**THE CONSUMER PROTECTION (REGULATION OF CREDIT SERVICING FIRMS) BILL 2015**

**SUBMISSION BY FLAC (FREE LEGAL ADVICE CENTRES LTD)**

 **2 FEBRUARY 2015**

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**A SUMMARY of the main points in this submission:**

1. This submission comes with a substantial health warning. This Bill is difficult to interpret and understand and what is suggested below is one view of some of its potential problem areas. The manner in which it is drafted makes it illegible to consumers or to anyone who is not prepared to dissect the draft and all the prior legislation referenced in it.. The explanatory memorandum does not provide clear explanations.
2. This Bill does not appear to regulate the sale of loan books as originally suggested. It only regulates the activity of servicing credit agreements once credit agreements are sold on and, arguably in our view, it only does so partially. Thus, there are no provisions that set out a concrete set of rights – to consumer information, to legal protection for example – that a borrower should be supplied with when his or her agreement is sold on.
3. The definition of credit servicing is quite narrow and there is a specific definition of what credit servicing is not. This may, depending on how you read these definitions, leave a number of the key aspects of decision making regarding the handling of a portfolio of credit agreements outside the ambit of credit servicing and conceivably outside the remit of a complaint to the ial Services Ombudsman (FSO).
4. The definition of credit servicing firm in this draft legislation would appear to mean that an entity that carries out credit servicing exclusively for an already regulated financial service provider does not itself require to be regulated. In turn, it looks as if a purchaser of a book of loans only requires to be authorised if it carries out its own credit servicing activities and the definition of credit servicing limits how it is regulated.
5. It is not clear whether the legislation automatically provides that newly regulated credit servicing firms must apply the relevant Central Bank codes immediately. There may also be some doubt as to whether the definition of credit servicing is robust enough to ensure that all decisions made under the Code of Conduct on Mortgage Arrears are credit servicing matters.
6. What may be a drafting error appears to provide that only credit servicing firms engaged by an already regulated financial service provider will have the FSO scheme extended to them. It is not clear whether it is intended that access to the FSO should be extended to either credit servicing firms engaged by unregulated financial service providers or unregulated financial service providers who buy agreements and service those agreements themselves.
7. Where a complaint to the FSO is possible, the range of issues which that office may investigate appears to be limited to credit servicing matters only. The effect of this may be that issues of critical importance to consumers, such as, for example, the imposition of interest rate increases on variable rate mortgages, may not be investigated.
8. It is unclear why the Consumer Credit Act 1995 (which does not apply to credit agreements issued after June 11th 2010) will apply to any credit union loans sold on to ‘any person’. It would also seem that such ‘persons’ still do not appear to be regulated by the Central Bank and a customer of that ‘person’ does not appear to be able to make a complaint to the FSO.

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We now look at the matters raised above in more detail.

1. **Does the Bill actually regulate the sale of loan books?**

It would appear that this Bill has already undergone something of a metamorphosis from what was published in the Government’s legislative programme for Spring/Summer 2015.

Described at No 18 in the list of Bills expected to be published in the current session as intending ‘*to introduce legislation to cater for the sale of loan books by regulated financial institutions to unregulated financial institutions*’, it has instead become a bill to regulate credit servicing firms when they carry out certain (limited) credit servicing functions following such a sale.

Thus, the Bill does not appear to regulate the sale of loan books in any form. It simply attempts to introduce limited consumer protection measures, once the sale of a loan book has actually taken place. This is more than a cosmetic point. For example, the customer of the entity selling on a loan book is not, it would appear, entitled to any express information on the nature of the transaction taking place above his or her head, including the price, discounted or otherwise, that the purchaser paid the seller for the loans.

The Bill also appears to neglect to expressly provide that the consumer is even entitled to be informed of the fact of the transaction, let alone its implications for the customer, whom the customer will be dealing with and making payments to henceforth and so on. Perhaps it is assumed that this information will be automatically provided but, in the world of debt sale, that may be to assume quite an amount.

**Thus, the first deficiency that should be remedied in this Bill is its failure to expressly provide that, upon the sale of a loan book, both the (transferor) seller and the (transferee) purchaser must provide the customer with a specific list of information items - a kind of charter of customer and consumer rights if you will.** In our view, this should include a statement disclosing whether the loan was sold at a discount, even though it might be commercially sensitive to have to actually disclose the nature or amount of that discount.

In employment law, for example, this is provided for. Thus, where a business or undertaking or part of a business or undertaking is sold from one entity to another, existing staff are entitled to a substantial range of employment rights including continuity of service and terms and conditions.[[1]](#footnote-1) Both the transferee and transferor employer have a statutory obligation to engage in an information and consultation process with staff at least one month prior to the transfer taking place.[[2]](#footnote-2) In our view, there is no reason why a similar, if less prescriptive, exercise should not be an obligation in loan book sale. Why should customers, most of whom will not be aware that the original loan documentation that they signed invariably authorises the original lender to sell on the debt, not be entitled to be informed of the basic terms of the transaction that affects their interests?

1. **What is and what is not credit servicing under the Bill?**

Section 1 of this Bill amends the Central Bank Act 1997 to provide in Section 28 of that Act for a new regulated entity of ‘authorised credit servicing firm’. Credit servicing is defined as managing or administering a credit agreement (secured or unsecured) and includes a list of named credit servicing activities. These include matters such as notifying changes in interest rates, collecting payments, dealing with complaints and managing financial difficulties, restructuring and so forth.

Perhaps more significantly, this section also specifically defines what credit servicing does not include. Thus, the more fundamental commercial decision-making activities of a lender as follows are not credit servicing activities:

1. determining the strategy for the management and administration of a portfolio of credit agreements,
2. the maintenance of control over key decisions relating to such a portfolio,
3. enabling the undertaking of credit servicing by another person or enforcing a credit agreements

However, this is qualified by a very obscure formula of words as follows:

‘whether any action referred to in paragraphs (a) to (c) is taken by a person who holds the legal title to credit in respect of a portfolio of credit agreements (in this section referred to as the ‘holder’) or a person acting on behalf of the holder, provided that such action, whether taken by the holder or such person, is not taken in a manner that if it were so taken by a regulated financial service provider it would be a breach of any provision of financial services legislation (within the meaning of the Central Bank Act 1942).”

What does this mean and what is this intended to achieve? This is a matter of guesswork but it appears to be saying that any one of a), b) or c) performed by the purchaser of credit agreements or someone acting on its behalf is not credit servicing provided it is done in such a way that if a regulated financial service provider was doing it, it would not be a breach of existing financial services legislation. The corollary of this would appear to be that if it is done in such a way that if done by a regulated financial service provider it would breach financial services legislation, than it would appear to no longer be outside the definition of credit servicing.

The potential significance of this will be explored, particularly insofar as it concerns consumer complaints to the Financial Services Ombudsman, in further detail below. However, suffice to say for the moment that it might prove very difficult to show that the conduct of a purchaser of credit agreements in carrying out tasks a), b) or c) theoretically breached financial services legislation (which doesn’t apply to it as it remains unregulated) so as to bring its conduct within the realm of credit servicing. Who would make this decision in the first place and how quickly? This does not appear to be provided for in the Bill.

1. **Who is considered to be a credit servicing firm that requires authorisation by the Central Bank?**

Section 1 of the Bill also defines who is considered to be a credit servicing firm. This definition seems to be somewhat convoluted but our reading of the effect of it is as follows:

* An entity (apart from NAMA, a NAMA group entity or an existing domestic or EU based regulated financial service provider) that carries out credit servicing ‘other than on behalf of a regulated financial service provider’ is a credit servicing firm and must be authorised
* Thus, it would appear that an entity that carries out credit servicing for an already regulated financial service provider does not have to become an authorised credit servicing firm
* An entity that holds legal title to credit – for example the purchaser of a loan book –but who carries out its own credit servicing itself rather than contracting it to an authorised credit servicing firm or an already regulated financial service provider, also has to become an authorised credit firm.

This reading may be mistaken and we are open to correction/ clarification. However, proceeding on the basis that this interpretation may be correct, two things would appear to follow.

* An entity that carries out credit servicing exclusively for an already regulated financial service provider does not itself require to be regulated
* A purchaser of a loan book only requires to be authorised if it carries out its own credit servicing activities. Should it do so, it is only the credit servicing activities that it carries out that are regulated. Its activities that are specifically not credit servicing (see above, for example, management of a portfolio credit agreements) would not appear to be regulated.

Some concerns arise from this analysis.

The State has persistently failed over the course of the boom/bust cycle to regulate debt collection and debt collection companies and this is a major consumer protection issue. It is clear, however, from the definition of credit servicing in the Bill that one of its key aspects is in effect the collection of debts. Thus, it appears that this Bill will in fact regulate certain debt collection activities, but only those carried out by authorised credit servicing firms on behalf of unregulated entities that purchase debts or carried out by unregulated entities themselves when they purchase debts. **Should any firm involved in servicing a customer’s credit agreement, whether on behalf of a regulated or unregulated financial service provider, not have to obtain an authorisation and adhere to minimum standards of conduct and probity?**

**In addition, should the commercial entities that purchase loan books not be regulated in terms of all of their decisions potentially affecting customers and not just the credit servicing element of them?** Is this Bill in fact only designed to do the minimum in terms of regulation? Thus, although the words consumer protection figure prominently in the title of the Bill the consumer still seems to be ‘piggy in the middle’ of a series of transactions in the shadow world of debt sale that often follows a credit boom and bust.

1. **What is the effect from a regulatory perspective of becoming an authorised** **credit servicing firm?**

Under the terms of Section 28 of Part V of the Central Bank Act 1997 (as amended), credit servicing will become a business regulated by the Central Bank, just as debt management has recently done.[[3]](#footnote-3) Section 3 of this Bill essentially extends the same regime to credit servicing firms as the recent Central Bank (Supervision and Enforcement) Act 2013 has done to debt management firms.

Under Section 30 (as amended) of the 1997 Act, a person who wishes to carry on a particular form of regulated business must apply to the Bank to be authorised. Should it authorise that person, under Section 33 (as amended), the Bank may impose such conditions ‘as it considers necessary for the proper and orderly regulation of the applicant’s business’. This includes the application of a prescribed code of practice.

1. **Does this mean that the Code of Conduct on Mortgage Arrears (CCMA) applies to entities buying mortgages?**

In the lead up to the publication of this Bill, the principal question that many considered to be important in the context of the sale of loans from a regulated to an unregulated entity was whether it would result in the unregulated entity being obliged to apply the terms of the Code of Conduct on Mortgage Arrears (CCMA) to customers in arrears with their mortgage when those customer’s loans are sold on.

The answer to that question is not as simple as it would first appear.

Firstly, it is important to note that Section 33 explained above is an ‘enabling provision’. **The Central Bank must therefore actively decide, once a credit servicing firm is authorised, to oblige it to apply the CCMA. This is not automatic.**

Secondly, the question may be asked – is the decision to offer or not offer an alternative repayment arrangement to a borrower by a lender under the terms of the CCMA actually a credit servicing function within the definitions of the Bill? Again, this may not be as straightforward as it initially appears. On this point, the Bill provides that managing or administering the following matters are credit servicing functions:

* the process by which a relevant borrower’s financial difficulties are addressed
* any alternative arrangements for repayment or other restructuring or
* assessment of the relevant borrower’s circumstances and ability to repay under the credit agreement

On the other hand, the determination of the overall strategy for the management and administration of a portfolio of credit agreements and taking such steps as may be necessary for the purposes of enforcing a credit agreement are not. An authorised credit servicing firm might therefore, for example, argue that it manages/administers the processing of the MARP under the CCMA but that it does not ultimately make the decision on what might be offered to the borrower and that this is a function reserved to the purchaser of the debt who ultimately retains the right to enforce that agreement if the mortgage is declared to be unsustainable under the MARP.

**In our view, there should be no room for ambiguity. The legislation should make it absolutely clear that the MARP will (not may) apply to all mortgages, regardless of who has purchased them and that the current owner of the debt or the entity servicing it or both (if both have a role in the process) are answerable to the Central Bank for breaches of the CCMA.**

1. **What about the application of other Central Bank Codes?**

A credit agreement as defined in in Section 1 of the Bill means an agreement whereby a person grants, or promises to grant, credit to a relevant borrower.

Thus, it is clear that this legislation is intended to cover credit servicing activities that relate to both secured and unsecured loans. The Central Bank can therefore impose upon an authorised credit servicing firm a requirement to adhere to the Consumer Protection Code (CPC). Insofar as it concerns over-indebtedness, the provisions of Chapter 8 of that Code entitled ‘Arrears handling’ are of particular relevance. This chapter is intended to provide for similar ‘shadow’ arrears handling requirements for unsecured loans (and secured loans issued to ‘personal consumers’ that are not on covered by the CCMA such buy-to-let mortgages) parallel to the CCMA. Although this chapter could do with being strengthened, it at least obliges lenders to adhere to some rules of process when dealing with arrears situations.

**Again there should be no ambiguity.** **The legislation should make it absolutely clear that the CPC will apply to all relevant loans and that the current owner of the debt or the entity servicing it or both (if both have a role in the process) are answerable to the Central Bank for breaches of the CPC.**

1. **Do customers of credit servicing firms have access to the complaints mechanism of the Financial Services Ombudsman (FSO)?**

Section 6 of the Bill amends the definition of eligible consumer in Section 57BA of the Central Bank Act 1942 but it is unclear to us precisely what the effect of this amendment is, despite what was stated to be its intention. This is what Section 57BA would look like if the proposed amendment in this Bill was passed (the proposed addition is in italics and in bold):

‘eligible consumer’, in relation to a regulated *(our emphasis)*financial service provider, means a consumer—

(*a*) who is a customer of the financial service provider, or

(*b*) to whom the financial service provider has offered to provide a financial service, or

(*c*) who has sought the provision of a financial service from the financial service provider; ***or***

***(d) who was, in relation to a credit agreement, a customer of the financial service provider in a case where a credit servicing firm undertakes credit servicing in respect of the credit agreement concerned, and for the purposes of paragraph (d) ‘credit agreement’, ‘credit servicing firm’ and ‘credit servicing’ have the same meaning as in section 28 of the Central Bank Act 1997”.***

In effect, this amendment seems to only allow a customer of a regulated financial service provider to be classified as an eligible consumer and so to make a complaint to the FSO, where that provider contracts a credit servicing firm to undertake credit servicing in respect of that customer’s credit agreement. To us, this seems to contradict the definition of ‘credit servicing firm’ explained above - an entity (apart from NAMA, a NAMA group entity or an existing regulated financial service provider) that carries out credit servicing ‘other than on behalf of a regulated financial service provider’.

Is the FSO scheme thus only extended to an authorised credit servicing firms instructed by a regulated financial service provider? Does it not expressly apply either to (unregulated) financial service providers who buy debts and service the agreements themselves or credit servicing carried out on behalf of an unregulated financial service providers?

**Clarity on this matter would be welcome. Who is it intended to add to the list of entities against whom a complaint may be made to the FSO and does the Bill actually achieve that aim?**

1. **In relation to what matters can a complaint be made to the FSO?**

Assuming that a particular customer is eligible to make a complaint against either an unregulated entity that buys credit agreements and services the agreements themselves or credit servicing carried out on behalf of an unregulated financial service provider, what is it he or she may complain about?

Again, with the caveat that we may have read a short, but perhaps unduly complex, Bill incorrectly, it would appear that the complaint to the FSO will be limited to credit servicing matters only as defined (as explained above). If this reading is correct, the extension of the FSO scheme is quite limited and may leave customers of unregulated entities who buy their credit agreements with substantially less protection than their counterpart customers of regulated entities.

A concrete example may serve to illustrate this. In the recent case High Court case of **Millar and the FSO (Danske Bank, Notice party)**, the appellant couple initially complained to the FSO that Danske Bank had unjustifiably increased the standard variable interest rate on a number of mortgages that they had taken out with National Irish Bank, which were subsequently taken over by Danske Bank. The FSO ruled against them finding that the mortgage contracts allowed for the alteration of interest rates ‘in response to market conditions’ and that Danske Bank did not have to demonstrate that the change in rate was made ‘in line with the general market interest rates’. The appellants appealed this decision to the High Court which ruled that that the FSO had erred in deciding that the wording of the clause allowing for the increase in the variable rate was clear. The Court ordered that the matter be remitted to the FSO for fresh consideration.[[4]](#footnote-4)

Could this kind of complaint be brought to the FSO by a customer whose loan was previously with a regulated lender but which has now been sold on to an unregulated lender? The answer to this would appear to be no.

The Bill only seems to have extended the FSO scheme to make complaints against an authorised credit servicing firm contracted by the new legal owner of the loans and not against the new legal owner itself if that owner is not engaged in credit servicing activities. In addition, the Bill expressly provides that credit servicing does not *include ‘the determination of the overall strategy for the management and administration of a portfolio of credit agreements’* or *‘the maintenance of control over key decisions relating to such portfolio’*. On the other hand, credit servicing does include ‘*notifying the relevant borrower of changes in interest rates’*. **Reading these provisions together, it seems clear that decisions concerning changes in interest rates are not credit servicing matters, though the ultimate notification of the decision is.**

If this reading is correct, then it can be argued again that the Bill does not level the playing field between customers of regulated financial service providers and customers of entities that purchase credit agreements. One of the principal concerns of customers whose variable rate mortgage has been purchased by an ‘investment fund’ is that the goalposts will be moved and that pre-drafted terms and conditions in mortgage agreements that provide the creditor with flexibility may be manipulated to the borrower’s detriment. **The example of a variation in the applicable interest rate is a case in point. This Bill does not seem to allow a consumer unhappy with variations of this nature to make a complaint to the FSO as he or she can do with a regulated lender, as demonstrated by the Millar and Danske Bank case above.**

1. **Application of the Bill to credit unions**

Section 7 of the Bill proposes to amend Section 3 of the Consumer Credit Act 1995 (CCA). Section 3 of the CCA provides, inter alia, that the CCA shall not apply to a credit agreement in relation to credit granted or intended to be granted by a society which is registered as a credit union or any registered society. Section 7 of the Bill proposes to amend this to add the following:

‘*except where the interest of the credit union or registered society in all or any part of the credit concerned has been directly or indirectly assigned or otherwise disposed of to any person that is not a credit union or registered society’.*

Thus, although the CCA does not apply to credit unions, it will apply to any person (legal or natural) to whom all or part of a credit originally provided by a credit union has been assigned. The explanatory memorandum states that this is to be done to ‘*ensure that the relevant Central Bank Codes will apply to credit union credit that is sold to an unregulated entity*’.

More questions than answers follow from this. We not clear as to how amending the Consumer Credit Act achieves this stated objective and this should be spelled out more explicitly. Section 117 (1) of the Central Bank Act 1989 provides that:

*The Bank may, after consultation with the Minister, from time to time draw up, amend or revoke, in relation to any class or classes of licence holders or other persons supervised by the Bank under this or any other enactment, one or more than one code of practice concerning dealings with any class or classes of persons and every such code shall be observed by the licence holders, or other persons so supervised, to whom they relate.*

Does this amendment mean that the purchasers of credit agreements from a credit union (should any such purchasers exist) become persons supervised by the Central Bank under an enactment, i.e. the CCA and therefore subject to the Central Bank codes? If so, why was the CCA chosen as the means to do this, given that it no longer applied to credit agreements (as distinct from housing loans, hire purchase or consumer hire agreements) issued since June 11th 2010?[[5]](#footnote-5) Even if as a result of this amendment the relevant Central Bank codes do apply, how will compliance with those codes be secured, given that the purchaser of the credit is still an entity that does not appear to be regulated by the Central Bank and a customer of that entity does not appear to have access to the FSO to make a complaint?

**A note on compiling this submission**

This Bill is short – only running to just over five pages in terms of its actual provisions – yet it has proven very difficult to try to comprehend properly and to make worthwhile observations upon, due to the number of technical impediments that have to be overcome.

In common with many explanatory memoranda, the explanatory memorandum does not in our view explain in sufficient detail many of the provisions of this Bill and just as importantly how they are designed to achieve their purpose.

It is also notable that in order to begin to understand this Bill, the reader of it must build familiarity with previous pieces of Central Bank legislation that created new classes of entities to be regulated. When you begin to do this, you find that these pieces of legislation have not been consolidated into one refined consolidated version.

Thus, Section 1 of this Bill, which defines everything that follows in it, refers to the amendments it intends to make to Section 28 (in Part V) of the Central Bank Act 1997. The curious reader might therefore begin by logging on to [www.statutebook.ie](http://www.statutebook.ie) to find the Central Bank Act 1997 and examine Part V, beginning with Section 28.

Such reader would see that Part V of the Central Bank Act 1997 is titled ‘Supervision of Bureaux de Change’. This would lead to immediate confusion as Section 1 of this Bill refers to existing definitions in Section 28 and Part V that have nothing to do with Bureaux de Change. What is not clear is that, in fact, the existing Part V of the Central Bank Act 1997 was completely replaced by a new Part V by virtue of Section 27 of the Central Bank and Financial Services Authority of Ireland Act 2004.

Unfortunately, the detective work does not stop here. Subsequent rummaging reveals that Section 19 of the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 in turn amended and added provisions to a number of the sections of the newly amended Part V.

Finally, Sections 59 to 66 in Part V of the Central Bank (Supervision and Enforcement) Act 2013 also substantially amended and added to Part V of the Central Bank Act 1997.

None of this is apparent on [www.statutebook.ie](http://www.statutebook.ie)., though at this point, it is only fair to mention the excellent work that the Law Reform Commission is doing in updating and revising statutes so that practitioners and members of the public can see the current working version of a piece of legislation in one document. Unfortunately, however, the Central Bank Act 1997 has not yet been revised by the Commission.

These observations are more than just academic. In our view, there is something profoundly undemocratic about this inadvertent concealment. In our recent submission to the Central Bank on the Macro–Prudential policy for Residential Mortgage Lending consultation, we wrote that:

‘*Too often, however, it would appear that the ‘public interest’ equates to maintaining the status quo, the primacy of the financial system and the financial position of those with resources, in the belief that the perceived benefits will trickle down to other less resourced members of society. From FLAC’s perspective, this has not happened sufficiently and the public interest has not been equated with the interests of those who are living in poverty or on the margins in Irish society. This should be a further learning from the personal debt crisis. Financial matters and financial services must become much more democratic’.[[6]](#footnote-6)*

The difficulty of accessing up-to-date legible versions of financial services legislation and proposals for such legislation may be a case in point. There are undoubtedly many people in this country whose credit agreements have been sold on and who are deeply worried about the potential ramifications. If, however, any such person wanted to understand what was being proposed here and how it was proposed to deliver it, with a view to making his or her own observations, he or she might find it very difficult to do so. There is a strong element here of taking it on trust that the institutions of the State have all the necessary skills and insights to produce perfect legislation which can be unquestioningly trusted and sometimes even elected members of the Houses of the Oireachtas are asked to have that trust, such is the sometimes unnecessarily complex nature of proposals for legislative reform.

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Web: [www.flac.ie](http://www.flac.ie/)[[7]](#footnote-7)

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1. #  S.I. No. 131/2003 - European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 transposing EU Council Directive No. 2001/23/EC of 12 March 2001.

 [↑](#footnote-ref-1)
2. Regulation 8 [↑](#footnote-ref-2)
3. As a result of amendments made to Part V of the Central Bank Act 1997 by Part 10 of the Central Bank (Supervision and Enforcement) Act 2013. [↑](#footnote-ref-3)
4. It is understood that the FSO has decided to appeal this decision to the new Court of Appeal [↑](#footnote-ref-4)
5. When it was superseded by the European Communities (Consumer Credit Agreements) Regulations - SI 281/2010 [↑](#footnote-ref-5)
6. See Submission on Central Bank of Ireland Consultation CP87 on Macro-prudential policy for residential mortgage lending FLAC (Free Legal Advice Centres), 8 December 2014 at [www.flac.ie](http://www.flac.ie). [↑](#footnote-ref-6)
7. Free Legal Advice Centres Ltd. is a company limited by guarantee not having a share capital, registered in Dublin, Ireland. Company registration number: 49413. Directors: Don Crewe, Julie Herlihy, Joanne Hyde, Jo Kenny, Peter Ward. [↑](#footnote-ref-7)