IRISH BANKING FEDERATION

IBF RESPONSE TO CONSULTATION PAPER 55:

REVIEW OF FINANCIAL DIFFICULTIES REQUIREMENTS OF THE CODE OF CONDUCT FOR BUSINESS LENDING TO SMALL AND MEDIUM ENTERPRISES

The Irish Banking Federation (IBF) is the leading representative body for banking and financial services in Ireland, representing some 70 member institutions, including licensed domestic and foreign banks and institutions operating in the financial marketplace here.

Introduction

IBF welcomes the opportunity to input to the review of the Code of Conduct for Business Lending to Small and Medium Enterprises (hereafter "the Code"). The SME Code provides welcome clarity for SMEs and banks alike regarding the rights and responsibilities of each party, and expectations regarding the bank/SME relationship. IBF members have invested significant resources in the implementation of the original SME Code, which is felt to be working well generally.

IBF members offer a wide range of banking services to SMEs in Ireland including credit facilities and played a significant role in the development of the current SME Code and the voluntary IBF Code of Practice for Small Business Customers, which pre-dated the SME Code. IBF members are committed to dealing honestly and fairly with such customers, and to working to find an agreeable approach for all involved.

Any revision to the SME Code and the planned report on SME arrears handling should be designed to encourage SMEs to approach their bank for assistance. Banks want to meet with customers and agree a proposal that is mutually beneficial. The Code should not distort or impede the normal SME/bank relationship or disincentivise customers from keeping their accounts in order. In our view, however this will be the affect of these proposals. For these and the reasons set out in this response, we would strongly urge the Central Bank to fundamentally revisit these proposals. We and our members would be happy to be involved in such a process.

Key Headline Issues

a) The level of codification is inappropriate to dealing with the SME Customer

The level of specificity and codification incorporated in the code does not accommodate or reflect the variety and complexity of business situations that exist in reality. It does not provide sufficient flexibility for dealing with customers in difficult situations (as evidenced by specific timelimits on many aspects of operations and only affording the lender one opportunity to see relevant information from the SME)

It is our view that the approach adopted by the CCMA for dealing with individuals experiencing mortgage arrears cannot be applied to the case of SMEs in financial difficulties. Unlike mortgage lending, which deals with a largely homogenous loan product provided to consumers seeking to cater for a primary personal need, SME lending is much more complex involving a wide range of loan products to borrowers of different types and sizes, engaged in an even wider range of enterprises.

Special recognition should be given to the realities of the nature of SME business which has at its heart the uniqueness of each individual SME. No one SME is the same and critically, this necessitates that IBF members consider and treat each SME on an individual case by case basis. From this perspective there is a strong sense of the

proposed Code revision, as currently drafted, being overly prescriptive and restrictive. We would advocate the retention of the current Codes concise format in order to ensure that the obligations for both IBF members and SMEs are clear and easily understood, regardless of the type of SME in question so as to resound with the widest possible audience.

A "one size fits all" framework approach to financial difficulties of borrowers is only achievable at the level of high principle and on the basis of general principles as enuntiated in the existing SME code of practice. The futility of the new proposed approach is underlined by the repeated requirement that the lender must adopt an individual case by case approach in an inflexible process characterised by regulatory micro-management. Attempts to flesh out the principles by prescribing rigid time frames for the lender but flexible ones for the borrower look absurd. Asking a lender, for instance, to state in writing in advance all of the information it will require to decide whether to continue a credit facility would entail hours and hours of preparatory work, much of it potentially redundant. Imposing on lenders a duty to assess viability in a formalised way ignores very real fundamental issues and uncertainties, such as the attitude of other creditors and other lenders, the willingness and capacity of backers and investors to support an enterprise, etc.

The Code includes a complex definition of “co-operating customer”. It is unclear what the intended consequence of the co-operating/non co-operating categorisation is, other than with respect to the application of certain charges, on which we comment below. Again, whatever the merits of such a categorisation when dealing with an individual or joint borrowers, it does not readily lend itself to the SME situation where there may be a range of executives responsible for managing the banking relationship.

b) The Approach laid down in the Code does not serve the SMEs’ Interests

Individual provisions and the Code when taken in its totality, do not appear to align with the SME’s interests. Two key examples of this are communications with borrowers and the determination of viability.

(i) Communications

It is our view that the limit on the number of communications allowed will only work to the detriment of the customer and is contrary to the provisions of General Principle 2, which requests that a lender acts with the best interests of the customer in mind. In addition, the specific inclusion of “… any communication where contact is not made with the borrower” is particularly unreasonable. The ability to contact customers is critical to agreeing a workable solution to the financial difficulties of the borrower. IBF members believe that communications with borrowers in financial difficulties should be balanced and not excessive, and any attempt to impede communications with the borrower will only serve to slow progress in working to agree a solution. Furthermore, the times within which lenders are permitted to contact borrowers are restrictive.

Many businesses are open on a Saturday and under the proposed Code amendment at Provision 33, contact by a lender, on days and times where such engagement has proven to be both welcome and mutually beneficial in supporting a SME in endeavouring to reach a resolution where financial difficulties have arisen, would be prohibited. Such a restriction would certainly place further delay on both parties working to achieve a solution for any SME in financial difficulties.

(ii) Determination of Viability

The code specifies that a lender must obtain information from the customer, and on that basis, within a certain timeframe, make and communicate a determination of the customer's viability. This is a fundamentally inappropriate provision for a number of reasons.

It oversimplifies the dynamic relationship which exists between a borrower and lender. This relationship is built on an iterative exchange of information about a range of variables which can change continuously (e.g., new business contracts entered into by the SME, SME debtor default, SME creditor terms, changes to other banking arrangements etc). The determination of viability in the manner envisaged by the code could be to the detriment of the customer, in a number of ways, including its potential impact for example on other creditors' dealings with the customer, its impact on an auditor's determination of business being conducted as a going concern, its impact on potentially removing the protections afforded by limited liability trading through insolvent and/or reckless trading.

Effectively, the Code urges a final decision through the determination of viability, within a specified timeframe, rather than focusing on the ongoing provision of financial support, where possible.

The concept of viability is at best nebulous. It is based on the subset of information available to the lender at a point in time - it may take an immediate, short, medium or long term perspective. It is based on any number of assumptions across a range of factors. Accordingly, it is a highly subjective assessment, but one which delivered prematurely, can be damaging to the SME concerned. Accordingly, many SME's will have to deal with a number of banks, and may well receive different determinations of viability from each.

In addition, it is unclear as to the impact within the code if a customer is deemed not viable. This situation becomes more absurd, if these subjective determinations are subject to appeal.

We are of the view that the concept of viability enshrined in the code should be fundamentally re-considered.

c) Legal Rights of the Lender

We are concerned that a number of the provisions of the Code substantively interfere with lenders' legal rights and that the approach laid down in the Code prejudices the legal rights of the lender, in a manner which is outside the powers envisaged in Section 117 of the Central Bank Act.

A number of questions arise as to how the provisions of the code sit with the lenders' legal rights to debt recovery. These questions include:

- Access to the commercial court
  As we currently understand it, a relevant case cannot be admitted to the Commercial Court unless it is shown that there is an "urgent matter to be tried". In the past where regulated entities have entered into lengthy discussions with borrowers in financial difficulties, they have faced problems in getting the matter admitted into the Commercial Court and as a result proceedings must then be dealt with in the ordinary plenary list, which seriously delays the regulated entity in asserting its rights under the applicable Security Documentation or otherwise.

  If the procedures set down in the Code must be followed prior to the regulated entity initiating any action against the Borrower, it will operate as a practical restriction on the lender's right to vindicate its rights in the Commercial Court. This is a restriction which would not be faced by the Borrower's other creditors.

- Fraudulent preference
  One of the greatest difficulties facing a lender is how to avoid an allegation of fraudulent preference, where it is receiving any payment from a borrower who may be in financial difficulties. For example, a liquidator may claim that the payments made by the borrower were made with the intention of making a preference to the lender compared to the other creditors.

  In order to mitigate against any such risk it is essential, we believe, under Irish law that a lender structures its relationship with a borrower in such a way so as to remove the implication that the lender was preferred. In this regard, it is necessary to ensure that no dominant intention to prefer the lender exists in the borrower's mind. The standard way of demonstrating this under Irish law is to show that the borrower's will was overborne by the lender. It should be noted however that a lender would not in normal circumstances ordinarily choose to overbear the will of the borrower - instead the law forces the lender to overbear the will of the borrower. If the lender does not overbear the will of the borrower the law penalises the lender.

  In order to show that the will of the borrower is overborne, a prudent lender must make it clear to the borrower that it will either commence legal proceedings for the recovery of the debt and/or demand immediate repayment of all outstanding debt,

and/or petition to liquidate the borrower and/or appoint a receiver in the event that the borrower does not agree to the lender's proposals.

In the event, for example, where the borrower's will was not overborne and the borrower decided of its own free will and in the absence of any pressure by the lender to pay the lender in priority to other creditors, then there would be a greater chance of success by a liquidator in claiming a fraudulent preference. If such a claim were to be successful, the lender will have to repay the relevant funds back to the liquidator.

Our concern is that adherence to the Code will result in less pressure being put on a debtor to repay funds, thus immeasurably increasing the risk of a fraudulent preference. If the draft Code were adopted in its current form it would have the effect of nullifying any attempts by a prudent lender to remove the risk of fraudulent preference. In addition, it would have the effect of pitting the objectives of the draft Code in direct opposition to the mandates of corporate law on the subject. Any such dichotomy will result in a damaging lack of integration on how the law is applied in this area.

- Recognition of Lender's legal rights
  The draft provisions of the Code unreasonably and disproportionately interfere with the lender's property rights by imposing unnecessarily stringent procedures which the lender must follow prior to enforcing its rights, under the agreements entered into between it and its customers i.e., Offer Letters, Charge documentation etc. (the "Security Documentation"), which procedures conflict with the lender's rights as stated in the Security Documentation.

  Clause 17 of the 2009 SME Code clearly states that Clause 17 is "without prejudice to a regulated entity's regulatory and/or legal obligations and legal rights a regulated entity must …..". There is no such acknowledgement of the regulated entity's legal rights in the draft Code. By its omission are we to infer that the rights of the borrower in financial difficulties as set out in the draft Code take precedence over the rights of the lender contained in the Security Documentation?

  The bottom of page 5 of the draft Code provides that "nothing in this Code prohibits a regulated entity from acting with all necessary speed in the case of a liquidation, receivership, examinership or similar insolvency event or from executing loan collateral, or where there is a reasonable evidence of fraud, terrorist connections, money laundering and/or misrepresentation." Despite the saver afforded to it at the bottom of page 5 of the draft Code, on the basis that a regulated entity is firstly obliged to follow the various procedures set out in the Code as they relate to a "viable" borrower (and arguably a number of them (such as appeals etc) as they relate to a borrower which is not "viable" (although this is unclear and requires clarification)), we fail to see how a regulated entity has any latitude to "act with all necessary speed in the case of a liquidation, receivership …..".

- Lenders right to protect security
  IBF has previously submitted that a code of practice under Section 117 is not competent to, say, severely compromise the existing legal right of lenders to set-off by requiring a notice period that would, in effect, allow any account holder to avoid set-off by withdrawing vulnerable funds from the lender. The Code sets out timeframes for certain communications and actions on the part of the lender; if it is expected that the lender is excluded from acting to protect his security whilst these time periods are being observed, this could be interpreted as compromising the legal right to set-off and ultra vires the section.

  Clauses 17 and 40 of the draft Code imply that a regulated entity cannot call in an overdraft on demand in respect of a viable business (or in relation to any business before a determination has been made as required under the Code as to whether the business is viable or not). This appears to us to amount to an amendment of Irish law. As we understand it, Irish law holds that in respect of commercial lending the lender can for any reason withdraw a demand overdraft. Under the draft Code it appears that the lender must first go through a number of procedures before this right can be invoked. Therefore, the key terms of existing agreements with borrowers in relation to overdraft facilities can be rendered null and void.

  Whilst a code of practice under Section 117 might provide against arbitrary or precipitate withdrawal of on demand facilities in cases where there was in fact no commercial justification, the imposition of a lengthy procedure in all cases to prevent such arbitrary abuses of lenders' discretion does not amount to a legitimate provision within a code of practice, but to a rule of law which requires a primary legislative basis.

  The new regime ignores completely the likely effects of borrowers triggering a formal "financial difficulties" situation and thereby plunging the lender into a rigid procedure lasting several months, during which other creditors or lenders or investors may act decisively to the lender's prejudice.

  The whole assumption in the proposed Financial Difficulties code is that a lender is reduced to a quasi-judicial role of formalised assessment of borrowers' circumstances and prospects on the basis of strict time limits. This is almost akin to a mini-examinership. It does not recognise that lenders are in business too.

  The fundamental problem from a legal point of view is the legal interaction of the new requirements with existing legal rights. The draft Code does not say or make clear in any way whether its terms and procedures are mandatory pre-conditions to legal action or to enforcement of security. This is a crucial consideration. If a lender sees a business obviously at risk, is it obliged to invoke the Financial Difficulties procedure? If the proposed Code had the effect of legally prohibiting all lender remedies and powers of enforcement in respect of SMEs, save where preceded by exhausting the procedures laid down for Financial Difficulty, it would be ultra vires Section 117. The saver in respect of liquidations, receiverships and examinerships

and similar insolvency events seems to imply that those steps have been taken by some party other than the lender.

Section 117 cannot and should not be used to reform the substantive law, and IBF, and its members reserve the right to challenge any term of the proposed amendment which they believe to be ulta vires the section.

d) Application of Surcharge Interest

Current proposals with regard to draft Provision 24 are unworkable for our members in practicable terms. As currently crafted, the proposals in relation to surcharge interest/referral fees fail to take account of high industry and third party transaction and other costs of managing out of order situations in the SME context. These costs arise both directly, through increased relationship and account management costs, and indirectly, such as through additional capital requirements to reflect the increased risks. Such costs fall to be absorbed either by those incurring them as set out in the security documentation, or failing that they are cross subsidised by other customers or they reduce the capital provided by shareholders/taxpayers. Costs which are validly incurred commercially need to be recovered whether an SME customer is co-operating or not. The application of the provision as currently crafted would have, no doubt, the unintended consequence of raising costs for all SMEs and, in some instances, encouraging undesirable behaviour which would have a direct adverse impact on the integrity of the market. It is critical that any proposed revisions to the Code do not inadvertently encourage opportunistic behaviours which may be damaging to the market by imposing benefits for customers in difficulty, in terms of reduced or eliminated charges over customers not in difficulty.

In so far as the draft Code purports to prohibit surcharges or penalties for unauthorised overdrafts, except where the borrower is not co-operating as defined and has been in that status for three continuous months, it is our view that the rational basis for such surcharges (increased risk and incentive to abide by contract), coupled with the pre-existing agreement with the borrower and notification under the terms of the Consumer Credit Act, all underline the point that the proposed prohibition in respect of SMEs would require a basis in primary legislation and may not be effected via S117.

e) Transitional Arrangements

A significant challenge arises in terms of the transitional arrangements pertaining to the Code. The provisions of the Code are indicated to incorporate "… all existing financial difficulties cases falling within this Code." We would request clarification as to whether or not any alternative repayment arrangement agreed prior to the introduction of the amendments proposed in CP55 would fall within the definition of "financial difficulties". Applying the provisions of the Code to a business that has a repayment arrangement already in place represents a particular difficulty to IBF members. It is noted that the

scope of the Code of Conduct on Mortgage Arrears (CCMA) is set out clearly. We request that a similar provision be included in the SME Code and that the transitional arrangements, pertaining to any revisions to the Code, are set out in detail.

Conclusion

In the limited timeframe afforded for consultation, we have identified a number of concerns with the revised approach outlined in the Code. We have also provided some detailed comments on the provisions of the Code. For the reasons set out in this response, we would strongly urge the Central Bank to fundamentally revisit these proposals. We and our members would be happy to be involved in such a process. We would request an early meeting with the Central Bank for this purpose.

Appendix 1 Specific comments in relation to the draft Code as set out in CP55

	Provision	Comments
Pg. 5	Nothing in this Code prohibits a regulated entity from acting with all necessary speed in the case of a liquidation, receivership, examinership or similar insolvency event or from executing loan collateral, or where there is reasonable evidence of fraud, terrorist connections, money laundering and/or misrepresentation.	We welcome the retention of this provision. However, we believe it may be necessary to go further to explicitly protect the legal rights of lenders in this regard, particularly in light of the omission from CP55 of Provision 17 as set out in the original SME Code.
"borrower"	"borrower" means a small and medium enterprise including its representatives and/or agents.	We would request that the definition end at the word "enterprise" as it is unclear who "representatives" or "agents" may extend to.
"financial difficulties"	'financial difficulties' - A borrower must be classified as in financial difficulties where: (a) arrears arise on a credit facility of a borrower; (b) the borrower notifies the regulated entity that there is a danger that the borrower will not be able to meet repayments and/or the borrower is concerned about going into arrears; (c) the borrower already has an alternative arrangement in place with the regulated entity to address difficulties with meeting repayments; or (d) in the case of an overdraft credit facility, where the approved limit on the facility is exceeded by the borrower and remains exceeded for 31 consecutive days.	We would request that the Central Bank clarify, in the case of an alternative repayment arrangement being made between a borrower and a lender for commercial reasons (rather than those falling within financial difficulties), whether or not such an arrangement would fall outside of the definition of financial difficulties. It is our view that the use of the term "concerned" is too vague. Is the fact that a borrower is "concerned" about going into arrears sufficient grounds for the borrower being defined as in financial difficulties, and as such covered by the provisions of the Code in this regard? We would request that the Central Bank provide clarification on the distinction between personal arrears and business arrears, and to provide clarity on any overlap. We would request that the Central Bank clarify when a borrower is deemed to be out of financial difficulties. This definition is fundamental to the operation of the Code. However, a number of issues arise in its interpretation. It is our view is that the definition needs to be reviewed by the Central Bank.
"not co-operating" customer	'not co-operating' - A borrower may be considered as "not co-operating" with the regulated entity when any of the following apply to the borrower's particular case:	We would request that the words "true and complete" be used instead of "full and honest" in clause (a). It is also our view that the borrower should be requested to make the lender aware of the affairs of any guarantors associated with his/her business lending. <u>It must be</u>

	a) the borrower fails to make a full and honest disclosure of information, that would have a significant impact on the borrower's financial situation, to the regulated entity; b) the borrower fails to provide information sought by the regulated entity relevant to assessing the borrowers financial situation; or c) a period of three consecutive months elapses during which the borrower: i. (a) has failed to meet repayments in full as per the credit facility contract or has failed to meet in full repayments as specified in the terms of an alternative repayment arrangement; or (b) has exceeded the approved credit limit on an overdraft credit facility and has not attempted to reduce the balance of the overdraft to the approved credit limit or below; and ii. has not made contact with, or responded to, any communications from the regulated entity or a third party acting on the regulated entity's behalf.	borne in mind at all times that banks to do not, in economic terms, lend to Borrowers. Instead banks lend to credits. A borrower may well be the credit ,but frequently the credit in this context may be a guarantor or an indemnity bond issuer for instance. In order to demonstrate this issue, let us take the example of where the economic credit is actually the guarantor but the borrower is co-operating within code. However, the actions and behaviour of the guarantor forces a prudent lender to take certain protective actions in respect of the loan, to protect its right vis-a-vis the guarantor for example by calling in the loan early in order to trigger the guarantor's obligations. If the Bank did not call in the loan early it could miss preserving its rights under the guarantee, which usually requires that a demand is made on the principal before the guarantor is obliged to pay out. If the Bank took this entirely legitimate course of action it could find itself in breach of the code, if the Borrower was technically co-operating within the terms of the code. It is our view that clause (b) contain a specified timeframe within which the borrower is required to have provided the necessary information to the lender, in particular if the range of specified timelines are retained throughout the remainder of the Code. It is also our view, within the same clause, that the borrower is required to provide evidence to the lender that his/her business is in financial difficulty. With respect to clause (c), the use of "consecutive" permits a borrower to make erratic payments and be classified as co-operating where this could be deliberate tactic to avoid repayments. A difficulty is highlighted with respect to the practical implementation of the Code in clause (c) i (a). It would seem that CP55 is working on the assumption of SME lending typically operating on a monthly repayment basis. An equivalent standard has to be permitted for other repayment arrangements. Clause (c) should read "a period of three months after a missed payment …" to reflect the fact that some loans have quarterly or half-yearly repayment terms. It is unclear how a lender will know that a borrower has or has not "attempted to reduce the balance of the overdraft", as referred to in clause i (b). We would request that the clause be reworded to read as: "(b) has exceeded the approved credit limit on an overdraft credit facility;" We would request that clause (c) (ii) be reworded to include "constructive contact to address the situation" to read as: "(c) (ii) has not made constructive contact to address the

		situation with, or responded to, …" It is unclear what the consequences of not co-operating are to a borrower in the case of CP55 (other than the proposal on surcharges.) We would request that the consequences of not co-operating are clarified for the benefit of both parties. In many business loans the borrower will be composed of two or more joint and several parties. In this regard, we are unclear as to the practical implementation of the Code in circumstances where one of the borrowers is co-operating and the other borrower is not. Irish law at present is quite clear on how such situations are to be handled as each borrower is jointly and severally liable for the actions of the other, and the issue as to whether one of the borrowers is co-operating or not does not affect the Bank's legal rights against each of the Borrowers. Therefore, with the revisions to the Code where one borrower is co-operating and the other not, does this mean that the lender must treat all borrowers as co-operating even when they are not? If so what is the incentive on the non co-operating borrower to co-operate as there would not be a rational reason for them to do so since as long as there is at least one co-operating borrower the Bank would be in breach of the Code if it moved against the non co-operating borrower? Alternatively in such circumstances if a lender can treat such a non co-operating borrower as non co-operating, does this mean that the lender can for example impose a surcharge on the loan? Since the loan is the joint and several responsibility does the co-operating borrower now have an obligation to pay such a surcharge? This definition is fundamental to the operation of the Code. However, a number of issues arise in its interpretation. It is our view is that the definition needs to be reviewed by the Central Bank.
16.	A regulated entity must have and implement procedures for dealing with borrowers in financial difficulties. Such procedures must: a) set out the process that the regulated entity will apply when treating borrowers in financial difficulties and how it will implement the process; b) set out how the regulated entity will assess cases in financial difficulties, including the type of information that may be required from borrowers and the types of	With reference to clause (e), when assessing the viability of a borrower each case is considered on its merits and therefore one definitive list would not be applied. In addition, the criteria used to assess viability may be different across lenders. We would ask that the Central Bank consider this in its preparation of the final Code.

	alternative repayment measures or any other relief method that may be offered to borrowers by the regulated entity; c) allow for a flexible approach for borrowers in financial difficulties to be handled on a case by case basis; d) be aimed at assisting the borrower in the borrowers particular circumstances; and e) set out how the criteria used for the assessment of the viability of a borrower.	
17.	Where a regulated entity assesses a borrower in financial difficulties and is of the view that it is viable, and the borrower is co-operating with the regulated entity, a regulated entity must: a. Give the borrower reasonable time, from the time a borrower is classified as in financial difficulties, having regard to the circumstances of the case, to resolve the financial difficulties; b. Endeavour to agree an approach with the borrower that will assist the borrower to address the financial difficulties.	As raised previously, if it is deemed necessary to retain the timelines imposed on the lender, we would request that the term "reasonable time" (clause 17 (a) refers) be clarified in the final Code. We would presume that it is at the discretion of the lender as to whether or not this assessment extends beyond the immediate business to the entire connection.
18.	A regulated entity must establish a dedicated unit for borrowers in financial difficulties, which must be adequately staffed, to assess alternative arrangements and liaise with staff dealing directly with borrowers in financial difficulties.	We would request that the term "dedicated unit" be changed to "dedicated personnel". In addition, it is our view that it is not always appropriate to move a borrower to a dedicated team/personnel. Where a short term repayment arrangement has been agreed, it is often the situation that the case continues to be managed by the same personnel rather than moving it.
19.	A regulated entity must have in place management information systems to capture information on its handling of borrowers in financial difficulties, including all alternative repayment arrangements put in place to assist borrowers.	We request that the specific requirements for the Management Information systems be clarified by the Central Bank to facilitate a focused and resource-efficient approach to the planning and implementation of these systems. We request clarification on the intended use of these reports i.e., for the information of the Central Bank or SMEs? IBF is happy to engage with the Central Bank over the coming period to assist in articulating the requirement in this area.

23.	Where a regulated entity requests a meeting with a borrower in financial difficulties which requires information from a third party to be provided by the borrower, the regulated entity must give the borrower reasonable notification of the meeting to allow for such information to be produced.	We would request that the term "reasonable notification" be clarified in the final Code.
24.	A regulated entity shall only impose surcharge/penalty interest, unpaid direct debit fees and/or referral fees on arrears arising on a credit facility, for any period in respect of which a borrower in financial difficulties is considered as not co-operating with the regulated entity.	It is our view that clause 24 will give rise to a number of borrowers operating outside of their contractual obligations as per their agreement with the lender. There may be scope under this clause for a borrower that is not in financial difficulties to delay making repayments for up to 89 days and avoid contractually agreed penalties for such late payments. Effectively, the code envisages three categories of customers: those not experiencing financial difficulties; those co-operating and experiencing financial difficulties; and those non co-operating customers experiencing financial difficulties. Through placing restrictions on the ability to impose contractually agreed charges on one group of customers, the Code can dis-incentivise behaviours as above and may result in cross-subsidisation of one group by another.
25.	A regulated entity must pro-actively encourage its borrowers to engage with them about financial concerns which may prevent them from meeting credit facility repayments.	Given the restrictions provided by the Code on communication, it is unclear how a regulated entity can perform this function. Where appropriate, the Code should address the issue of communications with guarantors.
27.	A regulated entity must ensure that all communications about financial difficulties are provided to the borrower in a timely manner. In doing so, the regulated entity must have regard to the urgency of the situation and the time necessary for the borrower to absorb and react to the information provided.	We would request that the term "timely manner" be clarified in the final Code.
29.	In the case of an overdraft credit facility, as soon as the approved credit limit is exceeded, a regulated entity must communicate promptly and clearly with the borrower to establish in the first instance why the limit has been exceeded.	We would request clarification as to whether or not this is a one-off or cumulative requirement e.g., is it anticipated that this happens on day 1, or if the excess balance increases on successive days? Does the process restart when a lodgement is received?

30.	A regulated entity must ensure that responsibility for direct engagement with a borrower in financial difficulties must only be assigned to a different section, area or staff member within a regulated entity, after staff members taking over this responsibility are familiar with and have been briefed in writing, on the circumstances of the borrower.	We would question the need to brief staff "in writing" and request that clarification be provided in the final Code regarding the use of alternative methods e.g., team meetings. We would request that the words "in writing" be deleted from the final Code. The text should also provide flexibility for the unanticipated situation where a staff member is unavailable unexpectedly.
32.	Each calendar month, a regulated entity and/or any third party acting on its behalf, may not initiate more than five unsolicited communications, by whatever means, to a borrower in respect of financial difficulties. The five unsolicited communications include any communication that has not been requested by, or agreed in advance with, the borrower and any communication where contact is not made with the borrower. The following communications are not included in the unsolicited communications limit: a) Any communications to the borrower which are required by this Code or other regulatory requirements; or b) Any communications to the borrower which are necessary for the operation of the borrower's credit facility.	We would request that the limit on unsolicited communications is removed from the final Code as it runs counter to the principle of strong and proactive communication with the customer. However, it remains our view that the inclusion of those communications where contact is not made with the borrower is unreasonable and ultimately to the detriment of working to achieve a solution to a borrower in financial difficulties. We would request that the words "and any communication where contact is not made with the borrower" be deleted from the final Code.
33.	A regulated entity must only contact a borrower regarding financial difficulties between 9.00am and 7.00pm Monday to Friday (excluding bank holidays and public holidays) except where: a) the purpose of the contact is to protect the borrower from fraud or other illegal activity, or b) the borrower requests, in writing, contact at other times or in other circumstances.	We would request that the Code includes the provision to permit communications from 9am-9pm Monday to Friday, and from 9am-6pm on Saturday.

35.	A regulated entity must prepare and make available to borrowers, an information booklet providing details of its procedures and process for dealing with cases in financial difficulties, which must be drafted in accordance with the requirements set out in provision 26 above and must include: a) an explanation of the regulated entity's procedures for dealing with cases in financial difficulties, including the alternative repayment measures available to borrowers b) an outline in general terms, of the regulated entity's criteria for assessing requests for alternative repayment measures including details of the type of information the regulated entity may request from the borrower as part of the assessment; c) relevant contact points (i.e., the dedicated contact points for a borrower in financial difficulties and not the general customer service contact points); d) an overview of how viability of a borrower is determined by the regulated entity; e) an explanation of the impact of arrears on a borrower's credit ratings; and f) an outline of steps that the borrower could consider that may assist in the process for dealing with the financial difficulties.	Clause 35 (c) presents a practical difficulty for lenders owing to the sometimes transient nature of staffing arrangements. It would be difficult in this situation to provide specific information for contact as staff often move departments within a bank or leave a bank etc., and we would ask that the Central Bank considers this in the context of this clause.
39.	When arrears arise on a borrower's credit facility and remain outstanding 31 days from the date the arrears arose, a regulated entity must: a) inform each borrower of the status of the facility in writing, within 10 business days. The letter must include the following information: i) the date the credit facility fell into arrears; ii) the number and total amount of full or partial payments missed; iii) the monetary amount of the arrears to date;	There may be circumstances where it is better for a lender to highlight any arrears arising sooner than the 31 days specified in the Code. We would request that a lender is permitted to inform the borrower of the arrears situation sooner than the 31 days specified, as the SME, unlike the individual consumer, is subject to a financial situation that is changing daily due to its exposure to debtors and other creditors.

	iv) confirmation that the regulated entity is treating the borrower's situation as a financial difficulties case; v) the importance of the borrower co-operating with the regulated entity to address the financial difficulties and the implication for the borrower if co-operation ceases; vi) details of any fees or charges that may apply to the arrears and information on methods by which such fees or charges may be mitigated; vii) where applicable, a statement that surcharge/penalty interest, fees and charges, in relation to the arrears will apply, where the borrower does not co-operate with the regulated entity and the rate of the surcharge/penalty interest and fees and charges; viii) if relevant, any impact of the non-payment on other facilities held by the borrower with that regulated entity; ix) a general statement about the impact of arrears on the borrower's credit rating; and x) offer the borrower the option of an immediate review meeting to discuss their circumstances and provide information on the relevant contact for the borrower to arrange such a meeting.	
42.	Where a borrower contacts a regulated entity, or contact is established with the borrower by the regulated entity, by whatever means, to discuss an alternative arrangement to address financial difficulties a regulated entity must provide the borrower with a complete list of the information the borrower will be required to provide for the regulated entity's assessment of their case. This list of information required must be provided to the borrower, in writing, within 10 business days of the contact.	It would appear that in the case that information is omitted from the initial list sent to the borrower that the lender cannot then ask for that information after the 10 business days alluded to. Information requirements evolve as the particular circumstances of a borrower are being assessed and there may be a need for further information requests arising. We would request that the final Code reflect this operational possibility, so as not to restrict the lender from making further reasonable requests for additional information should the need arise. We would also request that it be clarified in the final Code that the list is not an exhaustive one.

43.	The information required by a regulated entity for the assessment must be based on the circumstances of the case and must be relevant to assessing the financial situation of the borrower. A regulated entity must allow the borrower reasonable amount of time for the information to be gathered and submitted to the regulated entity.	We would request that the term "reasonable amount of time" be clarified in the final Code.
44.	A regulated entity should require a borrower in financial difficulty to certify that, to the best of the borrower's knowledge, any information provided by the borrower to assess its financial situation is accurate and represents the financial situation of the borrower.	The SME should be accountable and responsible for the information which is provided and the provision of information should be provided not on a *'to the best of the borrower's knowledge'* basis, but on a formal and official basis. An SME providing fraudulent, inaccurate or misleading information in an attempt to create a frustration under the Code should be held fully accountable for these actions. SMEs should also be required to provide the required information in a timely manner. We would request that clarification is provided in relation to who can certify that the information provided is accurate and honest. Is it self-certification or with the assistance of third parties?
46.	A regulated entity must perform its assessment of the borrower in financial difficulties on a case by case basis and on the full circumstances of the borrower including: a) the viability of the borrower concerned; b) the overall indebtedness and liabilities of the borrower; c) the information provided by the borrower for the assessment; d) cashflow of the borrower; e) the borrower's current repayment capacity; f) the borrower's previous payment history; g) the expected repayment capacity; h) the liabilities and/or exposures of the borrower to related entities that could impact on the financial situation of the borrower; and i) the overall exposure of the lender to the borrower.	The word "including" should be changed to "not limited to" in the first paragraph of clause 46. We would request that the words "that could impact on the financial situation of the borrower" be deleted from clause 46 (h), such that it reads as: "(h) the liabilities and/or exposures of the borrower to related entities;" We would request that an additional point be added to Clause 46 to read as "(j) Any asset disposals over a specified period."

47.	A regulated entity must assess a borrower's case and inform the borrower of the outcome of the assessment in writing. This response must be provided to the borrower within 15 business days of the information notified to the borrower under 42 above being received by the regulated entity.	It is our view that the time required within which to assess a borrower's case i.e., 15 business days, is too restrictive and would be difficult to enforce in practice. As alluded to under Clause 42 above, in some situations further information may be required from the borrower. Imposing an absolute deadline on decision making could run counter to the borrower's interests.
50.	Where an alternative repayment arrangement is offered by a regulated entity, the regulated entity must provide the borrower in financial difficulties with a clear explanation, in writing, of the alternative repayment arrangement, including: a) the new repayment amount; b) the term of the arrangement; c) the implications arising from the arrangement for the credit facility including the impact on: (i) the credit facility term, (ii) the balance outstanding on the credit facility, and (iii) the existing arrears on the account, if any; e) details of how interest, will be applied to the credit facility as a result of the arrangement; f) details of any terms and conditions attached to the alternative repayment arrangement; g) information on how the alternative repayment arrangement and any outstanding arrears will be reported by the regulated entity to the Irish Credit Bureau and the impact of this on the borrower's credit rating; h) information regarding the borrower's right to appeal the regulated entity's decision, including the procedure and timeframe for submitting an appeal; and i) the borrower must be advised to take appropriate independent legal and/or financial advice.	The specific reference to Irish Credit Bureau should be removed from clause 50 (g).

51.	The regulated entity must monitor the arrangement that is put in place for a case in financial difficulties, on an ongoing basis and formally review the appropriateness of that arrangement for the borrower, at least every six months. As part of the review, the regulated entity must check with the borrower whether there has been any material change in circumstances in the period since the arrangement was put in place, or since the last review was conducted.	In the event of a repayment arrangement being agreed upon, it would be the practice of IBF members to monitor the financial situation of each case on an ongoing basis. We would request that clarification be provided in respect of the need to carry out a formal review every six months. In some cases a borrower may be adhering to the terms of the repayment arrangement with no material change in circumstances, in which case a formal review would not be deemed necessary.
55.	A regulated entity must have in place a written procedure for the proper handling for appeals by borrowers in financial difficulties on the decision of a regulated entity on an alternative repayment arrangement. At a minimum, this procedure must provide that: a) The regulated entity must consider and adjudicate on an appeal within 40 business days of having received the appeal. b) The regulated entity must notify the borrower in writing, within 5 business days of the completion of the consideration of the appeal by the regulated entity and explain the terms of any offer being made. c) Where applicable, the regulated entity must inform the borrower of its right to refer the matter to the Credit Review Office or the Financial Services Ombudsman. The regulated entity must provide the borrower with the contact details of relevant office.	Is the Central Bank proposing a change to the remit of the Credit Review Office with respect to the industry generally? Also, is the Central Bank proposing a change to the remit of the Financial Services Ombudsman with respect to SME credit decisions?