



national **consumer** agency
gníomhaireacht náisiúnta tomhaltóirí

putting **consumers** first

SECOND CONSULTATION ON REVIEW OF THE CONSUMER PROTECTION CODE

CONSULTATION PAPER – CP 54

SUBMISSION FROM THE NATIONAL CONSUMER AGENCY

July 2011

National Consumer Agency Response to the “Second Consultation on Review of Consumer Protection Code” – Consultation Paper CP54

The National Consumer Agency (NCA) is a statutory body established by the Irish Government in May 2007. It aims to defend consumer interests and to embed a robust consumer culture in Ireland. In March 2010 the NCA assumed responsibility for the statutory information and education functions of the Financial Regulator,¹ the legal transfer of these functions took place on the 1 January 2011.²

The NCA welcomes the opportunity to respond on CP54. Our submission is in two parts.

Part 1 – outlines our response to the issues raised by the Central Bank (the Bank) in relation to Section 2 – titled additional/emerging issues³:

- Basic payment accounts
- Complaints resolution
- Unsolicited contacts
- Provision of credit to SME’s
- General principles
- Advertising
- Errors handling
- Claims processing
- Conflict of interest

In Part 2 – we are taking the opportunity to highlight and again raise issues that we put forward in our first submission⁴. We are taking this approach because of the importance of the Consumer Protection Code. The introduction of the Code in 2006 was a significant additional protection to prudential regulation. It set out how the Regulator expected regulated entities to treat their customers (through the general principles) and consumers (through specific provisions). We would like to see the Code develop to address any issues with the original; fill any gaps that exist and maintain the relevance of the Code to the current market and also to, in so far as possible, predict and prevent future problems.

We note that the drafting of a Code is a long process and that there are many interested stakeholders who should be involved. It is clear that the Bank has endeavoured to capture the views of all the interested stakeholders. This approach can lead to a conflict of interest

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

² The consumer information and education functions of the Financial Regulator (now the Central Bank) were transferred to the National Consumer Agency, with effect from 1 January 2011, by the Central Bank Reform Act 2010.

³ Page 11 of the introduction

⁴ NCA submission on CP47 – Review of the Consumer Protection Code – January 2011

between the needs and best interests of the consumer and those of the industry. The Code should be fair to all parties. It should be practicable. It should be possible to implement. A criticism of the existing Code has been the difficulties attached to pursuing cases because of the subjective nature of the Code because the 'rules' were not defined and too many important areas were left open to interpretation. The NCA would hope that the new Code would offer protections to consumers by setting out clear and objective rules about how regulated entities should work in relation to their dealings with customers, the procedures they should have in place and the minimum standards that the Central Bank will accept.

The NCA made a very detailed response to the first review of the Code. That submission was based on the issues identified through the contacts received from personal finance consumers. We have based our submission on what has gone wrong and what needs to be put in place to correct these issues. It is on that basis that we intend to strongly raise again or look for clarification (in light of the recent proposed changes) on the following issues:

- Definition of consumer
- Vulnerable consumer
- Clarification on the status of buy-to-let investors under the Code
- Hire purchase
- Trackers
- Guarantees
- Handling of arrears
- Know the consumer (KTC) and suitability
- Opening of joint accounts
- Lifetime mortgages and home reversions
- Fair and limited analysis of the market

Where relevant we have included previous comments in Part 1 of the submission. For information we are also attaching a copy of our original submission made in January 2011.

We would be happy to discuss any aspect of our submission with the Central Bank.

PART 1

1. Basic payment accounts⁵

This is a new provision included in the proposed Code to support the Strategy for Financial Inclusion recently published by the Department of Finance. The NCA will be supporting this new provision and welcomes the concept of a basic payment account. These relevant provisions are identified as referring to personal consumers only. The NCA notes and welcomes that its proposals in relation to the refusal of a basic banking product will now be recorded in writing and a copy of that refusal will be given to the

⁵ Chapter 3 – Common Rules – Page 17 Provisions 3.53 to 3.57

consumer for their own records, in order to assist them in the making of a complaint (where applicable).

However, the NCA has concerns in relation to paragraph 3.55⁶

“Where a personal consumer refuses to give information necessary for the assessment of whether or not a basic bank account may be suitable, the regulated entity must inform the personal consumer that it does not have the necessary information to assess the suitability of a basic payment account for their needs and cannot offer that product unless and until such information is provided.”

None of the provisions - in relation to basic payment accounts - clearly outline for both banks and consumers what ‘necessary information’ entails. If this refers to anti-money laundering requirements such as the production of proof of identification and verification of address – it should state these requirements. If it relates to some other information, this should be clearly stated. As it stands, the provision is unclear and again leads us to a subjective interpretation by the banks as to what ‘necessary information’ actually is and could lead to some consumers being unfairly refused a basic payment account.⁷

We note the Bank has included a detailed definition⁸, which outlines the proposed features of a basic bank account. We welcome this approach, but we are aware that the Strategy for Financial Inclusion is currently carrying out a consultation process and a pilot programme is planned in relation to basic bank accounts. We would ask the Bank to consider the findings that may arise from the results of this pilot and that the proposed definition for a basic bank account should be flexible enough to accommodate any proposed changes or amendments that may result from that body of work.

2. Complaints resolution

The NCA welcomes the new provisions on complaints resolution. In particular, we note that the Bank is proposing that regulated entities will be required to analyse complaints

⁶ *Ibid* – Page 17 – P.3.55

⁷ Chapter 12 – Definitions - Page 65. **“Basic bank account”** is a payment account, which will normally have the following features:

- (a) Salary, welfare benefits, pension can be paid directly into the account;
- (b) Cheques and cash can be lodged to the account;
- (c) No credit or cheque writing feature;
- (d) It will have a budgeting feature;
- (e) Bills can be paid by direct debit and/or standing order;
- (f) No charges;
- (g) No minimum or monthly balance required; and
- (h) The account balance can be accessed or withdrawn from the account at any time.

⁸ *Ibid* – as above.

in order to identify if any patterns of consumer complaints are emerging, and further that this analysis must be escalated to the regulated entity's compliance/risk function and senior management.⁹ This approach deals with the issue raised in our original submission¹⁰ in relation to senior management in regulated entities and what they were learning from the customer complaints experience about the services they provide and about emerging problems.

Provision 10.12 states:

“A regulated entity must undertake an appropriate analysis of the patterns of complaints from consumers on a regular basis including investigating whether complaints indicate an isolated issue or a more widespread issue for consumers. This analysis of consumer complaints must be escalated to the regulated entity's compliance/risk function and senior management.”¹¹

The NCA would like to see this provision strengthened by the approach outlined in 10.3¹² - which deals with errors - this would ensure that the Bank receives reports from regulated entities on both errors and consumer complaints from senior management. This approach would allow the Bank to monitor behaviours and issues that are appearing in relation to both individual regulated entities and their industry peers at a macro level. There is also a potential strong link between errors and complaints and this would give the Bank a more complete picture.

In relation to complaints resolution, paragraph 10.9¹³ is very specific about the complaints process and procedure that each regulated entity should have in place and how it should operate. However, the Code has not addressed what information should be contained in the Final Response letter issued by the regulated entity to the consumer. The Financial Services Ombudsman (FSO) outlines on his website the following requirements for the final response letter:

“The Final Response letter must:

- *Contain a detailed account of the dispute at hand*
- *Address all issues outlined in Complainant's Complaint Form*
- *Quote the applicable loan contract terms/policy conditions/terms of business etc*
- *Give details of any redress offered to the Complainant by the Provider*
- *State that it is the Final Response of the Provider for the purpose of referring the matter to the Financial Services Ombudsman's Bureau*

⁹ Page 11 – (ii) Complaints resolution - Introduction of CP54 - Page 11

¹⁰ NCA submission on CP47 – Complaints – Page 29

¹¹ Chapter 10 – Errors and Complaints Resolution – paragraph 10.12 – Page 62

¹² *Ibid* – Provision 10.3 – Page 60

¹³ *Ibid* – Provision 10.9 – Page 67

- *Advise the Complainant that he/she has 15 working days from the date of said Final Response to refer the matter to the Financial Services Ombudsman's Bureau for investigation.*¹⁴

The NCA would like to see greater communication between the Bank and the FSO on the information that should appear in the final response letter – since the complaints resolution process is covered by the Code – to ensure that procedural requirements such as the 15 working days referred to by the FSO appears in the final response letter issued by regulated entities.

We are concerned that the issue of the 15 working days is not always brought to the attention of the consumer when the final response letter is issued by the regulated entity and that this lack of knowledge could impact on the consumer's ability to proceed with their complaint to the FSO. We would like to see a provision in the Code to require regulated entities to include any time limits set out by the FSO (assuming that these are subject to change).

A further issue that relates to communication between the Bank and the FSO has arisen in relation to the recent decision of the FSO to exclude certain regulated entities from its remit, and the opportunity to bring complaints through this independent service no longer exists. This decision relates to loss assessors and it means that customers of these regulated entities are no longer allowed to bring their complaints forward to this statutory body. This is of relevance to the Code because consumers may decide to avail of a service because it is provided by a regulated entity and because of the protections that regulatory status brings with it. Who in this circle of regulation and complaints resolution has responsibility for informing potential customers that their complaint may not be allowed to go forward to this independent office and does the complaint process and time limits set down by the Consumer Protection Code apply at all, if the consumer is not able to refer the complaint on to the FSO?

The NCA would like to put forward the proposal that provision 4.15¹⁵ which relates to terms of business should be strengthened to not only state:

“The terms of business must set out the basis on which the regulated entity provides its regulated activities and it must include at least the following:

*k) a summary of the complaints procedure operated by the regulated entity;”*¹⁶

it should also include what redress system – if any – the consumer of a regulated entity can bring their complaint to. If a redress system (other than the courts) does not exist – this should be clearly stated in the terms of business.

We have already highlighted above the issue of concern in relation to loss assessors. The NCA would like the Bank to ensure that loss assessors inform potential customers before

¹⁴ www.financialombudsman.ie – complaints - accessed 6 July 2011

¹⁵ Chapter 4 – Provision of Information – Page 21

¹⁶ *Ibid* – Provision 4.15 (k) – Page 21

they enter into business with them, that the option of bringing a potential complaint to the FSO does not apply.

Chapter 10 deals with errors and complaints but only in relation to those that impact on **consumers** – this leads us to difficulties in relation to the other types of customers referred to above and throughout the Code.

Again the NCA would like to repeat an important issue – raised in the original submission – in relation to customer care contact facilities. The NCA is aware of a small number of regulated entities who do business in Ireland but who do not offer customer service facilities here. We believe that Irish consumers should not have to incur additional costs in contacting such an entity and that all those subject to the code here should be obliged to offer a customer care service that does not cost more due to the fact that it is located in another country.¹⁷ We are disappointed to note that this issue was not addressed in the revised code and it highlights a further gap in the complaints resolution process that the Bank's own Code is not addressing the issue of how easy it should be for customers, consumers, personal consumers and vulnerable consumers to contact their regulated entity, when they wish to raise an issue, ask a question or make a complaint.

3. Unsolicited contacts¹⁸

The NCA notes from the introduction:

“Pressurised selling of financial products to consumers, under any circumstances, is of particular concern to the Central Bank in light of consumer detriment which can occur. Where unsolicited contact is allowed, strict rules must be in place covering the circumstances of how and when it is allowed in the interest of protecting consumers from unwanted selling tactics which can be perceived as aggressive and overly intrusive or pushy. Consequently we have decided to further restrict the circumstances in which unsolicited contact can be made with consumers. In particular, we are proposing that the informed consent of the consumer is required before any contact can be made to sell or market a financial product or service to an existing customer. In addition, we are proposing that regulated firms will not be allowed in any circumstances to make an unsolicited personal visit or telephone call to a consumer who is not an existing customer.”¹⁹

We welcome the Bank's intention that the proposed Code in relation to unsolicited contacts has been strengthened. However, when we compare the provisions set out in

¹⁷ NCA submission on CP47 – Other issues – customer care contact facilities – Page 30

¹⁸ Chapter 3 – Common Rules, Personal contact with consumers – unsolicited contacts Pages 13 and 14

¹⁹ Introduction – (iii) Unsolicited Contact – Page 12

CP47 and those of the CP54, we are able to see the removal and addition of certain provisions that do not – on review – protect consumers or personal consumers.

The NCA notes that provision 33 of the CP47²⁰ that related to the sale of a payment protection policy to a consumer has disappeared. This provision stated that

“A regulated entity must not provide a protection policy to a consumer on the basis of an unsolicited personal visit or telephone call alone. A regulated entity may, during the course of an unsolicited visit or telephone call, provide the consumer with information about a protection policy but must allow at least 5 business days and no more than 10 business days to elapse before making a further visit or telephone call for the purpose of offering, arranging or recommending a protection policy or requesting the consumer to make any payment in relation to the protection policy. Where a consumer purchases a protection policy, the regulated entity must provide the consumer with details in writing of any cooling-off period that applies.”

We welcome provisions 3.31²¹ and 3.32²² and note that they have strengthened the whole approach to unsolicited contacts - namely who can be contacted and how consent is recorded by the regulated entity. However, if these provisions are revised in any subsequent review we would like provision 33 of CP47²³ to be reinstated.

Provision 3.35 has been expanded from the original provision in CP 47²⁴ to now include the following:

“P 3.35 – A regulated entity may only make a personal visit or telephone call to a personal consumer between 9.00 am and 7. 00 pm Monday to Friday (excluding bank holidays and public holidays), except where:

- (a) the purpose of the contact is to protect the personal consumer from fraud or other illegal activity, or*
- (b) the personal consumer requests, in writing, contact at other times or in other circumstances, or*
- (c) **the contact is permitted at other times under the Consumer Credit Act, 1995.**”²⁵*

The reference to the Consumer Credit Act, 1995 relates to s.46 of the Act that refers to visits and telephone calls.

²⁰ CP47 – Page 36

²¹ CP54 – Chapter 3 – Common rules – personal contact with consumers- unsolicited contacts - Page 13

²² *Ibid*

²³ CP47 – Page 36

²⁴ CP47 – Provision 31, Page 35

²⁵ Chapter 3 – Common Rules – Personal Contact with Consumers – unsolicited contacts – Page 14

“s.46 - A creditor, owner or a person acting on his behalf shall not visit or telephone

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(a) a consumer without his consent-

i. at his place of employment or business unless the consumer resides at that place and all reasonable efforts to make contact with him have failed,

ii. at any place

(I) between the hours of 9 o'clock in the evening on any week day and 9 o'clock in the morning on the following day, or

(II) at any time on a Sunday or a public holiday (within the meaning of the Holidays

(b) a consumer's employer or any member of the consumer's family unless that employer or family member is a party to the agreement, without the consent of the consumer, given in writing and separate from any other term of the agreement, for any purposes connected with an agreement other than the service of a document in connection with legal proceedings.

Section 46 (a) differs from (b) in that the consent of the consumer must be given in writing and separate from any other term of the agreement. The issue with s.46 (a) is that the consumer does not have to give his consent in writing and separate from the agreement – it is possible that the absence of the written consent could be open to abuse by regulated entities which would allow a consumer to be contacted at any time after 9 pm and before 9 am. It is disappointing to see this type of contact specifically referred to, in a proposed provision whose aim is to protect consumers. Since the majority of lenders covered by the remit of the Consumer Credit Act, 1995 are also regulated entities that are covered by the Code – there was the opportunity to remove this unfriendly aspect of the Act with consumer friendly provisions that covered unsolicited contacts. If provision 3.33²⁶ were applied to all consumer contacts – it would ensure that consents for contacts are recorded in writing. We suggest that it is possible to remedy this issue by ensuring that provision 3.33 is applied to all the sections outlined in provision 3.35 and in particular 3.35 (c).

The NCA believes that the section on unsolicited contacts is confusing because different elements apply to the ‘personal consumer’ and others apply to the ‘consumer’ alone. This was also one area of the code where specific examples needed to be given as to how vulnerable consumers should be contacted – yet no additional safeguards have been put in place by the Bank.

There is also one area of unsolicited contacts that is not covered by the Code. The NCA is aware that many consumers, particularly older consumers, who have varying amounts

²⁶ *Ibid* –Page 13

on deposit in banks, are subject to a sales pitch when they carry out transactions on their account. The usual approach in the bank branch is ‘your money is not working for you’; ‘I can arrange a meeting for you with our financial advisor – he or she will be able to help you’. These ‘internal lead generation’ types of unsolicited contacts are not captured within the existing Code. For many consumers there is confusion about who they are actually dealing with - because the financial advisor may be working for a subsidiary of the bank, or another regulated entity connected to the bank and not the bank itself - and this in turn can lead to confusion for some consumers about the type of product they are actually buying.

These types of unsolicited contacts are not monitored but they have implications for consumers who may be persuaded to move away from the safety of deposit and saving accounts to investment products which do not carry the same protection schemes with them and are more subject to charges, limited capital guarantees and risk. The NCA has concerns about the overall practice of ‘internal lead generation’ contacts and how it is working. In particular we have concerns from a data protection perspective and would seek clarification from the Bank on how the confidential information belonging to a consumer is accessed and used by regulated entities.

4. Provision of credit to SME’s

It is noted that the Bank introduced a new Code in February 2009 called “A code of conduct for business lending to small and medium enterprises”. This Code is known as the SME Code. The NCA notes the introduction of the new Consumer Credit Directive, which was introduced in Ireland by S.I. No 281 of 2010 – European Communities (Consumer Credit Agreements) Regulations 2010 and covers loans between €200 and €75,000. These Regulations define a consumer as

“a natural person who is acting, in the course of a transaction to which these Regulations apply, for the purposes outside his or her trade, business or profession.”

The NCA welcomes the statement by the Bank that *“the remaining population of consumers, i.e. persons who fall within the definition of consumer in the Code, other than natural persons, continue to warrant protection when seeking credit products.”* It is noted that the Bank proposes to ensure continuation of the relevant provisions – relating to protections - by incorporating them into the SME Code. We hope this issue is dealt with on an urgent basis.

However, the NCA would seek clarification on what happens to residential investment property owners (known as RIPs, who are not businesses) and we are specifically raising this issue in Part 2 of our submission.

5. General principles

CP 54 is only seeking views on general principle 2.4 :

“A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it, has and employs effectively the resources and procedures, systems and control checks including quality control checks, and staff training that are necessary for compliance with this Code.”²⁷

The NCA hopes that the inclusion of this general principle will add value to the regulatory process and ultimately to the protection of consumers. However, we have concerns as to how this general principle will work in practice because there should be two elements to the examination of how compliance is measured:

- Do the resources, procedures, systems, control checks, quality control checks and staff training exist?
- Do they work and do they work effectively?

There are the dangers of a ‘tick box exercise’ approach to the first element of the test and the second element relates to compliance with the Code itself. This is why we would like to see a stronger link between the monitoring of complaints from consumers and an assessment of compliance with the Code. A complaint shows – even if it is justified or not – that one element of the process has broken down. It can show a breakdown of communication at either the point of sale or during the on-going relationship with the customer. Something has gone wrong – why? If the Bank receives on a regular basis, information on complaints that (1) come into the regulated entity, (2) are resolved internally and (3) are forwarded on to a third party for adjudication (such as the FSO or the Courts system) then it is able to assess for itself how the elements such as resources, procedures, control check, quality control checks and staff training are actually working within that regulated entity. Further, it would have the opportunity to benchmark firms against each other in this regard.

6. Advertising

The NCA notes from the introduction²⁸ the following major changes:

- The definition of key information has been amended to mean *‘any information which is likely to influence a consumer’s actions with regard to a product or service.’*

²⁷ Chapter 2 – General Principles – Page 7

²⁸ Page 13 of the introduction

- *“A number of additional provisions are now proposed for regulated firms including requirements that:

 - (a) Advertisements must clearly state any qualifying criteria of a product or service,
 - (b) Warnings must appear alongside the benefits of the product to which they refer,
 - (c) The annual equivalent rate set out in an advertisement must not be misleading and any assumptions used to calculate it must be reasonable and up to date, and,
 - (d) More detailed disclosure requirements be included in advertisements.”*

The NCA is disappointed that the definition for advertising outlined on Page 65 of the proposed Code was not expanded to capture marketing (including printed and on-line material) as well as brochures and sales literature.

In relation to advertisements for credit and in particular the advertisements that relate to lifetime mortgages and home reversion schemes – it is noted the warnings for these products have been redrafted to read as follows:

Provision 9.32²⁹ states

“(b) an advertisement for a lifetime mortgage contains the following warning:

Warning: While no interest is payable during the period of the mortgage, the interest is compounded on an annual basis and is payable in full in circumstances such as, upon death, permanent vacation of or sale of the property.”

The NCA welcomes this warning but would like the warning outlined in CP47 to be also reinstated:

“Warning: Purchasing this product may negatively impact on your ability to fund future needs.”³⁰

Provision 9.32 states

“(c) an advertisement for a home reversion agreement contains the following warning:

Warning: The money you receive may be less than the actual market value of the share in your home.”³¹

²⁹ Chapter 9 – Advertising – Page 54

³⁰ CP47 – Page 72 – Provision 27

³¹ Chapter 9 – Advertising – Page 55

Again, the NCA welcomes this warning but would like the warning outlined in CP47 to be also reinstated:

“Warning: Purchasing this product may negatively impact on your ability to fund future needs.”³²

In relation to the advertising of investments the NCA would welcome greater clarity in this area. The nature of the product should also be advertised. The type of product should appear on advertising material, brochures, sales information and application forms. For instance, if the investment is a tracker product then it should clearly carry a warning stating:

This is a tracker product – if you invest in this product you could lose up to [xx] of the money you put in.

The NCA notes that it may not be possible or correct to include information about state protections - that exist in advertising material for savings and investment products - but we would welcome greater clarity on the information that appears in other forms of information that are presented to consumers of these products. For instance, brochures, applications forms and follow up information, should clearly outline what state protections exist.

We are aware that some customers have been told by regulated entities that when they purchase an investment product that tracks the movements on certain funds, and which places a percentage of the investment on deposit that this section of the investment is covered by the deposit guarantee scheme or the ELG scheme. In reality unless the account is in an individual's own name as opposed to the institution's client account, the protection is afforded to the institution (as the account holder) and an individual would not be able or eligible to make a claim as the funds would be pooled in the client account. If this is the case, it should be explicitly stated. These previous comments impact on provision 9.52³³. The NCA would like to see a clear distinction made between investment and deposit products in relation to the various state protections schemes that exist, otherwise the information could be interpreted as misleading.

In Ireland today we have many different banks offering saving accounts to consumers. On our website www.itsyourmoney.ie consumers can compare the different types of credit

³² CP47 – Page 72 – Provision 27

³³ Chapter 9 – Advertising – Page 59

“Where a regulated entity advertises an interest rate relating to a proportion of the tracker bond to be placed on deposit, the advertisement must also state clearly the following:

- a) whether the rate quoted is fixed or variable, and if fixed, for what period and, where relevant, an indication of the rate that will apply thereafter;*
- b) the relevant compound annual rate of this deposit over the full term of the tracker bond; and*
- c) whether any tax is payable on the interest earned.*

Each rate provided to a consumer under this provision must be of equal font size and prominence.”

institutions and the different rates they are offering. However, consumers do experience difficulties when it comes to differentiating between the various deposit protection schemes that exist and those that apply to different banks. This is reasonable when you consider that the relevant protection scheme depends on the home regulator of the credit institution. However, we would like to see all credit institutions offering this information to consumers and it should be monitored by the Bank for accuracy. Approximately 8% of all calls coming into the personal finance element of the NCA Helpline in the first year related to questions on deposit protection.³⁴ This remains an important issue for consumers.

7. Errors handling

In CP47 provision 1³⁵ had stated that:

“A regulated entity must review, monitor and test its internal control systems on a regular basis in order to provide reasonable assurance that the potential for errors is minimised and that any errors can be readily identified.”

The NCA referred to this provision in our initial submission,³⁶ - we were seeking a more specific time frame ‘than *on a regular basis*’ for the reviewing, monitoring and testing of internal control systems in order to identify errors. Unfortunately, this provision was removed entirely from CP54 and the inclusion of general principle 2.4³⁷ is not strong enough to compensate for the loss of the original provision which placed the onus on the regulated entities to not only have strong systems but to also ensure that they were tested on a regular basis. We are unclear as to why this was removed and we would like to see this provision reinstated.

It is noted that the section on errors is detailed but even a relatively strong provision such as 10.5³⁸ does not add value to the Code or to consumer protection regulation when the actual log does not have to be reviewed by senior management within the regulated entity or submitted to the Bank on a regular basis. The NCA notes that 10.3³⁹ ensures the reporting to the Bank of issues that are outstanding after 40 business days but there may be more value to be gained from taking an holistic approach to an overview of all errors (even those that are resolved) and this would be gained from reviewing the errors log on a regular basis.

³⁴ Personal finance element of NCA Helpline went live on the 1 July 2010 and this figure is based on one year’s results which ended on the 30 June 2011.

³⁵ CP47 – Errors and complaints – Chapter 11 – Page 76

³⁶ The NCA submission and response to the CP47 – January 2011 [Page 28]

³⁷ CP47 – General Principles – Chapter 2 – Page 7

³⁸ CP54 – Errors and Complaints Resolution – Chapter 10 – Page 60

³⁹ *Ibid* – Page 60

8. Claims processing

The NCA referred to provision 9 in our initial submission,⁴⁰ it was noted that this provision dealt with the written procedures that should be in place for dealing with effective and proper handling of claims. This provision is now 7.8⁴¹ and reads:

“At a minimum, the procedure must provide that: (e) details of all conversations with the claimant in relation to the claim must be noted.”

We had raised the issue that this provision is stating that details of conversations should be noted but it seemed inconsistent with a later provision in the Chapter on Records and Compliance which in CP 47 stated:

“Where there is a verbal interaction with the consumer to assist the consumer in understanding the product or service on offer, a regulated entity must keep a contemporaneous record of the detail of such verbal interactions.”⁴²

We had raised the issue of consistency in relation to the recording of conversations with consumers and we suggested that an industry standard should be put in place and followed in relation to important interactions such as discussing insurance claims. We are disappointed to note that the solution put forward by the Bank was to remove the contemporaneous record part from the relevant provision and it now reads as follows:

“A regulated entity must ensure that all instructions from or behalf of a consumer are properly documented and the date of both the receipts and transmission of the instruction is recorded.”⁴³

It is noted that the term “contemporaneous record” has managed to survive in relation to assessing suitability⁴⁴ but without any requirement for these types of records to be retained in the Records and Compliance section (as was previously outlined in CP47) it begs the question how much this provision will benefit the consumer. However, it is included and the NCA would again refer to our original submission and the following:

“Provision 16⁴⁵ refers to the taking of a contemporaneous record of the advice given by the regulated entity and the decision of the consumer to proceed with the transaction. In the context of the Code – greater clarity is needed on what would actually be recorded

⁴⁰ CP47 – Chapter 8 – Page 63

⁴¹ CP54 – Chapter 7 – Rebates and Claims Processing – Page 45

⁴² CP47 – Chapter 12 – Records and Compliance – Provision 1 – Page 78

⁴³ CP54 – Chapter 11 – Records and Compliance – Provision 11.1 – Page 63

⁴⁴ CP54 – Chapter 5 – Knowing the consumer and suitability – Provision 5.19 – Page 40

⁴⁵ Chapter 5 – Page 55 – Provision 16 – “ A regulated entity must not advise a consumer to carry out a transaction, or a series of transactions, with frequency or in amounts that, when taken together, are deemed to be excessive and/or detrimental to the consumer’s best interests. The regulated entity must make a contemporaneous record that it has advised the consumer that in its opinion the transaction(s) is/are excessive, if the consumer wishes to proceed with the transaction(s).”

on this note - for instance would it record the date, the information discussed, the conclusions reached, the risks being identified by the regulated entity? Would the consumer have to sign it or receive a copy and where would the record be held? If the approach is taken that the consumer signs this note it would confirm that the information recorded there is an accurate reflection of what took place but we would argue that the customer should be given a copy of the note along with enough time to read and digest it before signing and returning it.

Consumers are raising on a regular basis with the NCA, issues in relation to what they were told by regulated entities before they purchased a product such as a mortgage (interest only for the life of the loan) or a tracker investment product (your capital is secure – you cannot lose any part of your capital) to later find out that this interpretation of the product is not correct. We would like the provision strengthened by the reinstatement of the contemporaneous note with the suggestions made above. A compliant regulated entity should have not an issue in relation to the recording of oral discussions between themselves and the consumer and the retention of that documentation, particularly for significant conversations and products.

Guidance on the payment of cheques in relation to insurance claims

The NCA is disappointed that the above issue was not addressed in the Code review. We refer to this extract from our original submission:

“The payment of an insurance claim cheque is typically made out in the name of the insured (the consumer) and the bank holding an interest (through the mortgage) in the property. The aim of this cheque is to cover the insurance claim and reinstate the property to its former condition. The cheque being issued to two payees has in our experience, caused confusion and difficulty for consumers. It has also resulted with one consumer having his claim cheque being offset against the arrears on his account rather than going towards the cost of repairing damage.

We would suggest that issue of payment cheques for insurance claims and the details of the payees appearing on that cheque need further clarification. Further consideration should be given to potential solutions that protect the interests of all the parties involved.”⁴⁶

Treatment of insurance claims and the complaints process

In relation to the settlement of insurance claims and the complaints process, provision 7.21⁴⁷ states that:

“A regulated entity must provide a claimant with written details of any internal appeals mechanism available to the claimant.”

⁴⁶ The NCA submission and response to the CP47 – January 2011 [Page 24]]

⁴⁷ Chapter 7 – Rebates and Claims processing – Page 47

The NCA notes the difficulties that can exist on a practical level when it comes to the settlement of insurance claims and that due to these difficulties it is impossible to outline a definite time line that should be followed for the settlement of a claim – other than updating the claimant on a regular basis. It is unclear from the provision above if the Bank wishes the Insurance company to refer the claimant to an internal appeals mechanism regarding the claim or to the complaints process (and the outlined time frames in that process) and then on to the FSO. In view of the amount of time that can pass from when a claim is submitted and when a final decision is reached by the insurance company or the claimant in relation to that claim – is it reasonable to expect the claimant to then enter into another process (the complaints process) with another part of the insurance company that could increase the waiting by another 40 business days?

The NCA would like to see a more joined up and practical approach taken in relation to insurance claims, the internal complaints process and external complaints mechanism.

9. Conflict of interest

The NCA would like the Code to clearly outline for regulated entities what ‘*conflict of interest*’ actually means. It is noted that provisions 3.22 to 3.30⁴⁸ outline in detail the requirements that a regulated entity must have in place in relation to policies, procedures, remuneration arrangements, Chinese walls, acceptance of gifts and, soft commission agreements, yet conflict of interest is not defined by the Code. In view of the detailed chapter on definitions, it is interesting to note that at the very least a basic definition does not exist.

What is missing from these provisions is a clear statement that defines conflict of interest and clearly identifies who are the possible victims of conflict of interest – consumers and customers.

PART 2

1. Definition of consumer

The NCA notes the introduction of a new definition for consumer:

- **“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

⁴⁸ CP54- Chapter 3 – Common Rules – Provisions 3.22 to 3.30 – Pages 12 and 13

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 of the above);⁴⁹

We note that the following statements have been removed from the original code definition⁵⁰ (which was also the definition used by the Financial Services Ombudsman since 2005):

- A natural person acting outside of their business, trade or profession;
- A member of a credit union.

There is now a new definition that appears in the proposed Code for a personal consumer:

- **“personal consumer”** means a consumer who is a natural person acting outside of his business, trade or profession.⁵¹

The introduction of new definitions for consumer and personal consumer could lead to issues of interpretation and confusion when it comes to various chapters and provisions of the new Code. The NCA would like to see greater clarity on what applies and this could be achieved by including the term 'personal consumer' in the Code's new definition of consumer.

Confusion may also arise as the original definition of a consumer was based on the one used by the Financial Services Ombudsman and yet the complaints process⁵² is now clearly aimed at consumers – not customers, personal consumers or vulnerable consumers. We would welcome clarification on this issue.

2. Definition of vulnerable consumer

The NCA notes that the new definition that appears in the proposed Code is significantly altered from the definition that appeared in CP 47

- **“vulnerable consumer”** means a natural person who, a regulated entity could be reasonably expected to be aware,
 - (a) has the capacity to make his or her own decisions but who, because of the individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons); and/or

⁴⁹ Chapter 12 Definitions – Page 66-67

⁵⁰ Consumer Protection Code August 2006 – Definitions – Page 4

⁵¹ Chapter 12 – Definitions – Page 69

⁵² Chapter 10 – Errors and Complaints Resolution – Page 60

(b) has limited capacity to make his or her own decisions and who requires assistance to do (for example, persons with intellectual disabilities or mental health problems).⁵³

The NCA again has issues in relation to this definition. We would seek clarity on what this new definition is attempting to achieve and how it would work in practice. As previously pointed out in our first submission there are no linkages to particular areas of the Code and there are no suggestions made on how a vulnerable consumer should be treated. We stand by our original comments and that features of a vulnerable consumer should be discovered through a thorough 'know the customer' fact find. The NCA has a serious issue with part (b) of the definition that refers to limited capacity, intellectual disabilities and mental health problems. All financial products are contracts and we have concerns over what is being suggested by the Bank. Is the Bank expecting regulated entities to sell financial products to persons with limited capacity issues? We would welcome clarity on this issue.

3. Clarification on the status of buy-to-let investors and the Code

Based on our review of the proposed Code the NCA would seek clarification on how this Code proposes to deal with buy-to-let investors. These loans are commonly described by the lending industry as RIP's (residential investment properties) and relate to loans taken out to purchase investment properties. These investors can range from having a small number of properties to a larger number and yet they can be acting outside their trade, business or profession. We would like to see confirmation from the Bank on what their status is and what Code protections apply to them.

We are raising this issue in view of the many contacts we have recently received in relation to buy-to-let investors, interest only tracker mortgages, reviews and alternative options they are being offered by lenders.

4. Hire Purchase

The NCA raised the issue of hire purchase in our previous submission⁵⁴. As previously stated we believe that the Code should cover hire purchase – even if this requires a legislative change. Many firms covered by the Code provide hire purchase alongside other types of finance and it would be in the best interests of consumers while also creating a more level playing field for providers if hire purchase were covered. This would ensure that the protections outlined in the proposed Code would cover such important issues as advertising,

⁵³ *Ibid* - Page 70

⁵⁴ NCA Submission on CP47 – January 2011 – Page 3

the provision of information, the issuing of statements and the arrears process. It would also ensure that regulated entities would have to act honestly, fairly and professionally in the best interests of its customers and the integrity of the market.

The NCA believes that the issue of hire purchase is important to consumers. In the period from the 1 July 2010 to 30 June 2011 – approximately 8.4% of all personal finance contacts that came into the NCA Helpline related to the issue of hire purchase. During the same time period the relevant pages viewed from www.itsyourmoney.ie amounted to 18,057. In the latest research carried out the NCA - 3% of consumers stated they had a hire purchase product.

The NCA has seen during that time period new elements creeping into hire purchase agreements such as rescheduling, new agreements for the same product, the introduction of large balloon payments during the course of the hire purchase agreements which impacts on the consumer's ability to ever reach statutory protections such as the half-rule which allows the consumer to terminate the agreement by giving back the product.

Other issues relate to:

- The ability of the consumer to terminate the agreement when they are in arrears;
- The issue of engineers being sent out to examine cars (at the termination of the agreement under the half-rule) – yet these engineers were not sent out by the Finance Company to ascertain the condition of the car, when it was originally purchased;
- Customers of leasing and commercial hire purchase have no protections under the Consumer Credit Act, 1995. These are products sold by regulated entities to customers and yet no protections exist for these customers.

We would like to raise the significant area of arrears and the approach taken by some hire purchase providers. It is evident that there needs to be a joined up approach to lending arrears (secured and unsecured) by the Bank and the industry to ensure that the easing of pressures that comes from the introduction of the Mortgage Arrears Resolution Process is not offset by an aggressive approach from another element of the same lender – this approach is not acceptable.

In short the current limbo situation that applies to hire purchase is not acceptable.

5. Trackers

We welcome some of the changes that appear in the redrafted Code. This was an area of significant importance for the NCA in our first submission. We would like to see provision 4.37⁵⁵ strengthened by the addition **that any request (by a consumer) to change from an existing tracker interest rate should be in writing.**

6. Guarantees

The area of personal guarantees⁵⁶ is covered in the provision of information and responsibilities that are placed on lenders to inform the guarantor about the risks attached – paying off the debt amount, the interest and any associated charges. How is the Code ensuring that this person receives regular updates on the performance or non-performance of this loan? The NCA notes that person is advised to obtain independent legal advice before signing a guarantee but we would like to see the provision of additional information given to potential guarantors (by the lender under the Code) such as the limiting of the term of the guarantee or the monetary amount. In addition, greater clarity is needed on whether these guarantees terminate on the death of the person or do they go forward to impact on their estate. A simple guarantee given to a bank by a personal consumer should not need a legal interpretation to confirm when it ends.

7. Arrears handling

The NCA welcomes the changes in this chapter. However, the NCA again raises the same concerns -as previously raised in our first submission:

“There is an opportunity here for the Central Bank to ensure that regulated entities take a more joined-up approach to dealing with secured and unsecured lending and this would ensure that all contacts to the consumer are coming from the same areas within the regulated entity.”⁵⁷

However, the cost attached to communicating with consumers who are in arrears is not addressed and we believe this costs should be both reasonable and fair.

The NCA welcomes the removal of provision 10⁵⁸, which related to the offsetting of balance on accounts against arrears. Our concerns related to a bank being required to give 3 months notice before offsetting the balance on one account against another and the danger that it seemed to infer a right upon the bank they may not have had in the contractual relationship with the consumer. We note that the separate provision is now removed but now forms

⁵⁵ Chapter 4 – Provision of Information – Page 25

⁵⁶ *Ibid*

⁵⁷ NCA submission to CP 47 – Page 25

⁵⁸ CP47 – Chapter 11 – Page 67

part of provision 8.6⁵⁹ and the ability to offset is now confined to existing terms and conditions. The NCA would like the provision reworded to read:

“if relevant, any impact of the non-payment on other accounts held by the personal consumer with the regulated entity including the potential for off-setting of accounts, where there is a possibility that this may occur is confined to the original specific contractual terms of the loan.”

The NCA is aware that it is common for lenders to include a term in their lending contracts that allows them to change the terms - at a later stage - this would allow for offsetting to be introduced without any notice to borrower at the point-of-sale.

8. Knowing the consumer (KTC) and suitability

The NCA made a detailed submission on this topic in our original response to CP47. We welcome the inclusion of some of the suggestions made in relation to KTC. However there are still areas that need improvement and we now intend to focus on the issue of consumer vulnerability. The proposed Code sets out new definitions of consumer, personal consumer and vulnerable consumer but again the linkages between these definitions and how they will work in practice across KTC and suitability is unclear. Provision 5.1⁶⁰ takes a detailed approach across:

- Needs and objectives
- Personal circumstances
- Financial situation
- And where relevant - attitude to risk

but what practical guidance is given to regulated entities in identifying the person that is vulnerable and how does the Bank propose this will work in practice?

As referred to previously

“We would like to see a requirement for products where the risk of consumer detriment is high (such as for investments and pensions), which ensures that the regulated entity provides a copy of the KTC information to consumers. This would afford the consumer the opportunity to verify accuracy of the information and would ensure that all relevant information was used to determine the appropriateness of the product or service provided. The customer should be given the chance to take

⁵⁹ CP54 – Chapter 8 – Arrears handling – Page 49

⁶⁰ Chapter 5 – Knowing the consumer and suitability – Page 36

away and digest the information before signing it and a signed copy should be retained by the regulated entity on the consumer's file.”⁶¹

We note that the aim of provision 5.5⁶² is to ask the consumer to certify the accuracy of information but we note that there is no requirement for the regulated entity to actually give the consumer a copy of the information.

The NCA welcomes the retention of provision 5.19⁶³ and in particular the requirement that the regulated entity must take and retain contemporaneous notes.

In relation to provision 5.13⁶⁴ we welcome the inclusion that *“the lender must be satisfied that the personal consumer will be able to repay the principal at the end of the of mortgage term”* in relation to interest only mortgages but we revert to our previous point⁶⁵ that the Code does not state what measures a regulated entity should take to be satisfied that the consumer would be able to repay the principal/increased mortgage repayments at the end of the interest only mortgage term or period – when they are selling this mortgage to the consumer at point-of-sale. We made the suggestion that consideration should be given to the SFS e.g. life insurance, endowment policies, savings, credit history etc.

The NCA has concerns in relation to interest only mortgages – not as a product in itself – but in relation to how they are sold and what information is provided to consumers at point-of-sale (brochures and application forms) and later at the mortgage offer stage. In relation to the issue of buy-to-let properties, it is apparent that some confusion has arisen between what borrowers were told at the point-of-sale and the information that was later issued in mortgage offer letters, in relation to interest only tracker products. We would suggest that the issue of mortgage offer letters and contracts should be included in the Code and that all significant terms in contracts should be highlighted by the regulated entity during the sales process with the consumer and there should be consistency between both parts of the process.

9. Opening of joint accounts

This was a significant issue that was raised by the NCA in our previous submission.⁶⁶ We note the improvements that are outlined in provision 4.30⁶⁷ but again the issue of capturing the intention of the joint account holders is not included. We are raising this again because of the importance of the issue. The NCA would like see the Code requiring regulated entities to capture the intention of the real account holder (where funds are not jointly or equally

⁶¹ NCA submission on CP47 –Page 10

⁶² CP54 – Chapter 5 – Knowing the consumer and suitability - Page 37

⁶³ *Ibid* – Page 40

⁶⁴ *Ibid* – Page 38

⁶⁵ NCA submission on CP47 – Page 11

⁶⁶ *Ibid* – Page 8

⁶⁷ CP54 – Chapter 4 – Provision of information – Page 23

owned) when opening an account, in relation to the funds in that account and what happens if circumstances change.

We again set out our previous suggestion on this issue:

“Banks, Building Societies and Credit Unions should be (1) capturing the intentions of the main account holder and (2) making it very clear what the dangers and implications are for people – especially if something happens to the real owner of the account. This impacts on the older or vulnerable customer who wishes to give someone access to their account for a specific reason, such as depositing a pension, paying bills, and purchasing groceries. It should be very clear that a joint account does not imply ownership over the remaining balance in the account if the individual dies.

There are two scenarios regarding the set-up of a joint account –

- 1. Where a person has an existing current/deposit account and they decide to add a second person onto the account for a specific reason; and*
- 2. Opening a new joint current/deposit account with another person.*

Firstly, regulated entities should be required to capture the “intention” of the person who owns the account (of funds) in both scenarios and record:

- Is it merely for convenience to allow, say, a family member to operate the account, but the intention is that monies would go into the general estate on the death of the original account holder?*
- Is the intention to make a gift, that the second joint account holder will indeed get the monies, either immediately or on the death of the original account holder?*

Secondly, current and deposit accounts should be captured and covered by the Code in terms of suitability and know your customer requirements - this would ensure that the true intention and needs of the customer are recorded and complied with.”⁶⁸

10. Lifetime mortgages and home reversion agreements

The NCA welcomes the amendments to this area and the more detailed requirements that are outlined in provision 4.57 and 4.58⁶⁹. The NCA still however has concerns in relation to provision 4.60⁷⁰ which should be strengthened to reflect the required knowledge to:

- sell these products
- to offer independent legal advice; and

⁶⁸ NCA Submission to CP47 – Page 8

⁶⁹ CP54 – Chapter 4 – Provision of information – Page 29

⁷⁰ *Ibid* – Page 29 and 30

- to offer independent financial advice to the consumer.

11. Fair and limited analysis of the market

The NCA raised this issue in our previous submission⁷¹ and in the proposed Code it now comes under the area of information about the regulated entity and its regulated activities.⁷² We would reiterate the point previously raised that based on the review of the intermediary market, we strongly believe that there is a need for greater clarity on the terms “fair analysis of the market” and “limited analysis of the market” in relation to the types of regulated entities they refer to. It is possible that the different terminology when linked into the term “broker” may cause confusion among consumers. How does the Bank expect consumers to distinguish between an entity that provides a ‘fair analysis’ for one type of service and a ‘limited analysis’ in terms of objective criteria? We would also question how the Bank intends to police what intermediaries are calling themselves and how they are explaining what ‘fair’ and ‘limited’ means?

⁷¹ NC Submission to CP47 – Page 15

⁷² CP54 – Chapter 4 – Provision of information – Page 21P54 – Chapter 4 – Provision of information – Page 21