would be able to act freely and without imposition of the proposed Regulations, with the ability to call in any debts owed while a lender would be engaged in an overly prescriptive and lengthy process as set out in the proposed Regulations. BPFi believes that this significant consequence should be addressed.

Emerging Operating Models

It is the BPFi's view that the proposed SME Regulations do not make sufficient allowance for online SME credit applications and do not contain guidance as to how compliance with the various elements of the proposed Regulations can be achieved in the online environment. As member banks are experiencing a move by more and more SME customers to online platforms for credit applications, BPFi believes that the proposed Regulations should recognise this channel in addition to the traditional channels.

Further to such considerations in the context of credit applications, the approach to communication between SME customers and lenders is also changing. More and more, communication with borrowers is moving from traditional methods to more technology-based methods. For example, many banks now communicate with SME customers by tele- or video conferencing and many customer meetings are effectively carried out using these methods in order to facilitate the evolving needs of SMEs.

The proposed Regulations therefore need to be consistent in application/scope, regardless of the channel used by customers, and need to be future-proofed; otherwise, the proposed Regulations risk restricting developments in the digital banking space, which would be to the disadvantage of

SME customers. The move to a digital environment is also a key business objective of lenders and absent allowances for such, the proposed Regulations will serve to hamper the emerging operating models in this space, to a large extent being influenced by customer behaviour and demand, for the various SME banks.

Question 4: Do you agree that SMEs dealing with credit unions should have the same level of protections as when dealing with other lenders? If you do not agree, please outline the reasons why.

BPFI believes that SMEs dealing with credit unions should have the same level of protections as when dealing with other lenders. BPFI is supportive of the inclusion of credit unions, and consideration for inclusion of other relevant entities, within the scope of the SME Regulations to ensure a level playing field amongst all lenders to the SME market.

Question 5: Do you agree that the “Smaller Enterprises” provisions in the current SME Code should be extended to all SMEs? If not, please set out the reasons why.

Given the nature of the Irish market, it is not appropriate to extend the protections granted to smaller enterprises under the existing SME Code to all SMEs (which employ fewer than 250 employees and which have a turnover less than €50 million and/or an annual balance sheet not exceeding €43 million). Entities with this level of turnover and employees are usually highly sophisticated and financially astute and therefore, we believe there is no merit in extending the protections granted to smaller enterprises to all SMEs.

BPFI does not agree that the “Smaller Enterprises” provisions in the current SME Code should be extended to all SMEs.

It is noted that the proposed Regulations extend the protections granted to smaller enterprises to all SMEs by using a uniform “EU definition” of SMEs in contrast with the existing SME Code, which also includes the definition for “smaller enterprises”. The broad application of the EU definition means larger business and corporate clients captured within the scope of the proposed Regulations will be afforded the same protections as smaller enterprises. The uniform application of the EU definition is more appropriate to the larger markets of other European countries and raises the question regarding the intention of the CBI about the cohort of businesses it is trying to protect with the proposed Regulations. The partial review of the SME Code in 2012 incorporated the definition of “smaller enterprises” for this very reason with the aim of protecting less sophisticated SMEs in their financial dealings with lenders. The proposed Regulations, by suggesting the same protections for all types of enterprises/SMEs, gives unnecessary protection to a sophisticated cohort of businesses and brings administrative challenges for lenders in applying such Regulations.

The vast majority of Irish SMEs are captured by the definition of “smaller enterprises”, which is the same cohort defined as (non-personal) “consumers” in the Consumer Protection Code (CPC). It is worth noting that the majority (90%) of Irish SMEs have 10 employees or less. As a result, practical implementation of the application of the proposed EU definition will be challenging and anticipated issues that will likely emerge will be driven by the scope or the size of SMEs captured by the Regulations. BPFI would therefore request the CBI consider the use of the definition used in the CPC (extract below) rather than the EU definition as proposed.

“consumer” means any of the following:

- a. a **person** or **group of persons**, but not an incorporated body with an annual turnover in excess of €3 million in the previous financial year (for the avoidance of doubt a group of **persons** includes partnerships and other unincorporated bodies such as clubs, charities and trusts, not consisting entirely of bodies corporate) or*
- b. incorporated bodies having an annual turnover of €3 million or less in the previous financial year (provided that such body shall not be a member of a **group** of companies having a combined turnover greater than the said €3 million);*

and includes where appropriate, a potential ‘consumer’ (within the meaning above);

Question 6: Do you agree that business credit cards should be included in the scope of the regulations that are proposed to replace the SME Code for all SMEs? Please explain why you think this approach is appropriate. If you do not agree, please set out the reasons why.

BPFI believes that business credit cards should be excluded from the scope of the proposed Regulations.

Business credit cards are not considered a lending product, but rather a cash flow management tool for businesses. The primary focus of the Code is the provision of credit to SMEs. In a business context, credit cards are utilised as a payment channel and are settled each month in full by means of direct debit without incurring interest. As a result, BPFI is of the view that commercial credit cards are not a form of credit and therefore, should be excluded. In addition, if a balance is not cleared in its entirety then, under the Regulations, a lender would be required to enter into an arrears/financial difficulties process with the borrower. This would be inappropriate and unnecessary in the context of business credit cards.

Question 7: Do you agree that multi-lender credit, including syndicated, club or other multi-lender transactions, and special purpose vehicles should continue to be excluded from the scope of the regulations? If so, please provide the reasons for your view. If you do not agree, please set out the types of multi-lender credit or special purpose vehicles you think should be included and explain why the protections proposed would be appropriate or necessary for these borrowers.

BPFI supports the continued exclusion of syndicated, clubs or multi-lender transactions and special purpose vehicles from the scope of the proposed Regulations, owing to their sophistication in comparison to typical SMEs.

Question 8: Do you agree that the introduction of a concept of “not co-operating” is useful in an SME context? If so, do you have any comments on the proposed revisions?

The introduction of a concept of “not co-operating” in an SME context is a complex matter, given the notable differences between SME customers and personal customers. As such, it warrants further careful consideration and BPFI would welcome the opportunity to discuss the matter with the CBI in early course.